FEDERAL COURT OF AUSTRALIA

Cayzer v Minister for Immigration and Border Protection [2016] FCAFC 176

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| Appeal from: | *Cayzer v Minister for Immigration and Border Protection (No 3)* [2016] FCA 806 |
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| File number: | TAD 33 of 2016 |
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| Judge: | **KENNY, FLICK AND GRIFFITHS JJ** |
|  |  |
| Date of judgment: | 14 December 2016 |
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| Catchwords: | **CONSTITUTIONAL LAW** – appellant’s visa cancelled under s 501(2) of the *Migration Act 1958* (Cth) – whether appellant was an alien for the purposes of s 51(xix) of the *Constitution* – application of *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; 218 CLR 28 and *R v Pearson; Ex parte Sipka* [1983] HCA 6; 152 CLR 254  **MIGRATION –** whether appellant had taken oath under s 15 of the *Australian Citizenship Act 1948* – whether appellable error in findings of primary judge |
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| Legislation: | *Australian Citizenship Act 1948* (Cth) ss 13, 14, 15  *Constitution* ss 24, 41, 51(xix)  *Migration Act 1958* (Cth) s 501(2) |
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| Cases cited: | *Cayzer v Minister for Immigration and Border Protection (No 3)* [2016] FCA 806  *Fox v Percy* [2003] HCA 22; 214 CLR 118  *Nolan v Minister of State for Immigration and Ethnic Affairs* [1988] HCA45; 165 CLR 178  *Pochi v Macphee* [1982] HCA 60; 151 CLR 101  *R v Pearson; Ex parte Sipka* [1983] HCA 6; 152 CLR 254  *Re Patterson; Ex parte Taylor* [2001] HCA 51; 207 CLR 391  *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; 218 CLR 28  *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 |
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| Date of hearing: | 4 November 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 36 |
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| Counsel for the Appellant: | G Melick SC with R J Broomhall |
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| Solicitor for the Appellant: | Tremayne Faye Rheinberger Lawyers |
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| Counsel for the Respondents: | S Donaghue QC with D Hume |
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| Solicitor for the Respondents | Australian Government Solicitor |

ORDERS

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|  | | TAD 33 of 2016 |
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| BETWEEN: | GRAHAM RANKIN CAYZER  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  THE COMMONWEALTH OF AUSTRALIA  Second Respondent | |

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| JUDGES: | KENNY, FLICK AND GRIFFITHS JJ |
| DATE OF ORDER: | 14 DECEMBER 2016 |

THE COURT ORDERS THAT:

1. Leave to amend ground 3 of the amended notice of appeal be refused.
2. The appeal be dismissed.
3. Unless a party notifies the Court in writing by 4.00pm on 16 December 2016 that it opposes this order, the appellant pay the respondents’ costs of the appeal, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. On 27 October 2014, the respondent Minister decided to cancel the appellant’s Class BF Transitional (Permanent) Visa (**Visa**) under s 501(2) of the *Migration Act 1958* (Cth) (the **Act**). The appellant has been detained in immigration detention since about 23 November 2014.
2. The appellant challenged the Minister’s decision to cancel his Visa (**cancellation** **decision**) by a proceeding instituted in this Court. The notice of the cancellation decision provided to the appellant was accompanied by a statement of reasons signed by the Minister (**Minister’s reasons**), which referred to the fact that the appellant was convicted on 11 November 2011 “in the Supreme Court of Tasmania of Maintain Sexual Relations with Person Under 17 Years of Age, for which he was sentenced to four years imprisonment with a non-parole period of two and a half years”. The Minister’s reasons further stated that:

As a result of this sentence of imprisonment, [the appellant] has a *substantial criminal record*. I find that he does not pass the character test by virtue of subsection 501(6)(a) with reference to subsection 501(7)(c) of the Act and that he has not satisfied me that he passes the character test.

