Appl *B T R plc v Westinghouse Brake & Signal Co (Aust) Ltd* (1992) 34 FCR 246
Cons *Bowman v Durham Holdings Pty Ltd* (1973) 131 CLR 8
Foll *Chu Kheng Lim v Minister for Immigration Local Govt* (1992) 110 ALR 97
Cons *Chu Kheng Lim v Minister for Immig Local Govt & Ethnic Affairs* (1992) 67 ALJR 125
Appl *Chu Kheng Lim v Minister for Immig Local Govt & Ethnic Affairs* (1992) 176 CLR 1
Foll *R v Green; Ex parte Cheung Cheuk To* (1965) 113 CLR 506
Cons *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168
Foll *Repatriation Commission v Morris & Breen* (1997) 50 ALD 156
Appl *Perez v MIMA* (2002) 191 ALR 619
Cons *Al Masri v MIMIA* (2002) 192 ALR 609
Appl *MIMIA v Al Masri* (2003) 126 FCR 54
Foll *Perez v MIMA* (2002) 119 FCR 454
Dist *Al Kateb v Godwin* (2004) 78 ALJR 1099
Cons *Al Kateb v Godwin* (2004) 208 ALR 124
Cons *Al Kateb v Godwin* (2004) 79 ALD 233

[HIGH COURT OF AUSTRALIA.]

KOON WING LAU . . . . . PLAINTIFF;

AND

CALWELL AND ANOTHER . . . . . DEFENDANTS.

TSUI YUE SHING . . . . . PLAINTIFF;

AND

CALWELL AND ANOTHER . . . . DEFENDANTS.

CHEUNG POY . . . . . PLAINTIFF;

AND

CALWELL AND ANOTHER . . . . DEFENDANTS.

LEE DAI . . . . . PLAINTIFF;

AND

CALWELL AND ANOTHER . . . . DEFENDANTS.

LOY FOOK . . . . . PLAINTIFF;

AND

CALWELL AND ANOTHER . . . . DEFENDANTS.

THE KING

AGAINST

THE GOVERNOR OF HIS MAJESTY'S GAOL AT PENTRIDGE AND ANOTHER;

EX PARTE KOON WING LAU.

THE KING

AGAINST

THE OFFICER-IN-CHARGE, CITY WATCHHOUSE, RUSSELL STREET, MELBOURNE, AND ANOTHER;

EX PARTE TSUI YUE SHING.

THE KING

AGAINST

THE GOVERNOR OF HIS MAJESTY'S GAOL AT PENTRIDGE AND ANOTHER;

EX PARTE CHEUNG POY.

THE KING

AGAINST

THE GOVERNOR OF HIS MAJESTY'S GAOL AT PENTRIDGE AND ANOTHER;

EX PARTE LEE DAI.

THE KING

AGAINST

THE GOVERNOR OF HIS MAJESTY'S GAOL AT PENTRIDGE AND ANOTHER;

EX PARTE LOY FOOK.

NG KWAN AND OTHERS . . . . . PLAINTIFFS;

AND

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER . . . . . DEFENDANTS.

LI HOP AND OTHERS . . . . . PLAINTIFFS;

AND

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER . . . . . DEFENDANTS.

LEE WING AND OTHERS . . . . . PLAINTIFFS;

AND

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER . . . . . DEFENDANTS.

H. C. OF A. 1949.

MELBOURNE, *Oct.* 4-7; *Dec.* 21.

Latham C.J., Rich, Dixon, McTiernan, Williams and Webb JJ.

Constitutional Law (Cth.)—Legislative powers of Commonwealth Parliament—Aliens—Defence—Immigration—War-time refugees—Deportation—"Issue" of certificate of exemption—"Purported to issue"—Extension of period of certificate of exemption—Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*vi.*), (*xix.*), (*xxvii.*)—*Immigration Act* 1901-1949 (*No.* 17 *of* 1901—*No.* 31 *of* 1949), *s.* 4—*Immigration Act* 1949 (*No.* 31 *of* 1949), *ss.* 3, 4—*War-time Refugees Removal Act* 1949 (*No.* 32 *of* 1949).

The *War-time Refugees Removal Act* 1949 is a valid exercise of the legislative powers of the Commonwealth Parliament.

So *held*, by *Latham* C.J., *McTiernan* and *Webb* JJ., and as to ss. 4, 5 and 7 of the Act, by *Dixon* J. So *held*, also, by *Rich* and *Williams* JJ., so far as the Act applies to the class of persons defined in par. *a* of s. 4 (1), but not in its application to the classes defined in pars. *b* and *c*.

The provisions of the Constitution which support the legislation are:—*Per Latham* C.J. and *McTiernan* J.: Section 51 (vi.) (defence), (xix.) (aliens), (xxvii.) (immigration). *Per Rich* and *Williams* JJ.: As to the class defined in s. 4 (1) (*a*) of the Act—s. 51 (xix.). *Per Dixon* J.: It being conceded that the category of persons described in s. 4 (1) (*a*) of the Act is one with respect to which s. 51 (xix.) confers power to legislate, the material provisions of

H. C. OF A. 1949. KOON WING LAU v. CALWELL.

the Act are supported—as to that category—by s. 51 (xix.), and—as to the categories in s. 4 (1) (*b*) and (*c*)—by s. 51 (vi.). *Per Webb* J.: As to the whole Act—s. 51 (xxvii.): also, so far as it applies to aliens—s. 51 (xix.); so far as it applies to persons who have not become members of the Australian community—s. 51 (vi.).

Section 7 of the *War-time Refugees Removal Act* 1949 does not confer a power to keep a deportee in custody for an unlimited period without relation to the purpose of deportation.

So *held*, by the whole Court.

The *Immigration Act* 1949 is a valid exercise of the power of the Commonwealth Parliament under s. 51 (xxvii.) of the Constitution to legislate with respect to immigration.

So *held*, by *Latham* C.J., *Dixon*, *McTiernan* and *Webb* JJ. So *held*, also, by *Rich* and *Williams* JJ., as to s. 3 of the Act, and as to s. 4 so far as it relates to the persons defined in par. *a*, but not in relation to par. *b* thereof.

Nature and extent of the power conferred by s. 51 (xxvii.) of the Constitution to legislate with respect to immigration, considered.

The action of an authorized officer in writing out and signing a form of certificate of exemption in respect of a person who is a prohibited immigrant or a person who might be required to pass a dictation test, without delivery or notification of the same to such person, is not the issue or purported issue of a certificate of exemption to such person within the meaning of s. 4 of the *Immigration Act* 1949.

So *held*, by the whole Court.

The period of operation of a certificate of exemption may be extended under s. 4 (2) of the *Immigration Act* 1901-1949 without delivery of any document or notification to the person the subject of the certificate.

