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Paper 36

IMMIGRATION, CITIZENSHIP AND HUMAN RIGHTS IN AUSTRALIA

by

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Baden Powell wrote this paper as part of his final year in Social Work at the University of Queensland.

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Migrants seeking to settle in this country face a number of difficulties. Apart from the obvious problems that are often posed by different cultures and languages, immigrants are subject to a number of disabilities imposed by Australian legislation and administrative practice. It is the purpose of this paper to ascertain to what extent the laws of the Commonwealth and the States discriminates against migrants as a distinct group of people. To this end, four main areas will be discussed, namely 1) admission; 2) deportation; 3) naturalisation and loss of citizenship and 4) rights of resident aliens.

Admission

Traditional international law has recognised that a State is under no legal obligation to admit aliens into its territory except where it has agreed by treaty to do so. It is generally accepted that as an incident of national sovereignty each State has a right to decide who shall enter and remain within its boundaries. Consequently an alien could not be said to enjoy any basic right to enter and reside and may only do so as the discretion of the host State.

This principle was also recognised as part of Australian domestic law in the nineteenth century case of Musgrave v. Chun Jeeong Joy. The Privy Council stated:

"No authority exists for the proposition that an alien has any such right (of entry)..... It is quite another thing to assert that an alien excluded from any part of H.M.'s dominions by the executive government there, can maintain an action in a British court".

However, tribunals and writers have asserted that there exists some fetters on the exercise of a State's discretion to admit. Thus, whilst the interdependence of States does not impose a legal obligation to admit, it "demands the admission of some foreigners by comity or expediency". Moreover, international law lays down some limitations on the "manner in which a State may discriminate between those aliens who would be admitted and those turned away and those admitted freely and those admitted conditionally."

In particular, the International Convention on the Elimination of All Forms of Racial Discrimination (to which Australia is a signatory) proscribes distinctions exclusions, restrictions, or preferences based on race colour, descent, or national or ethnic origin (Article 1). An international standard of non discrimination based on race can also be deduced from other international instruments i.e. the U.N. Charter, Art. 1(3), 55 and the Universal Declaration of Human Rights, Art. 553.

The Australian government has embodied the principle of the right to territorial exclusion in the Migration Act and Regulations. Under the Act, all persons (unless exempted) entering Australia are required to hold an entry permit, which is issued at the discretion of the government. An immigrant who does not hold a permit is a prohibited non citizen and is liable to deportation by the Minister for Immigration.

Australia's current immigration policy complies with the international standards mentioned above. Admission into the country is placed on a firm non-discriminatory basis in that the stated criteria for entry are devigd of any requirements as to race descent or national or ethnic origin.

However, this policy is not given a foundation in law through a statutory basis. The Migration Act or its regulations in no way sets
out or deals with migration policies. Instead the Act merely provides
the machinery or framework through which the policies of the government
of the day can be pursued. As a result, the Minister and his officers
are vested with wide discretionary powers which are exercised in
accordance with government directives and bureaucratic practice.

The danger of such legislation is that it enables a reversion to
a discriminatory policy by mere executive decree. In fact, the "White
Australia Policy" was made possible by the breadth of these delegated
powers. Through the simple technique of issuing entry permits at the
complete discretion of the government, Australia was able to adopt a
selective policy in practice whilst not making any distinctions on grounds
of race in strict law.6

Furthermore, this system of immigration control affords the
individual migrant fewer legal safeguards than are normally required
when an agency of state deals with an individual in some other context.
In other words, the legislature has seen fit not to guarantee migrants
some of the legal rights which are thought to be "axiomatic for citizens
faced with problems caused by government decision-makers."7 The defect
manifests itself in three main areas.

First, aliens are denied the benefits of a clear statutory definition
of the requirements for entry. Instead they are subject to the absolute
discretion of immigration officers. It must be noted, however, that
admission criteria, although not contained in the Act, is detailed and
well defined in the various departmental manuals and handbooks. In
addition, officers that are delegated to make particular decisions are
required to act in strict compliance with the guidelines laid down.
Nevertheless, no matter how well the policy is administered its lack of
statutory force does not admit the possibility of testing objectively
whether the requirements stipulated have been satisfied in the particular
case.

Secondly, migrants are not entitled to know the real basis of
decisions made, regarding these applications. Even though departmental
policy broadly states that officers should tell the person concerned the
reasons for an adverse decision, the requirement is not onerous. All
that is required is that the officer indicate to the applicant that he/she
was unable to accumulate sufficient points or has failed the health
or character requirements. The giving of further details as to specific
reason(s) for rejection is not mandatory8 and is entirely within the
discretion of the officers concerned. Consequently, numerous complaints
from unsuccessful applicants have been received by such bodies as the
Human Rights Commission and the Internal Review Panel9 as well as
Members of Parliament10 as to the general and uninformative nature of
some departmental letters of rejection.