The Minister’s reasons then set out why he determined to exercise his discretion under s 501(2) of the Act to cancel the Visa. The Minister addressed the matters he considered under the headings “Criminal conduct”, “Mitigating factors and risk of re-offending”, “Ties to Australia”, “Best interests of minor children”, “Non-refoulement obligations”, and “Other considerations”. The Minister concluded:

I have taken the view that despite the strong countervailing considerations articulated above, they are not sufficient to justify not to cancel [the Visa], since even a low risk of re-offending could result in serious harm to a member of the Australian community.

Having given full consideration to all of these matters, I decided to exercise my discretion to cancel [the Visa] under subsection 501(2).

1. In a Further Amended Originating Application dated 11 December 2015 (**FAOA**) the appellant sought various declarations, and orders that the cancellation decision be set aside and that he be released from immigration detention. On 13 July 2016, a judge of the Court found against the appellant on all grounds and dismissed the FAOA.
2. This is an appeal from that judgment. For the reasons set out below, the appeal should be dismissed.
3. At the outset of the hearing of the appeal, the Court granted leave to amend the notice of appeal (without grounds 4 and 8, which the appellant formally abandoned). During the hearing the appellant also formally abandoned ground 1.
4. Although expressed in various ways, grounds 2, 5, 6, 7 and 9 of the Notice of Appeal, as amended, each encountered the same obstacle. This was the effect of *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; 218 CLR 28 and, in relation to grounds 6 and 9, also the effect of *R v Pearson; Ex parte Sipka* [1983] HCA 6; 152 CLR 254. In this Court these grounds necessarily failed if the decision of the High Court of Australia in *Shaw* required this Court to hold that the appellant was an alien. In this Court too, *Ex parte Sipka* also presented a further obstacle to the appellant’s prospects of success.
5. In *Shaw* 218 CLR 28, the High Court held, by a majority, that the power conferred on the Parliament by s 51(xix) of the *Constitution,* to make laws with respect to “naturalization and aliens”, supported s 501(2) of the Act in so far as it authorised the Minister to cancel Mr Shaw’s visa in 2001. Gleeson CJ, Gummow and Hayne JJ commenced by observing (at [2]) that:

The power conferred by s 51(xix) supports legislation determining those to whom is attributed the status of alien; the Parliament may make laws which impose upon those having this status burdens, obligations and disqualifications which the Parliament could not impose upon other persons. On the other hand, by a law with respect to naturalisation, the Parliament may remove that status, absolutely or upon conditions. In this way, citizenship may be seen as the obverse of the status of alienage.

(Citation omitted.)

1. The majority (Gleeson CJ, Gummow and Hayne JJ, and, separately, Heydon J) held that Mr Shaw, who was a British subject born to British parents in the United Kingdom in 1972 and who had arrived in Australia in 1974, was properly classified as an alien for the purposes of s 51(xix), since he had not become an Australian citizen pursuant to the *Australian Citizenship Act 1948* (Cth) (**Australian Citizenship Act**). In their joint judgment, Gleeson CJ, Gummow and Hayne JJ stated (at [31]-[32]):

The conclusion reached is that the applicant entered Australia as an alien in the constitutional sense. *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [(2002) 212 CLR 162] establishes that, this being so, he did not lose that status by reason of his subsequent personal history in this country. Upon cancellation of his visa, he became an “unlawful non-citizen” within the meaning of the Act.

This case should be taken as determining that the aliens power has reached 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. The scope of any earlier operation of the power does not fall for consideration. However, it may be observed that, like the other powers of the Parliament, s 51(xix) is not to be given any meaning narrowed by an apprehension of extreme examples and distorting possibilities of its application in some future law.

The result was that, when the Minister cancelled Mr Shaw’s visa pursuant to s 501(2) of the Act, he became an “unlawful non-citizen” within the meaning of the Act and liable to be deported.

