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## The Law And The Little Boy

By [Nick Olle](#) December 11, 2013

The newborn baby boy of an asylum-seeking Rohingya family is posing serious questions of the Australian government and, potentially, the Australian judiciary. What duties does Australia owe a stateless child born on the nation's soil? We asked five of the country's leading legal experts.

Last month, an asylum-seeking Rohingya family of five made headlines around Australia when it was revealed that the 31-year-old mother, Latifar, was **sent back to detention** in Brisbane for 18 hours a day while her newborn baby boy, Ferouz, remained in hospital with respiratory problems.

The family had been held on Nauru before being moved to Brisbane amid fears of a

**Nick Olle**

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complicated pregnancy; Latifar suffers from diabetes and was thought to be expecting twins.

On Tuesday the Senate passed a motion, put forward by The Greens' Senator Sarah Hanson-Young, calling on the immigration minister Scott Morrison to give the mothers and fathers of newborn babies **unrestricted access** to their children.



MAX RIETHMULLER

The Department of Immigration and Border Protection (DIBP) allayed fears that the Rohingya family in Brisbane would be returned to Nauru at short notice, by promising to afford them full procedural fairness as they argue their case. A federal circuit-court legal challenge – against a government order to send the family back to the Pacific Island nation – has been adjourned until March 21, 2014.

In the meantime, lawyers acting for the family are now pursuing two applications specifically on behalf of “baby Ferouz”. The Refugee and Immigration Legal Service (RAILS) has already applied for a protection visa for Ferouz and, in a groundbreaking move, is also set to lodge a citizenship application on his behalf. These applications are not mutually exclusive.

The family's lawyer's Maurice Blackburn, say their clients (Latifar, her husband Niza, daughter Habiba and son Muddin) **fled violence and forced labour** in Myanmar. And, importantly, as members of the persecuted Rohingya minority, they are not recognised as

citizens by the Myanmar government.

That is to say, they are stateless.

By virtue of his parents' statelessness, the newborn Ferouz too is stateless. But his situation is different inasmuch as he was born in Australia. Lawyers say these circumstances entitle Ferouz not just to protection from the Australian government, but to Australian citizenship.

We put the following two questions to five pre-eminent legal experts.

1. What citizenship rights does a stateless child born in Australia have?
2. What is the proper legal approach for a country to take when a stateless child is born in that country and asks for protection under the Refugee Convention?

Here are their responses.

#### *PROFESSOR KIM RUBENSTEIN*

*Professor Rubenstein is director of the Centre for International and Public Law (CIPL) in the Australian National University College of Law. She is a renowned expert on Australian citizenship law and has written extensively on the topic. She was a member of the Independent Committee appointed by the then Minister for*



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*Immigration and Citizenship to review the Australian Citizenship Test in 2008 and she has appeared three times in the High Court of Australia on citizenship matters.*

### **What citizenship rights does a stateless child born in Australia have?**

The acquisition of Australian citizenship is governed by the *Australian Citizenship Act 2007 (Cth) (Citizenship Act)*.

Under this law, birth in Australia does not automatically mean that a child is an Australian citizen (unless their parent is a citizen or permanent resident). Therefore, a stateless child born in Australia does not have an automatic 'right' to citizenship.

A child born in Australia, however, may still be able to apply for a 'conferral' of Australian citizenship. The key provision of the *Citizenship Act* for people who are stateless is **section 21(8)**.

An application for citizenship under s 21(8) will be approved if the Minister for Immigration and Border Protection is satisfied that the child:

- was born in Australia;
- *is not* a national or citizen of any country;
- *has never been* a national or citizen of any country; and
- is not entitled to acquire the nationality or citizenship of a foreign country.

Apart from the first dot point, the other elements depend on the laws of other countries; that is whether another country gives that child automatic citizenship through being a child of a national or citizen of that country, or the ability to apply for citizenship by virtue of their parents' citizenship or through other means.

The Minister must also be satisfied of the identity of the child. Provided all these elements are satisfied there is no discretion for the Minister to refuse the child's application for citizenship – that is, the child has a 'right' to conferral of citizenship under s 21(8) of the *Citizenship Act*.

The child may also be eligible to apply for citizenship on other grounds. For example, if the child is granted a permanent visa (such as a protection visa), they will be eligible to apply for Australian citizenship under s 21(5) of the *Citizenship Act* which is a separate section enabling the Minister to grant citizenship to a child.

### **What is the proper legal approach for a country to take when a stateless child is born in that country and asks for protection under the Refugee Convention?**

The proper legal approach is set out in article 1 of the *1961 Convention on the Reduction of Statelessness*, which states:



COURTESY KIM RUBENSTEIN

“A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.”

Australia acceded to the *Statelessness Convention in 1973*. It entered into force in 1975 and was the result of over a decade of international negotiations on how to avoid the incidence of statelessness. Australia intended to adhere “to its obligations under the [*Statelessness Convention*] that no-one born in Australia remain stateless” by enacting the current section 21(8) of the *Citizenship Act*.

