

# MORE THAN JUST A HUMBLE ABODE: THE IMPLICATIONS OF CONSTITUTIONAL CITIZENSHIP RIGHTS FOR PASSPORT LAW

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*An Australian citizen is abroad and wants to return home. The Commonwealth cancels their passport and refuses to issue a new one, effectively excluding them from Australia. What remedy does the law provide? Further to conventional administrative law grounds, this article contends the Constitution may be a source of remedy. It builds on previous scholarship and jurisprudence which suggests that the Constitution confers a special citizenship status, attached to which are a right of abode in Australia and to 'positive protection' (such as diplomatic protection and consular assistance). As experience from other jurisdictions shows, such rights may have implications for Parliament's power, particularly its power to deprive citizens of passports.*

## I INTRODUCTION

Commonwealth powers with respect to passports have been a recent matter of political and legal debate following legislative reforms to aspects of the Australian passports regime.<sup>1</sup> Those reforms were implemented to address concerns Parliament had about 'foreign fighters' (people who have participated in overseas conflicts associated with terrorism) returning home.<sup>2</sup> The reforms were a component, albeit a critical one, of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (the '*Foreign Fighters Amendment Act*').<sup>3</sup> Amendments to the passports regime increased the Commonwealth's

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<sup>1</sup> See generally Department of Parliamentary Services (Cth), *Bills Digest*, No 34 of 2014–15, 17 October 2014, 7–15, 23–6.

<sup>2</sup> The description 'foreign fighters' is used in the Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 2 [1].

<sup>3</sup> For a comprehensive list see *ibid* 4–9.

power with respect to passport decisions.<sup>4</sup> The rationale for the increased powers was to allow the Commonwealth to greater affect foreign fighters' use of their passports; thereby increasing the Commonwealth's ability to thwart their travel plans.<sup>5</sup> The precursor report to the *Foreign Fighters Amendment Act* underpinned this rationale. In that report, the Independent National Security Legislation Monitor (the 'INSLM') stated that by affecting a person's passport, the Commonwealth may prevent 'nefarious travel' more effectively than through the use of control orders.<sup>6</sup>

The implications of the changed passport arrangements are being tested. One Australian they have affected is Oliver Bridgeman. He is a 19 year-old who travelled from Toowoomba to Syria in March 2015.<sup>7</sup> Bridgeman has claimed that he has been doing aid work in Syria and that he is not involved in fighting in the ongoing Syrian civil war.<sup>8</sup> In early 2016, Bridgeman expressed a desire to return to Australia in light of the increased intensity of violent conflict in Syria since his arrival.<sup>9</sup> At that stage, Bridgeman's family and lawyer advised the Australian Federal Police (the 'AFP') that Bridgeman wished to return to Australia.<sup>10</sup> Bridgeman's family was finalising plans for Bridgeman to return to Australia.<sup>11</sup> His return looked imminent, but the Commonwealth cancelled his passport.<sup>12</sup> The Commonwealth's reason for cancellation was that Bridgeman was likely to

<sup>4</sup> See *Foreign Fighters Amendment Act* sch 1 pt 1 items 11–26.

<sup>5</sup> See Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 12–14; see generally Bret Walker, 'Annual Report' (Report, Independent National Security Legislation Monitor, 28 March 2014) 40 <<https://www.dpmc.gov.au/sites/default/files/publications/inslm-annual-report-20140328.pdf>>.

<sup>6</sup> See Walker, above n 5, 38.

<sup>7</sup> Michael Safi, 'Queensland Teenager Oliver Bridgeman Denies Joining Al-Qaida Affiliate in Syria', *The Guardian* (online), 24 August 2015 <<http://www.theguardian.com/australia-news/2015/aug/24/queensland-teenager-oliver-bridgeman-denies-joining-al-qaida-in-syria>>.

<sup>8</sup> Kym Agius, 'Queensland Teenager Oliver Bridgeman Denies Joining Terrorist Group in Syria', *ABC* (online), 17 June 2015 <<http://www.abc.net.au/news/2015-06-17/oliver-bridgeman-says-he-has-not-taken-up-arms-in-syria/6551770>>.

<sup>9</sup> Josh Bavas, 'Queensland teen Oliver Bridgeman Stranded in Syria After Federal Government Cancels His Passport', *ABC* (online), 27 February 2016 <<http://www.abc.net.au/news/2016-02-26/oliver-bridgeman-stranded-syria-federal-gov-cancel-passport/7204250>>; 'Government Defends Decision to Cancel Passport of Queensland Teenager in Syria Oliver Bridgeman', *ABC* (online), 27 February 2016 <<http://www.abc.net.au/news/2016-02-27/government-defends-decision-cancel-oliver-bridgeman-passport/7205508>>.

<sup>10</sup> Mark Solomons, 'Oliver Bridgeman: Arrest Warrant Issued for Queensland Teenager in Syria', *ABC* (online), 4 March 2016 <<http://www.abc.net.au/news/2016-03-03/oliver-bridgeman-syria-arrest-warrant-issued-toowoomba/7217628>>; 'Queensland Teenager Oliver Bridgeman Appeals Against Decision to Cancel Passport While in Syria', *ABC* (online), 29 February 2016 <<http://www.abc.net.au/news/2016-02-29/appeal-against-fed-gov-decision-cancel-oliver-bridgeman-passport/7207200>>.

<sup>11</sup> Solomons, above n 10.

<sup>12</sup> Nathanael Cooper, 'Queensland Teenager Oliver Bridgeman's Passport Cancelled by DFAT', *Brisbane Times* (online), 26 February 2016 <<http://www.brisbanetimes.com.au/queensland/queensland-teenager-oliver-bridgemans-passport-cancelled-by-dfat-20160226-gn4z4o.html>>; Solomons, above n 10.

engage in conduct prejudicial to national security and cancelling his passport would prevent this.<sup>13</sup> Bridgeman was instructed to deliver his passport to the nearest Australian consulate in Turkey, where he might be given travel documents to return to Australia.<sup>14</sup> Bridgeman's passport cancellation attempts to foreclose his travel generally. Issuing Bridgeman with travel documents would only allow him to travel to Australia, as they are issued on a provisional basis.<sup>15</sup>

Bridgeman's cancelled passport leaves him in a problematic position. Over two years have passed since the cancellation of Bridgeman's passport, and he appears to still remain in Syria.<sup>16</sup> As Bridgeman's lawyers have stated, if Bridgeman chose to exit Syria for Turkey in order to potentially obtain travel documents from an Australian consulate in order to return to Australia, that would constitute an offence under Australian law.<sup>17</sup> In particular, to cross the Syria-Turkey border, Bridgeman would have to travel on his cancelled Australian passport. That would be an offence carrying a penalty of 10 years imprisonment.<sup>18</sup> There are no options for Bridgeman to directly travel from Syria to Australia.<sup>19</sup> Even if he could, that would require the Commonwealth to issue him travel documents in Syria, which it has not done. Therefore, Bridgeman is effectively stranded in Syria.

Bridgeman's travel to Syria is significant because Parliament is of the view that Syria is a source of security threats to Australia, as reflected in the revised explanatory memorandum of the *Foreign Fighters Amendment Act*.<sup>20</sup> That revised explanatory memorandum states that Syria is a source of security threats to Australia because Australians that have participated in the current civil war there 'often possess enhanced capabilities to undertake terrorist and other acts that

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<sup>13</sup> Cooper, above n 12; Adrian Raschella and Ben Sveen, 'Queensland Teen Oliver Bridgeman Calls Passport Cancellation "absolutely ridiculous"', *ABC* (online), 13 March 2016 <<http://www.abc.net.au/news/2016-03-12/oliver-bridgeman-cancellation-passport-ridiculous-qld-teenager/7242452>>.

<sup>14</sup> 'Qld Teenager Stranded in Syria: Lawyer', *SBS* (online), 26 February 2016 <<http://www.sbs.com.au/news/article/2016/02/26/qld-teenager-stranded-syria-lawyer>>; 'Queensland Teenager Oliver Bridgeman Appeals Against Decision to Cancel Passport While in Syria', above n 10.

<sup>15</sup> See *Australian Passports Act 2005* (Cth) s 9(1) ('APA'); *Australian Passports Determination 2015* (Cth) s 9.

<sup>16</sup> Andrew Backhouse, 'Father's desperate plea to bring son home from Syria', *The Chronicle* (online), 9 February 2017, < <https://www.thechronicle.com.au/news/fathers-desperate-plea-bring-son-home-syria/3141649/>>.

<sup>17</sup> Bavas, above n 9.

<sup>18</sup> APA s 32(1).

<sup>19</sup> 'How Does a Queensland Teen end up Stuck in Syria With a Cancelled Passport?', *ABC* (online), 1 March 2016 <<http://www.abc.net.au/triplej/programs/hack/how-did-queensland-teen-oliver-bridgeman-end-up-stuck-in-syria/7207964>>.

<sup>20</sup> Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 2 [1].

could threaten the Australian Government and people'.<sup>21</sup> Thus, it is apparent that those travelling to and from Syria are persons of interest for the Commonwealth in relation to the exercise of its new powers under the *Foreign Fighters Amendment Act*.

The uniqueness and complexity of Bridgeman's case is such that analysis of it in its own right would provide enough interesting ground for academic exploration. The object of this article is to take merely one element of Bridgeman's case to examine a broader, seldom-explored legal question. That is, what are the limitations on the Commonwealth in relation to its passport decisions, especially when their result may be to leave stranded overseas an Australian citizen who wants to return home? Although there may be responses to this question at the levels of international and domestic law,<sup>22</sup> the scope of this article is limited to domestic law.

One source of limitations on the Commonwealth's passport decisions domestically may be administrative law. However, before turning to administrative law, this article commences in Part II with a brief analysis of the legal nature of passports and the rights they confer. It does so in order to provide an understanding of the full impact of passport decisions on citizens. Part III then examines the development of administrative law with respect to passport decisions, a matter scarcely addressed in scholarship.<sup>23</sup> Grounds for judicial review of passport decisions have been historically limited but are gradually developing.

Bridgeman's case also offers a window to explore the limits of governmental power beyond an orthodox administrative law context. In particular, it offers fertile ground for an exploration of the idea of constitutional citizenship and whether the *Constitution* limits Parliament's ability to legislate to deprive citizens of a passport.

A growing body of academics and judges are of the view that the *Constitution* confers a citizenship status (or 'constitutional citizenship'), which is

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<sup>21</sup> Ibid 44 [218].

<sup>22</sup> For relevant scholarship in relation to international law, see, eg, Vincent Chetail, 'The Transfer and Deportation of Civilians' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015) 1185; Vincent Chetail, 'Voluntary Repatriation in Public International Law: Concepts and Contents' (2004) 23 *Refugee Survey Quarterly* 1.

<sup>23</sup> The few examples include Michael Pryles, *Australian Citizenship Law* (Lawbook, 1981) 153–9; Robert Lancy, 'The Evolution of Australian Passport Law' (1982) 13 *Melbourne University Law Review* 428, 448–51; Marian Wheatley, 'Discretion to Cancel Australian Passports' [2012] (102) *Precedent* 21, 23–5.

different from citizenship statute bestows.<sup>24</sup> However, there is disagreement about the theoretical basis that underpins constitutional citizenship.<sup>25</sup> Part IV explores these matters. This article takes the view that constitutional citizens are those falling beyond the ambit of the aliens and immigration powers in the *Constitution* ('non-alien non-immigrants'). In taking this view, it can be argued that one right of constitutional citizens is a right of abode in Australia.<sup>26</sup>

Constitutional citizenship scholarship to date has focused on theoretical aspects of the concept. Part V illustrates how constitutional citizenship also has practical ramifications. In particular, Part V shows how a constitutional citizen's right of abode can be used as a limit on governmental power regarding passport decisions. As this matter has not been litigated in Australia, this article uses comparative jurisprudence to explore it. Part V draws on the Canadian case of *Abdelrazik v Minister of Foreign Affairs (Canada)*.<sup>27</sup> That case shows how the right of abode has worked in practice in Canada, remedying the position of a Canadian citizen who was refused a passport. It deepens the concept of a right of abode by illustrating that it must entail an incidental right of entry. It also shows how the right of abode has *practical* implications by being a source of remedy against governments in passport decisions when such decisions exclude a citizen from their country.

Part VI examines another potential right of constitutional citizenship that might affect Parliament's ability to legislate to deprive citizens of a passport. Part VI explores the question as to whether constitutional citizens have a right to 'positive protection' from the Commonwealth (particularly diplomatic protection and consular assistance). This question has been litigated internationally.<sup>28</sup> Australian scholarship has noted this,<sup>29</sup> hinting that positive protection may be a

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<sup>24</sup> See, eg, Genevieve Ebbeck, 'A Constitutional Concept of Australian Citizenship' (2004) 25 *Adelaide Law Review* 137; Helen Irving, 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30 *Sydney Law Review* 133; Elisa Arcioni, 'That Vague but Powerful Abstraction: the Concept of "The People" in the *Constitution*' (Paper Presented at Gilbert and Tobin Constitutional Law Conference, Sydney, 20 February 2009); Sangeetha Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited' (2013) 39 *Monash University Law Review* 568; *Singh v Commonwealth* (2004) 222 CLR 322, 379–80 [139] (McHugh J), 433 [317] (Callinan J) ('*Singh*'); *Hwang v Commonwealth* (2005) 80 ALJR 125, 128–9 [11]–[14] (McHugh J) ('*Hwang*'); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, 483–4 [119]–[120] (Kirby J) ('*Ame*'); *Koroitamana v Commonwealth* (2006) 227 CLR 31, 47–8 [56] (Kirby J) ('*Koroitamana*').

<sup>25</sup> Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 574–6.

<sup>26</sup> Irving, above n 24, 141.

<sup>27</sup> [2010] 1 FCR 267 (Canadian Federal Court) ('*Abdelrazik*').

<sup>28</sup> See Annemarieke Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection' (2006) 75 *Nordic Journal of International Law* 279; Christopher Tran, 'Government Duties to Provide Diplomatic Protection in Comparative Perspective' (2011) 85 *Australian Law Journal* 300.