Thirdly, no appeal rights are guaranteed. Such rights are of vital
importance in view of the fact that it has been judicially determined
that natural justice need not be accorded an applicant in the initial
decision-making process.11

Presently, there exists no formal statutory machinery for the review
of departmental decisions. Instead, an internal review process has been
established by government directive. The review body, entitled the
Immigration Review Panel is constituted by a chairman (usually a past
officer of the department) and two other members.12 The Panel receives
written submissions from the department and the unsuccessful applicant and
considers the case on its merits.
While the "Panel" system has proved a valuable adjunct to other informal mechanisms of review (such as the Commonwealth Ombudsman and M.P. intercession) it contains a number of deficiencies including:

1) It has no statutory basis
2) Constituency of the Panel
3) The powers of the Panel are limited to that of recommendation
4) Absence of a right to be given reasons (upon which a relevant appeal can be based)
5) Omission of review rights for persons overseas who lack a sponsor or nominated relative residing in Australia.

It is submitted that many of the inadequacies noted above would be removed if some of the features of overseas systems of immigration decision-making were adopted. Britain and Canada, in particular, would serve as useful models to emulate. Both countries have to a large extent laid down in legislation or quasi legislation, clearly prescribed criteria and norms of assessment. Thus, while immigration into those countries technically remains a privilege, a person who satisfies the requirements for admission can be said to have a claim as of right (or at least a legitimate expectation) to be admitted. The formulation of statutory admission criteria has also meant that prospective immigrants have to be given an opportunity to satisfy immigration officials that such criteria have been met.

Moreover, the appeals systems established in those two countries provide an effective check on possible abuses in the initial decision-making process. Under Canadian legislation most classes of "landed migrants" have the right to a de novo quasi-judicial determination in the shape of a hearing before the Immigration Appeal Board. The British Immigration Act (1969) established a two-tier administrative appeals system, with adjudicators at first instance and the Immigration Appeal Tribunal considering the merits of Home Office decisions.

It could be argued, however that immigrants have no legal right per se to be admitted into a foreign State and as such should not be entitled to these privileges (especially "review" which inevitably involves costs and delays in administration). This line of reasoning has much to be said for it, but it fails to appreciate that the present law in Australia is clearly inconsistent with the concept of rule of law which common law systems have traditionally depended upon to protect the individual in his dealings with the State. If the power to make decisions affecting a person's whole future is vested in officers of the executive from whose findings no appeal lies (as is largely the case in Australia) "government by men and not law" assumes prominence.

Deportation

Under Australian law admission for permanent residence confers no vested right to remain in the country. Migrants, unlike natural-born Australians remain liable to be expelled from or refused re-entry into Australia.

International legal standards permit this distinction. As a concomitant of the concept of national sovereignty, it has generally been recognised that every State may exclude or remove an alien from its territory. Furthermore, no detailed set of rules has as yet been developed to guide States in the exercise of their undoubted discretion.
The only major exception is that of Article 13 of the I.C.C.P.R. which states:-

"An alien lawfully in the territory of a State party to the Present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall (except where compelling reasons of national security otherwise requires) be allowed to submit the reasons against his expulsion and have his case reviewed by and be represented for that purpose before the competent authority, or a person or persons especially designated by the competent authority."

Australian legislation and practice would on the whole appear to comply with these procedural requirements. The Migration Act prescribes three classes of aliens who are subject to deportation i.e. 1) those aliens who within ten years of residence has been convicted of an offence and been sentenced to at least one year's imprisonment (s.12); 2) those aliens representing security risks or convicted of certain prescribed offences relating to sedition (s.14) and 3) prohibited migrants (non-citizens) i.e. those who have either violated the conditions of their temporary stay or have entered illegally (s.18).

The Act provides for the Minister to reach a decision in all three cases. Under ministerial instruction, immigration officers are required to ensure that each person is informed of any adverse information (apart from security and "confidential" information) held by the department and be allowed to put his/her case. Also, if a person is arrested on the grounds that he is a prohibited non-citizen (s.38) or a person subject to a deportation order (s.39) he is entitled under the Act to be brought before a prescribed authority (usually a stipendiary magistrate) to ascertain whether there are reasonable grounds for the arresting officers suspicion.

