

Deporting British Settlers

The High Court in *Shaw v Minister for Immigration and Multicultural Affairs* (December 2003)¹ has decreed that all British settlers who arrived in Australia after 1949 are 'aliens' unless they have become Australian citizens. Any non-citizen British migrants can now be expelled from Australia if, for example, convicted of a serious crime.

There are some 355 000 British-born migrants in this country who have not become citizens.²

In *Shaw* the High Court held that a man born in Britain who migrated to Australia in 1974 at the age of two—and who has never left this country—was an 'alien' and could be deported to his birthplace. The Court upheld the power of the Minister for Immigration to cancel Mr Shaw's permanent entry visa because of his 'substantial criminal record'.³

This ends the short-lived protection against deportation conferred on long-term British settlers by the High Court in *Taylor* (2001).⁴ In that case the Court held (in a 4:3 decision) that such people were 'non-removable non-citizens'.⁵ However the retirement of Justice Gaudron in mid-2003 has changed the balance on the High Court on this issue.

The critical question in *Shaw*, as in *Taylor*, was how to determine when Britons settling in Australia became 'foreigners' or 'aliens'.

Three judges (Chief Justice Gleeson and Justices Gummow and Hayne) held that while at the time of Federation Britain was not a 'foreign power' and British subjects

were not 'aliens' under Australian constitutional law, this position did not survive Australia's emergence as an independent sovereign nation and the creation of a separate Australian nationality. Political independence occurred perhaps as early as the 1926 Imperial Conference, which established 'equality of status ... from a constitutional as distinct from a legal point of view ... between Great Britain and the self-governing Dominions'.⁶ After World War Two, the United Kingdom passed the British Nationality Act which ended the concept of a common identity for the peoples of the British Empire. In the *Nationality and Citizenship Act 1948*⁷ Australia formally created the status of 'Australian citizen'. At least from this point there was a distinct Australian nationality that Britons arriving in this country did not share.

According to Justices McHugh and Callinan, however, Australia only became fully independent with the passing of the *Australia Act 1986*. This was 'a formal declaration that the Commonwealth of Australia and the Australian States were completely constitutionally independent of the United Kingdom'. Until then, Australian citizens and British settlers in Australia shared a common allegiance to the 'Crown of the United Kingdom of Great Britain and Ireland', and could not be aliens in relation to each other. Justice Kirby was prepared to agree with his two colleagues, although he preferred 1987—when the Citizenship Act was amended to

remove special recognition of 'British subjects'—as the critical date.

These judges noted that successive Australian governments after World War Two were eager to accept British migrants as members of the Australian community. For many years Australia provided 'assisted passage' to British migrants. British citizens living in Australia were liable for jury service, could be employed in the public service, were obliged to perform national military service and were entitled to vote in Federal and State elections.⁸ Until 1984 Australian passports could be issued to British subjects who were not Australian citizens. It was impossible, therefore, to regard British migrants settling in Australia between 1949 and the mid-1980s as 'aliens' in a constitutional sense.

This dispute over dates affects the legal status of hundreds of thousands of British settlers. The vast majority of British migrants currently in Australia arrived between the Second World War and the late 1980s.⁹

With the remainder of the High Court split 3:3, it was apparent that Justice Gaudron's replacement, Justice Heydon, would have the casting vote in *Shaw*. In various cases on this issue from the late 1980s, Justice Gaudron had consistently held that long-term British migrants were 'members of the community constituting the body politic of Australia' and could not be 'aliens' under Australian law. Justice Heydon's judgment in *Shaw*, however, did not examine his

predecessor's reasoning. Instead, in a one paragraph analysis, His Honour agreed with the joint opinion of Chief Justice Gleeson and his colleagues, thus producing the opposite outcome to *Taylor*.

The effect of *Shaw* is that non-citizen British settlers—even those who have lived here for 50 years or more—have no right to remain freely in this country and can be deported if they fail the 'character test' in the Migration Act.