<sup>29</sup> Tran, 'Government Duties to Provide Diplomatic Protection in Comparative Perspective', above n 28.

right of constitutional citizenship.<sup>30</sup> However, Australian scholarship has not fully examined the issue.<sup>31</sup> This article makes that examination and concludes that constitutional citizens may have a right to positive protection, although they cannot compel the Commonwealth to exercise that right in relation to them. However, it is argued that constitutional citizens have an enforceable right to have the Commonwealth *consider* their requests for positive protection. Part VI also explores how that right affects passports legislation, thereby potentially assisting Australians aggrieved by passport decisions.

Part VII builds on earlier parts by applying the rights of constitutional citizenship to Bridgeman's factual scenario. Such an approach is novel in scholarship on constitutional citizenship. The result of this approach, as illustrated through Part VII, is that the right of abode and the right to have the Commonwealth consider requests for positive protection can apply *practically* with respect to passport law in Australia.

The core contention of this article is therefore that constitutional citizenship yields rights that have implications for legislative power. Two such rights are that of abode and to have the Commonwealth consider requests for positive protection. They may act as limitations on Parliament's ability to legislate to deprive a citizen of a passport. In relation to the right of abode, that right necessarily entails an incidental right of entry. Passport decisions can curtail those rights practically. In such instances, a person's status as a constitutional citizen protects their rights from parliamentary abrogation. Furthermore, it may be that a Commonwealth passport decision involves no consideration of a constitutional citizen's request for the provision of positive protection. Again, where this occurs, a person's status as a constitutional citizen protects their rights from parliamentary abrogation.

## II THE RIGHTS PASSPORTS CONFER

In order to understand the significance of passport decisions for citizens and what rights they affect, it is necessary to understand the legal nature of passports. Therefore, this matter is addressed first in this article.

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<sup>30</sup> Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 597, citing *Singh* (2004) 222 CLR 322, 377 [131] (McHugh J), 387 [166] (Gummow, Hayne and Heydon JJ); Christopher Tran, 'New Perspectives on Australian Constitutional Citizenship and Identity' (2012) 33 *Adelaide Law Review* 199, 213.

<sup>31</sup> Tran, 'Government Duties to Provide Diplomatic Protection in Comparative Perspective', above n 28, 300.

A passport is Commonwealth property.<sup>32</sup> Historically, it was issued pursuant to royal prerogative.<sup>33</sup> The *Australian Passports Act 2005* (Cth) (the ‘APA’) is now the source of the Commonwealth’s power to issue passports.<sup>34</sup> The primary *legal* purposes of a passport are to provide evidence of Australian citizenship and identify persons. This is evidenced through the APA’s object that Australian passports be used ‘as evidence of identity and citizenship by Australian citizens who are travelling internationally’.<sup>35</sup> Furthermore, the operation of s 8 of the APA illustrates these purposes. Section 8 requires that the Minister for Foreign Affairs be satisfied of a person’s identity and Australian citizenship before issuing them with an Australian passport. Passports do not confer citizenship.<sup>36</sup> Rather, possession of a passport is merely ‘some evidence’ of citizenship of the country that issued the passport.<sup>37</sup>

The legal purpose of a passport is not necessarily to provide for passage of citizens in and out of Australia. Possession of a passport is not a legal requirement to leave Australia.<sup>38</sup> Australian passports also do not entitle holders to enter or leave foreign countries.<sup>39</sup> Furthermore, the possession of a passport does not oblige the Commonwealth to provide additional legal rights to passport holders abroad.<sup>40</sup> In *R v Brailsford*, it was held that a passport could be used for an ‘individual’s protection as a British subject’.<sup>41</sup> However, subsequent case law has read that position as not increasing ‘the sovereign’s duty of protection, though

<sup>32</sup> APA s 54; *Xu v Council of the Law Society of New South Wales* (2009) 236 FLR 480, 484 [14] (Basten JA).

<sup>33</sup> *R v Brailsford* [1905] 2 KB 730, 745 (Lord Alverstone CJ); *Jayaweera v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 395, 403 [29] (Heerey J), quoting *R v Brailsford* [1905] 2 KB 730, 745 (Lord Alverstone CJ); *VSAB v Minister for Immigration and Indigenous Affairs* [2006] FCA 239 (17 March 2006) [54] (Weinberg J); Greg Taylor, ‘Citizenship Rights and the Australian Constitution’ (2001) 12 *Public Law Review* 205, 219; see also *R (Everett) v Foreign Secretary* [1989] 1 QB 811, 817 (O’Connor LJ); Lancy, above n 23, 434.

<sup>34</sup> Various statutes have been passed over time covering the matter of passport issuance, see *Passports Act 1920* (Cth); *Passports Act 1938* (Cth); see also *Oates v Lamb* (1999) 95 FCR 526, 535 [26] (‘Oates’); Taylor, above n 33, 219.

<sup>35</sup> APA s 3.

<sup>36</sup> *Minister for Immigration and Ethnic Affairs v Petrovski* (1997) 73 FCR 303, 307 (Burchett J) (‘Petrovski’); see also *Joyce v DPP* [1946] AC 347, 369–70 (Lord Jowitt) (‘Joyce’).

<sup>37</sup> *VSAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 239 (17 March 2006) [54] (Weinberg J); see also *Jayaweera v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 395, 403 [31] (Heerey J); see generally *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4 for a reflection of this position in international law.

<sup>38</sup> Kim Rubenstein, *Australian Citizenship Law In Context* (Lawbook, 2002) 242 n 273; Pryles, above n 23, 140.

<sup>39</sup> Lancy, above n 23, 433.

<sup>40</sup> See generally Pryles, above n 23, 133, citing *Joyce* [1946] AC 347, 369 (Lord Jowitt).

<sup>41</sup> *R v Brailsford* [1905] 2 KB 730, 745 (Lord Alverstone CJ), described by Heerey J in *Jayaweera v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 395, 403 [29] as the ‘classic exposition’ of what a passport is at common law.

it will make [the passport bearer's] path easier' by providing evidence of identity in travel situations.<sup>42</sup> In relation to leaving Australia, passports are best characterised as a *request* (rather than a binding legal demand) from the Commonwealth to the receiving country to allow the passport bearer to pass freely. The language of the 'Safe Passage Request' in Australian passports reflects this concept. That asks the person viewing the document 'to allow the bearer, an Australian citizen, to pass freely without let or hindrance'.<sup>43</sup>

There is less clarity as to whether a passport is required to enter Australia. Upon entry into Australia, citizens must provide their passport or evidence of identity as an Australian citizen.<sup>44</sup> If they do not, the Commonwealth can assist them to identify themselves if they pay a fee.<sup>45</sup> However, if citizens cannot identify themselves and they do not have a passport, it is unclear whether they would be able to enter Australia.<sup>46</sup> In *Air Caledonie v Commonwealth*, it was held that 'a citizen ha[s], under the law, the right to re-enter the country'.<sup>47</sup> It is submitted that right is constitutionally protected.<sup>48</sup> Legislation is interpreted as subject to the *Constitution*.<sup>49</sup> Hence, the aforementioned provisions of the *Migration Act 1958* (Cth) would be construed as not limiting an Australian citizen's right to re-enter Australia, even if they do not have a passport. Practical experience also lends weight to this view. For example, in 2015, Callum Clayton-Dixon attempted to enter Australia using an 'Aboriginal passport'.<sup>50</sup> The Commonwealth did not recognise the Aboriginal passport as a valid travel document.<sup>51</sup> However, Clayton-Dixon was identified as an Australian citizen and

<sup>42</sup> *Joyce* [1946] AC 347, 369 (Lord Jowitt), quoted in Pryles, above n 23, 133; see also *Joyce* [1946] AC 347, 369, 375 (Lord Porter).

<sup>43</sup> Jane Doulman and David Lee, *Every Assistance and Protection: A History of the Australian Passport* (Federation Press, 2008) v.

<sup>44</sup> *Migration Act 1958* (Cth) s 166(1)(a)(i).

<sup>45</sup> *Ibid* s 171.

<sup>46</sup> Rubenstein, *Australian Citizenship Law In Context*, above n 38, 242; Kim Rubenstein, 'Citizenship in Australia: Unscrambling its Meaning' (1995) 20 *Melbourne University Law Review* 503, 512–3; Sangeetha Pillai, 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37 *Melbourne University Law Review* 736, 759–60.

<sup>47</sup> *Air Caledonie v Commonwealth* (1988) 165 CLR 462, 470. Note that in Kim Rubenstein, 'Citizenship and the Centenary – Inclusion and Exclusion in 20<sup>th</sup> Century Australia' (2000) 24 *Melbourne University Law Review* 576, 602 it is argued the right to re-enter in *Air Caledonie v Commonwealth* (1988) 165 CLR 462 is a common law one. It is submitted that the right is constitutionally protected (see below Part V(B)(1)).

<sup>48</sup> See below Part V(B)(1).

<sup>49</sup> *Acts Interpretation Act 1901* (Cth) s 15A.

<sup>50</sup> Joshua Robertson, 'Tolerance of Travellers with Aboriginal Passports Amounts to Recognition, Says Activist', *The Guardian* (online), 20 April 2015 <<https://www.theguardian.com/australia-news/2015/apr/20/tolerance-of-travellers-with-aboriginal-passports-amounts-to-recognition-says-activist>>; Stefan Ambruster, 'Aboriginal Activist Enters Australia Without Passport', *SBS* (online), 4 August 2015 <<http://www.sbs.com.au/news/article/2015/07/21/aboriginal-activist-enters-australia-without-passport>>.

<sup>51</sup> Robertson, above n 50; Ambruster, above n 50.

was allowed to enter Australia.<sup>52</sup> Hence, the legal effect of a passport is to provide some evidence of identity and citizenship, but not necessarily a right to enter and leave Australia.

Despite passports not necessarily being a *legal* requirement to enter and leave Australia, they are almost always a *practical* necessity for entry and exit from Australia. Commercial airlines and shipping companies commonly require the production of passports for passengers to be carried.<sup>53</sup> Therefore, a lack of a passport for a person seeking to enter or depart Australia through commercial airlines and shipping companies would practically prevent that person from leaving or entering Australia. This position underpins the United Nations Human Rights Committee's comments in relation to freedom of movement; a right enshrined in the International Covenant on Civil and Political Rights,<sup>54</sup> to which Australia is a party. The Committee notes that the right to freedom of movement necessarily entails a right to travel documents (including passports) because international travel usually requires those items.<sup>55</sup> These matters also informed aspects of the INSLM's precursor report to the *Foreign Fighters Amendment Act*.<sup>56</sup> That report concluded that hindering the use of passports could be more efficacious in preventing 'nefarious travel' than say through the use of measures such as control orders because of the fact that passports are almost always needed to leave Australia.<sup>57</sup> Therefore, the deprivation of a passport may not have the legal effect of precluding entry and exit of persons from Australia, but it may have the practical effect of doing so. With this in mind, I turn now to examine the legal limitations (if any) that exist on the deprivation of passports.

### III JUDICIAL REVIEW AND PASSPORT DECISIONS

Administrative law doctrines might provide the basis for a successful judicial review of a passport decision. Case law in this respect is scant. There is also a paucity of academic consideration of those cases.<sup>58</sup>

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<sup>52</sup> Robertson, above n 50; see also Ambruster, above n 50.

<sup>53</sup> Pryles, above n 23, 140–1. Penalties may also be imposed on airlines and shipping entities which carry individuals to Australia without valid entry documents (see e.g. *Migration Act 1958* (Cth) s 229).

<sup>54</sup> Opened for signature 19<sup>th</sup> December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12.

<sup>55</sup> Human Rights Committee, *General Comment No 27: Freedom of Movement (Art 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [9].

<sup>56</sup> Walker, above n 5, 37–8.

<sup>57</sup> *Ibid* 38.

<sup>58</sup> Notable exceptions include Pryles, above n 23, 153–9; Lancy, above n 23, 448–51; Wheatley, above n 23, 23–5.

The earliest Australian jurisprudence regarding judicial review of passport decisions greatly limited the application of the grounds for judicial review to such decisions. Whilst passport decisions were reviewable, the position was that unless the Minister exercised power dishonestly ‘no Court [could] interfere with him’.<sup>59</sup> The Minister had a discretionary power to issue or cancel passports if done ‘upon grounds conformable with the general objects of the [Passports] Act’.<sup>60</sup> Furthermore, the courts imputed little procedural fairness in passport decision-making. For example, in *R v Holt; Ex parte Glover*, the applicant’s passport was cancelled on national security grounds, but the cogency of those grounds was held to be a matter *entirely* for the Minister.<sup>61</sup> In *R v Paterson; Ex parte Purves*, the applicant sought a writ of mandamus to compel the Minister to consider his representations as to whether his wife’s passport should be cancelled.<sup>62</sup> The applicant’s concern was that his wife was about to leave Australia contrary to his wishes.<sup>63</sup> It was held that the Minister could consider the representations, but was not obliged to do so.<sup>64</sup>

Today, there are greater limitations on the Minister’s ability to refuse or cancel passports. The Minister’s discretion in relation to passport decisions is more curtailed. The grounds for denial of issuance of a passport are enumerated.<sup>65</sup> The grounds for passport cancellation are also enumerated.<sup>66</sup> However, those grounds are not exhaustive as the Minister maintains a general discretion to cancel passports.<sup>67</sup> The Administrative Appeals Tribunal (the ‘AAT’) may hear merits review of certain passport decisions.<sup>68</sup>

Despite the above, the *Foreign Fighters Amendment Act* was a recent increase in the Commonwealth’s power in relation to passport decisions. The legislation introduced new powers for the Minister to suspend a person’s passport for 14 days.<sup>69</sup> It also introduced a provision that the Minister need not give notice of a passport refusal or cancellation decision where the Australian Security Intelligence Organisation (‘ASIO’) or the AFP request that the Minister not give

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<sup>59</sup> *R v Paterson; Ex parte Purves* (1937) Arg LR 144, 146 (Evatt J).

<sup>60</sup> *Ibid* 145; see also *R v Holt; Ex parte Glover* (unreported, High Court of Australia, Taylor J, 7 April 1955), quoted in Doulman and Lee, above n 43, 146.