Moreover, aliens belonging to the first two categories are afforded rights of review under the Act. The ministers power to deport under s.14 is conditioned upon an independent finding of a commissioner that the grounds specified in the Minister's notice has been established. Whereas the strict meaning of the provision limits the function of a commissioner to deciding whether the facts were as the Minister stated, inquiries in practice proceed along the lines of a complete reconsideration of the merits of the case. "Criminal" deportees, on the other hand, can appeal against a Minister's decision to the Administrative Appeals Tribunal which has the power to review the merits of the case (s.66E).

These procedures adopted by the Australian government could fairly be said to satisfy the requirements of Article 13, except on two counts. First, it is uncertain whether the s.14 deportation process provides a sufficient opportunity for the deportee to submit reasons and be represented (especially at the appeal stage). Secondly it could be asserted that the Administrative Appeals Tribunals power only to recommend a reconsideration is inconsistent with the natural justice element of Article 13.

However, mere compliance with the I.C.C.P.R. does not guarantee that migrants are not discriminated against. Accordingly, it might be argued that all aliens and not just those legally admitted should be entitled to at least a fair administrative hearing. Presently, s.18 deportees are not entitled to any review rights. It has also been judicially determined that they need not be afforded natural justice before the deportation order is made.
In contrast, the alien in the United States is entitled to procedural due process of law in deportation hearings under the Fifth Amendment. The protection has been held to apply to illegal migrants since the due process clause applied to "all persons". As a result, all aliens within the U.S. territorial jurisdiction are assured of a fair hearing including rights to reasonable notice, counsel, confrontation and cross examination.

More importantly, why shouldn't the substantive measures (as opposed to procedural) be also subject to limitations. As is currently the case in Australia, lawfully admitted immigrants are singled out for special treatment in that objectionable conduct on their part subsequent to entry, attracts the threat of expulsion. For instance, an alien can be deported under the Act after he has served a prison sentence for an offence in Australia (s.12, s.14(2)) or has been adjudged by the Minister to be guilty of conduct constituting a security risk (s.14(1)).

Further, the liability to deportation covers a substantial period of time during which a migrant could have established ties with this country. For the purposes of constitutional law an alien remains an alien until he takes out Australian citizenship, "however long he has been in Australia and irrespective of how far he has become a member of the Australian community." Hence, as long as that status is retained, an immigrant would still be subject to the aliens power of the Constitution, thereby remaining liable to deportation or refusal of re-entry. In fact prior to the 1983 amendments, migrants granted resident status (apart from British subjects or Irish citizens) remained always liable under the criminal deportation provisions of s.12 and s.14. The amendments whilst abolishing distinctions between classes of migrants has imposed a ten year period of permanent residence during which liability will attach. It should be noted however, that there still exists an absence of a limitation period in respect of convictions for prescribed offences (mainly relating to sedition) under s.14(2).

Therefore, in relation to migrants alone, deportation provides a supplement to sanctions imposed by the criminal law.

Against this view, it is argued that deportation is not a punishment but merely an administrative measure available to government to enforce the return to his own country of an alien who is found to be an undesirable "acquisition". Associated with this reasoning is the second argument that deportation is just an extension of the exclusion power. Thus immigrants residing in the country are here on probation and are subject to deportation if they offend.

These arguments have been adopted by the Australian government. The Minister for Immigration summed up the government's position when he stated in an address to Parliament:

"The government must retain the legislative power to remove criminals and undesirables who have chosen not to commit themselves fully to Australia or who through their own criminal actions do not qualify for membership of the Australian community.... I must emphasise that the purpose of deporting a criminal is to protect the safety and welfare of the Australian community. Deportation is not imposed as a punishment and must not in any sense be regarded as a punishment."

It is proposed to deal with the second argument first. To assert that migrants enter on a probationary basis is to assume that entry is subject to conditions. But the entry permit itself (unlike the temporary entry permit) is not under the Act expressed to be subject
Furthermore, it is unclear whether any unrestricted permission to enter could be understood to be subject to implied conditions as are found in the deportation provisions of s.12 and s.14. Nevertheless, even if immigrants could be said to be subject to a contingent liability, it would clearly be inconsistent with the notion of immigration as a terminating process if such liability was to subsist for an indefinite period. Accordingly judicial authorities who have subscribed to the implied contingency rule have at the same time asserted that the power to deport on these grounds exists only during a limited period of probation and five years has been held reasonable for this purpose. The present law in providing a ten year period for some offences and an indefinite period for others, therefore exceed "requirements" laid down and is unnecessarily harsh.