1. The decision of the majority in *Shaw* was consistent with the earlier decision of the High Court in *Nolan v Minister of State for Immigration and Ethnic Affairs* [1988] HCA 45; 165 CLR 178, in which Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ approved the statement of Gibbs CJ in *Pochi v Macphee* [1982] HCA 60; 151 CLR 101 at 109-110 to the effect that a person born out of Australia of parents who were not Australian citizens and who was not naturalized would generally be an alien within s 51(xix) of the *Constitution*.
2. Although strong dissenting judgments were delivered by Gaudron J in *Nolan* 165 CLR 178 (at 187 and following); and by McHugh J, Kirby J and Callinan J (each writing separately) in *Shaw* 218 CLR 28 (from [41], from [54] and from [129] respectively), this does not diminish the binding force of the decisions of the majority in this Court.
3. Furthermore, the majority in *Shaw* emphasized that *Re Patterson; Ex parte Taylor* [2001] HCA 51; 207 CLR 391, on which the appellant relied in his written submissions, was not to be taken as overruling *Nolan* 165 CLR 178 and emphasized that the discussion of the aliens power in *Re Patterson* was not necessary for the decision in that case: see *Shaw* 218 CLR 28 at [36]-[39].
4. As regards the binding force of *Shaw*, we are in no different position to that of the primary judge. Absent the possibility that the appellant might have acquired citizenship under the Australian Citizenship Act (or the *Australian Citizenship Act 2007* (Cth)), applying *Shaw*, we are bound to hold that the appellant was an alien for the purposes of s 51(xix) of the *Constitution* at the time the cancellation decision was made and that he remains so.
5. Particularly in written submissions, the appellant contended that features of his case distinguished it from *Shaw*, including that he had voted in elections whilst Mr Shaw had not. At the hearing, however, senior counsel for the appellant stated that, although he “would very much like to be able to convince this Court, particularly in relation to *Shaw* that, because the facts were so different to this case ... therefore *Shaw* could be distinguished”, he doubted “very much whether the High Court would take a favourable view of that approach”. Having regard to the joint judgment in *Shaw*, particularly paragraphs [31]-[32] (see [8] above), we agree that none of the features to which the appellant referred would (alone or together) constitute a proper basis on which to distinguish the decision in *Shaw*.
6. The appellant also relied on the fact that he had voted in elections to support a contention, advanced in written submissions, that he was one of the “people of the Commonwealth” in s 24 of the *Constitution*. The appellant submitted that because he had enrolled to vote, voted and, at one stage, stood for election, the cancellation decision was contrary to ss 24 and 41 of the *Constitution*. It was not clear from the appellant’s argument, however, how the proposition that he was one of the “people of the Commonwealth” supported his challenge to the cancellation decision. Assuming that the proposition for which he argued was that he cannot be an alien because he is one of the “people of the Commonwealth”, then this Court is obliged to reject this proposition primarily on account of *Shaw*.
7. Further, *Ex parte Sipka* 152 CLR 254 would, amongst other things, prevent this Court accepting the proposition that the appellant has a constitutionally-protected right to vote at federal elections deriving from s 41 of the *Constitution* as the appellant’s argument apparently contemplated. In a joint judgment, Gibbs CJ, Mason and Wilson JJ explained (at 260-261) that:

Section 41 does not in terms confer a right to vote. … Under the Constitution, persons qualified as electors for the more numerous House of the Parliament of a State were qualified to vote for the election of members of the House of Representatives, but only until the Parliament otherwise provided: see s. 30 of the Constitution. By s. 8 of the Constitution, a person qualified to vote for the election of members of the House of Representatives is also qualified to vote for the election of Senators. The Parliament has power to make laws with respect to matters in respect of which the Constitution makes provision until the Parliament otherwise provides (s. 51 (xxxvi)) and thus has power to establish the franchise for electors of members of the House of Representatives and Senators. … Once a law of the Commonwealth has completely provided the qualifications for electors for Commonwealth elections (as in fact Commonwealth laws have done since the *Commonwealth Franchise Act* 1902 was passed) no elector thereafter could acquire a qualification to vote at Commonwealth elections under ss. 30 and 8 of the Constitution. By virtue of s. 41, the Commonwealth law which first established the franchise could not have prevented any person who then had a right to vote at elections for the more numerous House of the Parliament of a State from voting at elections for either House of the Parliament of the Commonwealth. But once a Commonwealth law had been passed completely establishing the franchise, no person, not already qualified to vote at Commonwealth elections, could become so qualified by virtue of the Constitution alone. No future law could be said to prevent such persons from voting, since there was nothing in the Constitution or in the law that gave them a right to vote.