<sup>61</sup> *R v Holt; Ex parte Glover* (unreported, High Court of Australia, Taylor J, 7 April 1955), quoted in *Habib v Minister for Foreign Affairs and Trade* (2010) 192 FCR 148, 156 [28] (Flick J).

<sup>62</sup> *R v Paterson; Ex parte Purves* (1937) Arg LR 144, 144 (Evatt J).

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid* 145.

<sup>65</sup> *APA* ss 11–7, 19A.

<sup>66</sup> *Ibid* ss 22(2)(b)–(g).

<sup>67</sup> *Ibid* ss 22(1)–(2).

<sup>68</sup> *Ibid* ss 48, 50.

<sup>69</sup> *APA* s 22A, as inserted by *Foreign Fighters Amendment Act* sch 1 pt 1 item 21.

such notice.<sup>70</sup> The AFP may make such a request when it is certified as investigating certain offences listed in s 48A(4) of the APA.<sup>71</sup> ASIO may make such a request where there is in force a certificate under s 38(2)(a) of the *Australian Security Intelligence Organisation Act 1979* (Cth) relating to the person whose passport is being affected.<sup>72</sup> Nonetheless, the general trend with the passage of time has been an increased curtailment of the Commonwealth's discretion and ability to refuse and cancel passports.

Case law regarding passport decisions has developed and is now a stronger source of limitations on the Commonwealth's ability to refuse and cancel passports. The scope of grounds of judicial review has widened in comparison to what it was historically. In recent years, the first grounds of judicial review developed with respect to passport decisions were reasoning grounds. In *Petrovski*, it was held that an applicant seeking an estoppel for procedural rights rather than substantive rights might successfully establish a judicial review claim in a passport decision.<sup>73</sup> The doctrine that the repository of power must exercise its power for proper purposes also applies to passport decisions.<sup>74</sup> In *Habib v Minister for Foreign Affairs and Trade*, it was submitted on behalf of the applicant that a passport decision-maker must not act under the dictation of someone else.<sup>75</sup> That submission was not made out on the facts.<sup>76</sup> However, the case illustrates in the same vein as *Petrovski* and *Oates* that reasoning grounds of review in passport decisions have developed.

In *Habib v Minister for Foreign Affairs and Trade*, a submission was also made on behalf of the applicant based on decisional grounds of judicial review.<sup>77</sup> The applicant argued that the Minister's passport refusal decision against him was so unreasonable that no reasonable person could have made it.<sup>78</sup> The applicant further submitted that there was no evidence on which the Minister could base his

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<sup>70</sup> APA s 48A, as inserted by *Foreign Fighters Amendment Act* sch 1 pt 1 item 25.

<sup>71</sup> APA s 48A(3)(b), as inserted by *Foreign Fighters Amendment Act* sch 1 pt 1 item 25.

<sup>72</sup> APA s 48A(2)(b), as inserted by *Foreign Fighters Amendment Act* sch 1 pt 1 item 25.

<sup>73</sup> *Petrovski* (1997) 73 FCR 303, 324–8 (Tamberlin J).

<sup>74</sup> *Oates* (1999) 95 FCR 526, 538 [37].

<sup>75</sup> *Habib v Minister for Foreign Affairs and Trade* (2010) 192 FCR 148, 158 [40] (Flick J). In that case the submission was made pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(e), 5(2)(e) ('ADJR Act').

<sup>76</sup> *Habib v Minister for Foreign Affairs and Trade* (2010) 192 FCR 148, 167 [82]–[83] (Flick J).

<sup>77</sup> *Ibid* 158 [41].

<sup>78</sup> Pursuant to the ADJR Act s 5(1)(g); see *Habib v Minister for Foreign Affairs and Trade* (2010) 192 FCR 148, 158 [41] (Flick J).

decision.<sup>79</sup> It was again held that these grounds of review were available for passport decisions, but they were not made out on the facts of the case.<sup>80</sup>

Procedural grounds of review have also been developed in relation to passport decisions. *Habib v Director-General of Security* is the main case that saw a clear framework for procedural fairness in passport decisions established.<sup>81</sup> There, the applicant argued he was denied procedural fairness because it was not put to him that he had given false evidence that would form the basis of adverse findings against him.<sup>82</sup> It was held that the fact adverse inferences would be drawn from the applicant's evidence was a matter that needed to be put to him in order to uphold procedural fairness.<sup>83</sup> However, relief was not granted. This was because even with the breach of procedural fairness, it was held that the outcome of the application would have been the same.<sup>84</sup>

Passport decisions involving elements of national security may face additional procedural fairness difficulties. This is because the Attorney-General has the power to restrict the disclosure of material adverse to applicants if disclosure would be contrary to national security.<sup>85</sup> Therefore, applicants may be unaware of material that is adverse to them and hence unsure of the basis upon which to challenge a decision. This regime survived an attack on constitutional grounds in *Hussain v Minister for Foreign Affairs*.<sup>86</sup> There, it was unsuccessfully argued that the *Administrative Appeals Tribunal Act 1977* (Cth) ss 39A–39B imposed a set of constraints on an AAT member (who was a Chapter III judge) that were incompatible with the judicial function.<sup>87</sup> The respondent Minister conceded the statutory regime could be viewed as unfair.<sup>88</sup> Nevertheless, it was held that the legislature had validly abrogated the rules of procedural fairness.<sup>89</sup>

The impact of *Hussain* can be seen in subsequent merits and judicial review passport cases involving national security issues. Those cases have held that, *on the material put to the applicants*, there was not enough evidence to sustain a finding that they should be denied valid passports on grounds that they would

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<sup>79</sup> Pursuant to the *ADJR Act* s 5(1)(h); see *Habib v Minister for Foreign Affairs and Trade* (2010) 192 FCR 148, 158 [40] (Flick J).

<sup>80</sup> *Habib v Minister for Foreign Affairs and Trade* (2010) 192 FCR 148, 165 [72] (Flick J).

<sup>81</sup> *Habib v Director-General of Security* (2009) 175 FCR 411.

<sup>82</sup> *Ibid* 421–2 [33].

<sup>83</sup> *Ibid* 429–30 [71]–[75].

<sup>84</sup> *Ibid* 430–1 [77]–[79].

<sup>85</sup> By operation of the *Administrative Appeals Tribunal Act 1977* (Cth) ss 39A–39B ('AAT Act').

<sup>86</sup> (2008) 169 FCR 241 ('*Hussain*').

<sup>87</sup> *Ibid* 254 [29].

<sup>88</sup> *Ibid* 274 [136].

<sup>89</sup> *Ibid* 279–80 [166].

prejudice national security.<sup>90</sup> However, the Attorney-General restricted certain material from being disclosed to the applicants.<sup>91</sup> It was held that the restricted material was sufficient to sustain a finding that the applicants should be denied passports on national security grounds.<sup>92</sup>

In sum, various grounds of judicial review have been developed that may regulate the Commonwealth's power to make passport refusals and cancellations. However, those can be limited in national security settings, particularly as disclosure of evidence may be restricted. The question therefore follows as to whether there are further limits on the Commonwealth's power in passport decisions.

#### IV CONSTITUTIONAL CITIZENSHIP STATUS AND RIGHTS FLOWING FROM IT

Further to administrative law as discussed in Part III, this Part examines whether the *Constitution* may be another basis on which an individual might challenge passport decisions. In particular, the question is examined as to whether the *Constitution* confers a status of citizenship. Does that status form a basis upon which the constitutional validity of the *APA* (which purportedly enables passport decisions) may be attacked?

The *Constitution* does not expressly define citizenship, does not have an express provision for the acquisition of Australian citizenship and grants no plenary power to the Commonwealth with respect to citizenship.<sup>93</sup> The primary reason for this is historical: at the time of the framing of the *Constitution*, individual members of the British Empire were 'subjects' rather than 'citizens' and Federation did not automatically translate into independence for the new

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<sup>90</sup> *Re BLBS and Director-General of Security* (2013) 137 ALD 196, 222 [146] ('*Re BLBS*'); *Re TCXG and Director-General of Security* (2013) 138 ALD 649, 656 [71], 657 [75] ('*Re TCXG*'); *MYVC v Director-General of Security* (2014) 234 FCR 134, 149 [59]–[61] (Rares J) ('*MYVC*'); *Re RZBV and Minister for Foreign Affairs* [2015] AATA 296 (5 May 2015) [54]–[55] ('*Re RZBV*'); *Re TNFD and Director-General of Security* [2015] AATA 752 (29 September 2015) [55]–[56] ('*Re TNFD*').

<sup>91</sup> *Re BLBS* (2013) 137 ALD 196, 222–3 [147]; *Re TCXG* (2013) 138 ALD 649, 657 [75]; *MYVC* (2014) 234 FCR 134, 136 [3] (Rares J); *Re RZBV* [2015] AATA 296 (5 May 2015) [45]; *Re TNFD* [2015] AATA 752 (29 September 2015) [13].

<sup>92</sup> *Re BLBS* (2013) 137 ALD 196, 223 [148]; *Re TCXG* (2013) 138 ALD 649, 656–7 [73]–[74]; *MYVC* (2014) 234 FCR 134, 149 [59]–[61] (Rares J); *Re RZBV* [2015] AATA 296 (5 May 2015) [54]–[59]; *Re TNFD* [2015] AATA 752 (29 September 2015) [55]–[60].

<sup>93</sup> Irving, above n 24, 133; Michelle Foster, "'An 'Alien' by the Barest of Threads" – The Legality of the Deportation of Long-Term Residents from Australia' (2009) 33 *Melbourne University Law Review* 483, 489–90; Michelle Foster, 'Membership in the Australian Community: *Singh v The Commonwealth* and its Consequences for Australian Citizenship Law' (2006) 34 *Federal Law Review* 161, 163.

Australian nation.<sup>94</sup> A constitutional definition of citizenship would have also been an unusual feature having regard to comparable jurisdictions at the time of the *Constitution*'s framing.<sup>95</sup> As the *Constitution* does not expressly define citizenship, it also does not expressly define any rights that might flow from citizenship.<sup>96</sup> Therefore, citizenship has been a legal concept which has primarily grown out of statute.<sup>97</sup>

Despite the above, it has been argued that the *Constitution* confers a citizenship status *beyond* citizenship bestowed by statute. This view is consistently iterated in scholarship and by various judges through case law.<sup>98</sup> For example, Kirby J has stated that it 'seems likely that further constitutional implications will be derived for the idea of citizenship'.<sup>99</sup> Kirby J has spoken of a 'constitutional status of nationality', which is contrasted to statutory citizenship.<sup>100</sup> Callinan J has noted that there is a possibility of a person being a citizen 'albeit not ... a citizen for the purposes of the Citizenship Act'.<sup>101</sup> McHugh J has made express reference to a notion of 'constitutional citizenship', which his Honour held Parliament cannot remove.<sup>102</sup> McHugh J has held that reference to "the people" of the Commonwealth' in the *Constitution* 'is a synonym for citizenship of the Commonwealth'.<sup>103</sup> Furthermore, Parliament 'could not declare that persons who were among "the people of the Commonwealth" were not "people of the Commonwealth" for any legal purpose'.<sup>104</sup>

<sup>94</sup> Irving, above n 24, 134, Foster, "An 'Alien' by the Barest of Threads" – The Legality of the Deportation of Long-Term Residents from Australia', above n 93, 490.

<sup>95</sup> Irving, above n 24, 134.

<sup>96</sup> See Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 572; Irving, above n 24, 139. This has resulted in significant ramifications for the tenure of people in Australia. For further discussion, see e.g. Foster, "An 'Alien' by the Barest of Threads" – The Legality of the Deportation of Long-Term Residents from Australia', above n 93.

<sup>97</sup> Foster, 'Membership in the Australian Community: *Singh v The Commonwealth* and its Consequences for Australian Citizenship Law', above n 93, 164.

<sup>98</sup> See above n 24 *contra* *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 54 (Gaudron J) ('*Chu Kheng Lim*'), quoted in Rubenstein, *Australian Citizenship Law In Context*, above n 38, 257; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 179 [53] (Gaudron J) ('*Te*'); *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* (2013) 215 FCR 35, 60–1 [113]–[115] (Flick J).

<sup>99</sup> *DJL v Central Authority* (2000) 201 CLR 226, 278 [135], quoted in Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 574.

<sup>100</sup> *Koroitamana* (2006) 227 CLR 31, 47 [56]; *Ame* (2005) 222 CLR 439, 483–4 [119]–[120] (Kirby J); see also *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 62–3 [98] (Kirby J) ('*Shaw*'); *Te* (2002) 212 CLR 162, 209–10 [175] (Kirby J).

<sup>101</sup> *Singh* (2004) 222 CLR 322, 433 [317] (Callinan J), cited in Tran, 'New Perspectives on Australian Constitutional Citizenship and Identity', above n 30, 202.

<sup>102</sup> *Singh* (2004) 222 CLR 322, 379–380 [139], quoted in Tran, 'New Perspectives on Australian Constitutional Citizenship and Identity', above n 30, 202.

<sup>103</sup> *Hwang* (2005) 80 ALJR 125, 129 [14].

<sup>104</sup> *Ibid* 130 [18].

Drawing on these propositions and the text and structure of the *Constitution*, as must be done to derive any constitutional implication,<sup>105</sup> scholars have argued that the *Constitution* protects a status of citizenship.<sup>106</sup> Present debate among those scholars concerns what conceptual basis underpins constitutional citizenship and therefore how a person may be said to hold constitutional citizenship.<sup>107</sup> One view of authors such as Professor Helen Irving is that constitutional citizens are those immune to the aliens power (s 51(xix) of the *Constitution*) and immigration power (s 51(xxvii) of the *Constitution*) or ‘non-alien non-immigrants’.<sup>108</sup> This draws on McHugh J’s view that Parliament’s power to legislate with respect to citizenship derives from the immigration, naturalisation and aliens heads of power in the *Constitution*.<sup>109</sup> Another view that authors such as Dr Elisa Arcioni suggest is that constitutional citizens may be those in the category of ‘the people of the Commonwealth’.<sup>110</sup> This draws on McHugh J’s statement that the phrase ‘the people of the Commonwealth’ in the *Constitution* is a synonym for citizenship.<sup>111</sup> Dr Sangeetha Pillai has attempted to reconcile these views, arguing that non-alien non-immigrants may be viewed as ‘the people of the Commonwealth’.<sup>112</sup> This article builds on the view of Professor Irving and others that constitutional citizens are non-alien non-immigrants. It assumes those people are constitutional citizens and focuses attention on what practical implications this may have, particularly with a view to passports law in Australia.

