[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

CARTER;

EX PARTE KISCH.

H. C. OF A. 1934.

SYDNEY, *Nov.* 15, 16.

Evatt J.

Immigration—Prohibited immigrant—Declaration by Minister—Statutory provisions—Validity—Source of information—Conclusiveness of declaration—Habeas corpus—Immigration Act 1901-1930 (*No.* 17 *of* 1901—*No.* 56 *of* 1930), *secs.* 3 (*gh*)*, 13B*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (XXVII.).

Neither the doctrine that an alien friend has no right enforceable by action to enter British territory nor the prerogative of the King to exclude an alien from his realm can operate to prevent the Court from entertaining an application of habeas corpus to inquire into the legality of the imprisonment of the alien by a private person.

Musgrove v. *Chun Teeong Toy*, (1891) A.C. 272, distinguished.

Sec. 3 (*gh*) of the *Immigration Act* 1901-1930 is a law with respect to immigration, and is therefore within the legislative power of the Commonwealth Parliament conferred by sec. 51 (XXVII.) of the Constitution.

A declaration by a Minister in which he merely refers to "another part of the British Dominions" as the source of his information, without specifying either the Dominion intended, or that the information was received by way of a Government communication, is not a declaration within the meaning of sec. 3 (*gh*) of the *Immigration Act* 1901-1930.

* The *Immigration Act* 1901-1930, by sec. 3, provides as follows:—"The immigration into the Commonwealth of the persons described in any of the following paragraphs of this section (hereinafter called 'prohibited immigrants') is prohibited, namely:— . . . (*gh*) any person declared by the Minister to be in his opinion, from information received from the Government of the United Kingdom or of any other part of the British Dominions or from any foreign Government, through official or diplomatic channels, undesirable as an inhabitant of, or visitor to, the Commonwealth." By sec. 13B:—"The master of a vessel on which a prohibited immigrant, or a person reasonably supposed to be a prohibited immigrant, is, may, with the necessary assistance, take all reasonable measures to prevent the prohibited immigrant from entering the Commonwealth from the vessel in contravention of this Act."

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Although a declaration by a Minister under sec. 3 (*gh*) of the *Immigration Act* 1901-1930 is conclusive as to the undesirability of an immigrant or visitor to the Commonwealth, it is not conclusive as to the source of the information upon which he based his opinion.

ORDER NISI for writ of habeas corpus.

One Egon Erwin Kisch, a national of Czechoslovakia, was prevented by Ernest Albert John Webb Carter, the master of the s.s. *Strathaird*, the vessel by which Kisch had travelled from Marseilles to Australia, from landing at any port in the Commonwealth, on the ground that he, the master, believed Kisch to be a prohibited immigrant within the meaning of the *Immigration Act* 1901-1930. Upon the arrival of the s.s. *Strathaird* at Sydney an application was made by Kisch to the High Court for the issue of a writ of habeas corpus directed to Carter. In an affidavit Kisch stated, *inter alia*, that he had not been declared a prohibited immigrant by the Government of the United Kingdom; that his passport had been vised by the British consul at Paris; and that he was detained on the s.s. *Strathaird* against his will.

The order nisi now came on for hearing.

Further material facts, and the nature of the arguments, appear in the judgment hereunder.

Piddington K.C. (with him *Parsonage*), for the applicant.

Watt K.C. (with him *A. R. Taylor*), for the Crown in right of the Commonwealth, intervener.

F. O. Ebsworth, for the respondent.

EVATT J. It is proved that the applicant is being held by the respondent, Carter, on board the s.s. *Strathaird*, now lying at a Sydney wharf. The only question upon this application to make absolute an order nisi for a writ of habeas corpus is whether the applicant's detention by the master is lawful.

