substantial reiteration of the discussion in their judgments on these questions. In the view which I have taken on these two questions it is unnecessary to decide whether the source of the income was in New South Wales.

Appeals dismissed with costs.

Solicitors for the appellant, *A. J. McLachlan & Co.*

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.

H. C. OF A. 1936-1937.

BROKEN HILL SOUTH LTD. *v.* COMMISSIONER OF TAXATION (N.S.W.).

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

DAVEY AND OTHERS;

EX PARTE FREER.

H. C. OF A. 1936.

SYDNEY, *Dec.* 4.

EVATT J.

Immigration—Prohibited immigrant—Dictation test—Failure to pass—No attempt made by immigrant—Language, by whom to be chosen—Suitability or desirability of immigrant—Decision of Minister—Review by court—Certificate of health—Immigration Act 1901-1935 (*No.* 17 *of* 1901—*No.* 13 *of* 1935), *secs.* 3 (*a*), 3J, 14*.

A passage of not less than fifty words in the Italian language was dictated to an immigrant by a person duly authorized under sec. 3 (*a*) of the *Immigration Act* 1901-1935. The immigrant, who deliberately prevented herself from hearing the dictation, refused to, and did not in fact, write any words in the Italian or any language.

* The *Immigration Act* 1901-1935 by sec. 3 provides:—Sec. 3: "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:—(*a*) any person who fails to pass the dictation test: that is to say, who, when an officer dictates to him not less than fifty words in any prescribed language, fails to write them out in that language in the presence of the officer or authorized person." Sec. 3J: "The Minister may, if he thinks fit, prevent an intending immigrant from entering the Commonwealth, notwithstanding that a certificate of health has been issued to the intending immigrant." Sec. 14: "Every officer may with any necessary assistance prevent any prohibited immigrant, or person reasonably supposed to be a prohibited immigrant, from entering the Commonwealth."

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Held that the immigrant had failed, within the meaning of sec. 3 (*a*), to pass the dictation test.

Despite the amendment of sec. 3 (*a*) since the decision in *Chia Gee* v. *Martin*, (1905) 3 C.L.R. 649, it is for the officer, or other representative of the Commonwealth, and not the immigrant to select the prescribed language for applying the test under sec. 3 (*a*) of the *Immigration Act* 1901-1935.

The power conferred by sec. 3J of the *Immigration Act* 1901-1935, is intended to be exercised upon grounds relating to health. It does not confer an absolute and unqualified power upon the Minister to prevent an intending immigrant from entering the Commonwealth.

Neither the court nor any other tribunal has authority, upon an application for a writ of habeas corpus, to review a decision of the Minister as to the suitability or desirability of the visitor or immigrant to the Commonwealth.

ORDER NISI for habeas corpus.

An application was made to *Evatt* J. on 4th December 1936 for an order that a writ of habeas corpus issue to Arthur Henry Davey, master of the s.s. *Awatea*, Herbert Bede Cody, an officer of customs, and the Commonwealth of Australia, to produce one Mabel Magdalene Freer before the court. His Honour granted an order nisi returnable during the afternoon of that day, and ordered that the applicant, Mrs. Freer, was not to be removed from the jurisdiction until the further order of the court or a justice thereof. On the return of the order the following facts were brought before the court by way of affidavits. Mrs. Freer, who was born in October 1911, at Lahore, India, of English parentage, arrived, during the morning of 4th December 1936, at Sydney, by the s.s. *Awatea* from New Zealand. Whilst proceeding to the wharf the vessel was boarded by Cody, who was accompanied by other officers of customs, and Dr. Monticone, the Chief Government Interpreter for the State of New South Wales. They interviewed Mrs. Freer in her cabin, and showed to her a document signed by Cody wherein he, as an officer within the meaning of the *Immigration Act* 1901-1935, authorized Dr. Monticone to give to her a dictation test as prescribed by the Act. She was informed that Dr. Monticone would twice read to her a passage of not less than fifty words in the Italian language and that at the second time of reading, which would be at a slow rate, she would be required to write it down, and if she failed to do so she would be

