



HIGH COURT OF AUSTRALIA

12 August 2021

FREDERICK CHETCUTI v COMMONWEALTH OF AUSTRALIA [2021] HCA 25

Today, the High Court by majority dismissed an appeal from a final judgment given by a single justice of the High Court after a trial on agreed facts in a proceeding in the original jurisdiction of the High Court. The appellant had challenged his detention under the *Migration Act 1958* (Cth) on the ground that he was not within the reach of the legislative power concerning aliens conferred by s 51(xix) of the *Constitution* ("the aliens power").

The appellant was born in Malta on 8 August 1945, then still a colony of the United Kingdom, and arrived in Australia on 31 July 1948. At the time of his arrival, the appellant had the status of a British subject under the *Nationality Act 1920* (Cth) and he subsequently retained that status under the *Australian Citizenship Act 1948* (Cth) from its commencement on 26 January 1949 through to the abolition of that status on 1 May 1987 (other than during a short period between 1964 and 1965). In 2017 by reference to the appellant's conviction in 1993 of murder, and after having served a 24 year term of imprisonment, a decision was made to cancel the appellant's visa under the *Migration Act* and the appellant was subsequently taken into detention. In challenging his detention, the appellant argued for an exception to the settled understanding that it is in general open to the Parliament to treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalised as an Australian. The exception contended for by the appellant was in respect of a person who was a natural born British subject and who commenced residing permanently in Australia before 26 January 1949. The appellant argued that the status of a non-alien attaches indelibly to a person in that category either by reason of the person having been born within the allegiance of an as yet undivided Imperial Crown or by reason of the Parliament having once and for all determined the person not to be an alien under the *Nationality Act*. At first instance, the single justice concluded that the appellant was within the reach of the aliens power and gave judgment for the respondent.

The High Court, by majority, dismissed the appeal. By majority, the High Court held that it was open to the Parliament in the exercise of the aliens power, through prescription of the criteria for the conferral of Australian citizenship set out in the *Australian Citizenship Act*, to deny the appellant the status of an Australian citizen and thereby to treat him as an alien in the transition that occurred on the commencement of that Act on 26 January 1949. The appellant's problem was that he did not take the available course of action under the *Australian Citizenship Act* to become an Australian citizen after that date.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*