So *held*, by *Latham* C.J., *McTiernan* and *Webb* JJ. (*Rich*, *Dixon* and *Williams* JJ. *contra*).

Per Dixon J.: Section 4 (2) of the *Immigration Act* 1901-1949 does not authorize the extension of the period of operation of a certificate of exemption which has expired.

Ah Sheung v. *Lindberg*, (1906) V.L.R. 323, *Chia Gee* v. *Martin*, (1905) 3 C.L.R. 649, *Potter* v. *Minahan*, (1908) 7 C.L.R. 277, and *Ex parte Walsh and Johnson*; *In re Yates*, (1925) 37 C.L.R. 36, considered.

Ex parte Lesiputty; *Re Murphy*, (1947) 47 S.R. (N.S.W.) 433; 64 W.N. 113 and *O'Keefe* v. *Calwell*, (1949) 77 C.L.R. 261. referred to.

CAUSES AND QUESTIONS referred to Full Court.

The first five of the causes indicated in the title of this report were numbered respectively 14, 15, 16, 17 and 18 of 1949 in the principal Registry of the High Court at Melbourne. Each of these was an action against the Minister for Immigration and the Com-

monwealth by a person against whom an order for deportation from Australia had been made under the *War-time Refugees Removal Act* 1949 or the *Immigration Act* 1901-1949 and who had been taken into custody for the purposes of deportation. Each plaintiff challenged the validity of the legislation above-mentioned, and also s. 4 of the *Immigration Act* 1949, in so far as the legislation purported to apply to him, and, alternatively, claimed that the legislation did not so apply. Declarations were sought accordingly. Each of the plaintiffs also applied for a writ of habeas corpus. These proceedings, being the second set of five in the title above, were causes numbered 25, 26, 27, 28 and 29 in the principal Registry. The foregoing causes are hereinafter referred to as the Melbourne proceedings. These proceedings were referred by *Dixon* J. to the Full Court of the High Court. Further facts relating to these proceedings appear in the judgments hereunder.

The last three of the causes in the title were numbered 25, 26, and 27 of 1949 in the New South Wales Registry of the High Court. They were actions similar to those already mentioned; in each a number of Chinese joined as plaintiffs, and the defendants were the Commonwealth and the Minister for Immigration. These are hereinafter referred to as the Sydney actions. In these actions the following questions were referred by *Williams* J. to the Full Court:—

Ng Kwan and others v. *The Commonwealth and another* (*No.* 25 *of* 1949, *New South Wales Registry*).

1. Whether the *Immigration Act* 1901-1949, or alternatively s. 4 or alternatively sub-s. 4 thereof, is beyond the powers of the Parliament of the Commonwealth and invalid.
2. Whether s. 4 of the *Immigration Act* 1949 (No. 31 of 1949) is invalid.
3. Whether the action of an authorized officer in writing out and signing a form of certificate of exemption in respect of a person who might be required to pass a dictation test without delivery or notification of the same to such person is the issue or purported issue of a certificate of exemption to such person within the meaning of s. 4 of the *Immigration Act* 1949 (No. 31 of 1949).
4. Whether the *War-time Refugees Removal Act* 1949 is beyond the powers of the Parliament of the Commonwealth and invalid or alternatively whether ss. 4, 5 and 7 thereof or any of them is beyond the powers of the Commonwealth and invalid.

H. C. OF A. 1949. KOON WING LAU v. CALWELL.

Li Hop and others v. *The Commonwealth and another* (*No.* 26 *of* 1949, *New South Wales Registry*).

1. Whether the *War-time Refugees Removal Act* 1949 is beyond the powers of the Parliament of the Commonwealth and invalid or alternatively whether ss. 4 and 5 thereof, or either of them, is beyond the powers of the Commonwealth and invalid.

Lee Wing and others v. *The Commonwealth and another* (*No.* 27 *of* 1949, *New South Wales Registry*).

1, 2 and 3. [These were the same as questions 1, 2 and 3 in cause 25 above.]

The following further questions were added in each of the three Sydney actions at the request of the parties:—

(*a*) Whether the action of an authorized officer in writing out and signing for the purpose of creating an effective document a document extending the period of operation of a certificate of exemption is, without delivery or notification of the same to such person, the extension of a certificate of exemption within the meaning of s. 4 (2) of the *Immigration Act* 1901-1949.

(*b*) Whether the action of an authorized officer in writing out and signing for the purpose of creating an effective document a form of certificate of exemption in respect of a person who is a prohibited immigrant or a person who might be required to pass a dictation test is, without delivery or notification of the same to such person, the issue or purported issue of a certificate of exemption within the meaning of s. 4 of the *Immigration Act* 1949.

All the references were heard together.

P. D. Phillips K.C. (with him *R. R. Sholl* K.C. and *T. G. Rapke*), for the plaintiffs and prosecutors in the Melbourne proceedings. The first submission is that s. 7 (in particular, sub-s. 1 (*a*)) of the *War-time Refugees Removal Act* is invalid because it is a law with respect to unlimited incarceration and the Commonwealth has no power to make such a law. No doubt there is power to make a law providing for imprisonment as incidental to the execution of some other power; that incidental power is presumably to be measured by what is reasonably necessary for carrying out some other power which the Commonwealth has. For the purposes of the present argument it is assumed that the Commonwealth

has the power to deport aliens and immigrants under s. 51 (xix.), (xxvii.), of the Constitution and that s. 5 of the Act now in question is valid in relation to the persons defined in s. 4. Section 5 provides for deportation "in accordance with this Act," but there does not seem to be any section apart from s. 5 itself "in accordance with" which deportation takes place. Provisions such as s. 7 might be said to be in aid of the power in s. 5, but it does not follow that they are within the incidental power. Section 7 contains no limitation or qualification by relation to time or otherwise which would correlate it with, and limit it to, the purpose of deportation. The words of s. 7 (1) (*a*), "pending . . . deportation," have no limiting effect; on the contrary, their effect is that the "deportee" may be kept in custody for a time to which no limit is set. Such a provision is not incidental to the power of deportation; it would require for its support a substantive power to provide for unlimited incarceration, and the Commonwealth has no such power. The section leaves the Minister (or "an officer") entirely at large as to how long a person is to be kept in custody, and it would leave no room for the contention that a person was entitled to his release on habeas corpus because he had been kept in custody for an "unreasonable" time. The next submission is that s. 4 (1) (*b*) and (*c*), together with pars. *d-g* and with s. 5, are beyond the powers of the Commonwealth Parliament. So far as s. 4 (1) (*a*) is concerned, it deals with aliens and therefore with a subject on which the Commonwealth has power to legislate, but, if the present submission is correct, that paragraph could not be left standing in conjunction with s. 5; this would be a substantially different law from that which Parliament enacted, and a severance could not be made. The only powers by which the provisions now challenged could be supported are the defence and the immigration powers (Constitution, s. 51 (vi.), (xxvii.)). The only relation which these provisions have to defence is that they deal with *sequelae* of the war, and that in itself is not sufficient. They are not directed to dis-establishing war-time adjustments made by the Commonwealth or re-establishing persons who had been diverted by the Commonwealth as part of the war effort; therefore they are not the type of *sequelae* of the war which the Commonwealth under the defence power can readjust. [He referred to *Crouch* v. *The Commonwealth* (1).] There is nothing to suggest that the people that the Commonwealth is now seeking to remove from Australia by this legislation were admitted here as a conscious or planned part of the war effort. The reasonable inference is that

(1) (1948) 77 C.L.R. 339.