The applicant is an alien friend, but, in my opinion, no question arises here as to the power or prerogative of the Crown itself to exclude an alien from the realm. The question is whether the

master of the ship has an original authority to keep the applicant under detention for the purpose of preventing his entering the Commonwealth. In *Musgrove* v. *Chun Teeong Toy* (1), the Privy Council determined that an alien did not possess a "legal right, enforceable by action" (2), or an "absolute and unqualified right of action" (3) to enter British territory. But that case is very different from the present, where the person imprisoning the alien within the territories of the Commonwealth is merely a private individual and not the Government or the Crown at all. If it were otherwise, an alien slave detained on board a vessel lying at a wharf in Australia could not obtain his liberty. *Musgrove* v. *Chun Teeong Toy* (1) has no application to such a case as the present. Despite arguments to the contrary (*Law Quarterly Review*, vol. 6, pp. 29, 39), the *obiter dicta* in *Johnstone* v. *Pedlar* (4), indicate that the King may refuse an alien admission to the realm, and, if so, His Majesty's representative in the Commonwealth may well be deemed capable of exercising the same prerogative.

But Captain Carter, the respondent, bases his justification for the detention of the applicant, not on any exercise of prerogative power (which obviously he cannot exercise himself) but solely on sec. 13B of the *Immigration Act* 1901-1930. It provides that "the master of a vessel on which a prohibited immigrant, or a person reasonably supposed to be a prohibited immigrant, is, may, with the necessary assistance, take all reasonable measures to prevent the prohibited immigrant from entering the Commonwealth from the vessel in contravention of this Act." The issue I have to try is whether, under that statutory warrant, the master of the vessel is entitled to detain the applicant on board.

The jurisdiction of this Court was invoked because the applicant based his first and main claim upon the Constitution. He contended that his detention was not authorized, either by any valid law of the Commonwealth, or by any provision of the *Immigration Act* itself. In particular he contended that sec. 3 (*gh*), which alone is relied upon as the authority for making him a prohibited immigrant, is *ultra vires* the Commonwealth Parliament. I have come to

(1) (1891) A.C. 272.
(2) (1891) A.C., at p. 282.
(3) (1891) A.C., at p. 283.
(4) (1921) 2 A.C. 262, at pp. 276, 296.

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the conclusion that the constitutional objection is untenable, but that the proper steps under sec. 3 (*gh*) of the *Immigration Act* for declaring the applicant a "prohibited immigrant" have not been taken. The jurisdiction of this Court, once vested, is not lost by reason of the rejection of the constitutional point. See *Ex parte Walsh and Johnson*; *In re Yates* (1), where an order was made absolute on the ground of non-compliance with the statute.

I shall deal first with the question whether the applicant has been validly declared a "prohibited immigrant" under sec. 3 (*gh*).

The history of this matter is very curious. On October 15th last the Director of the Investigation Branch of the Attorney-General's Department made a report to the Secretary of the Department of the Interior in reference to the applicant. The report was put in evidence by counsel for the Commonwealth, which was allowed to intervene. The report made certain assertions about the applicant, and suggested that the information strengthened his prior recommendation that Kisch should be refused entry into Australia. The prior memorandum of October 11th was not produced, no doubt because it would tend to destroy the case suggested by the Commonwealth. However, after the report of October 15th, a person acting for the Secretary of the Department of the Interior recommended to the then Minister, Mr. Harrison, that M. Kisch be declared by the Minister to be an undesirable immigrant under sec. 3 (*gh*) and prohibited from landing. The reason stated for the recommendation was "In view of the restriction placed on this man in the United Kingdom and the other information received by the Investigation Branch from official channels."

A side note to the report of October 15th states, apparently in reference only to the identity of the applicant, "on information received from British authorities in London." I am by no means satisfied that the full explanation has been given as to this side note. It is reasonably plain that the reports both of the 11th and 15th October were prepared in the course of an inquiry commenced by the Investigation Branch, probably into the proposed activities of the Australian Anti-War Congress, referred to in the report of the 15th October. The whole course and conduct of the case satisfy

(1) (1925) 37 C.L.R. 36.

me that the information contained in these reports is not in any relevant sense "information received from the Government of the United Kingdom . . . through official or diplomatic channels," and the history of the matter places this conclusion beyond doubt.