Their Honours concluded (at 264) that “[f]or the reasons we have given we hold that s 41 preserves only those rights which were in existence before the passing of the *Commonwealth Franchise Act* 1902”.

1. Senior counsel for the appellant, Mr Melick SC, sensibly recognised the difficulties the appellant’s constitutional arguments faced in this Court. Although not abandoning the appellant’s written submissions, he frankly acknowledged that:

The law, at the moment, seems quite clear. If you are ... not born in Australia, of non-Australian born parents, after [the] passing of the [Australian] Citizenship Act of 194[8], you’re an alien. Furthermore, the law seems to state that to obtain citizenship in Australia it’s a process by legislation as set out in sections 14 and 15 of the [Australian] Citizenship Act. We have considerable problems, in relation to that convincing this Court to take a different view. I appreciate that. The submissions have to be formally put to allow us to go somewhere else, and the same goes in relation to the *Sipka* point.

1. In this circumstance it is unnecessary to say anything further about grounds 2, 5, 6, 7 and 9, which could not succeed in this Court because the Court is bound by the decisions of the High Court, in this case in *Shaw* and in *Ex parte Sipka*.
2. Before turning to another ground, we note that, in another case involving s 501 of the Act, we have considered and rejected different, though related, arguments involving s 24 of the *Constitution*: see *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177, also delivered today.
3. Only one other ground was addressed separately by senior counsel for the appellant at the hearing. This was ground 3. At the outset of the hearing ground 3 was in the following terms:

The learned trial Judge erred in law and/or fact by failing to find that after making an application for citizenship and taking the appropriate oath, the applicant had become an Australian Citizen.

This ground arose from the primary judge’s rejection of the appellant’s claim that he was granted citizenship in a ceremony in Hobart in 1981.

1. In 1981, Pt III, Div 2 of the Australian Citizenship Actprovided for a process by which a non-citizen could apply for, and receive, a grant of citizenship. For present purposes, the relevant provisions are ss 13, 14 and 15, which at that time relevantly stated:

13 (1) A person may, not earlier than one year after his entry into Australia, make a declaration in the approved form of his intention to apply for the grant to him of a certificate of Australian citizenship.

(2) A person may apply in the approved form for the grant to him of a certificate of Australian citizenship.

(3) An application under sub-section (2) may be made whether or not the applicant has previously made a declaration under sub-section (1), but shall not be made more than six months before the earliest date on which the Minister, under the provisions of section 14, could become empowered to grant the certificate.

14 (1) The Minister may grant a certificate of Australian citizenship to a person who has made an application in accordance with section 13 and satisfies the Minister–

(a) that he is of full age;

(b) that he is capable of understanding the nature of the application;

(c) that he has resided continuously in Australia or New Guinea, or partly in Australia and partly in New Guinea, throughout the period of one year immediately preceding the date of the grant of his certificate;

(d) that, in addition to the residence required under paragraph (c), he has resided in Australia or New Guinea, or partly in Australia and partly in New Guinea, or has had service under an Australian government, or partly such residence and partly such service, for periods amounting in the aggregate to not less than two years during the eight years immediately preceding that date;

(e) that he is of good character;

(f) that he has an adequate knowledge of the English language;

(g) that he has an adequate knowledge of the responsibilities and privileges of Australian citizenship; and

(h) that he intends, if granted a certificate of Australian citizenship, to reside or to continue to reside in Australia or New Guinea or to enter or continue in service under an Australian government, in the service of an international organisation of which the Australian government is a member, or service under the employment of a person, society, company or body of persons resident or established in Australia or New Guinea.