Secondly, the so-called civil theory of deportation which forms the basis of the first argument has never received widespread judicial acceptance in Australia. Conversely, various judicial opinions have recognized that deportation is capable of inflicting an additional punishment. For example, Deane J. (with whom Evatt J. concurred) in the Federal Court decision of Minister for Immigration v. Pochi stated that "there is a great deal to be said for the view that banishment consequent upon his conviction of a criminal offence of one who has become an accepted member of the Australian community, was an interference with personal liberty by way of punishment." The Human Rights Commission has accordingly suggested that deportation could amount to double punishment in certain circumstances i.e. "when the Minister in making his decision to deport relies exclusively or almost so, on the fact of the conviction and the evidence which supported it." In such circumstances, the Commissioner argues he would be punishing the alien on the same facts that led to his being imprisoned by the court and thereby contravenes paragraph 7 of Article 14 of the I.C.C.P.R.

Moreover, irrespective of whether deportation should be characterised as a "civil penalty" and not a punishment for a crime, it is still a sanction applied only to resident aliens and would be considered punishment for citizens.

If equal protection for aliens is to have any meaning such a measure should only be used as adjunct of the exclusion process in its strict sense. Hence, the deportation power should only be available against illegal immigrants. All other migrants should be assured of the right of residence upon entry and if guilty of unlawful conduct be dealt with solely through the criminal process.

Citizenship

It can be seen from the foregoing discussion that the possession of Australian citizenship by an immigrant in Australia assumes a great significance. Not only has citizenship an important bearing on civil and political rights in Australia, it also determines to a large extent whether a person is entitled to reside permanently in the country without being liable to deportation.

Yet, the granting of citizenship to an alien has been treated in international law as the conferral of a privilege rather than as a granting of a right. Thus none of the international human rights conventions have stipulated that a migrant has a basic right to naturalization. Nevertheless, various provisions in the Conventions generally assume that the possession of a nationality is the right of every person
which is not to be arbitrarily deprived.42

Australian legislation is consistent with these principles. Hence while persons born in Australia acquire citizenship automatically at birth, migrants lack Australian citizenship unless and until it is conferred by the executive. The Minister for Immigration has under the Citizenship Act (s.14) a discretion to grant a certificate of citizenship to a migrant who satisfies him of six factors.

Although the conditions imposed could not be said to be overly onerous or arbitrary,43 the problem with the provision is that it confers a residual discretion upon the Minister to refuse to grant citizenship. Consequently, migrants though prima facie fulfilling the requirements of the Act may still be denied citizenship without any reasons being given for the denial.44 In practise, however, it appears that refusals are only made for discretionary reasons based upon policies defined by the Minister for refusing applications by persons having an adverse security assessment or seeking to rely on periods of unlawful resident.45

In contrast, the conferral of citizenship in the United States is not a matter of administrative discretion but the subject of judicial proceedings (petition). More importantly an alien who does comply with the defined conditions for granting may claim naturalization as of right which can be enforced in the courts.46 It is submitted that this system of conferral is preferable from the viewpoint that it converts a "privilege" of the migrant into an enforceable right upon compliance with the stated criteria.

On the other hand, some of the shortfalls of the Australian legislation is remedied by adequate provisions for review. Even though the Citizenship Act does not provide for appeals from the Minister's decision in the sense of a rehearing on the merits,47 unsuccessful applicants are able to invoke the supervisory jurisdiction of the courts. Apart from the availability of prerogative writs in the High Court (s.75 of the Constitution), applicants may seek an order for review pursuant to the Administrative Decisions (Judicial Review) Act. Thus, migrants are able to ensure that the Minister acts in accordance with the law without abusing his discretion.

A second area of distinction between migrants and Australian-born citizens is the area of deprivation of citizenship. A naturalised Australian may be deprived of his Australian citizenship status under s.21 of the Act. But the circumstances in which deprivation can occur is circumscribed and fully complies with the relevant international treaties.48 A person may only be denaturalized if he/she has been convicted of an offence in relation to the application for his certificate49 and then only if the Minister is satisfied that to continue citizenship would be contrary to the public interest.

The only provision which appears to be oppressive50 is that stipulating that children of persons deprived of their citizenship may, if the Minister so directs, cease to be Australian citizens (at least for the term of their minority) if they thereupon become nationals of another country.

Rights of Resident Aliens

Immigrants who choose not to become Australian citizens for whatever reason or are refused citizenship by the government, are subject to "pockets of statutory discrimination" during their residence in Australia.
Distinctions between aliens and citizens have existed and still do exist in four main areas.

(a) Participation in the political process

Electoral legislation of the Commonwealth and the States disqualify aliens from voting. A fortiori, they are ineligible to be elected as Members of Parliament.

