[HIGH COURT OF AUSTRALIA.]

DONOHOE . . . . . APPELLANT;
INFORMANT,

AND

WONG SAU . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF QUARTER SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1925.

SYDNEY, *April* 17.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Immigration—Immigrant—Chinese born in Australia—Person returning to home in Australia—Marriage to Australian—Immigration Act 1901-1920 (*No.* 17 *of* 1901—*No.* 51 *of* 1920), *sec.* 3.

Where a person born in Australia has left the Commonwealth, the question whether when he attempts to re-enter the Commonwealth he is an immigrant within the meaning of the *Immigration Act* 1901-1920 depends on whether he is as a fact coming back to Australia as to his home.

Potter v. *Minahan*, (1908) 7 C.L.R. 277, applied.

APPEAL from a Court of Quarter Sessions of New South Wales.

Lucy Wong Sau was prosecuted at the Central Police Court, Sydney, on the information of John Thomas Tamplin Donohoe, charging that she was a prohibited immigrant within the meaning of the *Immigration Act* 1901-1920 in that within three years after she had entered the Commonwealth, having been required to pass the dictation test within the meaning of the Act, she failed to do so and was found within the Commonwealth in contravention of the Act.

At the hearing the following facts were deposed to :—The father of the defendant was On Hing, a native of China, who obtained a certificate of naturalization at Gulgong in New South Wales on 8th May 1875. On Hing owned certain land in New South Wales and carried on business at Gulgong as a storekeeper. On 12th January 1879 On Hing married Wah You, a native of China, at Sydney; and they lived at Gulgong, where the defendant was born on 20th March 1883. On Hing and his family belonged to the Church of England. In 1889 On Hing and his wife and some members of their family, including the defendant, went to China, he then being in ill health, and they lived at Goomfoo on land which belonged to him. His ill health continued, and he died in 1902. After his death the defendant continued to live at Goomfoo with her mother until the death of the latter about 1908, and, after her mother's death, with her brother and sister. About 1910 the defendant's birth certificate was procured for her and sent to her. In 1917 the defendant was married at Goomfoo to a Chinese named Wong Sau, who was a market gardener residing and domiciled in New South Wales and who had gone for a trip to China. The marriage was according to the Chinese custom, there being no English missionaries at any place nearer to Goomfoo than Canton and Hong Kong, a day's journey by steamer. Five months after the marriage Wong Sau returned to Australia. On 21st August 1924 the defendant arrived in Australia, and at that time could not speak English.

The Stipendiary Magistrate before whom the information was heard convicted the defendant and sentenced her to imprisonment for six months. The defendant appealed to the Court of Quarter Sessions at Sydney, which upheld the appeal and quashed the conviction.

From that decision the informant now, by special leave, appealed to the High Court.

Bavin A.-G. for N.S.W. (with him *Bowie Wilson*), for the appellant. On the evidence the only conclusion which can properly be arrived at is that the respondent was an immigrant within the meaning of the *Immigration Act* 1901-1920. The test of whether a person is

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an immigrant or not is whether at the time when he enters the Commonwealth he is a member of the Australian community and one of whom it can be said that he is coming to his home (*Potter* v. *Minahan* (1)). That test was not modified in *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (2). Neither of those cases supports the view that the mere fact that a person was born in Australia is conclusive as to whether he is an immigrant or not. Here there is no evidence of anything which brings the respondent within the category of persons who are members of the Australian community. From the time her father took her to China she practically discontinued her identification with Australia, and, except for the sending to Australia for her birth certificate, she had never indicated any intention of returning there.

E. M. Mitchell (with him *Cassidy*), for the respondent. The Court of Quarter Sessions did not act on a mistaken view that in *Potter* v. *Minahan* (3) it was decided that the fact that a person was born in Australia conclusively showed that that person was not an immigrant. The question here is one of fact only, namely, was the respondent returning to Australia as to her home. On the evidence the conclusion may be drawn that when the respondent's father took her to China he intended to return to Australia where his home was, and was prevented from doing so only by his illness. So that at the time of his death in 1902 the respondent would not have been an immigrant if she had then returned to Australia. There is no evidence of any events that afterwards happened which deprived her of her right to re-enter Australia. The conclusion might properly be arrived at that the respondent's birth certificate was obtained on her behalf, and an inference might properly be drawn that she obtained it for the purpose of returning to her home in Australia. Assuming that in 1917 the respondent was not disqualified from entering Australia, there could be no stronger fact to identify her with Australia than her marriage with an Australian. If she believed that the marriage would be valid in Australia, the fact that it would not be valid is immaterial.