#### A *Constitutional Citizens as Non-Alien Non-Immigrants*

In this article I argue that constitutional citizens are non-alien non-immigrants. Accordingly, it is first necessary to elucidate the precise legal character of that status of person in order to realise the implications and rights that may flow from it. To fall outside the scope of the immigration power, a person needs to be absorbed into the Australian community or have a substantial

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<sup>105</sup> *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ), 232 (McHugh J) (*‘McGinty’*); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (*‘Lange’*).

<sup>106</sup> See, eg, Ebbeck, above n 24; Irving, above n 24; Pillai, ‘Non-Immigrants, Non-Aliens and People of the Commonwealth’, above n 24; Arcioni, above n 24; see generally Tran, ‘New Perspectives on Australian Constitutional Citizenship and Identity’, above n 30, 203–4.

<sup>107</sup> See generally Pillai, ‘Non-Immigrants, Non-Aliens and People of the Commonwealth’, above n 24.

<sup>108</sup> Irving, above n 24, 148–51; see generally Ebbeck, above n 24, 151–5; see generally Pillai, ‘Non-Immigrants, Non-Aliens and People of the Commonwealth’, above n 24, 576.

<sup>109</sup> *Hwang* (2005) 80 ALJR 125, 128 [8]–[10].

<sup>110</sup> Arcioni, above n 24, 5; see generally Pillai, ‘Non-Immigrants, Non-Aliens and People of the Commonwealth’, above n 24, 576.

<sup>111</sup> *Hwang* (2005) 80 ALJR 125, 129 [14].

<sup>112</sup> Pillai, ‘Non-Immigrants, Non-Aliens and People of the Commonwealth’, above n 24, 606–8.

connection to it.<sup>113</sup> Thus, a person born in Australia may be a constitutional immigrant if they leave Australia and are subsequently found to lack a substantial connection to it.<sup>114</sup> However, a person may not be an immigrant but could still be an alien.<sup>115</sup>

The crucial factor that makes a person fall within the ambit of the aliens power is if that person has an absence of allegiance to Australia.<sup>116</sup> In current Australian law, this position derives from the reasoning in two cases: *Singh* and *Koroitamana*. In *Singh*, it was held that a person who had allegiance to a foreign power was an alien.<sup>117</sup> In *Koroitamana*, it was held that a person lacking allegiance to any power at all was an alien.<sup>118</sup> Hence, a person with allegiance to Australia is a non-alien. One indicator of allegiance to Australia is the possession of statutory citizenship.<sup>119</sup> A person showing a subjective feeling of connectedness with Australia will not evidence that the person has allegiance to Australia for legal purposes.<sup>120</sup>

It is submitted that the possession of statutory citizenship is not the only criterion of whether a person has allegiance to Australia. If Parliament's definition of citizenship (pursuant to citizenship legislation) were the sole definition of non-alienage for the purposes of the *Constitution*,<sup>121</sup> the corollary would be that the constitutional definition of 'alien' would be tied to Parliament's definition. However, Parliament has no power to define constitutional facts,<sup>122</sup> including the constitutional fact of what constitutes an alien.<sup>123</sup> Thus, the concept

<sup>113</sup> See *Potter v Minahan* (1908) 7 CLR 277; *Re Yates; Ex parte Walsh* (1925) 37 CLR 36; *Donohoe v Wong Sau* (1925) 36 CLR 404; *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369; see also Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 583–5.

<sup>114</sup> *Donohoe v Wong Sau* (1925) 36 CLR 404, 407 (Knox CJ); see also Irving, above n 24, 146.

<sup>115</sup> *Pochi v Macphee* (1982) 151 CLR 101, 111 (Gibbs CJ); see also Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 589–90.

<sup>116</sup> See *Koroitamana* (2006) 227 CLR 31, 39 [15] (Gleeson CJ and Heydon J), 46 [49] (Gummow, Hayne and Crennan JJ), 56 [86] (Callinan J); see also Irving, above n 24, 149–50; Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 592.

<sup>117</sup> *Singh* (2004) 222 CLR 322, 383–4 [154] (Gummow, Hayne and Heydon JJ).

<sup>118</sup> *Koroitamana* (2006) 227 CLR 31, 39 [15] (Gleeson CJ and Heydon J), 46 [49] (Gummow, Hayne and Crennan JJ), 56 [86] (Callinan J).

<sup>119</sup> *Pochi v Macphee* (1982) 151 CLR 101. Australian statutory citizenship can be acquired automatically or by application: see *Australian Citizenship Act 2007* (Cth) pt 2 divs 1–2.

<sup>120</sup> Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 592; Irving, above n 24, 150.

<sup>121</sup> See *Australian Citizenship Act 2007* (Cth) s 3 (definition of 'Australian citizen').

<sup>122</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J) ('*Communist Party Case*'); see also Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 593.

<sup>123</sup> *Singh* (2004) 222 CLR 322, 329–30 [5] (Gleeson CJ); *Pochi v Macphee* (1982) 151 CLR 101, 109 (Gibbs CJ); see also Irving, above n 24, 148; Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 593.

of allegiance arguably requires further constitutional definition. Nevertheless, if constitutional citizens are non-alien non-immigrants, by current constitutional definition they must have allegiance to Australia (in order to be non-alien) and have a substantial connection to the Australian community (in order to be non-immigrants). This article now turns to the implications of this legal status and whether they may extend to passport decisions.

### B *The Right of Abode as Flowing from Constitutional Citizenship*

It should be first noted that non-alien non-immigrants fall into the most legally privileged status of person under the *Constitution*. Aliens and immigrants enjoy fewer rights and protections from Parliament's legislative power than non-alien non-immigrants. For example, aliens are liable to deportation.<sup>124</sup> They also have fewer protections against executive detention.<sup>125</sup> Additionally, a person's status as a non-alien non-immigrant may entitle that person to positive rights.

Regarding the positive rights of constitutional citizens, this article accepts and builds upon the position of Professor Irving, who argues through reference to the constitutional text and relevant case law that a positive right of constitutional citizens is a right of abode.<sup>126</sup> The objective of this article is not to revisit Professor Irving's position, as it has been a matter for debate in past scholarship.<sup>127</sup> However, the position can be briefly summarised as follows.

Through reference to *Hwang*, it can be said that a citizenship law is characterised as one with respect to aliens or immigrants.<sup>128</sup> In the words of Professor Irving: 'If the power to pass laws with respect to citizenship derives from the "aliens" or "immigration" powers ... citizenship must have the qualities or characteristics that make it the antonym or obverse of alien or immigrant'.<sup>129</sup> An alien lacks allegiance to Australia.<sup>130</sup> Allegiance entails a reciprocal relationship between Crown and subject (citizen): in exchange for allegiance comes 'protection' (although the precise character of what is 'protection' is

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<sup>124</sup> *Robtelmes v Brenan* (1906) 4 CLR 395, 400 (Griffith CJ); see also Irving, above n 24, 150.

<sup>125</sup> *Chu Kheng Lim* (1992) 176 CLR 1, 29 (Brennan, Deane and Dawson JJ); *Falzon v Minister for Immigration and Border Protection* (2018) 92 ALJR 201, 209–210 [39] (Kiefel CJ, Bell, Keane and Edelman JJ); see also Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 596.

<sup>126</sup> Irving, above n 24, 141.

<sup>127</sup> See generally above n 24–25.

<sup>128</sup> Irving, above n 24, 148.

<sup>129</sup> *Ibid* 150.

<sup>130</sup> *Ibid*.

disputed).<sup>131</sup> Professor Irving describes this relationship as follows: in exchange for a person's allegiance a 'quid pro quo' results.<sup>132</sup> One compelling candidate for a 'quid pro quo' for allegiance is a right of abode in Australia.<sup>133</sup> A lack of allegiance, or status as an alien, may lead to one's expulsion from Australia.<sup>134</sup> Additionally, if one surveys other rights traditionally ascribed to citizens such as the right to vote, the right not to be extradited, and the right not to be deprived of statutory citizenship, they have been ascribed inconsistently to some citizens and even occasionally aliens.<sup>135</sup> The one right uniformly protected for all non-alien non-immigrants is the right of abode.<sup>136</sup> Case law supports this position: there is a line of authority from 1908 in Australia that Australian-born citizens who have Australia as their home have a right to be in Australia.<sup>137</sup> If one accepts Professor Irving's position that one right of constitutional citizenship may be that of abode, how then does it limit Parliament's power to legislate to deprive a person of a passport?

#### V THE RIGHT OF ABODE AS LIMITING PARLIAMENT'S POWER TO DEPRIVE CITIZENS OF PASSPORTS – COMPARATIVE JURISPRUDENCE

The question of whether the right of abode may limit Parliament's ability to deprive a citizen of a passport has not been litigated in Australia. Australian scholarship has also not directly addressed the question.<sup>138</sup> This Part aims to do so by drawing upon relevant litigation in a comparative jurisdiction. In this respect, *Abdelrazik* is of particular importance. There, a Canadian citizen was denied the ability to return home contrary to his wishes because his government refused to issue him a passport. This brought into consideration whether the constitutionally enshrined right of abode in Canadian law could be a source of remedy for him against his government.<sup>139</sup> This Part first turns to the judgment in *Abdelrazik*. It then analyses how it may be translated into Australian law to

<sup>131</sup> See *Joyce* [1946] AC 347, 368 (Lord Jowitt); for discussion of the dispute, see Glanville Williams, 'The Correlation of Allegiance and Protection' (1948) 10 *Cambridge Law Journal* 54.

<sup>132</sup> Irving, above n 24, 150.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*, citing *Robtelmes v Brennan* (1906) 4 CLR 395, 400 (Griffith CJ).

<sup>135</sup> *Ibid.* 138–41.

<sup>136</sup> *Ibid.* 141.

<sup>137</sup> *Ibid.* 141–7, citing *Potter v Minahan* (1908) 7 CLR 277; *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518; *Donohoe v Wong Sau* (1925) 36 CLR 404; *Air Caledonie v Commonwealth* (1988) 165 CLR 462.

<sup>138</sup> George Williams and David Hume, *Human Rights Under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 42, quoted in Pillai, 'The Rights and Responsibilities of Australian Citizenship', above n 46, 761 n 131 address whether the common law principle of legality operates to allow citizens to re-enter Australia without a passport.

<sup>139</sup> *Canada Act 1982* (UK) cl 11, sch B pt I s 6(1) ('*The Canadian Charter of Rights and Freedoms*' or '*Charter*').

develop the concept of a right of abode. This has implications with respect to limiting Parliament's ability to make laws depriving a person of a passport, a matter which this Part also examines.

## A *Abdelrazik*

### 1 *The Case*

Abdelrazik was a dual Canadian-Sudanese citizen.<sup>140</sup> After travelling to Sudan in 2003 with a valid Canadian passport to visit his mother, it expired and was not renewed.<sup>141</sup> His prolonged stay resulted in Sudanese authorities detaining him and international suspicions arose that he may be a terrorist.<sup>142</sup> The United Nations Security Council Committee established pursuant to SC Res 1267<sup>143</sup> listed him as an Al-Qaida associate, subjecting him to a global asset freeze, travel ban, and arms embargo.<sup>144</sup> Wanting to return to Canada, he made requests for a new passport to the Canadian government, all of which were in vain.<sup>145</sup> The government subsequently promised him a passport subject to him obtaining a paid airline ticket, but that promise was never fulfilled.<sup>146</sup> Meanwhile, he resided in the Canadian embassy in Khartoum in fear of torture from Sudanese authorities.<sup>147</sup>

In the Federal Court of Canada, Abdelrazik sought an order that the Canadian government repatriate him to Canada.<sup>148</sup> Abdelrazik sought this order as a remedy for what he argued was the Canadian government's breach of s 6(1) of the *Charter*. That provision states: 'every citizen of Canada has the right to enter, remain in and leave Canada'. However, s 1 of the *Charter* qualifies s 6(1). Section 1 allows for a breach of s 6(1) 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and fair society'. Hence, if there was a breach of s 6(1), another issue in the case was whether s 1 qualified the breach, thereby validating it.

### 2 *The Law and its Application*

Abdelrazik argued that his right under s 6(1) of the *Charter* was breached on various occasions.<sup>149</sup> However, Zinn J held the breach occurred when Abdelrazik

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<sup>140</sup> *Abdelrazik* [2010] 1 FCR 267, 274–5 [1] (Zinn J).

<sup>141</sup> *Ibid* 278–9 [12]–[14].

<sup>142</sup> *Ibid* 279–82 [13]–[23].

<sup>143</sup> UN SCOR, 4051<sup>st</sup> mtg, UN Doc S/RES/1267 (15 October 1999) ('*Resolution 1267*').

<sup>144</sup> *Abdelrazik* [2010] 1 FCR 267, 282 [23] (Zinn J).

<sup>145</sup> *Ibid* 285–7 [33]–[34].

<sup>146</sup> *Ibid* 287–9 [36]–[41].

<sup>147</sup> *Ibid* 274–5 [1].

<sup>148</sup> *Ibid* 276 [6].