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

the Commonwealth simply relaxed its powers to keep them out so that they might come here by way of refuge. It does not follow as of course that they may now be ejected by reason of the defence power. The limits of the defence power in the aspect with which the present submission is concerned may be illustrated by reference to the problem of inflation. It may be said that inflation is a product of the war, but it cannot be contended that all steps directed at the prevention or cure of inflation fall within the post-war defence power. It cannot be said of everything which can be a matter of legislative control: "This is something caused by the war, and it is therefore the subject of the defence power of the Commonwealth Parliament now." Limits must be drawn, and, it is submitted, narrowly drawn. It is one thing to continue laws in existence in order to wind up the war; it is another thing to extend the Commonwealth Parliament's power to new subject matters on the ground that the law is dealing with a problem created by the war. The criterion is to be found by asking: "Has the situation which has arisen and which calls for legislative control been created as part of the deliberate activity of the community in conducting the war, either by law or without law—by deliberate national policy? Is the situation something which has to be undone, unwound, and which was created by the conduct of the war by the Commonwealth and the pursuit of victory by the community?" In brief, if the matter is a dislocation caused by the war-time power, the peace-time defence power can cure it. In this regard the time at which an Act comes into operation may be very significant. Even if the provisions now in question might have been within the defence power at some earlier stage (which is not admitted), they are now too remote from matters of defence. It is a ground of distinction for present purposes that the people to whom this legislation is directed came here because of the enemy which they had, not because of the enemy which we had. It is a coincidence that it is the same enemy in either case, but what drove them here was the hostile action of that enemy towards them, not towards us. The present submission is not that there is —or was—no power to deal with these people; it is merely that the defence power is not appropriate. It remains to consider the immigration power. It may be conceded that—broadly speaking, though not with complete accuracy—the effect of pars. *d* and *e* of s. 4 (1) is such that the persons included in pars. *b* and *c* are "immigrants" as that word is understood in the jurisprudence of this country. The majority of the persons who would be covered by pars. *b* and *c* would, prima facie, be within the immigration

power, and they would normally be the subject of legislation of the kind now in question if the provisions were not wide enough to include persons who on 12th July 1949, when the Act came into operation, had ceased to be immigrants and become members of the Australian community. The exceptions in pars. *d-g* of s. 4 (1) show that Parliament directed its attention to the question of what persons were to be included or excluded, and it is impossible —it is submitted—to read s. 4 (1) as subject to a further unexpressed exception such as might have been expressed by the insertion after par. *g* of " (*h*) a person who has become a member of the Australian community." Parliament must be taken to have expressed its intention not to exclude such persons, and therefore there can be no " reading down " or severance under s. 15A of the *Acts Interpretation Act*. It is not contended, however, that, if pars. *b* and *c* of s. 4 (1) are invalid but severable, par *a* in conjunction with pars. *d-g* and s. 5 is not a valid law with respect to aliens; but it is contended that the provisions are inseverable because the suggested severance would produce a substantially different law from what Parliament intended—a law with an entirely different policy. The contention is that persons who originally were immigrants but have since become members of the community are no longer subject to the immigration power (*Ex parte Walsh and Johnson*; *In re Yates* (1)), and, as pars. *b* and *c* are wide enough to cover—and seem obviously intended to cover—such persons, they are not within the immigration power. A further matter in connection with the immigration power is that in s. 4 (1) (*b*) and (*c*) (as in par. *a*, though that is not significant here) the legislature has selected entry into Australia as the operative fact, and it is entry unqualified, including involuntary entry and deliberate and purposed entry. It is appreciated that, though entry in itself is not necessarily immigration, there is a power to control entrants in the course of regulating the process of absorption of newcomers; but, where legislation purporting to be in respect of immigration selects the fact of entry as the operative fact, it must—to be within the power—be entry as an immigrant. It is not a matter of the state of mind of the person coming in nor is it a matter of the length of his stay; but the entry must be *his* entry, not a mere mechanical coming in. Immigration connotes an entry which can be attributed to the supposed immigrant as his act; a power to make laws with respect to immigration is a power to make laws with respect to the entry of an immigrant as such; however desirable it might be that power should exist to deal with

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

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

non-immigrant entry, it is not in fact covered by the grant of power. There is therefore no competence in Parliament to make a law directly relevant to entry which may be a non-immigrant entry. If a visitor to this country, merely on a trip and without any idea of settling here, is entirely outside the immigration power, any danger that may be supposed to result is not—if it is relevant at all—a grave matter; if the Commonwealth has not the power to deal with such persons, the States have. [He referred to *Chung Teong Toy* v. *Musgrove* (1).] It may be the true interpretation of s. 4 (1) that the entry referred to is an act properly attributable to the individual as his act of entry and not an entry which is objectively performed by the individual but is really the act of some superior authority of which he is the mere object. If so, it becomes a question of fact whether the circumstances relating to the entry of the plaintiffs fall within the statutory description. On the other hand, if the section covers any physical incoming, whether voluntary or not, whether the act of entry is truly attributable to the individual or not, then, it is submitted, Parliament has exceeded its legislative competence by deliberately legislating for an entry which is outside the immigration power. As to the *Immigration Act* 1949, the considerations already mentioned are relevant, but this matter will be developed by Mr. *Barwick*, and it is desired to adopt the argument which will be presented by him.

G. E. Barwick K.C. (with him *W. J. Lee*), for the plaintiffs in the Sydney actions. Orders of deportations were made as to some of the plaintiffs under the *War-time Refugees Removal Act* and as to others under the *Immigration Act*. As to the former, it is submitted that the questions should be answered in accordance with the views which have been put by Mr. *Phillips* and it is desired to adopt also what he said about the *Immigration Act*. It is further submitted that s. 4 (1) and (4) of the *Immigration Act* 1901-1949, as inserted by s. 3 of Act No. 31 of 1949, is *ultra vires*, as is also s. 4 of the last-mentioned Act. The first point relates to s. 4 (4) of the Act of 1901-1949. It provides for the exercise of the Minister's power " upon " the expiration or cancellation of a certificate. This means at any time after the expiration &c. (*Ex parte Lesiputty*; *Re Murphy* (2)). Thus, a person who has been admitted on a certificate and is not otherwise within the provisions of the Act may be subjected to a deportation order many years afterwards, when he has ceased to be an immigrant and has been absorbed into the community. The immigration power does not extend thus far. The

(1) (1888) 14 V.L.R. 349.

