

# To pass freely without let or hindrance

**W**hile for most of us obtaining a passport is a relatively straightforward, if occasionally tedious, process, two recent examples have highlighted the fact that this is not always the case.

The cases of Pixie Skase and Mamdouh Habib, while arising in different circumstances, highlight the fact that in many cases citizenship and the right to a passport constitute privileges and not rights. Furthermore, the two examples raise a number of human rights issues under Article 12 of the International Covenant on Civil and Political Rights (ICCPR), including deprivation of entry to, and prohibition of exit from, one's own country.

## Pixie Skase

In 1991, following the collapse of his economic empire, and with personal debts of \$170 million and corporate debts of \$1.7 billion, Christopher Skase fled to Spain with his wife Pixie to escape charges of corporate mismanagement, including the misuse of \$19 million of company funds.

In 1998, both Mr and Mrs Skase renounced their Australian citizenship and vowed never to return to Australia, with Mr Skase famously declaring that the renunciation of his citizenship was akin to discarding a pair of old socks. Notwithstanding the above, Mrs Skase has applied to regain, and has recently been granted, her Australian citizenship, claiming that she was unaware that by taking the citizenship of another country her Australian citizenship would cease.

Under the *Australian Citizenship Act 1948 s17(1)*, a person will lose their Australian citizenship where they do an act or thing for the purpose, and having the effect, of acquiring the citizenship of another country. In Mrs Skase's case, this involved her obtaining citizenship of the Dominican Republic. However, under s23AA, where a person can prove, *inter alia*, that at the time the person did the act or thing, the person did not know that they would cease to be an Australian citizen, the person may make a declaration outlining the same. On the making of such a declaration, the Minister may, at his discretion, register the declaration, at which time that person's citizenship will be reinstated.

In deciding Mrs Skase's recent application to the Administrative Appeals Tribunal,<sup>1</sup> Deputy President SA Forgie's reasoning was based largely on whether Mrs Skase knew that obtaining Dominican citizenship would result in the loss of her Australian citizenship. The Deputy President ultimately decided that Mrs Skase did not know that her actions would result in the loss of her citizenship, and further that Mrs Skase was unaware until several years after the event that such a loss had occurred. It was further held that, based largely on Mrs Skase's family and other connections with Australia, the discretion to register Mrs Skase's declaration should be exercised. In doing so reference was also made to the fact that Mrs Skase ought not to be punished for the actions of her husband, which would be the case were the application rejected.



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Ultimately, although Mrs Skase was successful in her application, her example highlights the fact that, while citizenship may be easily discarded, it is far more difficult to reattain, especially where there is no innocent or necessary reason for having done so in the first place.

## Mamdouh Habib

While Pixie Skase's example highlights the difficulties that may be faced by a former Australian citizen seeking to regain their erstwhile citizenship, the case of Mamdouh Habib highlights the more disturbing way in which an Australian citizen may have their rights to a passport curtailed.

On his return to Australia, former Guantanamo Bay detainee Mamdouh Habib was advised that his passport had been cancelled and, given the circumstances in which the cancellation occurred, there is little likelihood that Mr Habib will be successful in having his passport reinstated.

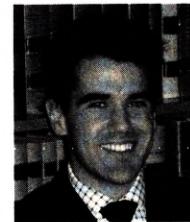
The right to freedom of movement, including the right to leave any country, including one's own, is enshrined in the ICCPR. However, this human right is qualified in circumstances where, *inter alia*, pursuant to law, those rights must necessarily be curtailed for the protection of national security, or the rights and freedoms of others.

Under the *Passports Act 1938 s7*, there is a general presumption that all Australian citizens are entitled to be issued with a passport. However, consistent with the ICCPR, this entitlement is subject to certain qualifications including, under s7E, circumstances in which the Minister:

- (a) has formed an opinion that, if an Australian passport were issued to a person, that person would be likely to engage in conduct that:
  - (i) might prejudice the security of Australia or of a foreign country;
  - (ii) might endanger the health or physical safety of other persons, whether in Australia or in a foreign country; or
  - (iii) might interfere with the rights and freedoms of other persons, as set out in the International Convention on Civil and Political Rights, whether in Australia or in a foreign country; and
- (b) considers that, in the circumstances, action to prevent that person engaging in that conduct should be taken by way of not issuing an Australian passport to that person."

An equivalent provision exists under s8(1B) in relation to the cancellation of passports.