deemed to be a prohibited immigrant. Mrs. Freer demanded a test in the English language. Paper and pencil were supplied to her. Dr. Monticone then read for the first time, in clear tones, at an ordinary rate of speech, a passage of not less than fifty words in the Italian language, and, after warning her that he was about to do so, again, in clear tones, slowly, and a few words at a time read the same passage to her. On both occasions Mrs. Freer closed each of her ears by placing a finger of her right hand on her right ear and a finger of her left hand on her left ear. She removed her fingers from her ears after the passage had been read to her the second time. She made no attempt to write during the second reading or at any time during which the passage was being read, or at any subsequent time. Cody informed Mrs. Freer that she had failed to pass the dictation test in the Italian language and that he deemed her to be a prohibited immigrant within the meaning of the *Immigration Act*. He further informed her that she would not be allowed to disembark, but must remain on the s.s. *Awatea* in his custody, and that in addition he had a written authority from the Minister of State for the Interior to prevent her from landing. The written authority, which bore date 4th December 1936 and was signed by the Minister, was as follows:—"To Herbert Bede Cody . . . whereas by section three J of the *Immigration Act* 1901-1935 it is provided that the Minister may, if he thinks fit, prevent an intending immigrant from entering the Commonwealth, notwithstanding that a certificate of health has been issued to the intending immigrant. Now therefore I, Thomas Paterson, Minister of State for the Interior, being the Minister administering the said Act, in pursuance of the powers conferred upon me by section three J of the said Act, and of all other powers me thereunto enabling, do hereby authorize and empower you in my name and on my behalf to prevent Mabel Magdalene Freer, an intending immigrant to the Commonwealth, from entering the Commonwealth."

Mrs. Freer had never lived in Australia. She was the holder of a passport issued to her at Lahore in March, 1930, and renewed at the Chief Passport Office, London, valid until March 1938.

In an affidavit filed on behalf of Mrs. Freer it was stated that she was detained against her will on the s.s. *Awatea*, which was to

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leave Sydney for New Zealand at 5 o'clock in the afternoon of 4th December, and, although desirous of doing so, was prevented from leaving the vessel by Davey and Cody, who purported to act upon the direction of the Government of the Commonwealth of Australia in pursuance of the provisions of the *Immigration Act* 1901-1935. The paper and pencil supplied to Mrs. Freer for the purpose of the dictation test, together with the written authorities referred to above, were produced to the court.

Further facts appear in the judgment hereunder.

J. W. Bavin (with him *Farrer*), for the applicant.

Creagh, for the respondent Davey.

Spender K.C. (with him *A. R. Taylor*), for the respondents Cody and the Commonwealth of Australia.

The following judgment was delivered :—

EVATT J. This is an application on behalf of Mabel Magdalene Freer to make absolute an order nisi for a writ of habeas corpus which was granted this morning, and directed against the master of the vessel, s.s. *Awatea*, now lying at a Sydney wharf, as well as against the Commonwealth and its authorized officer.

On the facts stated in the affidavits filed on behalf of the applicant this morning, the master of the vessel, as well as the Commonwealth Executive Government through its officers, was actively responsible for the present detention of the applicant on board. But the evidence of the captain now makes it plain that the sole responsibility for the admitted detention of the applicant rests with the two other respondents, namely, the Commonwealth of Australia, and its authorized officer.

The jurisdiction of the court to hear the present application is established by sec. 75 (iii.) of the Constitution. From cases like *The Commonwealth* v. *New South Wales* (1) and *New South Wales* v. *Bardolph* (2) it might appear that sec. 75 (iii.) operates not merely as a grant of jurisdiction to the court, but as an assimilation of a

(1) (1923) 32 C.L.R. 200. (2) (1934) 52 C.L.R. 455.

citizen's rights against State and Commonwealth to those which one citizen could, in similar cases, enforce against another (See also *Judiciary Act* 1903-1933, sec. 56). Whether this be so or not I need not inquire further here, because the Commonwealth is in fact a party, and the court's jurisdiction is undoubted.

Of course the onus rests upon persons detaining a person within the jurisdiction to show with precision the legal authority for such a serious invasion of the personal liberty of the subject. Two grounds only have been relied upon by the respondents for the detention of Mrs. Freer.