However, the difficulty in practice is determining whether the child is stateless.

Under the *Statelessness Convention*, a stateless person is one who is not considered a national by any State under the operation of its law. Conclusions published by the United Nations High Commissioner for Refugees point out that the issue “is not whether or not the individual has a nationality that is effective, but whether or not the individual has a nationality at all”. Further, the definition employs the present tense, so “the test is whether a person is considered as a national at the time the case is examined and not whether he or she might be able to acquire the nationality in the future”.

In this context, it is important to note that the words of Australia’s citizenship legislation, which focuses on entitlement to, rather than actual foreign nationality, may not align with the words of the *Statelessness Convention*. Further, the Australian Government’s citizenship policy instructions do not provide any guidance on the assessment of statelessness for the purposes of the *Citizenship Act*.

Stateless people may sometimes also be refugees. If the stateless child is a refugee, the country should comply with its protection and non-refoulement obligations under the *1951 United Nations Convention Relating to the Status of Refugees*. Statelessness alone does not engage Australia’s obligations under the Refugee Convention, but statelessness may be a relevant consideration in the assessment of protection claims.

*DAVID BENNETT AC QC*

*One of Australia’s most decorated barristers, Bennett was twice appointed as Solicitor-General of the Commonwealth of Australia by the Howard government. His efforts in this role were acknowledged when he was appointed in 2000 as an Officer within the Order of Australia and in 2008 as Companion in the Order of Australia. He has been president of both the New South Wales and Australian Bar Associations. In the words of the legal magazine *Jusitnian*, Bennett has a “stupendous High Court practice” as well as taking on pro bono and legal aid work.*



COURTESY DAVID BENNETT

### **What citizenship rights does a stateless child born in Australia have?**

The answer to Question 1 is now provided by s. 21(8) of the *Australian Citizenship Act 2007* which provides, so far as is relevant:-

Statelessness

(8) A person is eligible to become an **Australian citizen** if the Minister is satisfied that:

- (a) the person was born in **Australia**; and
- (b) the person:
  - (i) is not a national of any country; and
  - (ii) is not a citizen of any country; and
- (c) the person has:
  - (i) never been a national of any country; and
  - (ii) never been a citizen of any country; and
- (d) the person:
  - (i) is not entitled to acquire the nationality of a foreign country; and
  - (ii) is not entitled to acquire the citizenship of a foreign country.

**What is the proper legal approach for a country to take when a stateless child is born in that country and asks for protection under the Refugee Convention?**

Question 2 depends on the innumerable categories of visa and I do not know the answer.

*MICHAELA BYERS*



ELLA RUBELI/THE GLOBAL MAIL

*Michaela Byers is one of Australia's leading immigration lawyers. She is a registered migration agent and works as a lecturer at the University of Western Sydney. She is currently working on a PhD entitled "Australia's Alien Children", which examines whether the Migration Act and the Citizenship Act violate the United Nations Convention on the Rights of the Child. So far she's found 21 violations.*

**What citizenship rights does a stateless child born in Australia have?**

From my limited research on Burmese Nationality Law the ethnic group of Rohingyas are not recognised and they are **denied Burmese nationality**. Therefore, it would be prudent for the legal representatives of the child to make an

application under s.21(8) of the *Australian Citizenship Act 2007*. It would appear that the child could satisfy the s.21(8) criteria.

The child being granted Australian citizenship does not get the parents out of jail. The parents will need to be screened in and do their own protection visa application and endure the refugee processing system. Depending on their date of entry to Australia the system varies, e.g. if they arrived in Australia after 19 July 2013 they will not be allowed to make a protection visa application and could be sent to either Manus Island or Nauru with the child if they provide consent as an Australian citizen cannot be detained.

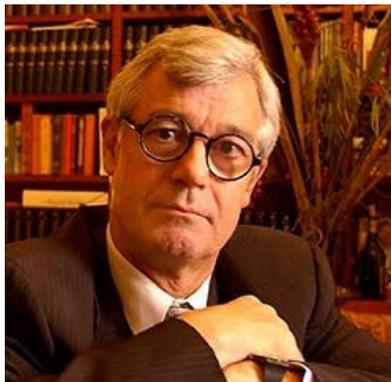
**What is the proper legal approach for a country to take when a stateless child is born in that country and asks for protection under the *Refugee***

## **Convention?**

I would advise against filing in court as the Koroitamana precedent of the High Court of Australia found that the Australian Parliament can treat stateless persons as aliens.

*JULIAN BURNSIDE AO QC*

*The bulk of Burnside's resume is taken up by commercial litigation, trade practices and administration, but he is also regarded as one of Australia's leading advocates for refugees and asylum seekers. In 2009 he was appointed as an Officer of the Order of Australia for his work as a human rights advocate as well as his services to the arts and the law.*



COURTESY JULIAN BURNSIDE

## **What citizenship rights does a stateless child born in Australia have?**

If a stateless child is born in Australia and, at the time of their birth, has at least one parent who is either an Australian citizen or permanent resident, that child is entitled to Australian citizenship. They are also entitled to citizenship if they are born in Australia and live there as an ordinary resident for 10 years (*Australian Citizenship Act, section 12*).