<sup>149</sup> *Ibid* 298–9 [62].

obtained a paid flight from Sudan to Canada and the Canadian government refused to issue him a passport, contrary to its promise that it would issue him a passport if he did obtain that paid flight.<sup>150</sup> The decision to refuse Abdelrazik a passport was made pursuant to the *Canadian Passport Order* SI/81-86 (the Canadian passports regulation referred to as a 'statutory instrument').<sup>151</sup> Zinn J did not invalidate the entire statutory instrument because his Honour held that it broadly did not breach s 6(1) of the *Charter*.<sup>152</sup> However, the *discrete decision* to refuse Abdelrazik a passport made pursuant to the *Canadian Passport Order* SI/81-86 was a breach of s 6(1).<sup>153</sup>

Zinn J also addressed the issue of whether the passport refusal could be a breach of s 6(1) despite possession of a passport not being a *legal* requirement for Canadian citizens to enter Canada.<sup>154</sup> Zinn J acknowledged this *legal* position.<sup>155</sup> However, his Honour held a passport refusal could still constitute a breach of s 6(1) because the *practical effect* of a lack of a passport was to preclude entry of Canadian citizens into Canada.<sup>156</sup> The breach of s 6(1) arose because the only reason Abdelrazik was not in Canada was the Canadian government's conduct in failing to issue him a passport.<sup>157</sup>

As it was held that there was a breach of s 6(1) of the *Charter*, the next issue in the case was whether s 1 of the *Charter* operated to validly qualify that breach. Zinn J addressed two arguments in relation to this issue. First, Zinn J examined whether the Canadian government's refusal to provide Abdelrazik a passport was justified because he posed a danger to national security.<sup>158</sup> Zinn J held there was no evidence for this position; therefore s 1 was not made out on this ground.<sup>159</sup>

Secondly, the Canadian government submitted that if it repatriated Abdelrazik, it would be in breach of its obligations under *Resolution 1267*.<sup>160</sup> In particular, *Resolution 1267* provides that states shall prevent transit of listed individuals through their territories.<sup>161</sup> The Canadian government submitted that

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<sup>150</sup> Ibid 322 [130], 329 [146].

<sup>151</sup> Ibid 288–9 [40].

<sup>152</sup> Ibid 323 [132]–[133].

<sup>153</sup> Ibid.

<sup>154</sup> Ibid 330–1 [151]–[152], quoting *Kamel v A-G (Canada)* [2009] 4 FCR 449, 459 [14]–[15] (Décary JA) (Canadian Federal Court of Appeal) ('*Kamel*').

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> *Abdelrazik* [2010] 1 FCR 267, 329–30 [148], 332–3 [153] (Zinn J).

<sup>158</sup> Ibid 333 [154].

<sup>159</sup> Ibid 333–4 [154]–[155].

<sup>160</sup> Ibid 319 [122].

<sup>161</sup> Ibid 318 [121], quoting *Resolution 1267*.

assisting Abdelrazik would involve transiting him through other states' territories because he would have to be flown through other states' airspace.<sup>162</sup> Zinn J rejected this argument because the obligation in *Resolution 1267* to disallow listed individuals to transit through 'territories' of states did not extend to states' airspace.<sup>163</sup> Therefore, the Canadian government could repatriate Abdelrazik by assisting him to fly to Canada through other states' airspace and not breach its obligations under *Resolution 1267*. This meant that s 1 of the *Charter* was not made out.

Zinn J's findings regarding *Resolution 1267* include criticism for the lack of natural justice it provides listed individuals.<sup>164</sup> Although beyond the scope of this article, this aspect of *Abdelrazik* has formed the basis for much commentary regarding *Resolution 1267* and whether it falls foul of international standards in respect of natural justice.<sup>165</sup>

As it was held that there was a breach of s 6(1) of the *Charter* that s 1 did not qualify, the final issue in *Abdelrazik* concerned the appropriate remedy to be awarded.<sup>166</sup> The remedy ordered for a *Charter* breach should put the applicant back in the position they were, had the breach not occurred.<sup>167</sup> Therefore, the Canadian government was ordered to repatriate Abdelrazik by issuing him an emergency passport.<sup>168</sup> The Canadian government was ordered to pay for Abdelrazik's flight if he was unable to afford it.<sup>169</sup> This was because but for the Canadian government's breach of s 6(1), Abdelrazik would not have had to pay for an additional flight.<sup>170</sup> The Canadian government was also ordered to provide Abdelrazik an escort unless he waived that requirement.<sup>171</sup>

On the issue of remedy, *Abdelrazik* can be viewed as somewhat innovative in Canadian law. For example, in *Prime Minister (Canada) v Khadr*, the Canadian government was held to have breached the rights of a Canadian Guantánamo Bay

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<sup>162</sup> *Abdelrazik* [2010] 1 FCR 267, 319 [122] (Zinn J).

<sup>163</sup> *Ibid* 318–22 [121]–[129], 334–5 [156].

<sup>164</sup> *Ibid* 293–4 [51]–[53].

<sup>165</sup> See Antonios Tzanakopoulos, 'United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in *Abdelrazik v Canada*' (2010) 8 *Journal of International Criminal Justice* 249; Grant Willis, 'Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson' (2011) 42 *Georgetown Journal of International Law* 673.

<sup>166</sup> *Abdelrazik* [2010] 1 FCR 267, 335 [157] (Zinn J).

<sup>167</sup> *Ibid* [158], citing *Doucet-Boudreau v Minister for Education (Nova Scotia)* [2003] 3 SCR 3.

<sup>168</sup> *Abdelrazik* [2010] 1 FCR 267, 336 [160] (Zinn J).

<sup>169</sup> *Ibid*.

<sup>170</sup> *Ibid*.

<sup>171</sup> *Ibid* 338 [166].

detainee through its international conduct and dealings with the United States.<sup>172</sup> However, in that case, the Canadian Supreme Court only granted declaratory relief, as opposed to ordering that the Canadian government repatriate the detainee.<sup>173</sup> In comparison to *Khadr*, the approach in *Abdelrazik* has been praised as providing a practical vindication of the applicant's rights.<sup>174</sup> The approach has also seen *Abdelrazik* placed among a constellation of other cases of courts taking a less deferential approach to the review of executive power.<sup>175</sup> What then does *Abdelrazik* mean for the right of abode in Australia and Parliament's power to legislate with respect to passports?

### B Applicability in Australian Law

This section draws upon four crucial elements of *Abdelrazik* to develop the right of abode in Australia and understand how it might limit Parliament's ability to deprive a citizen of a passport.

#### 1 The Right of Abode Incorporating an Incidental Right of Entry

At a basic level, *Abdelrazik* is support from a comparable common law jurisdiction of the right of abode being protected in a constitutional form. The *Charter* provides for an explicit catalogue of rights in a manner that the *Constitution* does not. However, if one accepts the argument above that the right of abode is constitutionally protected in Australia, Canadian jurisprudence provides a useful point of reference for Australian legal development. This is because Canada is another common law country where the right of abode has been constitutionally protected for many years and developed through relevant case law.

Attention should also be drawn to the right of abode as characterised in Part IV in comparison to how it is characterised in *Abdelrazik*. Section 6(1) of the *Charter* provides for three distinct rights for Canadian citizens: the right to enter Canada, the right to remain in Canada and the right to leave Canada. The right of abode as discussed in Part IV focuses on constitutional citizens remaining in Australia. This is effectively the second right of the three in s 6(1) of the *Charter* – the right to remain in Canada. It is submitted that the right to enter Australia is a necessary corollary of the right of abode. One cannot enjoy a right of abode in

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<sup>172</sup> *Prime Minister (Canada) v Khadr* [2010] 1 SCR 44 ('*Khadr*').

<sup>173</sup> *Ibid*; see also Reg Whitaker, 'The Post 9/11 National Security Regime in Canada; Strengthening Security, Diminishing Accountability' (2012) 16 *Review of Constitutional Studies* 139, 151.

<sup>174</sup> Lorna McGregor, 'Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of *Khadr v Canada*' (2010) 10 *Human Rights Law Review* 487, 502–3.

<sup>175</sup> See David Mullan, 'Judicial Review of the Executive – Principled Exasperation' (2010) 8 *New Zealand Journal of Public and International Law* 145, 159–61.

any country if one cannot enter it. However, the same cannot be said of the right to leave a country, which is the third right in s 6(1) of the *Charter*. One does not necessarily have to leave a country to enjoy a right of abode there. Thus, *Abdelrazik* and s 6(1) of the *Charter* illustrate how the right of abode encompasses an incidental right of entry. This addendum to the concept of the right of abode may apply in Australian law.

## 2 *Passport Decisions May Abrogate the Right of Abode*

What constitutes a breach of the right of abode was a critical element of *Abdelrazik*. Zinn J acknowledged on the basis of *Kamel* that a passport cancellation or refusal could not legally stop a person entering Canada.<sup>176</sup> However, Zinn J also held that passport cancellations or refusals could practically exclude Canadian citizens from Canada, thereby impinging their right of abode.<sup>177</sup> This view does not impose legal fictions as it respects the established position (in Canada and Australia) that citizens do not legally require passports to enter or leave their countries.<sup>178</sup> However, the view also gives *practical substance* to citizenship rights in modern society by acknowledging that the practical effect of a passport decision (given the appropriate factual scenario) can be to exclude citizens from their countries. This notion can extend to Australian law with respect to the right of abode. Passport cancellations and refusals could be one practical example where the right of abode could be breached in Australia.

## 3 *Remedying the Abrogation of the Right of Abode*

The result of the breach of the right of abode in *Abdelrazik* is an aspect of the case that could also be adapted into Australian law. In *Abdelrazik*, the applicant was refused a passport pursuant to the *Canadian Passport Order* SI/81-86, s 10.1.<sup>179</sup> In *Abdelrazik*, the entire *Canadian Passport Order* SI/81-86 was held to be valid because it generally did not breach the right of abode under s 6(1) of the *Charter*.<sup>180</sup> What breached *Abdelrazik*'s right of abode was the *discrete* passport refusal made pursuant to the *Canadian Passport Order* SI/81-86, s 10.1.<sup>181</sup>

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<sup>176</sup> *Abdelrazik* [2010] 1 FCR 267, 330–1 [151].

<sup>177</sup> *Ibid.*

<sup>178</sup> For the position in Australia, see above Part II.

<sup>179</sup> *Abdelrazik* [2010] 1 FCR 267, 332–3 [153] (Zinn J).

<sup>180</sup> *Ibid* 323 [133].

<sup>181</sup> *Ibid* 332–3 [153].

Accordingly, the discrete passport refusal was invalidated rather than the entire *Canadian Passport Order SI/81-86*.

In Australia, where legislation would be constitutionally invalid, the method of reading down applies. That method attempts to save the legislation under challenge by reading it in a way that is within constitutional power.<sup>182</sup> That is, the law in question is read as valid, subject to the relevant constitutional limitation.<sup>183</sup> However, when reading down occurs, the result must not be something fundamentally different to the law as Parliament enacted it.<sup>184</sup> Otherwise, the entire impugned legislative provision must be held invalid.<sup>185</sup>

In relation to the validity of the *APA* in light of the constitutional citizen's right of abode, the position is that it must be read as being subject to the constitutional citizen's right of abode (and incidental right of entry). In a broad sense, the *APA* does not impinge on the right of abode of constitutional citizens. Much of the statute provides for the issue of passports,<sup>186</sup> the review of passport decisions,<sup>187</sup> and offences in relation to passports.<sup>188</sup> These matters do not impinge on the right of abode. Therefore, the approach of invalidating the entire *APA* when a passport decision breaches the right of abode would be inappropriate. This mirrors the approach in *Abdelrazik*, where Zinn J did not invalidate the entire *Canadian Passport Order SI/81-86*.<sup>189</sup>

Would it be more appropriate to only invalidate pt 2 divs 2–3 of the *APA*, which provide for the Minister to refuse and cancel Australian passports? Perhaps not, because even when passport cancellations and refusals are made pursuant to the *APA*, a constitutional citizen's right of abode is seldom breached. For instance, when a citizen's passport is cancelled and they are overseas, they may be given replacement travel documents to return to Australia.<sup>190</sup> It would be thus inappropriate to *entirely* invalidate the passport refusal and cancellation provisions in the *APA* as unconstitutional.

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<sup>182</sup> *Acts Interpretation Act 1901* (Cth) s 15A.

<sup>183</sup> *Ibid*; see also *Victoria v Commonwealth* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

<sup>184</sup> *Industrial Relations Act Case* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *New South Wales v Commonwealth* (2006) 229 CLR 1, 241 [597] (Kirby J) ('*Work Choices Case*').

<sup>185</sup> *Work Choices Case* (2006) 229 CLR 1, 241 [597] (Kirby J).

<sup>186</sup> *APA* pt 2 divs 1–2A.

<sup>187</sup> *Ibid* pt 5 div 3.

<sup>188</sup> *Ibid* pt 4.

<sup>189</sup> *Abdelrazik* [2010] 1 FCR 267, 323 [133].

<sup>190</sup> *APA* s 9; *Australian Passports Determination 2015* (Cth) s 9.

However, as *Abdelrazik* shows, given the appropriate circumstances, certain individual passport cancellations or refusals may breach the right of abode.<sup>191</sup> The better view would be to therefore read down the refusal and cancellation provisions in the *APA*, but to a lesser extent than mooted above. In particular, they could be read down such that they do not provide the Minister authority to make passport refusals or cancellations when those decisions have the practical effect of breaching the constitutional citizen's right of abode. If this reading down applies, the next matter that must be addressed is whether it changes the fundamental character of the passport refusal and cancellation provisions. If so, the provisions need to be invalidated entirely.<sup>192</sup>

The result of the reading down explained above would be that the Commonwealth would still be able to refuse and cancel passports in a vast majority of circumstances. However, it would not be able to do so when the practical effect would be to abrogate the right of abode of constitutional citizens. This practical effect only results from very few passport decisions. Accordingly, only very few passport decisions would be impugned. This means that the passport refusal and cancellation provisions would not lose their fundamental character, as they would remain operative in a vast majority of circumstances. The reading down would also not derogate from the purpose of the passport refusal and cancellation provisions of the *APA*. Their purpose is to facilitate passport refusals and cancellations for various reasons, none of which are to exclude Australian citizens from Australia.<sup>193</sup> By retaining their purpose and thereby their character, the provisions can be read down without being invalidated entirely. Thus, as the analysis above shows, *Abdelrazik* lends useful ideas to Australian law in relation to how passports legislation breaching the right of abode may be impugned.

There would be a divergence between *Abdelrazik* and Australian law in relation to the remedy to be ordered for a passport decision that breaches the right of abode. *Abdelrazik* takes the approach of *Charter* jurisprudence. The remedy granted for a *Charter* breach shall restore the aggrieved party to the position they would have been in, but for the breach.<sup>194</sup> In *Abdelrazik*, Zinn J ordered that

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<sup>191</sup> *Abdelrazik* [2010] 1 FCR 267, 323 [133] (Zinn J).

<sup>192</sup> *Industrial Relations Act Case* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Work Choices Case* (2006) 229 CLR 1, 241 [597] (Kirby J).