(2) (1947) 47 S.R. (N.S.W.) 433, at p. 436; 64 W.N. 113, at p. 115.

ultimate reach of the power extends only to persons who still remain immigrants. Even if the effect of a certificate, while it is current, is that it prevents a person from ceasing to be an immigrant, it cannot have the effect that after it has expired he is prevented from becoming a member of the community. It may be that a law could be made which would prevent immigrants from ever becoming members of the community (in the sense that they have ceased to be immigrants); if so, it would have to be in a different form from the law now challenged. The next point is that s. 4 (1) of the *Immigration Act* 1901-1949 gives authority to the Minister to produce a similar objectionable result (that is, objectionable from the point of legislative power) by going through the form of issuing a certificate of exemption to a person who has not applied for it. The provision would extend to a person who has been allowed to come in as an immigrant—a person who did not ask for and was not issued with a certificate of exemption—and has been here for many years and has been absorbed into the community. The sub-section does not require that an application must be made for a certificate nor does it say that a certificate shall be issued only on an application. The power to extend the currency of the certificate, which s. 4 (2) confers, is likewise objectionable from the point of view of legislative power. Generally as to s. 4, it is permitted that the system of exemption certificates which the section sets up cannot validly debar the person whose entrance is permitted under a certificate from becoming a member of the community and ceasing to be an immigrant. The section does not create the position that the person who receives a certificate is to be regarded in every case as only here temporarily while the certificate is in force. The receipt of the certificate does not involve any undertaking on the part of the recipient that he will leave the country when the certificate expires, nor is there any implication that the Minister necessarily will then deport him. If the section operates to prevent the acquisition of a domicil in fact during its currency, it is bad because of the way in which it is drawn—because it is unlimited in point of time and unqualified both in the discretion that can be exercised and in the qualification of the persons to whom the certificate may be granted. It may well be that there is power to fix some probationary period during which a person cannot cease to be an immigrant, but that is not what the section does. The Commonwealth cannot admit a person to the country and at the same time qualify the admission so that the qualification will operate beyond the period when the person is an immigrant. *Ex parte Walsh and Johnson*; *In re Yates* (1) supports the view that a law

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

H. C. OF A. 1949. KOON WING LAU v. CALWELL.

which authorizes the deportation of a person who is in fact at the time of the purported deportation a member of the Australian community is bad. As to s. 4 of Act No. 31 of 1949, it is invalid for the same reasons as have already been advanced in respect of the principal Act. It purports to validate certificates which were invalid to begin with and were made out in the names of persons who were outside the immigration power when Act No. 31 of 1949 was enacted, 12th July 1949. A subsidiary point is that the certificates were never "issued" and the proper construction of s. 4 is that it does not purport to validate something which was not issued.

H. G. Alderman K.C. (with him: in the Melbourne proceedings, *J. B. Tait* K.C. and *G. Gowans*; in the Sydney actions, *J. D. Holmes* K.C. and *W. R. Blacket*), for the defendants and respondents. As to s. 7 of the *War-time Refugees Removal Act*, it is merely ancillary to s. 5 and cannot be used for any purpose but to carry out the duty to deport which results from s. 5. If the deportation is within power, s. 7 is necessarily so. It is not denied that s. 4 (1) (*a*) is within power; so, even if pars. *b* and *c* are bad, they are clearly severable. It is submitted, however, that the Act is good as to persons within s. 4 (1) (*b*) and (*c*) under the defence power. That power cannot be limited in the way contended by Mr. *Phillips*. The presence of these persons in Australia was a direct consequence of the war in which Australia was concerned. It is not to the point to say that the situation was not created by the Commonwealth and therefore it has no power to remedy it. It is a war problem which is essentially within the defence power. If it is suggested that the matter must be remedied within a reasonable time, the period during which the Act can operate to empower deportation orders is approximately five years from the cessation of hostilities; when all circumstances are regarded, that is not unreasonable. [He referred to *Hume* v. *Higgins* (1); *R.* v. *Foster* (2).] If the immigration power is needed to support the Act, it is wide enough to do so. That power also supports the *Immigration Act* 1949. As to the argument that refugees are not—or may not be—"immigrants," no facts appear here which raise the question. The argument has been put before and not accepted. As to the main proposition in the challenge to the Acts, *Walsh and Johnson's Case* (3) is relied on as authority for the proposition that the immigration power does not support an Act which provides for the deportation from Australia

(1) (1949) 78 C.L.R. 116.
(2) (1949) 79 C.L.R. 43.
(3) (1925) 37 C.L.R. 36: See pp. 109, 111-113, 116-118, 123-125, 136, 137.

of a person who has become a member of the Australian community, whatever that may mean. To show that a majority of the Court supported such a proposition, the views of *Higgins* J. are put forward in addition to those of the Chief Justice and *Starke* J. It is, to say the least, not clear that *Higgins* J. supported any such proposition. What the case decides does not take the matter any further than *Potter* v. *Minahan* (1); that is to say, a person born here who leaves here and comes back again does not return as an "immigrant." Otherwise, it is submitted, persons who come here as immigrants remain subject to the immigration power unless, at any rate, some bilateral transaction—in which there is something in the nature of a consent on the part of the Commonwealth—puts them outside the power. A person cannot merely by his own acts put himself beyond the power. The immigration power is co-extensive with the power over aliens (*Robtelmes* v. *Brenan* (2); *Ah Yin* v. *Christie* (3). It has been held that where an alien has been naturalized, the naturalization can be revoked and he can be deported (*Meyer* v. *Poynton* (4)). [He referred to *Ah Sheung* v. *Lindberg* (5).] As to the meaning in s. 4 of the *Immigration Act* 1949 of the words "purported to issue a certificate of exemption," "issue" does not necessarily involve handing over the certificate, and "purported to issue" cannot mean "purported to hand over." Whether a particular document has been "issued" may depend on the facts of the case. [He referred to *Dalton Time Lock Co.* v. *Dalton* (6); *Burrows' Words & Phrases*, *s.v.* "issue."] Generally, it is submitted, a certificate is issued when the formal act of bringing it into existence is completed, and actual delivery of the document is not required. The contrary view could in some circumstances be very much against the interests of the person named in the certificate. If the reference in s. 3H of the *Immigration Act* 1901-1949 to possession of a certificate suggests that the certificate is to be handed over, it does not affect the meaning of "issue." A person may be in possession of a document as a matter of law although he does not physically hold it. Moreover, s. 3B of the same Act refers to possession of a certificate of health; this is not a document which would be handed to the person named in it, but it cannot be suggested that it would not have been issued. As to the extension, under s. 4 (2) of the Act of 1901-1949, of the period of an exemption certificate, there is no reason why any document in the nature of a further certificate

(1) (1908) 7 C.L.R. 277.
(2) (1906) 4 C.L.R. 395.
(3) (1907) 4 C.L.R. 1428, at p. 1433.
(4) (1920) 27 C.L.R. 436.
(5) (1906) V.L.R. 233.
(6) (1892) 66 L.T. 70.