…

15 (1) A person to whom a certificate of Australian citizenship has been granted under this Division shall be an Australian citizen—

(a) in the case of a person to whom paragraph (b) does not apply—as from the date upon which he takes an oath of allegiance or makes an affirmation of allegiance in the manner provided by this section and in accordance with the form contained in Schedule 2; or

(b) in the case of a person who has not attained the age of sixteen years or a person to whom sub-section (2) of section 14 applies—as from the date upon which the certificate is granted.

(2) The oath or affirmation of allegiance referred to in sub-section (1) shall—

(a) be taken or made before a Judge of a Federal Court or a Judge or Magistrate holding office under the law of a State or Territory or before a person, or a person included in a class of persons, approved by the Minister; and

(b) if the Minister has made arrangements in pursuance of section 41 for it to be taken or made in public—be taken or made in accordance with those arrangements, unless the Minister otherwise permits.

1. The learned primary judge addressed the matters on which the appellant’s citizenship claim depended at [94] and following of her Honour’s reasons for judgment: see *Cayzer v Minister for Immigration and Border Protection (No 3)* [2016] FCA 806 at [94]-[127]. The primary judge discussed the evidence and made various findings of fact: see *Cayzer* [2016] FCA 806 at [98]-[117]. It is unnecessary to refer to them in detail here. Significantly, however, the primary judge stated (at [118]-[124]):

I accept the respondents’ submission that there is no evidence of any record held by the Department of Immigration of any application for Australian citizenship by Mr Cayzer. I also accept, in Mr Cayzer’s favour, that this may be explicable on the evidence before me because he did not proceed to enlist and it is unlikely that any search by or behalf of the Department of Immigration, or the Minister, would have turned up any such application because if it did exist it might well be in the files of the Department of Defence. Taking into account the evidence of Group Captain MacDonald, it would seem likely Mr Cayzer was asked by the enlistment officers to fill in such a form during the enlistment and interview process. I am prepared to find on the balance of probabilities that he did fill in such a form.

However, I find that Mr Cayzer has not discharged his burden of proving on the balance of probabilities that he underwent a ceremony in the RAAF recruiting offices in 1981 through which he became an Australian citizen. I am prepared to find on the balance of probabilities that Mr Cayzer was shown a card that had an oath of some kind on it, and that he may have repeated some words which approximated to some of the words he described in his evidence. I am prepared to find that the word “allegiance” may have been included in the words he said. He seemed to have a reasonably clear memory of that word. But I am not prepared to find that he repeated all the words he described in his evidence: his evidence appears to me to have been affected by events that have occurred during the period in which Mr Cayzer has struggled to prove he is a citizen. He has come to know only too well the kind of language which is in fact used in an oath of allegiance during a citizenship ceremony. His confusion about whether he renounced his British citizenship contributes to my view that there was an element of reconstruction in his evidence. I do not find he intended to make up any evidence, but in my opinion his evidence was confused as between what he could actually recall and what he has since learned about citizenship ceremonies and the effect of becoming a citizen, as well as the number of times he has read and participated in the making of arguments on his behalf about the difference between the Queen of Great Britain and the Queen of Australia, which also featured in historical evidence. I am not prepared to find that what occurred was the taking of the oath of citizenship. Nor am I prepared to find it was the taking of the oath of enlistment. It may well be that, for some purpose which cannot now be identified, some kind of oath was required of Mr Cayzer that day. Perhaps he was given an oath to practice, or to see what he would have to swear to in the future. Perhaps he practiced by uttering the words of the oath and that is what he now recalls. Perhaps, for some local or administrative purpose unknown to the witnesses in these proceedings, prospective enlistment candidates were asked to swear to something. There are many possibilities and it is inappropriate for the Court to speculate about which is correct, or to choose between contentions which are no more than competing possibilities: see *Seltsam Pty Ltd v McGuiness* [2000] NSWCA 29; 49 NSWLR 262 at [79]-[80] per Spigelman CJ.