Although on October 18th the then Minister, Mr. Harrison, approved the recommendation in the report of October 15th, such approval did not, of itself, satisfy the requirements of sec. 3 (*gh*) of the *Immigration Act*. In fact, as will appear, the Minister made no proper declaration following upon his approval of the recommendation of October 15th.

In spite of the absence of a proper declaration, Captain Carter was informed by a Customs official on November 6th, when the vessel arrived at the port of Fremantle, that the applicant was a prohibited immigrant. As a matter of law and fact he was not then a prohibited immigrant. If an application had then been made to a competent Court, the applicant should have been able to prevent the master of the vessel from hindering his freedom of movement towards shore, for, assuming that sec. 13B enables the master to prevent the landing, not only of a prohibited immigrant, but also of a person reasonably supposed to be so, such a Court should have found that, at that moment, the applicant was not a prohibited immigrant, and, after such a declaration, the master could have had no reason for continuing to suppose him to be so.

The next chapter of the affair which requires notice is that at Melbourne the applicant applied to a Supreme Court Judge for a writ of habeas corpus. In an affidavit then made on behalf of the Commonwealth by the Deputy Crown Solicitor for Victoria, it was sworn that Mr. Paterson, the Minister who succeeded Mr. Harrison, had sent a lettergram, dated 12th November, stating that on October 18th, in pursuance of sec. 3 (*gh*) of the Act, the then Minister had declared Kisch to be in his opinion undesirable "from information received from *another part of the British Dominions* through official channels." The italics are mine.

The actual declaration of October 18th, referred to by Mr. Paterson, was not produced in those proceedings. Nor was it produced in these proceedings, although counsel for the Commonwealth produced the preliminary minute of approval. In my opinion, it is clear that

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a declaration merely referring to "another part of the British Dominions," without any specification either that it is a Government communication or of the Dominion intended, cannot be regarded as a declaration within the meaning of sec. 3 (*gh*) of the *Immigration Act*.

But great significance attaches to the lettergram of 12th November, because it shows clearly that Mr. Harrison regarded his decision as proceeding upon information derived, not from the Government of the United Kingdom, not even from the Government of any British Dominion, but merely from some (unspecified) channel in some (unspecified) part of the Empire outside the United Kingdom.

At the time of the Supreme Court proceedings in Victoria, just as at Fremantle, Kisch was not a prohibited immigrant, and if the Court, on the evidence produced, had chosen so to find, the master would undoubtedly have terminated his detention of the applicant. As it was, however, the master still supposed that Kisch was a prohibited immigrant, and there was nothing in the judgment of the Supreme Court of Victoria to lead him to a contrary opinion. If "reasonably supposed" in sec. 13B means "reasonably supposed in fact" and not "reasonably supposed by the master" I think that the applicant could not be "reasonably supposed" (after the Victorian proceedings) to be a prohibited immigrant.

After the Supreme Court proceedings in Victoria had terminated, however, the present Minister made a further declaration in relation to the applicant. The master does not defend these proceedings by reference to such declaration, as his affidavit shows. The date of this last declaration is November 13th. In form it satisfies sec. 3 (*gh*). It states that the Minister's opinion was reached "from information received from the Government of the United Kingdom through official channels."

The question then arises whether sec. 3 (*gh*) makes a declaration of the Minister, in proper form, conclusive evidence that the information has been received from one of the Governments mentioned, and whether, in the absence of such fact, the declaration is valid. No doubt the discretionary power conferred on the Minister by the sub-section makes his opinion as to desirability final and conclusive.

It is contended that his declaration or opinion is equally conclusive as to the source of the information upon which he reaches a finding of undesirability.

In my opinion, this contention is erroneous. A similar provision is not easily discoverable, but the general principles of interpreting a discretionary power of a somewhat analogous character may be deduced from the judgment of *Rich* J. in *Federal Commissioner of Taxation* v. *Clarke* (1), and in *Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (2). I hold that if, in fact, the source of the information received is not one of the Governments mentioned, the Minister's declaration that it is the source is insufficient either to prove such fact or to make the person mentioned a prohibited immigrant.