H. C. OF A. 1949. KOON WING LAU v. CALWELL.

should be brought into existence at all; no doubt there would have to be some official record, but there is no need for the handing over of a document or even notifying the person concerned. It is not suggested that, under s. 4 (1) of the Act of 1901-1949, or the corresponding previous sub-section, an application is necessary before a certificate of exemption is issued, but it is submitted that this has no bearing on the question of legislative power.

P. D. Phillips K.C., in reply. The whole of the argument for the defendants and respondents in justification of the *War-time Refugees Removal Act* was that the factual situation with which Parliament was dealing was a product or result of the war. No attempt was made to show that the method of dealing with that situation which was embodied in the Act was for purposes of defence. Unless that is shown, there is no relation with the defence power at all. It has not been shown that the removal now of persons who came here during the war for reasons related to the war is for purposes of defence; no real connection between the Act and the defence power has been shown. Where something done by the Commonwealth during the war requires readjustment after the war, the connection with defence is that what has been done does need readjustment; but that is not this case. As to the immigration power in relation to the *War-time Refugees Removal Act*, it has been contended against us that it is within power to deport a person who has become an Australian before Parliament speaks on the matter. It has not been suggested that the Act does not purport to do this, nor that, if our argument is right, the Act can be read down so as to bring it within power. It would not be a question of severance of provisions; it would be a question of giving a limited meaning to words. As to the expressions "becoming a member of the Australian community" and "being absorbed into the Australian community," the suggestion against us seems to be that they involve a difficult or unreal conception. The answer is that it is the same conception as the central part of the concept of domicil—the permanent home *facto et animo*. The kind of problem that arises in asking: "Is he a member of the community?" is the same as arises in certain classes of domicil cases where one asks: "Which is the place with which he is identified?"

G. E. Barwick K.C., in reply. One distinction made in *Walsh and Johnson's Case* (1) was that a person who had come into Australia before the establishment of the Commonwealth could not, after

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

its establishment, be an immigrant within the ambit of the Commonwealth power over immigration; but it does not follow that all persons who came in after the establishment of the Commonwealth remain for ever immigrants for the purpose of the power. This would be inconsistent with *Potter* v. *Minahan* (1). Immigration is a process which begins with a person's entry into the country; there must be a point of time at which the process is complete so that the person's presence here ceases to be immigration. *Isaacs* J. in *Walsh and Johnson's Case* (2) endeavours to get over that—it would seem—by suggesting that you may have a retroactive law which goes back to the person's entry and is a law about his having entered. *Starke* J. supplies the answer to that—and it appears to be the view of the majority—by saying that you may have retroactive laws about some things but you cannot have one that will unmake the citizen and turn him back, as it were, into an immigrant. In *Potter* v. *Minahan* (3) the critical question as to the person seeking to enter was: "Where is his home now?" It was an important evidentiary fact in assisting the answer to that question that he had been born here; and the fact was that he had been here before the establishment of the Commonwealth, but the decision did not turn on that particular point of time. It is not correct to say that our contention is that a person can become a member of the community by his own acts; against the will, so to speak, of the Commonwealth. There is the additional fact that he is allowed to enter without being subjected at the time of entry to any conditions which (assuming that such conditions could be imposed) would prevent him from becoming a member of the community. The argument that the existence of a certificate of exemption precludes the formation of a permanent home here by the person in respect of whom it is issued proceeds on the basis that the Commonwealth has consented—and he has accepted the consent—to his coming in on terms that he will go out when asked; but the certificate does not impose any such condition. It does not extort any undertaking; it simply relieves the person to whom it is issued of the obligations which the Act might otherwise impose on him during its currency. If the effect of s. 4 (1) of the principal Act (whether the old sub-section or the new one inserted in 1949) is that the certificate does preclude the person from making his permanent home here, then the sub-section is bad as being an attempt to extend the immigration power indefinitely. [He referred to *Baldrini* v. *Baldrini* (4).] Naturalization is not on the

(1) (1908) 7 C.L.R. 277.
(2) (1925) 37 C.L.R. 36.
(3) (1908) 7 C.L.R. 277.
(4) (1932) P. 9, at pp. 13, 15.

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

same footing as immigration; it is an entirely artificial thing that is in the gift of the Commonwealth. It has nothing to do with a man's external circumstances. The new s. 4 (1) of the principal Act (as inserted in 1949) only comes into question here because of the way in which it is, in effect, incorporated in s. 4 of Act No. 31 of 1949. The last-mentioned section is not, in any sense that is relevant here, retroactive in its operation. It is true that it takes a past fact, a certificate issued in the past, and gives it the same effect as if it had been issued since 12th July 1949, but it does so only for the purpose of identifying a person by finding his name in a certificate and fixing the date from which he may be deported by reference to the date of expiry of the certificate. Otherwise it is no more than a law which speaks for the future and—when coupled with s. 4 (4) of the principal Act—says that certain persons may be deported. What s. 4 of Act No. 31 of 1949 does that is important here is that it says that, if an officer has written out a certificate of exemption without any application therefor, the person named in it may be deported as at the date of expiry which the officer has written into the certificate. As to the words of that section, "purported to issue a certificate . . . to a person," the thing "purported" is the issue *to a person*. It is difficult to see how the mere writing out of a document without delivery or communication could be the issue to a person, and it is equally difficult to see how—without at all events some attempt at delivery or communication—there could be "purported issue to a person." If the words are read as meaning "issued a purported certificate to a person," the difficulty still remains. The words suggest the need for an actual delivery or handing out, and the suggestion is strengthened by the words of s. 3 (*h*) of the principal Act, "possessed of a certificate." As to whether the extension of the period of a certificate needs communication, the real claim of the Crown here is, not merely to be able to write out an unsolicited extension and not communicate it, but to make the extension operate from a past date. This, it is submitted, cannot be done. Moreover, if the person exempted by the original certificate needs to be possessed of that certificate, there would seem to be the like need in respect of a document extending its operation.

Cur. adv. vult.

Dec. 21.