I do not accept Mr Cayzer’s evidence that any person present that day said words to the effect of “you are now an Australian citizen”. I find Mr Cayzer’s memory is insufficiently reliable for me to be confident that this is what occurred, as opposed to a reconstruction by him based on going over and over these events in his mind and in his memory for a number of years.

Whether or not there was, in 1981, a capacity in officers of the Defence Force, or immigration officers present on Defence Force premises, to administer the oath of allegiance as part of an Australian citizenship ceremony, I am not persuaded on the balance of probabilities that any officer engaged in such conduct in Mr Cayzer’s presence on the (unspecified) day he identifies in 1981.

Even if I had been persuaded that Mr Cayzer did take an oath in the required form for Australian citizenship on that unspecified day in 1981 at the Air Force recruiting offices in Hobart, that would not have led me to conclude that Mr Cayzer was, at and from that time, an Australian citizen. Nor would it lead me to conclude he has at any time since become an Australian citizen.

That is because, as the respondents submitted, there is another condition precedent to the grant of Australian citizenship: namely, the grant of a certificate of citizenship.

The respondents are correct to submit that Mr Cayzer himself led no evidence that he had been granted, or given, a certificate of Australian citizenship. Mr Cayzer does not claim to have been granted or given one. I find Mr Cayzer has not discharged his burden of proving that the Minister granted a certificate of Australian citizenship to him in 1981, or at any other time.

1. By reason of s 15 of the Australian Citizenship Act (see [19] above) the appellant’s citizenship claim was bound to fail unless he established, on the balance of probabilities, that the Minister had granted him a certificate of Australian citizenship in the exercise of the discretion conferred by s 14. Her Honour found that the appellant had not established, on the balance of probabilities, that the Minister had granted him a certificate of Australian citizenship in 1981 or at any other time. This finding was, as s 15 indicates, fatal to the appellant’s claim that he had become an Australian citizen. Even if her Honour had been persuaded that the appellant had taken an oath pursuant to s 15(1)(a) of the Australian Citizenship Act in 1981, unless he had been granted a certificate of Australian citizenship, he could not have become an Australian citizen. Senior counsel for the appellant conceded at the hearing of the appeal that the appellant had “some considerable difficulty in relation to the question of whether or not the Minister had issued a certificate”. On the hearing of the appeal, the appellant did not contend that the primary judge erred in finding that the appellant had not discharged his burden of proving that the Minister granted a certificate of Australian citizenship to him in 1981 or thereafter: see *Cayzer* [2016] FCA 806 at [124].
2. Further, as explained hereafter, we discern no appellable error in the primary judge’s findings that the appellant had not shown, on the balance of probabilities, that he had participated in a ceremony in 1981 at which he had taken “the oath of citizenship” or “the oath of enlistment”.
3. Ground 3, as originally framed, therefore fails.
4. During the hearing of the appeal, however, Mr Melick SC, for the appellant, applied to amend ground 3. The proposed amendment ultimately took the following form:

That the learned trial judge erred in law and/or fact by failing to find that the applicant took the oath of allegiance pursuant to the *Australian Citizenship Act 1948*.