(b) Property Rights

"The chief disability which aliens were subjected to at common law, the prohibition on their holding real estate (including leaseholds), has been altered by legislation." However complete parity with citizens has not yet been given in two States. In Victoria, equality is reserved only for alien "friends" resident in the State. Similarly, New South Wales legislation qualifies the aliens right to own and dispose of property in the area of homestead selections and settlement leases.

(c) Social Security Benefits

To be eligible for various pensions and benefits provided under the Commonwealth Social Security Act, migrants have to satisfy residency requirements ranging from ten years of continued residence for age and invalid pensions to twelve months continued residence for unemployment and sickness benefits.

(d) Employment

This is the area in which the disabilities of aliens in Australia is most pronounced. With the exception of Queensland, State and Commonwealth legislation provide that only British subjects are eligible for appointment as public servants. Other public utilities such as the Commonwealth Bank and T.A.A. also exclude migrants who are not natural born or naturalized British subjects.

Furthermore, until recently, aliens in most Australian jurisdictions were barred from practising in the legal profession because of statutory rules which stipulated British subject qualifications. Western Australia and the Australian Capital Territory still maintain these restrictions.

Various other "vocational discriminations" are imposed on aliens or classes of aliens under isolated statutes. In South Australia, aliens without a sufficient knowledge of the English language may not be issued with a hawkers licence and formerly gold buyers licences could not be issued to a Chinese alien. In Western Australia, licences required for the pearling trade (e.g. ship licence, shell buyers and pearl dealers licences) are denied to all aliens and until 1970 aliens were excluded from obtaining licences to sell liquor. In addition, prior to 1973, Asiatic and African aliens could not be granted a miners right, nor a gold mining or mineral lease nor be employed in any capacity in or about a mine. Finally Commonwealth Air Navigation Regulations places restrictions upon aliens (who are not British subjects) obtaining various licences required under the regulation.

This discriminatory treatment embodied in Australian legislation reflects a world-wide practice. Further, it represents a practice which does not contravene any of the strictures laid down in international law. It is generally recognised that each State is left free to concede to aliens resident within its territory such measure of rights, apart
from protection of life and property, as it may see fit to confer upon them. The various human rights treaties also suggest that differentiation on the basis of alienage is permissible. For example, the United Nations Declaration, whilst concerned with the protection of basic human rights (e.g. freedom of religion, assembly and speech) for every human being regardless of nationality, envisages no more than that the individual should enjoy the right to participate in the government of his country and the right to have equal access to public service in his country. More explicitly, Article 25 of the I.C.C.P.R. limits the enjoyment of such rights to citizens in their own countries. But perhaps the strongest expression of this permissive attitude is the International Convention on the Elimination of Racial Discrimination which states (in Art. 1(2)) that "the Convention shall not apply to distinctions, exclusions, restrictions or preferences made...between citizens and non-citizens."

Despite their apparent condonation in international law, it remains arguable that such legislation involves unequal treatment which often lacks a reasonable basis. This point is borne out by an analysis of the treatment of aliens within the American constitutional framework.

As a general proposition, mandates of the U.S. Constitution, including the Bill of Rights have been held to generally encompass all persons in the United States, whether they are citizens or aliens. In particular, it is firmly established that a resident alien is a person entitled to the protection of the equal protection clause of the fourteenth amendment. Moreover, the courts have in recent years, been quite diligent in protecting aliens against arbitrary and discriminatory action. Starting with Takahashi v. Fish and Game Commission, the United States Supreme Court has declared that there must be a reasonable justification (relating to the public interest) for discrimination against aliens and the "power of a State to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." Hence, a Californian statute prohibiting the issuing of licences to fish in State waters, to aliens not eligible for citizenship was held invalid.

The language of Takahashi was expanded by the landmark decision of Graham v. Richardson which held that:-

"Classifications based on alienage, like those based on nationality or race are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a discrete and insular minority...for whom such heightened solicitude is appropriate."

No longer was minimal equal protection standards (i.e. the rational basis test) to be applied to alienage classifications. Instead such classifications could only be justified by some compelling state interest. With the imposition of such a strict standard of scrutiny many discriminatory statutes were rendered invalid as States were not able to meet the burden of justification.