(1) It was suggested that section 3J of the *Immigration Act* 1901-1935 warrants the detention; and, indeed, the responsible Minister of the Commonwealth—Mr. Paterson—signed an authority to prevent the applicant's arrival, which was expressly based on sec. 3J. The section provides that the Minister may, if he thinks fit, prevent an intending immigrant from entering the Commonwealth notwithstanding that the prescribed certificate of health has been issued to the intending immigrant.

I am clearly of opinion that the power conferred by sec. 3J is intended to be exercised upon grounds relating to health, and that it does not confer an absolute and unqualified power upon the Minister to prevent an intending immigrant from entering the Commonwealth. A person who is not armed with the prescribed certificate of health is a prohibited immigrant (See sec. 3 (*b*)). The object of sec. 3J is to secure that mere possession of the certificate is not conclusive against the Executive's power to exclude the intending immigrant; so that it is directed solely to exclusion upon grounds pertaining to health. In the present case, it is admitted by the Commonwealth's counsel that sec. 3J can have no application, because the Minister's direction, under sec. 3J, was not made upon medical or health grounds.

(2) After argument had proceeded, the only justification relied upon for the detention was based upon sec. 3 (*a*) of the Act coupled with sec. 14. Sec. 14 gives authority to every Customs officer to prevent a prohibited immigrant from entering the Commonwealth; and it is contended that the applicant is a prohibited immigrant upon the grounds specified in sec. 3 (*a*) of the Act, namely, that she

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is a person who failed to pass the dictation test; so that, at the time of the application to the court, and at the present moment, her imprisonment by the Commonwealth and its officer is only justified if it is proved that, prior to the detention, the applicant was a person who failed to pass the dictation test.

Mr. *Bavin* for the applicant has argued the case very fully. But, although I am unable to agree with his argument, I would refer to the statement of Lord *Selborne* L.C. that the ingenuity and zeal of counsel are never misplaced when exercised for the defence of the personal liberty of the subject (*Green* v. *Lord Penzance* (1)).

The facts as to the administration of the dictation test to the applicant are not in substantial dispute. So far as material they are referred to hereafter. The chief argument for the applicant is that, under sec. 3 (*a*) of the Act, neither the officer who gives the dictation test himself, nor the person authorized by him to do so, is entitled to select the language in which the test is to be administered. And Mr. *Bavin* has relied strongly upon the history of sec. 3 (*a*).

Certainly the history of sec. 3 (*a*) is one of extraordinary interest. It is quite clear that, by executive action, there has been a remarkable turning or twisting of the original scheme of the Commonwealth Parliament in prescribing a failure to pass the dictation test as itself making the person failing a prohibited immigrant. The provision was first incorporated in the *Immigration Restriction Act* 1901, passed in December 1901. It is perfectly well known to all who are acquainted with the social and legal history of the Commonwealth that the test was never intended to be a real education test, or a provision guarding against the entry of illiterates. It was merely a convenient and polite device (which had previously been used similarly in the Colony of Natal) for the purpose of enabling the Executive Government of Australia to prevent the immigration of persons deemed unsuitable because of their Asiatic or non-European race. Accordingly the Parliament said that the test had to be applied in an European language directed by the officer. Not only when the original Act was passed, but also in many subsequent government documents and immigration pamphlets circulated

(1) (1881) 6 App. Cas. 657, at p. 663.

amongst persons likely to become immigrants, it was officially stated that the dictation test was never intended to be applied, and would never be applied, to immigrants of an European race.

But the blanket words of the section do not require the adoption of such a policy and, in modern times, they have been found sufficiently wide to cover not only any person of European race, but British subjects of European race. It is well established that it is impossible to confine the application of the restrictions to persons of non-British nationality. Indeed, one of the original purposes of the Act was to enable the Executive to exclude British subjects of Asiatic race.

In determining the selection of the European language to be used in the dictation test, I agree with Mr. *Bavin* that the decision of this Court in *Chia Gee* v. *Martin* (1) is not conclusive against him, for, under the 1901 Act, which was then in question, the section expressly indicated that the language of the test was to be directed by the officer. The question is whether sec. 3 (*a*) in its revised form has transferred the power of selection from the person dictating the words to the examination. In my opinion the answer is in the negative.