In habeas corpus applications which an alien is not disentitled to make (*Johnstone* v. *Pedlar* (3); *Ex parte Lo Pak* (4)) the duty of the Court is to see if "legal ground (is) made to appear justifying detention" (per Lord *Birkenhead*; see *Secretary of State for Home Affairs* v. *O'Brien* (5)). The general onus as to the legality of detention is upon the respondent. If, as I think, the true meaning of sec. 3 (*gh*) is that there must in fact be information received from the specified quarter, and not merely a declaration to that effect, before a person becomes a "prohibited immigrant" with the liabilities and penalties attached to those answering such description, it would seem to follow that, once a substantial issue arises as to the quarter of the information, or at any rate when, as here, the applicant shows that there is, to say the very least, very strong reason for supposing that the quarter is not correctly stated in the declaration, the respondent should satisfy the Court upon the disputed point. But in the view I take, the question of onus need not be determined.

Here the Commonwealth has furnished no evidence whatever to show that the information was received from the Government of the United Kingdom, and actually withdrew the evidence it had tendered to prove the fact.

In this case the only "evidence" relied upon by the Commonwealth is that the Minister had made a declaration. The affidavit

(1) (1927) 40 C.L.R. 246, at pp. 304-306.
(2) (1932) 47 C.L.R. 621, at p. 636.
(3) (1921) 2 A.C., at p. 273.
(4) (1888) 9 L.R. (N.S.W.) 221, at p. 239.
(5) (1923) A.C. 603, at p. 610.

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of the Deputy Crown Solicitor at Sydney, which was put in evidence this morning, referred to a conversation or a statement made to him by another Commonwealth official. In the circumstances, that is not evidence upon which the Court can or should act. As Mr. Watson's affidavit did not prove the necessary fact, I invited the attention of counsel for the Commonwealth to the matter, gave him every opportunity of showing that the Minister's decision was reached "upon information received" from the quarter mentioned, and granted an adjournment for the purpose. Later, an affidavit of the Minister, Mr. Paterson, was tendered. Immediately Mr. *Piddington* sought leave to cross-examine, stating that he desired to show that the statements in the affidavit were incorrect, or made under a complete misapprehension or misinterpretation either of the facts or of the sub-section. I was loath to inconvenience the Minister, but he is not entitled to any immunity from bona fide cross-examination. I therefore indicated that I could not resist the application to cross-examine, although I made it quite clear that I reserved my opinion as to whether any question asked would be admissible or allowed. Counsel for the Commonwealth then asked leave to withdraw the affidavit, and, the two parties agreeing, I allowed such withdrawal.

In view of the history of the affair, of the report which has been put in evidence, of the lettergram which was sent to the Deputy Crown Solicitor at Melbourne by direction of Mr. Paterson, and the whole conduct of the case, I draw the inference that although, no doubt, the Minister acted in perfect good faith, believing that he was quite entitled to do what he has done, he did not form his opinion of the applicant from information received from the Government of the United Kingdom. It follows that the declaration he made is ineffective to make the applicant a "prohibited immigrant."

It must be remembered that the power conferred by sec. 3 (*gh*) is a very drastic power. The main safeguard with which Parliament saw fit to hedge around the power is that the Governments referred to, the Government of the United Kingdom, the Government of one or other of the British Dominions, or some foreign Government, shall be the authority or source from which the information is received, so that such information shall be the basis upon which the Minister forms his opinion.

Mr. *Piddington's* main contention is that the power conferred by sec. 3 (*gh*) is not warranted by the Constitution. It has to be taken as established that the legislative power of the Commonwealth in respect to the subject matter of "immigration" authorizes legislation directed to the prevention of the entry of any person who is not at the time of such entry "a member of the community of Australia," as that concept has been defined in a number of cases, including *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (1), and the case of *Ex parte Walsh and Johnson*; *In re Yates* (2). Further, the power over such subject matter authorizes the deportation of a person who is not at the time of deportation a member of the community of Australia. But persons who are or become "Australians" as that concept is defined and recognized by the cases, cannot, under the power to deal with "immigration and emigration" be prevented from entering Australia, nor can they be removed. Whether a person is an "Australian" at the time the legislative provisions for exclusion or deportation are sought to be exercised against him, is a question of fact in the determination of which all the circumstances have to be examined.