(1) (1908) 7 C.L.R. 277, at pp. 289, 298, 302, 308, 318.
(2) (1923) 32 C.L.R. 518, at pp. 531, 565, 580.
(3) (1908) 7 C.L.R. 277.

KNOX C.J. In this case I do not think that any question of law arises. It is a bare question of fact, and on the facts I think that the proper inference is that the respondent, in attempting to enter Australia, was not coming home and for that reason was an immigrant. The question of law which the Attorney-General said at the commencement of his argument that he desired to raise does not arise at all. I do not think that the District Court Judge ever imagined, certainly he never said, that the mere fact that a person was born in Australia prevents him being an immigrant within the meaning of the Act whenever after an absence from Australia he desires to come back there. On the facts I think an inference ought to be drawn opposed to the decision of the District Court Judge, and that the appeal should be allowed.

ISAACS J. I agree that the appeal ought to be allowed; but I take a more serious view of the case because the District Court Judge said: "So far as it is a question of fact, I find that she is not in the ordinary acceptation of the word an immigrant, and as a question of law that she is not an immigrant within the meaning of the *Immigration Act* 1901-1920." Of course a Court has no feeling in the matter, but has simply to administer the law on the facts before it. But I do recognize that this Act, which is a very important one in the policy of Australia, may easily be rendered futile if it is not properly administered.

The test of whether a person is an immigrant or not I endeavoured to express in *Potter* v. *Minahan* (1) in these words :—" The ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not at that time a constituent part of the community known as the Australian people. Nationality and domicil are not the tests; they are evidentiary facts of more or less weight in the circumstances, but they are not the ultimate or decisive considerations." Further on I said that the circumstances which constitute actual domicil " may also prove the only important and ultimate fact, namely, that the person claiming entry has still his real home in Australia, and is therefore one of its people." I mention this because I understand that some doubt has been

(1) (1908) 7 C.L.R., at p. 308.

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Isaacs J.

suggested as to the meaning of that case. I also said (1): "There is not, in my opinion, any proper test but this practical one, namely, whether the whole of the facts show that at the moment of entry the person desiring to be admitted is fairly to be considered as one of the people of the Commonwealth, and whether, notwithstanding any personal absence from Australia, he can justly and in substance claim to regard this country as a place of habitation or general residence which he had never abandoned." I regard the *test* as being whether the person is a *constituent part of the Australian community*. If that question is answered in the affirmative, this is that person's real home in the relevant sense; if it is answered in the negative, it is not his real home in the relevant sense whatever it may be in the sense of domicil. Therefore I think it is important that the law should be thoroughly understood.

Applying that to the facts of this case, if it were a matter upon which different minds might reasonably draw different conclusions, I should not regard the case as so important, but in my opinion the facts are reasonably susceptible of only one conclusion, namely, that the respondent was not at the time of her entry into the Commonwealth a member of this community. She was not Australian in point of language, bringing-up, education, sentiment, marriage, or of any of those indicia which go to establish Australian nationality. Under those circumstances this is a matter of law because the question is susceptible of only one answer.

I therefore think that the appeal should be allowed.

HIGGINS J. I concur with the conclusion of my learned brothers. I think the Chief Justice has hit the nail on the head when he said that the respondent was not coming home. The more I think of it the more I am persuaded that that is the test, or the nearest thing to a test, in such a case as the present: Was the respondent coming as to a new home, or was she coming as to her old home? I think she was coming as to a new home because she had married a husband who was living here. If anyone were to ask a member of the family in China, after the father's death and before her marriage, where was this lady's home, the answer would be surely that her home was in China.

(1) (1908) 7 C.L.R., at p. 309.

In the case of *Potter* v. *Minahan* (1) it will be noticed that there were some facts which were not present in this case. The father in that case took the birth certificate with him to China when leaving Australia; and the mother of the child was an Australian of European stock. In this case the mother of the respondent was Chinese, and there is not the slightest evidence of anything Australian about the respondent except her birth. She could not even speak a word of English.

I have come to the conclusion that the respondent was an immigrant within the meaning of the Act.

RICH J. I have no doubt that the respondent was not returning home as part of the Australian community. That being so, the Magistrate's finding that she was an immigrant within the meaning of the *Immigration Act* 1901-1920 was clearly right, and the appeal should be allowed.

STARKE J. I agree that the appeal should be allowed.

Appeal allowed. Judgment appealed from discharged and judgment of the Stipendiary Magistrate restored. The Commonwealth to pay the costs of the appeal pursuant to its undertaking.

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Sly & Russell.*

B. L.

(1) (1908) 7 C.L.R. 277.