If a stateless child does not meet the requirements set out in section 12 there is at least one other provision through which they may be granted citizenship. Section 21(8) of the Act provides that a person is eligible to become an Australian citizen if the Minister is satisfied that:

(a) the person was born in Australia; and

(b) the person:

i is not a national of any country; and

ii is not a citizen of any country; and

(c) the person has:

i never been a national of any country; and

ii never been a citizen of any country; and

(d) the person:

i is not entitled to acquire the nationality of a foreign country; and

ii is not entitled to acquire the citizenship of a foreign country.

In the circumstances of the Rohingya infant recently in the news, in my opinion those criteria are very likely satisfied, with the possible exception of (d). But I think it would be very difficult for the Minister to be satisfied that the infant is entitled to nationality or citizenship of another country.

## **What is the proper legal approach for a country to take when a stateless child is born in that country and asks for protection under the Refugee Convention?**

When the person is a refugee infant, the Minister's approach to those criteria should

be tempered by the following international human rights instruments to which Australia is a party:

- Universal Declaration of Human Rights:

s15(1) “Everyone has the right to a **nationality**.”

- International Covenant on Civil and Political Rights:

s24(3) “Every child has the right to acquire **nationality**.”

- **Convention on the Rights of the Child:**

7(1) “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”

8(1) “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”

The Minister should treat very seriously any application on behalf of the infant for citizenship. The infant would be entitled to natural justice before the question of citizenship is decided. That is, the infant’s parents (or someone on their behalf) would be entitled a proper hearing so they can explain the infant’s position to the Minister.

Pending resolution of the question of citizenship, the Minister should not remove the infant from Australia, because that could only be done lawfully if the infant is a non-citizen and the Minister would be wrong to pre-judge that question.

Equally, the Minister should not remove the parents from Australia until the question of the infant’s citizenship is determined. This is so for two reasons. First, because doing so would split the family, contrary to the provisions of the *Convention on the Rights of the Child*. Secondly, if he did so it would prejudice the infant’s ability to make the case for citizenship; but in addition, the Minister would then become the guardian of the infant and would be faced with the difficult position of having to put to himself the arguments for citizenship which the infant’s parents would otherwise have put.

*GILLIAN TRIGGS*

*Emeritus Professor Gillian Triggs is the president of the Australian Human Rights Commission (AHRC). Formerly a barrister, she has combined an academic career with international commercial legal practice. She has worked with governments and international organisations on human rights law and hopes through the AHRC to focus on the implementation in Australian law of the human rights treaties to which Australia is a party.*

### **What citizenship rights does a stateless child born in Australia have?**

Any child who is born in Australia to parents who are not Australian citizens or permanent residents will become an Australian citizen automatically after residing in Australia for



COURTESY GILLIAN TRIGGS

10 years.

A stateless child born in Australia may also apply for citizenship at any time on this basis (see section 21(8) of the *Australian Citizenship Act 2007 (Cth)*). In order for a person to be eligible to make an application on this ground, they must be born in Australia, not be or have been a national or citizen of any country, and not be entitled to acquire nationality or citizenship of a foreign country.

The *Australian Citizenship Act* sets out the requirements that would have to be satisfied in order for an application to be approved by the Minister.

### **What is the proper legal approach for a country to take when a stateless child is born in that country and asks for protection under the Refugee Convention?**

The Refugees Convention applies to people who are outside the country of their nationality (or, in the case of stateless persons, outside the country of their habitual residence) owing to well-founded fear of being persecuted for particular reasons. If a child is born in Australia to stateless parents who are fleeing persecution elsewhere and are seeking protection under the Refugees Convention, then the child should be considered for protection as part of the same application.

Australia is also a party to the Convention relating to the *Status of Stateless Persons (1954)* and the *Convention on the Reduction of Statelessness (1961)*. The 1954 Convention provides in article 31 that States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.

The Commission has recommended that the Australian Government should develop a formal statelessness determination mechanism which recognises both de jure and de facto statelessness, and establish administrative pathways for the grant of substantive visas to stateless persons who have been found not to be refugees or otherwise owed protection.

The Commission's views on this issue have been published in a [report](#) in July 2012 on community arrangements for asylum seekers, refugees and stateless persons. The then Department of Immigration and Citizenship provided a [response](#) to the recommendations in this report.

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#### **1 COMMENT ON THIS STORY**



by Marilyn

During the case of Singh in 2004 Mazhar Bakhtiyari was joined to the case, if Afghanistan had denied him citizenship he could have applied here but the Afghan government said he was a citizen.

He was still forcibly and illegally deported to Pakistan by Vanstone while she had a letter