It has also been authoritatively decided that, under the power in question, persons who in fact are mere casual visitors to the Commonwealth, and have no intention of residing here, may be excluded or deported. The *Irish Envoys Case* (1) illustrates the position. I refer to the judgments of *Knox* C.J. (3), *Isaacs* J. (4), and *Rich* J. (5). *Higgins* J. took the contrary view, but was the dissentient.

These general principles being established, I ask myself the question whether sec. 3 (*gh*) travels outside the power upon the subject of "immigration." In my opinion it does not.

Mr. *Piddington* argues that the sub-section is really not a law at all, but I am satisfied that it is a law, a drastic law no doubt, but a law as to immigration. The substance of the enactment is this, that, if the Minister reaches a certain opinion as to the desirability of the immigrant or tourist, providing it is based upon information received from a certain quarter, then the immigration or the entry

(1) (1923) 32 C.L.R. 518.
(2) (1925) 37 C.L.R. 36.
(3) (1923) 32 C.L.R., at p. 533.
(4) (1923) 32 C.L.R., at pp. 555, 557.
(5) (1923) 32 C.L.R., at p. 578.

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of such person into the Commonwealth may be prohibited. Such a law is very different from that under review in the case of *Ex parte Walsh and Johnson*; *In re Yates* (1) in relation to the legislative power over trade and commerce among the States. That law provided in substance that if the Minister thought that trade and commerce amongst the States was being interfered with by a person, such person might be deported. The distinction between that alleged law and sec. 3 (*gh*) is this, that in the former case the opinion of the Minister as to the given subject matter was being treated as a substitute for the subject matter itself. Though trade and commerce among the States might not have been interfered with in any way by the person in question, that person was to be deported. It was determined that such a law was not one "with respect to" such commerce. Here it is quite different. Sec. 3 (*gh*) operates only upon persons who are in fact immigrants or visitors—that is to say persons who are not members of the Australian community. Such persons may lawfully be excluded from Australia for a short time, or for a long time, or for ever. When the Act says that some of such persons, the class being indicated in sec. 3 (*gh*), may be lawfully excluded, the statute is dealing with the arrival of non-Australians, i.e., persons not members of the Australian community. Sec. 3 (*gh*) proceeds upon the basic fact involved in all immigration.

It is true that the power is drastic in character. But it is no more drastic than the power mentioned in sec. 3 (*a*), which enables non-Australians coming to Australia to be made prohibited immigrants if they fail to pass a dictation test. In such a case, as in sec. 3 (*gh*), the person concerned does not, or may not, know the language in which the test is to be applied. In fact, as we all know, the dictation test was a means devised in order to confer a discretion upon the authorities concerned with the administration of the Act. I fail to see any wider exercise of power in sec. 3 (*gh*) than in sec. 3 (*a*).

I appreciate what Mr. *Piddington* says in reference to sec. 3 (*gd*), which refers to persons advocating the overthrow by force or violence of the Commonwealth, &c. That sub-section may be regarded as

(1) (1925) 37 C.L.R. 36.

suggesting that in sec. 3 (*gh*) the Parliament was looking to some other ground of exclusion than such advocacy. But overlapping between such provisions as sec. 3 (*gh*) and sec. 3 (*gd*) may, and perhaps must, occur. The power conferred by sec. 3 (*gh*) may be exercised upon grounds which, if true in fact, would be covered by sec. 3 (*gd*). There is nothing in that possibility which affects the validity or interpretation of sec. 3 (*gh*). Mr. *Piddington* also illustrated the extensive nature of the operation of sec. 3 (*gh*) by reference to *Darnel's Case* (1), where the return to the writ of habeas corpus was that the applicant was being detained by the special command of His Majesty. It is perfectly true that that was a bad return to the writ, despite the decision of Sir *Nicholas Hyde*. But that was because the common law gave no general authority to the King to detain a person in custody. Here we have the intervention of a statute which purports to give the power, and the only question is whether it is within the constitutional domain or subject of immigration.