The following written judgments were delivered:—

LATHAM C.J. These proceedings consist of (1) five actions by individual plaintiffs and five applications by the same persons for writs of habeas corpus (proceedings in the Melbourne Registry)

which have been referred to the Full Court by *Dixon* J., and (2) references by *Williams* J. of certain questions of law which arise in three actions (proceedings in the Sydney Registry) by thirty-eight plaintiffs. The object of the proceedings instituted by the plaintiffs in the actions and the prosecutors in the habeas corpus proceedings (to all of whom I will hereafter refer as the plaintiffs) is to prevent the deportation of the plaintiffs from Australia either by obtaining an order for release from the custody in which they have been held as a preliminary step to deportation or by obtaining injunctions against deportation.

The plaintiffs are persons of Chinese race who entered Australia during the war, most of whom are alleged to be war-time refugees who were forced here by the stress of war. Some of them who were seamen left Australia afterwards in ships and returned to Australia. Now they all desire to stay here permanently. The respondents to the proceedings by way of habeas corpus are the Governor of His Majesty's Gaol at Pentridge and Arthur Augustus Calwell the Minister of State for Immigration, or the Officer-in-Charge of the City Watchhouse, Melbourne, and Mr. Calwell. In the actions the defendants are the Minister and the Commonwealth of Australia. Orders have been made by the defendant Minister for the deportation of the plaintiffs under one or other of two statutes which were passed in the year 1949 by the Commonwealth Parliament. These statutes are the *War-time Refugees Removal Act* 1949 and the *Immigration Act* 1949. It is contended for the plaintiffs that these Acts are invalid either completely or in their relevant provisions. It is argued that the *War-time Refugees Removal Act* cannot be supported under any legislative power of the Commonwealth Parliament and, more particularly, that it cannot be supported under the powers upon which the defendants rely, namely, the power to make laws with respect to the naval and military defence of the Commonwealth and of the several States (Constitution, (s. 51 (vi.)); aliens (s. 51 (xix.)); immigration (s. 51 (xxvii.)). With respect to the *Immigration Act* 1949, it is contended that these plaintiffs have made their homes in Australia and, accordingly, have placed themselves beyond the applicability of any laws with respect to immigration. If the Act applies to them it is therefore, it is contended, invalid. This ground is also relied upon as a means of attacking the validity of the *War-time Refugees Removal Act* because, it is said, a person who has his permanent home in Australia has a right to remain in Australia which, unless he is an alien, cannot be affected by Commonwealth legislation passed under any power conferred upon the Commonwealth Government—the only

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Latham C.J.

possibly relevant power other than the defence power being the power to make laws with respect to immigration.

War-time Refugees Removal Act 1949. I consider first the *War-time Refugees Removal Act* 1949. Section 3 defines " officer " as meaning an officer of the Department of Immigration and certain other persons, and defines the period of hostilities as meaning a period from and including 3rd September 1939 to and including 2nd September 1945.

Section 4 is in the following terms :—" (1) This Act shall apply to every person—(a) who entered Australia during the period of hostilities and is an alien ; (b) who, during the period of hostilities, entered Australia as a place of refuge, by reason of the occupation, or threatened occupation, of any place by an enemy, and has not left Australia since he so entered ; or (c) who, during the period of hostilities, entered Australia by reason of any other circumstances attributable to the existence of hostilities and has not left Australia since he so entered, not being— (d) a person who, at the time of that entry, was domiciled in Australia ; (e) a person who was born in Australia ; (f) a diplomatic or consular representative or official trade commissioner of a foreign country, or a member of the staff of any such representative or commissioner, who has been sent to Australia by the Government of the foreign country ; or (g) the wife or a dependent relative of any person referred to in the last preceding paragraph. (2) The Minister may, by writing under his hand, certify that a person named in the certificate is a person specified in paragraph (a), (b) or (c) of the last preceding sub-section and any such certificate shall, for the purposes of this Act (including any proceedings arising under this Act or in which a question arises as to the application of this Act to any person), be prima facie evidence of the fact so certified."

The Minister has by writing certified under his hand that the plaintiffs are persons named in one or other of pars. (a), (b) and (c) of s. 4 (1). Accordingly, if this Act is valid the position of each plaintiff must be considered in the light of the prima-facie evidence afforded by the certificate of the Minister. The onus rests upon the plaintiffs to displace that prima-facie evidence if they desire to do so.

Section 5 provides that the Minister may at any time within twelve months after the time of the commencement of the Act (12th July 1949) make an order for the deportation of a person to whom the Act applies and that that person shall be deported in accordance with the Act. Section 7 provides that—" A deportee may— (a) pending his deportation and until he is placed on board

a vessel for deportation from Australia; (b) on board the vessel until its departure from its last port of call in Australia; and (c) at any port in Australia at which the vessel calls after he has been placed on board, be kept in such custody as the Minister or an officer directs."

Section 7 also contains provisions for the release of a deportee from custody upon certain security being given.

The Commonwealth Parliament has full power to make laws with respect to aliens and no reason has been suggested for holding that s. 4 (1) (*a*) of the Act is invalid except that it is contended that other provisions of the Act are invalid and that par. (*a*) is inseverable from those other provisions. It appears to me to be very clear that par. (*a*) is completely severable from the other provisions of the Act. If the provisions referring to the persons described in pars. (*b*) and (*c*) of s. 4 (1) were invalid and were accordingly struck out of the Act, par. (*a*) of the Act would apply without any difficulty of construction or otherwise to all the persons included within par. (*a*). In my opinion par. (*a*) is severable from the rest of the Act and there is full power to deport in accordance with the Act any of the plaintiffs who entered Australia during the period of hostilities as defined and who are aliens. The plaintiff Lee Dai is admitted to be an alien. Most of the plaintiffs in the proceedings in the Melbourne Registry alleged that they were born in Hong Kong and therefore British subjects. If so they do not fall within the class of persons described in par. (*a*). The question whether these persons were born in Hong Kong or in China is a matter the onus of proof of which rests upon the plaintiffs and it should in my opinion be determined by a single judge upon full evidence rather than upon affidavit by the Full Court.

Paragraphs (*b*) and (*c*) of s. 4 (1) do not apply to persons who have left Australia since entry during the period of hostilities. It appears that certain of the last-mentioned plaintiffs who entered Australia during the period of hostilities (Tsui Yue Shing, Cheung Poy and Loy Fook) subsequently left Australia as seamen in ships.

Paragraphs (*b*) and (*c*) do not apply to any such persons. As to one of them (Loy Fook) it would appear upon the present evidence that he did not enter Australia as a place of refuge or by reason of any circumstances attributable to the existence of hostilities. Here again issues of fact arise which should in my opinion be determined by a single judge and not in these proceedings before the Full Court.

Paragraphs (*a*), (*b*) and (*c*) all apply only to persons who entered Australia during the period of hostilities. Paragraph (*a*) deals

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Latham C.J.

with aliens. Paragraphs (*b*) and (*c*) are important, therefore, only in relation to such persons who are not aliens.