1. Mr Melick SC stated that, if the appellant’s application to amend was unsuccessful, then he did not abandon the original form of ground 3 discussed above. For the reasons stated below, we would not grant leave to amend ground 3 as proposed at the hearing and, as stated above, we would dismiss ground 3 in its unamended form.
2. The reference to “the oath of allegiance” in the proposed amended ground 3 was, as senior counsel for the appellant confirmed, a reference to the oath set out in Schedule 2 referred to in s 15(1)(a) of the Australian Citizenship Act, as it stood in 1981. There was evidence before the primary judge that in 1981 the oath in Schedule 2 was as follows:

I, A.B., renouncing all other allegiance, swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Elizabeth the Second, Queen of Australia, Her heirs and successors according to law, and that I will faithfully observe the laws of Australia and fulfil my duties as an Australian citizen.

1. Senior counsel for the appellant did not cavil with the proposition that, in order to establish that he had become an Australian citizen, the appellant had to establish on the balance of probabilities that he had been granted a certificate of Australian citizenship in 1981 or thereafter. As stated above, the appellant failed to do so. Mr Melick SC said, however, that the appellant desired to have this Court hold that the primary judge erred in failing to find that he had taken the oath of allegiance. This was because such a holding would provide a basis for an argument before the High Court that the appellant was not an alien and that *Shaw* 218 CLR 28 ought to be distinguished on this account.
2. Bearing in mind that the primary judge was prepared to find on the balance of probabilities that the appellant was shown a card that had an oath of some kind on it in 1981, Mr Melick SC, for the appellant, submitted that, on the evidence, the appellant must have taken either “the oath of allegiance or the enlistment oath”. He submitted that “[t]here was no suggestion of any other form of oath or any other form of practice in evidence before her Honour”; and that it was not open to her Honour to draw the inference that the appellant took some other form of oath “because there was absolutely no evidence about it”. He submitted that “the evidence made it quite clear it could not have been the oath of enlistment, therefore it must have been the oath of allegiance”. It was not open to her Honour, so senior counsel for the appellant submitted, to infer that “he took some other form of oath or some form of practice because there was absolutely no evidence about it”.
3. Mr Melick SC referred to an affidavit sworn by the appellant on 9 December 2015, in which the appellant deposed that he was told that he had “to swear an oath of allegiance for citizenship” and that an “officer got us to swear an oath of allegiance together. The officer then said at the end that we were now Australian Citizens”. Mr Melick SC also referred the Court to the evidence given by the appellant in cross-examination, in particular the appellant’s evidence that:

There was a card with an oath written on it. Now, I can’t tell you verbatim what those words were on that oath. All – my recollection of it was, I had to renounce my allegiance to the Queen of Great Britain and swear allegiance to the Queen of Australia. There was a number of words on that after that, but my memory of those words is not accurate to today.

Senior counsel also referred to the appellant’s statement in cross-examination that he did not believe that the oath that he took was “connected with enlistment in the armed forces”. He also referred to a statement by the appellant’s mother made on or about 2 June 2015 and exhibited to her affidavit of 11 February 2016. The statement was discussed by the primary judge at [103] of her reasons for judgment and, plainly enough, the statement could not overcome the deficiencies in the appellant’s own evidence about the events in which he said he participated.