I therefore hold that sec. 3 (*gh*) is valid.

It is admitted that an order should be made if the applicant is not at the present moment a "prohibited immigrant." The reason for this should be explained. It is true that, under sec. 13B, the master of a vessel on which a person reasonably supposed to be a prohibited immigrant is, may take all reasonable measures to prevent him from entering the Commonwealth from the vessel. But, so soon as it is determined by a competent Court that the person is not a prohibited immigrant, then, as has been conceded, it is perfectly clear that the master will no longer have any justification for detaining him on the vessel. In other words, after a decision of a competent tribunal in appropriate proceedings that the person detained is not a prohibited immigrant, sec. 13B does not, in my opinion, authorize the master to detain him longer, for he is neither a prohibited immigrant nor a person *reasonably* supposed to be such. Otherwise the perfectly absurd position would result that the master would be empowered to detain immigrants or visitors aboard his vessel after they had been adjudged not to be prohibited immigrants at all, solely because he chose to continue to believe them to be such.

(1) (1627) 3 State Trials 1.

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It should be observed that under sec. 13B the master may take all reasonable measures to prevent the entry into the Commonwealth of " the prohibited immigrant " only, and not " the person reasonably supposed to be a prohibited immigrant." It would seem that in sec. 13B Parliament started out with the intention of giving an authorization in respect also of persons reasonably supposed to be prohibited immigrants. The verbiage of the section seems hardly equal to the task of carrying out the intention, but I am assuming for the purpose of this judgment that the master's authorization extends to both classes.

It follows that I am bound to direct the master no longer to detain the applicant in custody. No doubt if it is decided by the Government itself to act, relying upon any power vested in it by the statute or by virtue of the royal prerogative, such powers are still available. But this is an application between one individual and another, and it is only as an incidental part of the proof in the necessary inquiry as between Captain Carter and the applicant that the question of the validity of the declaration of November 13th comes into the case. It is not directly in issue as between the Minister and the applicant, and the alien is not directly challenging the exercise of the executive power.

The Commonwealth is not a party to the present proceedings, and the respondent Carter was not its servant or agent.

I again desire to make it perfectly clear that every opportunity has been given in order to enable the essential or basic condition of sec. 3 (*gh*) to be proved. The matter was mentioned yesterday, and again this morning, when Mr. Watson's affidavit was tendered. It should not be assumed that there is any reflection whatever upon the bona fides of the Minister. All the probabilities are that there has been a mistake or mis-information. The initial error was that no proper or even plausible declaration existed when M. Kisch arrived in Australia. In spite of this, Captain Carter was misinformed that the applicant was a prohibited immigrant. From that time on there has been an attempt to repair a position which was almost irreparable. For, so soon as it is appreciated (1) that despite the words appearing on the margin of the report of October 15th, no communication from the Government of the United Kingdom had

been received, as the first declaration mentioned in the lettergram of November 13th shows, and (2) that the present Minister must have acted upon the report of October 15th (or upon the earlier or other reports which have not been produced), the only reasonable conclusion is that the present Minister has misinterpreted the marginal reference in the report of October 15th as showing the existence of information proceeding from the Government of the United Kingdom. Mr. Harrison did not so understand the report nor do I. The history of the matter, and the conduct of the case alike convince me that the Minister's opinion did not in fact proceed "upon information received from the Government of the United Kingdom through official channels."

For the reasons I have given I make the order absolute with costs.

I direct that the applicant be released from detention by the respondent Carter without the issue of a writ of habeas corpus. I also order that so much of the order nisi as directed that pending the hearing the applicant should not be removed from his present custody, be discharged.

Order accordingly.

Solicitors for the applicant, *C. Jollie Smith & Co.*

Solicitors for the respondent, *Ebsworth & Ebsworth.*

Solicitor for the intervener, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

J. B.