The defendants contend that the provisions in the Act for the deportation of persons who are not aliens and who fall within the classes described in pars. (*b*) and (*c*) are valid as an exercise of the defence power of the Commonwealth Parliament. It is submitted for the defendants that it is incidental to the exercise of the power of defending the Commonwealth in time of war that war refugees and members of allied forces and other persons whose services may be required for war purposes should be admitted to the Commonwealth though they might have been excluded by virtue of the *Immigration Act* or by the exercise of a common law power of excluding aliens. The stress of war drives persons from their homes. If there had been more ships in the Netherlands East Indies when Japan attacked those islands many thousands of refugees might have reached Australia and the disturbed conditions in the islands might have made it either impossible or inhumane to send them back. The question which arises as to the power of the Commonwealth Parliament to deal with such a situation is the same whether there are many thousands of such persons or, as is possibly the case, only some hundreds. It appears to me to be obvious that in time of war it may, from a practical point of view, be impossible to go through the process of "screening" persons who are forced into a country by belligerent acts in their own countries or who by reason of actual war or threat of war in their own countries come to the Commonwealth as a place of refuge. It is also an obvious reflection that if the Commonwealth in time of war had exercised its full rights of excluding aliens and others in accordance with ordinary procedure under the *Immigration Act* difficulties would have arisen with allied powers which might have gravely prejudiced the defence of the country.

On the other hand, it has been contended for the plaintiffs that certain cases recently decided in this Court have laid down a principle that the mere fact that a state of affairs may be said to have resulted from the war in the sense that the war has been a real and perhaps a major contributing element to it is not in itself sufficient to justify legislation with respect to that state of affairs after hostilities have actually ceased. The cases which were relied upon by the plaintiffs were all cases which dealt with laws which were admittedly valid when made, but which were held to be no longer operative by reason of the termination of hostilities and because the argument in support of the continued validity of the legislation failed to establish a real connection of the legislative

measures with defence as constituting either a winding-up process or as dealing with a situation created by the exercise of the defence power itself at an earlier period. This, however, is a very different case. The law in question was passed in 1949 after hostilities had ceased. It was not like the *Defence (Transitional Provisions) Act* 1946 and subsequent similar legislation—a provision that laws enacted during the period of hostilities and valid when enacted should be continued in operation. In *Wagner* v. *Gall* (1), it was argued that a law providing for petrol rationing was valid on the ground that petrol rationing was necessitated by what is known as the dollar shortage and that the dollar shortage was a result of the war. The dollar shortage was plainly a result, not only of the war, but of many events and of varying national policies since the war. It was held that the fact that the war was a contributing cause to the dollar shortage did not in itself justify the continuance in operation of laws which could be made by the Commonwealth Parliament only by virtue of the defence power. Similarly, in *R.* v. *Foster*; *Ex parte Rural Bank of New South Wales* (2), special provisions for women's rates of pay which were thought by Parliament to have been required by war conditions were held to be no longer operative when those conditions had ceased to exist. But, as has already been said, this is a very different case from those just mentioned. Those cases recognized that if the exercise of the defence power had itself created a situation, the power of Parliament to deal with that situation was more extensive than in the case of what might be described merely as a war result. The exercise of the defence power includes much more than the enactment of legislation. Acts done in pursuance of defence fall within the conception of the exercise of the defence power. Equally, acts done by the enemy may create situations the reparation or removal of which falls within the exercise of the defence power by the Commonwealth. In *R.* v. *Foster*; *Ex parte Rural Bank of New South Wales*; *Wagner* v. *Gall*; and *Collins* v. *Hunter* (2), reference was made to actual physical damage caused by the enemy, e.g. by bombing. The reparation of such physical damage by the Commonwealth was said to be within the defence power. But also Parliament may consider that the belligerent activities of the enemy have caused damage to the community by driving or inducing into the community a number of persons who, apart from war conditions, would probably never have been admitted to the country. Whether the presence of these persons would cause what I have called "damage to the community" is a question

(1) (1949) 79 C.L.R. 56. (2) (1949) 79 C.L.R. 43.

H. C. OF A. 1949. KOON WING LAU v. CALWELL. Latham C.J.

of policy to be determined by Parliament, and not by any court. (At this stage of the consideration of the case I assume that the Act applies only to persons who could have been refused entry into Australia if the administrative authorities of the Commonwealth had desired to exclude them from the country. I deal with this question hereafter.) The persons included in pars. (*b*) and (*c*) of s. 4 are persons who entered Australia as a place of refuge during hostilities, and did so by reason of the occupation or threatened occupation of a place by an enemy, and persons who during that period entered Australia by reason of any other circumstances attributable to hostilities, provided in either case that they did not leave Australia since entering. Upon the supposition which I am temporarily making that all such persons might have been excluded if the Government had so desired, the omission to exclude them must be attributed to considerations of war policy, which are not unaffected by considerations of humanity. It is obvious that the exclusion of such persons in time of war might have greatly damaged the relations of Australia with other friendly people and allies and might therefore have impeded the effective prosecution of the war. The refusal or failure to exclude them involved the positive act of admitting them and of allowing them to remain for some period. This was an act of war policy in the course of the defence of the country. In my opinion the Commonwealth Parliament can deal with the situation thereby created just as in the case of any other act of defence policy on the part of the Government itself or in the case of an act of an enemy which created a situation in Australia which Parliament does not choose to allow to continue.

I have said, however, that I have hitherto assumed that all the persons referred to in pars. (*a*), (*b*) and (*c*) of s. 4 (1) could have been excluded from Australia. This is so if all those persons at the time of entry were immigrants into Australia so that they could have been excluded when they originally entered Australia if the administrative authorities had chosen to apply the provisions of the *Immigration Act*. But it is argued that the provisions for the deportation of persons within pars. (*a*), (*b*) and (*c*), or at least of non-aliens falling within pars (*b*) and (*c*), are wide enough to apply to persons who were originally immigrants but who have established a permanent home in Australia, and it is contended that no such persons can be deported from Australia, at least by virtue of laws made under the power to make laws with respect to immigration. I reserve this subject for consideration in relation to the *Immigration Act* 1949, but it may be pointed out that par. (*e*) of s. 4 (1) excludes

from the operation of the Act persons who were born in Australia. Accordingly any person who was born in Australia, whether he has a permanent home here or not, does not come within the provisions of the Act. Paragraph (*d*) excludes from the application of the Act persons who at the time of their entry were domiciled in Australia. A person can have only one domicile at any given time. All persons have a domicile of origin—their place of birth. Persons born here are expressly excluded from the Act: par. (*e*). If they have retained an Australian domicile of origin they are doubly excluded—by par. (*d*) and par. (*e*). The other kind of domicile in the case of persons not under a disability of any kind is a domicile of choice. The essential feature of a domicile of choice is that the person concerned has a fixed purpose of making his principal or sole permanent home in a particular country where he in fact resides. Thus if a person has retained his domicile of origin in Australia or has chosen to make his permanent home here and resides here he is domiciled in Australia and the provisions of the Act do not apply to him. But the domicile of infants follows the domicile of the father or, in certain cases, of the mother and the domicile of married women follows the domicile of their husband: see the summary of the law as stated in *Halsbury's Laws of England*, 2nd ed., vol. 6, pp. 208-209. Such persons, though not domiciled in Australia, may have had a permanent home in Australia at the time of entry or have acquired such a home since entry. If they were not born here or are not domiciled here the Act does apply to them. In relation to such persons it is necessary to consider the extent of the power of the Commonwealth Parliament to make laws with respect to immigration.