<sup>193</sup> See *APA* pt 2 divs 2–3.

<sup>194</sup> *Abdelrazik* [2010] 1 FCR 267, 335 [158] (Zinn J), citing *Doucet-Boudreau v Minister for Education (Nova Scotia)* [2003] 3 SCR 3.

Abdelrazik be issued an emergency passport and his travel paid for if he could not afford it, thus he could return to Canada.<sup>195</sup>

As explained above, if a passport decision in Australia were made that abrogated the right of abode of a constitutional citizen, the *APA* would be read down so that particular passport decision would not be valid. The passport decision would thereby be quashed. This approach departs markedly from *Abdelrazik*, where Zinn J effectively ordered the applicant's repatriation as the remedy.<sup>196</sup> Nevertheless, *Abdelrazik* illuminates *how* the right of abode can limit a government's power to deprive citizens of a passport. This point may be translated into Australian law. In particular, the *APA* may be read down as not authorising certain passport decisions where their effect would be to practically exclude constitutional citizens from Australia.

#### 4 *Potential Qualifications on the Right of Abode*

*Abdelrazik* raised an issue as to whether s 1 of the *Charter* could qualify the Canadian government's breach of s 6(1) of the *Charter*. Zinn J rejected the Canadian government's argument that its purported failure to repatriate Abdelrazik was because it was complying with its obligations under *Resolution 1267*.<sup>197</sup> Zinn J also rejected the argument that the Canadian government's refusal to issue Abdelrazik a passport was because he was a threat to national security.<sup>198</sup>

In Australian law, rights have been implied from the *Constitution*, but some qualifications on them also exist. For example, laws that are proportionate to a legitimate legislative purpose may abrogate the constitutionally enshrined freedom of political communication and right to vote.<sup>199</sup> It is argued that there may be no qualification on the right of abode of constitutional citizens. Under the aliens power, Parliament has power legislate to exclude persons from the Commonwealth's borders on grounds it sees fit.<sup>200</sup> As constitutional citizens are non-alien, they are not subject to the aliens power. Parliament's power to legislate exclude persons could not validly apply to non-alien (including constitutional citizens).<sup>201</sup> Placing a qualification on the right of abode would

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<sup>195</sup> *Abdelrazik* [2010] 1 FCR 267, 336 [160].

<sup>196</sup> *Ibid* 335–6 [158]–[160].

<sup>197</sup> *Ibid* 334–5 [156].

<sup>198</sup> *Ibid* 333 [154].

<sup>199</sup> See, eg, *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 91 ALJR 1089.

<sup>200</sup> *Robtelmes v Brenan* (1906) 4 CLR 395, 400 (Griffith CJ); see also Irving, above n 24, 150.

<sup>201</sup> Irving, above n 24, 150, citing *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 186 (Latham CJ).

allow Parliament to legislate to exclude non-alien in certain circumstances. However, that would impermissibly extend the application of the aliens power to non-alien. Thus, there may be no qualification on the right of abode of constitutional citizens.

The corollary of the above point is that the right of abode is limited to protecting constitutional citizens from being excluded from Australia *on the grounds of being a constitutional alien or immigrant*. This makes concession for Parliament's power to legislate to extradite citizens, which is constitutionally valid pursuant to the external affairs power.<sup>202</sup> Extradition is a necessary limitation on a citizen's right of abode because of the policy consideration of bringing fugitives to justice.<sup>203</sup> This policy consideration similarly underpins Canadian jurisprudence in respect of s 6(1) of the *Charter*, where the right of abode is also subject to extradition.<sup>204</sup> Additionally, there are distinctions between extradition and the arbitrary exclusion of persons (the latter being a power of Parliament with respect to aliens).<sup>205</sup> Extradition is the removal to face trial overseas that the executive may only undertake pursuant to legislation consistent with the external affairs power.<sup>206</sup> It accordingly involves various protections.<sup>207</sup> Hence, whilst the right of abode may not have any qualifications,

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<sup>202</sup> *Constitution* s 51 (xxix); see *Vasiljkovic v Commonwealth* (2006) 227 CLR 614, 630–1 [36]–[37] (Gleeson CJ), 643 [88] (Gummow and Hayne JJ). As the law in Australia presently stands, the author is unaware of other constitutional heads of power which are purportedly used to abrogate a right of abode of constitutional citizens. It is foreseeable that Parliament may purportedly make laws pursuant to the defence power (s 51 (vi) of the *Constitution*) to abrogate a right of abode of constitutional citizens in some way. Such laws would be a matter for further analysis depending on their precise nature (including on the question of whether they would provide further limits to the constitutional citizen's right of abode). Critically, the validity of such purported laws would turn on whether it could be shown that they were for the *purpose of the defence of the Commonwealth*: *Stenhouse v Coleman* (1944) 69 CLR 457, 464 (Latham CJ), 466 (Starke J), having regard to the prevailing international and political climate: *Farey v Burvett* (1916) 21 CLR 433, 441 (Griffith CJ). Additionally, the laws would need to be shown to have proportionality between their purpose and the means they embody to achieve that purpose: *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 256 (Fullagar J). Accordingly, such laws would differ from laws which purported to arbitrarily exclude persons from Australia, which would be laws with respect to the aliens power. In relation to the defence power, see also Kate Chetty, 'A History of the Defence Power: Its Uniqueness, Elasticity and Use in Limiting Rights' (2016) 16 *Macquarie Law Journal* 17, 17–20 and James Stellios, *Zines's The High Court and The Constitution* (The Federation Press, 6<sup>th</sup> ed, 2015) 332–43.

<sup>203</sup> See *Vasiljkovic v Commonwealth* (2006) 227 CLR 614, 619 [8] (Gleeson CJ), 634 [48] (Gummow and Hayne JJ), citing *DJL v Central Authority* (2000) 201 CLR 226, 279 [137] (Kirby J).

<sup>204</sup> Pillai, 'The Rights and Responsibilities of Australian Citizenship', above n 46, 768 n 172, citing *United States v Cotroni* [1989] 1 SCR 1469.

<sup>205</sup> See above n 200 and accompanying text.

<sup>206</sup> *Vasiljkovic v Commonwealth* (2006) 227 CLR 614, 632 [40] (Gleeson CJ), 635 [50] (Gummow and Hayne JJ), quoting *Valentine v United States ex rel Neidecker*, 299 US 5, 9 (Hughes CJ) (1936).

<sup>207</sup> See, eg, *Extradition Act 1988* (Cth) ss 7(a)–(e), 15B(3)(a)–(b), cited in Pillai, 'The Rights and Responsibilities of Australian Citizenship', above n 46, 767–8.

it accords with constitutional doctrine that provides for Parliament to validly legislate to extradite citizens.

To summarise, *Abdelrazik* offers a useful precedent for the recognition of a right of abode in Australia at a constitutional level. *Abdelrazik* also has various implications on the right of abode in Australian law. In particular, it illustrates how an incidental right of entry should complement the right of abode. The right may also have no qualifications. The right may be breached in certain passport decisions. Where this occurs, the *APA* would be read down so as to not authorise those decisions. The next step of this article is to apply these concepts to Bridgeman's factual scenario to illustrate how they work in practice. Before doing so, another potential right of constitutional citizenship that may supplement the right of abode falls for consideration.

#### VI THE RIGHT OF CONSTITUTIONAL CITIZENS TO HAVE THE COMMONWEALTH CONSIDER REQUESTS FOR PROTECTION

Could constitutional citizens have a right to some kind of 'protection' that may limit Parliament's power to legislate to deprive them of a passport? This article adopts the position that constitutional citizens are those falling outside the ambit of the aliens and immigration powers in the *Constitution*. The essence of being a non-alien is owing allegiance to Australia.<sup>208</sup> Allegiance entails a reciprocal relationship whereby the subject (or citizen) gives allegiance, resulting in protection.<sup>209</sup> Professor Irving describes this as a 'quid pro quo'.<sup>210</sup> In her view, the 'quid pro quo' involves the constitutional citizen owing allegiance to Australia in exchange for a right of abode.<sup>211</sup>

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<sup>208</sup> See above nn 116–118 and accompanying text.

<sup>209</sup> Note that this position is a longstanding one at common law and is adopted in Australian law: *Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 337; *Isaacson v Durant* (1886) 17 QBD 54, cited in David Wishart, 'Allegiance and Citizenship as Concepts in Constitutional Law' (1986) 15 *Melbourne University Law Review* 662, 699; *Joyce* [1946] AC 347, 368 (Lord Jowitt) cf Sir Hersch Lauterpacht, 'Allegiance, Diplomatic Protection and Criminal Jurisdiction Over Aliens' (1947) 9 *Cambridge Law Journal* 330, 334; *Singh* (2004) 222 CLR 322, 387–8 [165]–[166] (Gummow, Hayne and Heydon JJ).

<sup>210</sup> Irving, above n 24, 150.

<sup>211</sup> *Ibid.*

This Part contends that another form of protection flows from the constitutional citizen's allegiance.<sup>212</sup> In particular, a right to have the Commonwealth properly consider requests for positive protection (which includes diplomatic protection and consular assistance such as the provision of a passport or travel documents). To come to this position, it is necessary to explore the following concepts at law more deeply:

a) the precise character of 'protection', including how that might encompass diplomatic protection and consular assistance;

b) the nature of the 'allegiance' which constitutional citizens owe and how that allegiance entitles constitutional citizens to any rights to positive protection; and

c) any case law authorities or precedents which may support or limit the existence of any rights to positive protection.

This Part explores these matters accordingly.

#### A *The Nature of Protection*

Glanville Williams suggests protection, as developed at common law, may be characterised in two ways: 'negative protection' and 'positive protection'. He defines negative protection as 'the absence of illegal interference with the individual by the sovereign himself and his officers'.<sup>213</sup> This means that the law binds the Commonwealth in its conduct towards individuals. Accordingly, even if it were established that constitutional citizens have a right to negative protection, it would not pose limits on Parliament's power to legislate to deprive a person of their passport beyond those that currently exist. Thus, in the context of limiting Parliament's power to deprive a person of their passport (and for present purposes), positive protection is what is of importance.

Williams defines positive protection as the 'protection of the individual against the activities of others'.<sup>214</sup> Diplomatic protection and consular assistance constitute types of positive protection that occur outside the Commonwealth's dominions. Diplomatic protection involves governments protecting persons that have exhausted all local remedies in seeking redress for a wrong a foreign

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<sup>212</sup> This idea has been touched on in other Australian scholarship, but not fully explored. See Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 597; Tran, 'New Perspectives on Australian Constitutional Citizenship and Identity', above n 30, 213.

<sup>213</sup> Williams, above n 131, 58.

<sup>214</sup> *Ibid.*

government has committed against them in breach of international standards.<sup>215</sup> In the context of diplomatic protection, states could protect persons through a range of measures. These measures vary from economic sanctions to commencing proceedings in international tribunals.<sup>216</sup> Consular assistance refers to governments providing assistance to persons whose welfare is at risk whilst abroad.<sup>217</sup> This entails a government providing a range of services such as, inter alia, assistance if a person is detained overseas, ensuring that prisoners' needs are met, and informing next of kin of a person's detention.<sup>218</sup>

The provision of a passport or travel documents constitutes a form of positive protection. The Commonwealth's published material suggests that one form of consular assistance it may provide is to issue replacement passports and travel documents.<sup>219</sup> It has also been held at common law that a passport may be used for a citizen's protection.<sup>220</sup> Lord Jowitt noted in *Joyce* that the primary protective function of a passport is that it identifies a person, thereby making their passage among nations easier.<sup>221</sup> This position is particularly pertinent in contemporary times because of the intrinsic importance of passports for international travel.<sup>222</sup> Passports may therefore provide citizens positive protection through facilitating their repatriation from dangerous situations overseas. Additionally, a citizen's possession of a passport is an indicator that the Commonwealth has a right to diplomatically protect them should another state commit a wrong against them.<sup>223</sup> Therefore, positive protection may include diplomatic protection and consular assistance. One component of the latter includes the issue of passports and travel documents.

It should be noted that Christopher Tran has suggested a third category of protection: protection as treatment according to the law.<sup>224</sup> Arguably, that

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<sup>215</sup> Tran, 'Government Duties to Provide Diplomatic Protection in Comparative Perspective', above n 28, 300.

<sup>216</sup> *Ibid.*

<sup>217</sup> Pillai, 'The Rights and Responsibilities of Australian Citizenship', above n 46, 769–70; see also Natalie Klein, 'David Hicks, Stern Hu, Scott Rush, Jock Palfreeman and the Legal Parameters of Australia's Protection of its Citizens Abroad' (2011) 35 *Melbourne University Law Review* 134, 138.

<sup>218</sup> Pillai, 'The Rights and Responsibilities of Australian Citizenship', above n 46, 770.

<sup>219</sup> Department of Foreign Affairs and Trade ('DFAT'), *Consular Services Charter* (December 2014) 1, 4.

<sup>220</sup> *R v Brailsford* [1905] 2 KB 730, 745 (Lord Alverstone CJ); *Joyce* [1946] AC 347, 369 (Lord Jowitt); *Jayaweera v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 395, 403 [29] (Heerey J), quoting *R v Brailsford* [1905] 2 KB 730, 745 (Lord Alverstone CJ).

<sup>221</sup> *Joyce* [1946] AC 347, 369.

<sup>222</sup> See above Part II.

<sup>223</sup> Pryles, above n 23, 133, citing *Joyce* [1946] AC 347, 349 (Lord Jowitt); see also Williams, above n 131, 73–4; see Daniel Turack, *The Passport in International Law* (Lexington, 1972) 232–3, for support for this position at international law.

<sup>224</sup> Christopher Tran, 'Revisiting Allegiance and Diplomatic Protection' [2012] *Public Law* 197, 200.

characterisation falls into Williams' dichotomy as 'negative protection' because it accords the Commonwealth no positive duty to guard citizens against others. In sum, there exists negative and positive protection. Only the latter may further the current limits on Parliament to legislate to deprive a person of their passport. The question that now follows is whether constitutional citizenship carries with it a right to positive protection.