Consequently State legislation denying welfare benefits to aliens who did not meet residency requirements was declared (to violate) the equal protection clause. Arguments that the States special public interest in favouring its citizens over aliens in the distribution of limited resources was dismissed as not revealing a compelling justification. The Supreme Court pointed out that aliens, like citizens pay taxes and may be called into the armed forces. As well, they may live and work within the State for many years and contribute to the economic growth of the State.
Similarly, the States could not put forward a compelling public interest that would justify prohibiting aliens from public employment and participation in the professions.77

Furthermore, although the U.S. Supreme Court has not explicitly invalidated alien land laws, the High Courts of a number of States have invalidated such legislation on the basis of the equal protection clause.79

However, two important exceptions have developed to this doctrine of strict scrutiny which appeared to have laid the foundations for the abolition of all governmental discriminations against aliens. First, it has been held that the States retain the power to preserve the basic conception of the political community. The States could define the community by limiting to citizens both the right to vote and eligibility for offices which participate directly in the formulation, execution or review of broad public policy without being subject to strict judicial review.80 The breadth of this exception has expanded over the years to cover not only elective and high public office but also other governmental occupations such as policemen81 and public school teachers82 whose relation to the political process seemed too attenuated.

Secondly, and more importantly the U.S. Supreme Court has remained reluctant to apply the same tests to federal legislation even though the due process clause of the fifth amendment imposes many of the same requirements upon the federal government as the fourteenth amendment imposes upon the States.83 In creating such an exception, the Court relied heavily on the point that Congress and the President have been given specific power over matters of immigration and naturalization. Finding this authority constitutionally committed to the "political" branches of the federal government, the Supreme Court has not applied the strict scrutiny test to federal legislation.

Instead, it has adopted a lower standard of review at least in respect of discrimination authorised by Congress or the President. Thus the classification need only substantially further "overriding legitimate federal interests."84 As a result federal medicare regulations prescribing a five year residency requirement85 and a presidential executive order to exclude aliens from the Federal Civil Services86 were both upheld.

Thus it could be seen that even if similar constitutional guarantees were available in Australia, it would not necessarily lead to an invalidation of discriminatory legislation. It would all depend on which standard of review was adopted by the courts in this country. If minimal equal protection standards were employed so-called "reasonable discriminations" (especially those relating to participation in the political process) would remain valid. If on the other hand a more vigorous standard of review (such as the strict scrutiny test) was applied, alienage classifications in the area of employment and welfare benefits could be struck down as unconstitutional. Even then, the federal government which retains exclusive constitutional power over aliens, immigration and naturalisation, may still be exempt from strict scrutiny for reasons similar to that adopted by the United States Supreme Court.

Conclusion

A general conclusion from this survey would be that the immigrant (at least until he/she acquires Australian citizenship) is denied several of the rights and privileges accorded to the Australian born citizen. Whether or not such distinctions are justifiable (or have a reasonable basis) is another matter. International legal instruments
which might have been expected to have provided some protection for aliens have to a large extent considered that these differentiations are a legitimate exercise of a sovereign right. Accordingly, only minimal international standards for the protection of aliens have been prescribed.

Nevertheless, it is arguable whether mere compliance with these standards by Australia is sufficient to avoid undue discrimination against aliens. Overseas comparisons (especially American) have shown that greater scope can and should be given to equal protection principles in its application to aliens. The federal government has recently recognised that although Australian legislation and administrative practice conforms with the "rather elementary" demands of international law, further reform is needed in the field of immigration and citizenship. It has therefore instituted an internal review. But it remains to be seen whether the outcome of this review will result in any significant change in the legal status of the alien in Australia (as opposed to procedural amendments which are currently all that is expected).
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3. The various international treaty provisions relating to the protection of the Family (e.g. Art. 10 of the I.C.C.P.R. and Art. 12 of the U.N. Declaration of Human Rights) also impinges upon the exercise of a State's discretion. See Plender, R., op. cit.

4. Based on information contained in Departmental Handbooks and Manuals.

5. The only exception is concessions given to New Zealand citizens who are exempt from migration control - but there are also arguments that the policy in effect favours migrants from certain countries e.g. the current government's stress on family reunification is asserted to provide an inbuilt bias in favour of Asian immigrants.

6. Plender, R. op. cit. pp.150-1; see also Palfreeman, A.C. The Administration of the White Australia Policy pp.68-75.


8. In some cases divulging information is strictly prohibited (e.g. security and health records).

9. Based on information contained in Dept. Consolidated List of Instructions.

10. One such M.P., Mr. Mountford included the topic insufficiency of reasons by immigration officials in a grievance debate in the House of Representatives (29th March, 1984).

11. Schmidt v. Secretary of State 1969 1 All E.R. 904 - possible exceptions of cancellation of temporary permits and refusal to grant entry permits to holders of migrant visas (where "legitimate expectations" may be raised).

12. The Minister has stated they should come from outside the Public Service - but no particular qualifications have been stipulated.