According to the plain words of sec. 3 (*a*), failure to pass the test results automatically upon the occurrence of a double event, viz. :—

(1) The officer (or person duly authorized in writing by the officer) dictates to the person arriving a certain number of words in an European language, and

(2) The person arriving fails to write down those words in the said European language in the presence of the officer (or authorized person).

In using the words "an European language," I am reading into sec. 3 (*a*) the words which occur in sec. 5 of the *Immigration Restriction Act* 1905, which provided that, until a regulation prescribing the languages came into full force, any language authorized by sec. 3 of the Act of 1901 should be deemed to be a "prescribed language."

In the present case, the respondents who are responsible for the detention of the applicant have proved each of the events which I have set out above. First, Dr. Monticone (who was a person duly authorized in writing by the officer) dictated to the applicant not

(1) (1905) 3 C.L.R. 649, at p. 653.

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less than fifty words in Italian, and, second, the applicant failed to write down in Italian any of those words.

While the Act does not specifically state that the European language is to be selected by the person administering the dictation test, this is the necessary result of the fact that the first of the two events is controlled by the person who dictates; and that it is nowhere suggested that the person arriving has the right of selecting the European language, a right which would entirely contradict and defeat the object of the legislation.

There are two other points which have been made. First, it was contended that, if the language in which the test is administered is to be selected by the person dictating, the selection must be his own; and that, in the present case, the selection of Italian was made by the Commonwealth Crown Solicitor, Mr. Sharwood, who also arranged for Dr. Monticone's services as a person skilled in Italian. There is nothing in the argument. Under sec. 3 (*a*) the only questions material to the point are (*a*) whether Mr. Cody was an officer; (*b*) whether Dr. Monticone had written authority to administer the test; and (*c*) whether the test actually took place in an European language. The fact that a direction to use Italian proceeded from a higher executive source is not material.

The second and last point was that there cannot be a "failure" to pass the dictation test unless the person to whom the test is applied voluntarily submits to the test. This morning, when the authorized officer asked the applicant to write down the words in Italian, she protested against the selection of Italian and refused to submit to a test in any language save English. She closed her ears with her fingers to prevent herself from hearing the dictation in Italian. The argument that, thereby, she enabled herself to say that she did not "fail" in the test is untenable. As I have already held, the section operates objectively in the sense that the person arriving automatically becomes a prohibited immigrant upon the occurrence of the events specified in sec. 3 (*a*). Those events I have already paraphrased. It necessarily follows that so long as the person arriving is aware that the test is being administered to him, a failure to pass is none the less a failure because the person under test deliberately prevents himself from hearing the words which are being dictated.

It must not be supposed that, in dealing with applications like the present, the Parliament has given any authority to the court to examine the question whether a person can or should be regarded as an unsuitable or undesirable visitor or immigrant to Australia. If, in any particular case, there has been an abuse of the power entrusted by statute to the Government, responsibility for that rests with the Minister or with the Government for which he is acting, or with the Parliament to which the Government is politically responsible. The legislature has refrained from giving this court or any tribunal authority to review a decision of the Minister. It is true that the decision to exclude from Australia by imposing a dictation test may have been based upon inaccurate or misleading information; but, even if that fact is proved, the court cannot, upon habeas corpus applications like this, regard the decision as illegal. I entirely agree with Mr. *Bavin* that it must not be thought for an instant that, in refusing the present application, the court is in any way indorsing or confirming the justice of any executive decision to exclude. Further no question whatever has been or could be raised before me as to the personal character or reputation of the applicant. They remain quite unaffected by the decision of the court.

For these reasons, the detention of the applicant by the respondent Cody, acting on behalf of the respondent Commonwealth, is lawful, and it is my duty to discharge the order nisi.

Order discharged.

Order nisi discharged.

Solicitors for the applicant, *Allen, Allen & Hemsley.*

Solicitors for the respondent Davey, *Creagh & Creagh.*

Solicitor for the other respondents, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

J. B.