It might surprise such people to learn that they are now deemed to have been 'aliens' ever since their arrival decades ago. While the High Court in *Shaw* makes no reference to contemporary attitudes, it is difficult to imagine an Australian court in the 1950s or 1960s conferring 'alien' status on permanent British settlers.

As *The Age* noted this raises an important policy issue:

In the case of convicted criminals who, but for attention to bureaucratic detail, are in all other respects Australian, the idea of sending them 'home' to countries with which they have no more than a nominal relationship seems neither reasonable nor fair ... the fact that these people have committed crimes does not justify the authorities using the citizenship laws to 'dispose' of a social problem any more than transportation to the colonies was a solution to the social ills of late 18th century England.¹⁰

Shaw also raises questions about the ability to rely on High Court decisions in constitutional matters. Plainly the outcome of the case would have been different had the composition of the Court not changed in mid-2003. While there is doubt about the precise precedent set by *Taylor*, a majority in that case found that British settlers who arrived by the 1970s or 1980s could not be 'aliens' under the Australian Constitution.

In *Shaw*, Justice Kirby warned against discarding majority rulings such as that in *Taylor* 'on the basis of nothing more intellectually

persuasive than the retirement of a member of a past majority'. Otherwise, he said, 'every important constitutional decision will be resubmitted for redetermination following new appointments until the dissenter gets his or her way'.

The High Court faced a similar situation in the 1970s over the issue of Senate representation for the ACT and the Northern Territory. After a 4:3 decision allowing such representation in the *First Territory Senators Case* (1975), two judges changed sides in the *Second Territory Senators Case* (1977) to prevent the Court reversing its position following a new appointment. Justice Gibbs said 'the replacement of one Justice by another' could not justify review of the earlier decision.¹¹

Nevertheless, in *Shaw* a majority of the High Court overruled the majority in *Taylor*. *Shaw* determines that Parliament's power to make laws in relation to 'aliens' under section 51(19) of the Constitution extends, in the words of Chief Justice Gleeson et al., to:

all those persons who entered this country after the commencement of the Citizenship Act on 26 January 1949 and who were born out of Australia of parents who were not Australian citizens and who had not been naturalised.

Contrary to Justice Kirby's suggestion in *Shaw*, this does not mean that any person who is not a 'citizen' is necessarily an 'alien' under Australian law. The *Shaw* principle leaves uncertain and clearly does not cover the status of non-citizens *born within* Australia. This issue will be addressed by the High Court in a separate case due to be heard in February 2004.¹²

Further reading:

[The High Court and Deportation Under The Australian Constitution](#), *Current Issues Brief* no. 26, 2002–03.¹³

[We are Australian – The Constitution and Deportation of](#)

[Australian-born Children](#), *Research Paper* no. 3, 2003-04.¹⁴

1. [2003] HCA 72.
2. See *The United Kingdom-born Community*, at <http://www.immi.gov.au/statistics/infosummary/textversion/uk.htm>, citing 2001 census.
3. *Migration Act 1958* s. 501(2), triggering removal under s. 198.
4. *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.
5. See Mary Crock, review of *Rubenstein, Australian Citizenship Law in Context in The Sydney Law Review*, vol. 25, no. 1, March 2003, p. 126.
6. Report of the Royal Commission on the Constitution (1929), cited in *Sue v Hill* (1999) 199 CLR 462 at 496.
7. Later renamed the 'Australian Citizenship Act'.
8. And can still vote if enrolled before 26 January 1984.
9. See n. 2.
10. 'Cherish the right to be a citizen', *The Age*, 11 December 2003, p. 12.
11. (1977) 139 CLR 585 at 600.
12. See 'We are Australian', n.14.
13. <http://www.aph.gov.au/library/pubs/CIB/2002-03/03cib26.htm>
14. <http://www.aph.gov.au/library/pubs/rp/2003-04/04RP03.htm>

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