13. I.e. the British Immigration Rules which are drawn up by the Home Secretary within a statutory framework (published and presented to Parliament for possible disapproval).

14. S.19(3) of the Canadian Immigration Act is framed in mandatory terms i.e. upon satisfaction...."shall be admitted". Cf. in Britain the so-called right is subject to the exercise of a reserve power given to the Home Secretary to prohibit entry if it is conducive to public good.

16. The appeal provisions have been criticised for the breadth of its exemptions, for example, the British Act denies review of refusals of entry certified by the Home Secretary to be conducive to the public good.

17. The Act is unusual in that it extends the right of review to "overseas applicants".

18. Lord Denning in R. v. Gov. of Pontonville Prison; Ex parte Azam 1973 2 All E.R. 741, summed up the position at common law when he observed at p.747 that an alien "had no right whatsoever to remain here". He is liable to be sent home at any time if in the opinion of the Crown his presence is not conducive to the public good.

19. Cf. some writers, particularly Jessup and Oppenheim have asserted that international law demands that the right not be abused.

20. Based on information contained in Dept. Manuals and Handbooks.

21. I.e. a person who is or has been a judge of a Federal or Supreme Court or a barrister or solicitor of not less than 5 years standing (s.14(5)).

22. Successive governments have regarded the Function to be as extensive as under the 1948 Migration Act - see Piggott, J. "Correspondence" Australian Law Journal Vol. 35 pp.320-1.

23. Both the Administrative Review Council and the Human Rights Commission have questioned the limited power of the AAT. Although it is a policy of the government that recommendations of the AAT should be overturned by the Minister only in exceptional cases, decisions such as Pochi's Case serve as a reminder of the inadequacy of such a right of review.


26. By the same token similar powers are exercised by most governments overseas.


28. 7th September 1983 (Senate Reading of Amendment Bill).

29. s.6 provides for the issue of permit to admit simplicitor without limitation of time and as such must be unconditional. See H.A. Finlay, "The Immigration Power Applied" 40 A.L.J. 120.

30. H.A. Finlay, op. cit.


33. Contra position in the U.S.A. where the Supreme Court uses the theory to justify "apparent violations" of the due process ex post facto and cruel and unusual punishment clauses of the constitution. Cf. Rowoldt v. Perfetto 355 U.S. 115 (1957) - rule of strict interpretation.

34. 31 A.L.R. 66. A number of Admin. Appeal Tribunal decisions have also recognised the artificiality of the distinction e.g. Piscioneri's Case (1980) 3 A.L.N. No. 6.

35. A similar approach is taken in Britain where a court recommendation of deportation is considered part of the sentence imposed.


37. "No-one should be liable to be tried or punished again for an offence for which he has already been convicted".

38. The U.S. Supreme Court has recognised that deportation is the "equivalent of banishment or exile" and a "forfeiture for misconduct of a residence". As a result deportation statutes have been held to be subject to the rule of strict construction - see Fong Haw Tan v. Phelan (1948) 333 U.S. The Human Rights Commission has also stated that such a penalty could amount to an act inconsistent with Art. 7 of the I.C.C.P.R. (cruel inhuman or degrading treatment).


40. To be discussed in the next section of this paper.


42. E.g. Article 24 of the I.C.C.P.R. - every child has the right to acquire a nationality. Article 5 of International Convention on Elimination of Racial Discrimination - equality before the law in the enjoyment of the right to nationality. Art. 15(2) of the Universal Declaration of Human Rights - "no-one shall be arbitrarily.... denied the right to change his nationality".

43. E.g. residence, intention to permanently reside, adequate knowledge of the English language - the only questionable criteria is good character, the proof of which may be difficult to establish due to the nebulous nature of the standard.

44. See s.40 of the Citizenship Act (cf. s.23 of the ADJR Act).

45. Cf. Jakubowicz & Buckley in Migrants and the Legal System claims that the Liberal Government in the sixties and early seventies based some of their refusals on political grounds. It must also be noted that the grant of a certificate does not ipso facto make the grantee an Australian citizen. The grantee must further take an oath of allegiance (s.15(1)) - problems arising from the imposition of this
further requirement was highlighted by Pochi's Case.


47. The Administrative Review Council in its 4th Annual Report has recommended that the AAT should be empowered to review decisions of the Minister.

48. Note that the revocation of a grant of citizenship is within the constitutional power of the Commonwealth (Meyer v. Poynton 1920 27 C.L.R. 436) and a simple legislative amendment could see a return of the draconian provisions of the earlier s.21 (enacted 1948) which conferred broad powers on the Minister to deprive citizenship.