### B *Constitutional Citizens' Allegiance and the Protection It Brings*

Do constitutional citizens have an enforceable right to positive protection, thereby being able to compel the Commonwealth to undertake protective action such as issuing them a passport? To enjoy the benefit of positive protection abroad, constitutional citizens would need to continue to owe allegiance whilst abroad. Citizens owe what is called 'permanent allegiance', which means their allegiance exists wherever they may be.<sup>225</sup> Hence, positive protection can be said to extend to constitutional citizens wherever they may be. This contrasts to the 'local allegiance' that aliens owe.<sup>226</sup> The local allegiance of aliens is owed when they are within the realm and outside the realm *only if* they have once entered the realm *and* left behind family and property, intend to return, or have a passport the Commonwealth has issued.<sup>227</sup> Consequently, the alien's local allegiance, and therefore status, entitles them to protection abroad in only certain circumstances, rather than automatically.<sup>228</sup> In contrast, the constitutional citizen's permanent allegiance entitles them to positive protection wherever they may be. However, it does not necessarily follow that this entitlement to positive protection is enforceable against the Commonwealth.

### C *How Does Case Law Support or Limit Any Right of Constitutional Citizens to Positive Protection?*

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<sup>225</sup> *Singh* (2004) 222 CLR 322, 344 [39], 377–8 [133] (McHugh J); 386–8 [164]–[169] (Gummow, Hayne and Heydon JJ).

<sup>226</sup> *Te* (2002) 212 CLR 162, 173 [29] (Gleeson CJ), citing *Joyce* [1946] AC 347, 197–8 [125]–[128] (Gummow J), citing *Joyce* [1946] AC 347; *Shaw* (2003) 218 CLR 28, 42–3 [29] (Gleeson CJ, Gummow and Hayne JJ), citing *Joyce* [1946] AC 347; *Singh* (2004) 222 CLR 322, 387–8 [166] (Gummow, Hayne and Heydon JJ), citing *Te* (2002) 212 CLR 162, 198 [126]–[128] (Gummow J).

<sup>227</sup> *Joyce* [1946] AC 347, 368–71 (Lord Jowitt); Williams, above n 131, 76; see also Colin Murray, 'In the Shadow of Lord Haw Haw: Guantánamo Bay, Diplomatic Protection and Allegiance' [2011] *Public Law* 115, 125–7, citing *Joyce* [1946] AC 347.

<sup>228</sup> For example, some sources suggest the Commonwealth may extend positive protection to aliens in select cases such as to permanent residents, stateless persons, and refugees: see Sir Lauterpacht, above n 209, 340; DFAT, above n 219, 7; 'Report of the International Law Commission on the Work of its Fifty-Eighth Session (1 May – 9 June and 3 July – 11 August 2006)' (2006) II(2) *Yearbook of the International Law Commission* i, 47 cf *R (Al-Rawi) v Secretary of State* [2008] 2 QB 289, 338 [119]–[120] (Laws LJ) ('*Al-Rawi*').

The authorities suggest that even if constitutional citizens had a right to positive protection, it is unlikely that it is enforceable. Since the early 20<sup>th</sup> century, the common law position has been that subjects (citizens) could not compel the Crown to protect them whilst they were overseas.<sup>229</sup> The courts have described the citizen's right to protection as one of 'imperfect obligation' on the Commonwealth.<sup>230</sup> That is, citizens have a right to receive positive protection from the Commonwealth, but have no right to oblige the Commonwealth to provide it. The reason for this is that matters of positive protection largely pertain to how the Commonwealth conducts its foreign policy. Such matters are within the competence of the executive rather than the judiciary.<sup>231</sup> Furthermore, the courts may not pass judgement on the merits of Australian foreign policy.<sup>232</sup> The courts therefore cannot enforce citizens' claims for positive protection. The common law thus provides no authority for the view that constitutional citizens have an enforceable right of positive protection.

International law reflects the position of the common law. States may provide diplomatic protection to their citizens but they are not obliged to do so.<sup>233</sup> In international law, a wrong a state commits against another state's citizen is considered a wrong against that citizen's state, thereby entitling that state to exercise diplomatic protection.<sup>234</sup> It is therefore at the discretion of the state of the citizen affected whether it decides to exercise its right of positive protection. Thus, even if a constitutional citizen's permanent allegiance granted them a right to positive protection from the Commonwealth, it would not be legally enforceable.

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<sup>229</sup> See *China Navigation Co Ltd v A-G (UK)* [1932] 2 KB 197 ('*China Navigation*'); *Mutasa v A-G (UK)* [1980] 1 QB 114; *R (Pirbhai) v Secretary of State* (1987) 107 ILR 461; *R (Ferhut Butt) v Secretary of State* (1999) 116 ILR 607; *Hicks v Ruddock* (2007) 156 FCR 574, 594 [64]–[65] (Tamberlin J) ('*Hicks*').

<sup>230</sup> See *Mutasa v A-G (UK)* [1980] 1 QB 114, 120 (Boreham J); *Hicks* (2007) 156 FCR 574, 593–4 [61]–[67] (Tamberlin J); *Habib v Commonwealth (No 2)* (2009) 175 FCR 350, 367 [62] (Perram J) ('*Habib (No 2)*'), citing *Hicks* (2007) 156 FCR 574, 593–4 [62]–[66] (Tamberlin J).

<sup>231</sup> *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369 (Gummow J) ('*Re Ditfort*'); *Habib (No 2)* (2009) 175 FCR 350, 364 [49]–[51] (Perram J).

<sup>232</sup> *Habib (No 2)* (2009) 175 FCR 350, 364 [51], 367 [62] (Perram J); see also *Re Ditfort* (1988) 19 FCR 347, 370 (Gummow J).

<sup>233</sup> *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 44; see also Craig Forcese, 'The Obligation to Protect: the Legal Context for Diplomatic Protection of Canadians Abroad' (2007) 57 *University of New Brunswick Law Journal* 102, 110; see also Klein, above n 217, 142; Tran, 'Government Duties to Provide Diplomatic Protection in Comparative Perspective', above n 28, 300; Natalie Klein and Lise Barry, 'A Human Rights Perspective of Diplomatic Protection: David Hicks and His Dual Nationality' (2007) 13 *Australian Journal of Human Rights* 1, 16.

<sup>234</sup> *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 12; see also Tran, 'Government Duties to Provide Diplomatic Protection in Comparative Perspective', above n 28, 300; see also Forcese, above n 233, 110.

However, the law as it stands does not preclude the possibility that a constitutional citizen's permanent allegiance may entitle them to an enforceable right to have the Commonwealth *consider* their request to provide them positive protection. The framing of the right as one to have the government consider requests for positive protection was first considered in comparable jurisdictions. In British law, it has been held that citizens have a legitimate expectation that the government duly considers their requests for protection.<sup>235</sup> However, it is a question for the government as to whether it would actually protect its citizen and in what manner it would do so.<sup>236</sup> Similarly, in South Africa, citizens enjoy a right to have their government consider their requests to provide them diplomatic protection.<sup>237</sup>

In Australia, it was argued in *Hicks* that, on the basis of the allegiance-protection relationship and the discretionary right of the Crown to protect citizens whilst they are abroad, the Commonwealth had a duty to consider a citizen's request to provide them protection.<sup>238</sup> The Commonwealth sought to strike out that application on summary judgment, arguing it had no reasonable prospects of success.<sup>239</sup> Tamberlin J rejected the Commonwealth's application.<sup>240</sup> Tamberlin J distinguished the facts of *Abbasi* from the case before the Court.<sup>241</sup> However, his Honour did not reject the position in *Abbasi* that the citizen had a legitimate expectation that the government would consider their request to grant them protection. It must be borne in mind that proceedings never continued after that stage and it is unknown whether the submission would have been subsequently accepted.<sup>242</sup>

A few years after *Hicks*, *Habib (No 2)* raised the question as to whether the Commonwealth had a duty to consider a citizen's request to provide them protection.<sup>243</sup> Perram J held it was arguable that such a right might exist but did not take the position any further.<sup>244</sup> It is therefore arguable and open for a court to hold that constitutional citizens, by virtue of the permanent allegiance that their

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<sup>235</sup> *R (Abbasi and Juma) v Secretary of State* (2002) 126 ILR 685, 723 [99] (Lord Phillips) ('*Abbasi*').

<sup>236</sup> *Ibid* 724–5 [106].

<sup>237</sup> *Kaunda v President (Republic of South Africa)* [2005] 4 SA 235, 259 [67] (Chaskalson CJ) (Constitutional Court); see also *Van Zyl v Government of the Republic of South Africa* [2008] 3 SA 294 (Supreme Court of Appeal); *Von Abo v Government of the Republic of South Africa* [2009] 5 SA 345 (Constitutional Court).

<sup>238</sup> *Hicks* (2007) 156 FCR 574, 593–4 [62]–[66] (Tamberlin J).

<sup>239</sup> *Ibid* 576 [3].

<sup>240</sup> *Ibid* 597 [77], 600 [92].

<sup>241</sup> See *ibid* 597–9 [78]–[86].

<sup>242</sup> *Ibid* 597 [77], 600 [92].

<sup>243</sup> *Habib (No 2)* (2009) 175 FCR 350, 367 [63] (Perram J).

<sup>244</sup> *Ibid* 367 [63]–[64].

status carries, have an enforceable right to have the Commonwealth consider their requests to provide them positive protection.

In light of problems that often arise in diplomatic protection cases, the position that constitutional citizens have a right that the Commonwealth considers their requests for protection is suitable for two primary reasons. First, the position addresses a common concern in diplomatic protection cases that by hearing a claim relating to diplomatic protection, the court is adjudicating a non-justiciable matter.<sup>245</sup> Australian law posits that the content of dealings between the governments of foreign states and the Commonwealth will not ordinarily create rights for private citizens.<sup>246</sup> The concern that follows is that by making diplomatic protection a justiciable matter, the content of dealings between the Commonwealth and other states may form the basis of private rights for citizens. However, by formulating the right as one to have the Commonwealth consider a request for protection, no adjudication of the actual content of dealings between the Commonwealth and other states occurs.<sup>247</sup> What is adjudicated is whether the Commonwealth has considered such dealings.

There is a second reason why framing the right of constitutional citizens as one to have the Commonwealth consider requests for positive protection is suitable. Framing the right as such alleviates a prevalent concern in diplomatic protection cases that courts should avoid encroaching on executive power. The concern derives from the position that the exercise of diplomatic protection is a matter for the executive because it is a matter of foreign policy.<sup>248</sup> The courts have no competence to supervise the adequacy of the executive's conduct of Australia's foreign policy.<sup>249</sup> The courts are therefore anxious to avoid intruding upon the function of the executive branch through adjudicating matters of diplomatic protection. The concern manifests in some overseas jurisprudence, where some courts have ordered remedies prescribing courses of conduct of positive protection of citizens.<sup>250</sup> Arguably, such orders are evidence of the judiciary undertaking the executive function.<sup>251</sup>

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<sup>245</sup> See *Abbasi* (2002) 126 ILR 685, 699 [26], 702–6 [36]–[50] (Lord Phillips); *Hicks* (2007) 156 FCR 574, 585–7 [26]–[34] (Tamberlin J); Justice Brian Tamberlin and Lucas Bastin, 'David Hicks in the Australian Courts: Past and Future Legal Issues' (2008) 82 *Australian Law Journal* 774, 783–5; *Habib (No 2)* (2009) 175 FCR 350, 367–8 [67] (Perram J).

<sup>246</sup> *Re Ditfort* (1988) 19 FCR 347, cited in *Hicks* (2007) 156 FCR 574, 585–6 [26]–[28] (Tamberlin J).

<sup>247</sup> *Habib (No 2)* (2009) 175 FCR 350, 367 [64] (Perram J).

<sup>248</sup> See, eg, *ibid* [62]; *Hicks* (2007) 156 FCR 574, 585–6 [26]–[29] (Tamberlin J).

<sup>249</sup> See *Re Ditfort* (1988) 19 FCR 347, 369–70 (Gummow J); *Hicks* (2007) 156 FCR 574, 585–6 [27]–[28] (Tamberlin J), quoting *Re Ditfort* (1988) 19 FCR 347, 370 (Gummow J); see also *Habib (No 2)* (2009) 175 FCR 350, 367 [62] (Perram J).

<sup>250</sup> See, eg, *Khadr v Prime Minister (Canada)* [2010] 1 FCR 34, 67 [92] (O'Reilly J) (Canadian Federal Court), cited in Tran, 'Government Duties to Provide Diplomatic Protection in Comparative

By framing the right as one to have requests for positive protection considered, the court need not examine the merits of the executive's course of action in foreign relations to determine whether the right has been upheld.<sup>252</sup> The court also need not prescribe that certain acts of positive protection are undertaken.<sup>253</sup> All the court must do is examine whether a course of action has been considered.<sup>254</sup> There are thus conceptual strengths to framing the right of constitutional citizens as one to have the Commonwealth consider requests for positive protection. These support the emergent precedent underpinning the existence of the right.

In summary, whilst the permanent allegiance of constitutional citizens may entitle them to positive protection, it is unlikely that entitlement is enforceable against the Commonwealth. However, it is arguable constitutional citizens have an enforceable right to have the Commonwealth consider their requests for positive protection. How then does that enforceable right limit Parliament's power to legislate to deprive constitutional citizens of a passport?

#### D *The Right to Have a Request for Protection Considered as Limiting Parliament's Power to Deprive Citizens of a Passport*

Parliament's power to legislate with respect to passports is subject to the *Constitution*. This includes the constitutional implication that a constitutional citizen has a right that the Commonwealth consider their requests to provide positive protection. The issue of passports and travel documents is a form of positive protection.<sup>255</sup> The *APA* empowers the Commonwealth (in particular the Minister for Foreign Affairs) to provide that form of positive protection.<sup>256</sup> Therefore, the *APA* may not authorise the Minister's failure to appropriately consider a constitutional citizen's request for positive protection in the form of

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Perspective', above n 28, 308; *Von Abo v Government of the Republic of South Africa* [2009] 2 SA 526 (High Court), cited in Tran, 'Government Duties to Provide Diplomatic Protection in Comparative Perspective', above n 28, 307 cf *Government of the Republic of South Africa v Von Abo* [2011] 5 SA 262, 275–6 [31], 278 [38] (Snyders JA) (Supreme Court of Appeal).