1. As paragraphs [119]-[121] of her Honour’s reasons demonstrate, the primary judge carefully considered the appellant’s evidence about the oath he said he took at a ceremony in 1981. Although her Honour accepted that the appellant had been shown a card that had an oath of some kind on it (and that the words of this oath may have included the word “allegiance”), her Honour did not accept the appellant’s evidence that “he repeated all the words he described in his evidence” ([119]). Her Honour was not persuaded that the appellant had shown, on the balance of probabilities, that he took the oath of citizenship. Nor was her Honour persuaded that the appellant took the oath of enlistment. Rather, the primary judge held that it was inappropriate for the Court to speculate about the “many possibilities”, which were “no more than competing possibilities” ([119]). Her Honour specifically did not accept that the appellant was told “you are now an Australian citizen” ([120]).
2. The appellant submitted that the primary judge should not have speculated about what had occurred on the basis that there were “only two forms of oath that could have been taken by the applicant”, the oath of citizenship or the oath of enlistment. We reject the proposition, however, that the primary judge’s findings involved impermissible speculation. Her Honour made it clear that at the conclusion of [119] that she was not proceeding on this basis at all. Rather, her Honour specifically held that she was “not prepared to find that [the appellant] repeated all the words he described in his evidence”. Her Honour explained why this was so. Her Honour explained that she did not find that the appellant had intentionally fabricated evidence, but she did find that the appellant’s evidence contained “an element of reconstruction”, in that his evidence confused what he could actually recall about the events in 1981 with what he had come to learn “about citizenship ceremonies and the effect of becoming a citizen, as well as the number of times he has read and participated in the making of arguments on his behalf about the difference between the Queen of Great Britain and the Queen of Australia, which also featured in historical evidence”.
3. The primary judge had the advantage of hearing and seeing the appellant and the other witnesses give their evidence. Her Honour therefore had an advantage that this Court does not have in weighing the entirety of the evidence, including the evidence led by the Minister, such as the evidence given by Ms Heather Penhaligon as to the kinds of records that should have come into existence if the appellant had become an Australian citizen, the steps she took to find them and her failure to locate them: see, for example, *Cayzer* [2016] FCA 806 at [112]-[115] and [118].
4. In order to succeed on the proposed amended ground 3, the appellant must show that there was an appellable error in the primary judge’s finding that he had not shown, on the balance of probabilities, that he had participated in a ceremony in 1981 through which he became an Australian citizen and at which he had taken the oath of allegiance. The appellant would therefore have to show that the finding was contrary to “incontrovertible facts or uncontested testimony”, “glaringly improbable” or “contrary to compelling inferences”: see *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [28]-[29]. In assessing the prospects of the appellant doing this, it must be borne in mind that the appellant’s proposed amended ground 3 involved challenging the primary judge’s inability to be satisfied, on the balance of probabilities on the evidence before her, that the appellant had taken the oath of allegiance at the ceremony. In order to succeed on the proposed amended ground 3, the appellant would therefore have to show that, in the circumstances of the case and on the evidence before the Court, her Honour was, in effect, bound to find that the appellant had established that he had taken the oath of allegiance in the form set out in schedule 2 to the Australian Citizenship Act as it stood in 1981. We consider that the appellant has no reasonable prospect of success, bearing in mind the relatively slight evidence the appellant gave about the oath he took, the fact that the oath of allegiance in its applicable form was not put to him as the oath that he took at that time, her Honour’s assessment of the reliability of the appellant’s evidence about events that had occurred 35 years before, and her Honour’s uncontroverted findings that the appellant led no evidence that he had ever been granted a certificate of Australian citizenship and that he had not shown, on the balance of probabilities, that the Minister had ever granted him such a certificate. In the circumstances of the case, it was clearly open to the primary judge to hold, in substance, that the appellant had not proved his case.
5. We would not grant leave to amend ground 3 for two reasons. First, it is plainly the case that in this Court, for the reasons explained above, even if the appellant were to succeed on the proposed amended ground 3, this would not lead to success on his appeal since, absent a showing that he had been granted a certificate of Australian citizenship, the appellant would still be unable to establish that he had acquired citizenship under the Australian Citizenship Act. In this circumstance, he would continue to be an alien, on the binding authority of *Shaw* 218 CLR 28. This would ordinarily be enough to refuse the leave to amend that is sought. Secondly, if it were the case that leave might be given in order to facilitate an appellant’s foreshadowed argument in the High Court, we do not consider that this would be an appropriate occasion to grant such leave. This is because, for the reasons we have stated, there is no reasonable prospect that the appellant might succeed in showing any relevant error in the contested findings made by the primary judge. Accordingly we are of the opinion that it is not in the interests of justice to grant leave to amend ground 3, as proposed.
6. For the reasons stated, we would dismiss the appeal.

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| I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kenny, Flick and Griffiths. |

Associate:

Dated: 14 December 2016