While it is not difficult to understand the logic and necessity of such a provision, the broad and potentially arbitrary nature of the section does raise concerns. The provision does not require the Minister to form a reasonable belief that the person is a threat to national security, but rather simply provides the Minister with a veritable



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# Hello Legal Profession Act 2004



Tory Strong

**N**o one is pretending it's riveting, exciting, plot-driven drama, but all young lawyers should have a good understanding of the new *Legal Profession Act 2004* and the main changes it brings to the profession in Victoria.

It is, after all, the backbone of the way the profession is defined, regulated and managed in the state. So whatever your recollection of the Act – probably based on the semester at university spent on professional conduct, it's time for a quick refresh.

"It is a bit dry," said LIV president and former Young Lawyers' president Tory Strong. "But the LIV recognises that all practitioners need to be across the basics of the new Act."

"We've got a number of information resources available to help – including print and an interactive online Q and A facility. Everything is available online – from the Act to the summary information, so it's very easy to access," she said.

The major reforms introduce a new regulatory system for the legal profession and also pave the way towards a unified, national profession.

A significant development will be the provision for local practising certificates to be valid

in jurisdictions across Australia, easing the administrative burden for solicitors practising across state and territory borders in other jurisdictions.

Apart from this, practising certificate types remain essentially the same, with the exception of a new type of practising certificate for volunteers at community legal centres and there will no longer be an incorporated practising certificate.

Practitioners who take out their first practising certificate after the commencement of the Act will be subject to a supervised practice requirement, regardless of when they were admitted to practice.

However, the new Act has important implications for all areas of practice, including:

- regulation via the new Legal Services Board and Legal Services Commissioner;
- trust money;
- costs agreements;

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*carte blanche* to impose the restrictions on any person who, in the Minister's opinion, falls within that category.

Furthermore, while the legislation granting the Minister with the power makes reference to upholding the rights and freedoms of the ICCPR, the arbitrary cancellation of Mr Habib's passport without due process is difficult to reconcile with the overall aims of the treaty.

Ultimately, Mr Habib's case highlights the fact that, while a passport may be easily obtained by the majority of Australians, the right to obtain same may be withheld in certain circumstances, and often without any clear evidence or due process.

Therefore, while the problems faced by Mrs Skase and Mr Habib arise from entirely different bases, they do seek to highlight the many issues that surround Australian citizen-

- fidelity cover;
- incorporated legal practice;
- multi-disciplinary partnerships;
- practising certificates; and
- changes in terminology.

The overhaul of the regulatory regime will result in the Legal Practice Board and the Legal Ombudsman being abolished and replaced by a Legal Services Board and a Legal Services Commissioner.

The new structure will involve:

- the Legal Services Board being the peak regulatory body responsible for funding, policy-setting and all non-disciplinary regulatory functions;
- the Legal Services Commissioner, who will be CEO to the Board, being responsible for investigating complaints, prosecuting solicitors and barristers over conduct matters, and resolving disputes;
- the Victorian Civil and Administrative Tribunal (VCAT) taking over the functions of the Legal Profession Tribunal and being the venue for hearings;
- the commissioner being the single entry point for complaints against the legal profession. Previously complaints could be taken to the Legal Ombudsman, the Law Institute of Victoria (LIV) or the Victorian Bar;
- the commissioner being able to delegate investigations to the LIV and the Victorian Bar; and
- the associations no longer making decisions whether to prosecute or dismiss a case, but instead making a recommendation to the commissioner.

## Need more information?

Practitioners are encouraged to have a look at a copy of the new Act (available from the LIV Library, Bookshop or website), however, there are three ways the LIV can assist you to become familiar with the changes which come into effect in July.

Get a copy of our detailed *Goodbye Legal Practice Act 1996 Hello Legal Profession Act 2004* booklet. The free booklet was mailed directly to all practitioners in April with the latest RPA News. Copies are also be available from the LIV.

Go to the *Legal Profession Act Questions and Answers* section of our website at [www.liv.asn.au/regulation/ar/](http://www.liv.asn.au/regulation/ar/). There you can find the booklet in PDF format, post a question and read other members' questions. All posted questions will carry LIV answers.

Call us for assistance on ph 9607 9423. ■

ship rights. Moreover, as the current global climate promotes increasing issues in this area of law, further situations of this type will undoubtedly continue to arise. ■

1. *Skase v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 308 (8 April 2005).

## References

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 "Give me my passport back, says Habib", *The Sydney Morning Herald* (Sydney), 4 February 2005.