49. S.50 - wilful and material fraud in procuring a grant (within 10 years of the offence).

50. S.23(2), 23(B), 23(D)(4) - Citizenship Act. In this regard see Art. 24 of I.C.C.P.R. - child's right to nationality.

51. E.g. Commonwealth Electoral Act 1918 ss.39, 69; Electoral Act (Qld) 1915-65 s.9.

52. Pryles, M. Australian Citizenship Law, p. 62. Queensland continued to impose restrictions on the holding of real property until 1958 and limited the right to apply for and hold selections and miners homestead leases until 1965.

53. Property Law Act, 1958 s.27.

54. Crown Land Consolidation Act; 1913-78 which imposes residency and citizenship requirements.

55. Ss.21, 24(1)(b), 25. S.83 AAC, 95(8), 107, 108.

56. Cf. Public Service Act (N.S.W.); Public Service Act (W.A.) 1904-1975 s.24.

57. Public Service Act 1922 s.34(a) - subject to amendment.

58. Commonwealth Bank Act 1959 s.90(1)(a); Australian National Airlines Act 1945 s.17(3)(a).

59. Legal Practitioners Act 1893 (W.A.) ss.9, 15(1); Legal Practitioners Ordinance 1970 (A.C.T.) s.10(2).

60. Hawkers Act 1934-1960 (S.A.) s.7(5).


63. Licensing Act 1911-1969 (W.A.) s.28(3).

64. Mining Act 1904-1973 (W.A.) ss.23, 24, 42, 48, 291; see West v. Suzuka 1964 W.A.R. 117 per Wolfe C.J. - as to possibility of conflict with the Migration Act.

65. Air Navigation licences include those for pilots, crew members and flying school operators. See also, Navigation Act 1912 (Cth) ss.17,
341 which until 1979 imposed similar restrictions with respect to shipping.

66. See Oppenheim, L. International Law; A Treatise pp.641-4; 688-9; Lauterpacht, H. International Law and Human Rights pp.121-2; Green, N.A. International Law - Law of Peace.

67. I.e. equal protection in respect of property which the State allows the alien to own.

68. Article 21.

69. Cf. see The International Convention on Economic Social and Cultural Rights in which rights sought to be protected (including rights to work and to social security) are designed for all human beings irrespective of nationality.

70. Truax v. Raich 239 U.S. 33 (1915). 14th Amend. - No State shall deprive any person of life, liberty or property without due process; nor to deny to any person within its jurisdiction the equal protection of the laws.

71. 334 U.S. 410 (1948) at 420.


73. In order to justify the use of a suspect classification a State must show that its purpose or interest is both constitutionally permissible and substantial and that its use of the classification is necessary for the accomplishment of its purpose or the safeguarding of its interest - In Re Griffiths 413 U.S. 722 at 722.

74. In doing so the Graham Court rejected the concept that constitutional rights turned upon whether the government benefit is characterised as a right or as a privilege - see p.374.

75. Which almost amounts to an assertion of discrimination for its own sake which is not a constitutionally permissible purpose-see McLaughtlin v. Florida 379 U.S. 184 (1964).

76. Sugarman v. Dougall 413 U.S. 634 (1973) - eligibility for positions in the competitive class of the State civil service.

77. In Re Griffiths 413 U.S. 717 (1973) - in that case it was not established that it must exclude all aliens from the practise of law in order to vindicate the State's undoubted interest in high professional standards - see also, Examining Board of Engineers v. Flores de Jero U.S.S.R. (1976).

78. Cf. Oyama v. California 332 U.S. 633 (1948) which was relied upon by the State courts to declare the laws unconstitutional.

79. E.g. Fujii v. State 38 Cal. 2d 718; Kenji Namba v. McCourt 185 One 579.

80. Although the rational basis test was applied - its application led to State statutes being upheld on rather spurious grounds e.g. it was held reasonable for a State to assume that citizens were more familiar with and sympathetic to American tradition.
83. I.e. failure to accord equal protection may offend the due process guarantee.
85. Mathews v. Diaz ibid.
86. Mow Sun Wong v. Campbell 626 F2d 739 (Ct. of Appeals) - the suggested Federal interests i.e. encouragement of naturalization and civil service efficiency might not have survived the strict scrutiny test - see Stanford Law Review (1979) 31:1069 at 1088.
87. In particular those aliens who are within the territorial jurisdiction of Australia.
88. The Minister has stated that the review will take into account the views of Human Rights Commission which is also examining the area.
89. At present it is anticipated that the most important change will be the upgrading of review rights. A right of appeal to an independent tribunal (such as the AAT) will probably be afforded to migrants within Australia or sponsors in the case of overseas applicants.