<sup>251</sup> See also Tran, 'Government Duties to Provide Diplomatic Protection in Comparative Perspective', above n 28, 319.

<sup>252</sup> See *Habib (No 2)* (2009) 175 FCR 350, 367 [63]–[64] (Perram J); *Abbasi* (2002) 126 ILR 685, 723 [99], 724–5 [106] (Lord Phillips); see also *Kaunda v President (Republic of South Africa)* [2005] 4 SA 235, 261–2 [77]–[81] (Chaskalson CJ) (Constitutional Court); *Government of the Republic of South Africa v Von Abo* [2011] 5 SA 262, 273–5 [28]–[29] (Snyders JA) (Supreme Court of Appeal).

<sup>253</sup> See generally Tran, 'Government Duties to Provide Diplomatic Protection in Comparative Perspective', above n 28, 319.

<sup>254</sup> Cf *Habib (No 2)* (2009) 175 FCR 350, 367–8 [63]–[68] (Perram J); *Abbasi* (2002) 126 ILR 685, 723 [99], 724–5 [106] (Lord Phillips).

<sup>255</sup> See above nn 219–223 and accompanying text.

<sup>256</sup> *APA* ss 7, 9.

passports and travel documents.<sup>257</sup> Accordingly, ss 7 and 9 of the *APA* (the provisions that provide for the issuance of passports and travel documents) would be read down. They would be read down such that they grant no authority to the Minister to refuse a passport or travel documents where the Minister has failed to properly consider a constitutional citizen's request for them.<sup>258</sup> Consequently, constitutional citizens effectively have an enforceable right that the Commonwealth consider their requests for positive protection in the form of passports or travel documents.

The right of a constitutional citizen to have their request for positive protection considered does not affect the passport cancellation provisions in the *APA*.<sup>259</sup> The fact that the Minister is able to cancel a constitutional citizen's passport means the Minister at one stage provided that constitutional citizen positive protection in the form of a passport. The fact the Minister has done so implies that the Minister has already considered providing positive protection to that constitutional citizen. This is because one cannot provide something without having initially considered whether to do so. However, if a constitutional citizen's passport is cancelled and they subsequently make a new request for one, they have the right that the Minister duly considers their new request.<sup>260</sup>

## VII A PRACTICAL APPLICATION: BRIDGEMAN'S CASE

Australian scholarship regarding constitutional citizenship has focused on the doctrinal basis of the concept. It has not examined what practical implications the concept has for litigants in various scenarios. Thus, the final step in this article is to bring together the two rights of constitutional citizenship as discussed above and illustrate how they may apply in practice. In particular, the rights are applied with respect to Bridgeman's case, as he is a constitutional citizen who has been deprived of his passport.<sup>261</sup>

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<sup>257</sup> A failure to consider a request would involve a failure to give that request proper, genuine, and realistic consideration. See *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 174–5 [26], citing *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 292 (Gummow J); see also *Tickner v Chapman* (1995) 57 FCR 451, 462 (Black CJ).

<sup>258</sup> There would be no need to invalidate the *APA* entirely or ss 7 and 9 of the *APA* entirely because neither provide for the Commonwealth to categorically refuse to consider for a passport or travel document: see discussion in above Part V(B)(3).

<sup>259</sup> Particularly, the *APA* pt 2 divs 2–3.

<sup>260</sup> See above n 257 and accompanying text.

<sup>261</sup> Bridgeman is a non-alien as he possesses statutory citizenship: *Pochi v Macphee* (1982) 151 CLR 101. He is also a non-immigrant as he has a substantial connection to the Australian community: see Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth', above n 24, 583–5, citing

### A *The Right of Abode*

It was established above that the *APA* may be read down as not authorising the Commonwealth to deprive a person of their passport where the effect would be to disallow a constitutional citizen enjoyment of abode in Australia (including by disallowing entry into Australia).<sup>262</sup> The question is therefore: has the Commonwealth's cancellation of Bridgeman's passport abrogated his right of abode? It must be shown that the passport cancellation, rather than any other factor, is what prevented Bridgeman enjoying abode in Australia.<sup>263</sup> By way of comparison, in *Abdelrazik*, it was held that the Canadian government breached Abdelrazik's right of abode because the *only* reason he was not in Canada was his government's failure to issue him a passport.<sup>264</sup> The breach arose when Abdelrazik obtained a paid flight with an airline willing to fly him to Canada, but his government refused to issue him a passport, which meant he could not board the flight.<sup>265</sup> In contrast, on another occasion where Abdelrazik obtained a flight, even though the Canadian government did not issue him a passport, the airline refused to fly Abdelrazik.<sup>266</sup> There it was the airline's conduct that caused Abdelrazik's inability to enjoy abode in Canada, rather than the Canadian government's conduct.<sup>267</sup> Hence, the question is whether the *only* reason for Bridgeman's inability to enjoy abode in Australia is the fact that the Commonwealth cancelled his passport.

Bridgeman wished to return to Australia immediately before his passport was cancelled.<sup>268</sup> Bridgeman's lawyers stated publicly that he had 'immediate plans' to return to Australia.<sup>269</sup> They have also stated Bridgeman communicated his travel plans to Australian authorities.<sup>270</sup> This contrasts to another source that states Bridgeman's parents were 'finalising plans' to bring Bridgeman back to Australia when his passport was cancelled.<sup>271</sup> It could be that those plans were so concrete that Bridgeman had a confirmed path of return to Australia (including flights and other appropriate measures). In that case, the Commonwealth's

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*Potter v Minahan* (1908) 7 CLR 277; *Re Yates*; *Ex parte Walsh* (1925) 37 CLR 36; *Donohoe v Wong Sau* (1925) 36 CLR 404 and *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369; as evidenced by the fact his home is in Australia and he has lived there his whole life.

<sup>262</sup> See above Part V(B)(1)–(3).

<sup>263</sup> Cf *Abdelrazik* [2010] 1 FCR 267, 329–30 [148], 332–3 [153] (Zinn J).

<sup>264</sup> *Ibid* 329–30 [148].

<sup>265</sup> *Ibid* 289 [41], 329–30 [148].

<sup>266</sup> *Ibid* 311 [98].

<sup>267</sup> *Ibid* 312 [100].

<sup>268</sup> *Bavas*, above n 9.

<sup>269</sup> Bosscher Lawyers, *Government Cancels Oliver Bridgeman's Passport* (26 February 2016) <<http://bosscherlawyers.com/government-cancels-oliver-bridgemans-passport/>>.

<sup>270</sup> *Bavas*, above n 9.

<sup>271</sup> *Solomons*, above n 10.

subsequent cancellation of Bridgeman's passport would have precluded his ability to undertake his pre-planned path because of the practical requirement of a passport for travel.<sup>272</sup> Therefore, given that factual matrix, the cancellation caused the breach of Bridgeman's right of abode. However, it could be that Bridgeman's plans were so tenuous such that they were merely intentions to return to Australia with no confirmed route. In that case, Bridgeman's inability to enjoy abode in Australia would not be because of the cancellation of his passport. The probable cause would be his failure to appropriately confirm a path of return to Australia.

In any case, a question arises as to whether Bridgeman could return to Australia without a valid passport, meaning that the cancellation is not the cause of his inability to enjoy abode. In this respect, the Commonwealth might submit that a passport is not a legal requirement to enter Australia; therefore cancelling Bridgeman's passport does not breach his right of abode.<sup>273</sup> However, this position overlooks the practical effect of passport decisions, which can sometimes be to exclude a citizen from their country.<sup>274</sup> Indeed, this is the case with respect to Bridgeman. He has no options to travel directly from Syria to Australia so as to avoid using a passport to return to Australia.<sup>275</sup> He might choose to attempt to cross the Syria-Turkey border to obtain the travel documents the Commonwealth has suggested it might provide for him to return to Australia.<sup>276</sup> If he produced his cancelled Australian passport to do so, that would constitute a criminal offence.<sup>277</sup> Even if Bridgeman managed to exit Syria without using his passport, he would inevitably require commercial travel to return to Australia. That invariably involves the production of a passport. If he produced his cancelled passport, that too would be a criminal offence.<sup>278</sup> Consequently, Bridgeman's current position means that he is practically excluded from Australia.

Therefore, whether the Commonwealth caused Bridgeman's practical exclusion from Australia turns on the concreteness of Bridgeman's travel plans as discussed above. If they constituted a confirmed path to Australia, it would be that the Commonwealth's cancellation of his passport is the reason for his inability to enjoy abode in Australia. In that case, s 22 of the *APA* (which provides for the Minister to cancel passports) would be read down so as to not

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<sup>272</sup> See above Part II.

<sup>273</sup> *Ibid.*

<sup>274</sup> *Abdelrazik* [2010] 1 FCR 267, 330–1 [151] (Zinn J), quoting *Kamel* [2009] 4 FCR 449, 459 [14]–[15] (Décary JA).

<sup>275</sup> 'How Does a Queensland Teen end up Stuck in Syria With a Cancelled Passport?', above n 19.

<sup>276</sup> 'Qld Teenager Stranded in Syria: Lawyer', above n 14.

<sup>277</sup> *APA* s 32(1).

<sup>278</sup> *Ibid.*

authorise the cancellation of Bridgeman's passport. The cancellation would thereby be quashed.

B *The Right to Have the Commonwealth Consider Requests for Protection*

Also established above was that it is arguable that the Commonwealth has an obligation to consider a constitutional citizen's request for a passport or travel document (insofar as they are forms of positive protection). The *APA* is read down as not authorising failures to consider such requests. At this stage, Bridgeman's passport has been cancelled and he has neither made a request for a new one nor requested travel documents. His lawyers have appealed his passport cancellation and have said that they 'do not ask for help and have never asked for help' of the Commonwealth.<sup>279</sup> However, if Bridgeman made a request for a passport or replacement travel documents, the Commonwealth would have to consider it. This means that the request will not be treated cursorily and be given proper, genuine, and realistic consideration.<sup>280</sup>

At present, the Commonwealth's conduct is at most merely illustrative of its inclination as to whether it would properly consider a request from Bridgeman that it provide him positive protection in the form of a passport or travel documents. Furthermore, an added degree of difficulty exists in ascertaining whether the Commonwealth would consider a request for positive protection from Bridgeman. This is because the Minister for Foreign Affairs and the Department of Foreign Affairs and Trade ('DFAT') have stated that they will not comment on the details of Bridgeman's particular matter.<sup>281</sup> DFAT has represented that it may not provide consular assistance to Australians in Syria.<sup>282</sup> Additionally, the Minister for Foreign Affairs has said that the Commonwealth cannot facilitate the safe passage of people out of conflict zones.<sup>283</sup> The Commonwealth's claimed inability to provide Australians protection in Syria suggests an inclination that it would be less likely to consider a request for it from Bridgeman, if he were to make one. However, this is an inference at most. Despite the fact that the Commonwealth has stated it may not provide consular assistance to Australians in Syria, it must still duly consider requests to do so. The very fact that the

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<sup>279</sup> 'Queensland Teenager Oliver Bridgeman Appeals Against Decision to Cancel Passport While in Syria', above n 10.

<sup>280</sup> See above n 257 and accompanying text.

<sup>281</sup> See Bavas, above n 9; see also Sam McKeith, 'Australian Teen Oliver Bridgeman Calls Passport Cancellation "A Big Joke"', *The Huffington Post Australia* (online), 13 March 2016 <[http://www.huffingtonpost.com.au/2016/03/12/bridgeman\\_n\\_9447294.html](http://www.huffingtonpost.com.au/2016/03/12/bridgeman_n_9447294.html)>.

<sup>282</sup> McKeith, above n 281.

<sup>283</sup> 'Government Defends Decision to Cancel Passport of Queensland Teenager in Syria Oliver Bridgeman', above n 9.

Commonwealth has cancelled Bridgeman's passport also illustrates disinclination on its part to provide Bridgeman positive protection, particularly in the form of a passport or travel documents. Nevertheless, this does not necessarily mean that the Commonwealth will not properly consider a forthcoming request for positive protection in the form of a passport from Bridgeman. Thus, it remains to be seen whether Bridgeman will make a request to the Commonwealth for positive protection in the form of a passport. Whether the Commonwealth would duly consider such a request also remains to be seen.

## VIII CONCLUSION

Passport law in Australia is an area which has attracted relatively little attention in case law and scholarship. Accordingly, there is scope for passport law to develop and be the basis for legal innovations. This is particularly the case when one appreciates that passport decisions may have the profound impact of excluding citizens from their country. Passport law could evolve to be the basis for the protection of critical rights. This is perhaps less the case with administrative law in comparison to constitutional law.

In relation to administrative law and passports, whilst there has been a trend towards widening the ambit of judicial review in passport decisions, procedural fairness remains a notoriously problematic issue where decisions involve an element of national security. This was the core theme of Part III of this article.

As subsequent Parts illustrated, passports may form the basis for innovative developments of constitutional law in Australia, particularly with respect to the concept of constitutional citizenship. Scholarship to date has already divined the theoretical bases of constitutional citizenship and suggested that it might carry substantive rights, such as a right of abode.<sup>284</sup> However, little (if any) scholarship has shown that constitutional citizenship may have *practical* ramifications. The core contention of this article was that constitutional citizenship can have practical ramifications, one area of which may be with respect to passport decisions. Such developments can be supported by precedents in comparable foreign jurisdictions, as can be seen with *Abdelrazik*.

Comparable foreign jurisdictions also provide useful precedents in relation to other rights, such as a right to diplomatic protection. As this article showed, this is another right that may flow from constitutional citizenship. As the law

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<sup>284</sup> Irving, above n 24, 141.

presently stands, it is at least arguable that constitutional citizens have an enforceable right that the Commonwealth consider their requests for positive protection (one form of which is the provision of passports or travel documents). Future scholarship may need to account for developments in the law in this respect, particularly if the submission is ever made before the courts again and a position is definitively taken.

These limits on legislative power elucidated above can apply to practical cases. One such example, as Part VII exposed, could be that of *Oliver Bridgeman*. However, passport decisions are merely one realm in which constitutional citizenship may have implications. It is now open for further scholarship to examine additional rights of the status and their implications in other contexts of governmental power.