A particular attack was made upon s. 7 of the Act, which has already been quoted. This section is substantially identical with s. 8c of the *Immigration Act* 1901-1940. It is contended that it is invalid because it permits unlimited imprisonment. Any deprivation of liberty must be shown to be authorized by law before it can be justified. But deportation legislation is a necessary element in the control of immigration into a country. "The power to deport," *Barton* J. said in *Robtelmes* v. *Brenan* (1), "is the complement of the power to exclude." Deportation under legislation of this character, whether it is regarded as legislation relating to aliens or legislation relating to immigration, is not imposed as punishment for being an alien or for being an immigrant: *Ex parte Walsh and Johnson*; *In re Yates* (2). As far as aliens

(1) (1906) 4 C.L.R. 395.

(2) (1925) 37 C.L.R. 36: see pp. 60, 96.

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Latham C.J.

are concerned, they can be excluded and prevented from remaining in the country at common law or by the authority of a statute: see *Musgrove* v. *Chun Teong Toy* (1); *Attorney-General for Canada* v. *Cain and Gilhula* (2); *R.* v. *Bottrill* (3). Section 7 does not create or purport to create a power to keep a deportee in custody for an unlimited period. The power to hold him in custody is only a power to do so pending deportation and until he is placed on board a vessel for deportation and on such a vessel and at ports at which the vessel calls. If it were shown that detention was not being used for these purposes the detention would be unauthorized and a writ of habeas corpus would provide an immediate remedy.

Subject to the consideration of the position of persons who have entered Australia and who claim to have a permanent home here, in my opinion the attack upon the validity of the *War-time Refugees Removal Act* fails and the legislation should be held to be valid as an exercise of the power to legislate with respect to aliens and to defence. For reasons which I hereafter state I am of opinion that the Act is also valid as an exercise of the powers to make laws with respect to immigration.

Immigration Act 1949. The *Immigration Act* No. 31 of 1949 amends s. 4 of the *Immigration Act* 1901-1948. Section 4 (1) as enacted by Act No. 36 of 1940 purported to authorize the issue of certificates of exemption to persons who were described as persons who, unless they possessed such a certificate, were "liable to be prohibited under this Act from entering or remaining in the Commonwealth." The section provided that upon the expiry of such a certificate such a person might be deported. The decision in *O'Keefe* v. *Calwell* (4), was that the expression "liable to be prohibited under this Act from entering or remaining in the Commonwealth" meant a prohibited immigrant and did not include a person who might be, as it were, turned into a prohibited immigrant by being given a dictation test under s. 3 (*a*) of the *Immigration Act* and failing to pass it. The *Immigration Act* 1949 consists of provisions evidently designed to alter the law as it stood at the time of the decision in *O'Keefe* v. *Calwell* (4).

Section 3 of the 1949 Act provides that sub-ss. (1) and (4) of s. 4 of the principal Act should be omitted and that the following provisions should be inserted respectively in their stead:—"(1) The Minister or an authorized officer may issue a certificate of exemption in the prescribed form authorizing the person named in the certifi-

(1) (1891) A.C. 272.
(2) (1906) A.C. 542.
(3) (1947) K.B. 41.
(4) (1949) 77 C.L.R. 261.

cate (being a prohibited immigrant or an immigrant who may be required to pass the dictation test) to enter or remain in the Commonwealth, and the person named in the certificate shall not, while the certificate is in force, be subject to any of the provisions of this Act restricting entry into or stay in the Commonwealth . . . (4) Upon the expiration or cancellation of any such certificate, the Minister may declare the person named in the certificate to be a prohibited immigrant and that person may thereupon be deported from the Commonwealth in pursuance of an order of the Minister."

Thus the scheme of the Act is to make it possible to issue a certificate of exemption, not, as formerly, to a person "liable to be prohibited" from entering or remaining in Australia, but to any person who is a prohibited immigrant or an immigrant who may be required to pass the dictation test. When the certificate expires or is cancelled the person to whom it applies may under the new sub-s. (4) be declared to be a prohibited immigrant and may be deported. These provisions relate only to persons who are prohibited immigrants or immigrants who may be required to pass the dictation test, i.e. under the law as it now exists. An immigrant may be required under the existing law to pass the dictation test at any time within five years after he has entered the Commonwealth: *Immigration Act* 1901-1949, s. 5 (2). Section 4 of the 1949 Act (the terms of which I have not yet stated) enables the immigration authorities to apply the provisions of s. 4 of the principal Act as amended to persons to whom certificates of exemption had not in fact been issued in the past, and therefore to persons in respect of whom it could not be said that a certificate of exemption had expired or been cancelled.

Section 4 (1) of the principal Act as amended relates only to persons who are prohibited immigrants or immigrants who may be required to pass the dictation test. Such persons are plainly subject to any law which applies in terms to them which is passed under the power to make laws with respect to immigration. Section 4 (1) is permissive in its terms. It enables the Minister to issue a certificate. In my opinion such a law cannot in itself be invalid. It creates only an exemption from the provisions of the *Immigration Act* which restrict entry into or stay in Australia. When a certificate is issued under this section the result is simply that the person named in the certificate is not during the currency of the certificate subject to any of the provisions of the Act restricting entry into or stay in Australia. There can be no question as to the power of

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Latham C.J.

Parliament to *exempt* immigrants from the provisions of the *Immigration Act* either altogether or for a specified period or subject to conditions.

Section 4 of the 1949 Act is as follows:—"Where, before the commencement of this Act, a person (being a person empowered by or under the *Immigration Restriction Act* 1901, or by or under that Act as amended, to issue certificates of exemption) purported to issue a certificate of exemption to a person named in the certificate (being, at the time when the certificate was issued, a prohibited immigrant or an immigrant who might be required to pass the dictation test) and—(a) the person named in the certificate was, at the commencement of this Act, an immigrant; or (b) the certificate purported to have been in force at any time within the period of two years immediately preceding the commencement of this Act, the certificate shall be deemed to have been validly issued, and the provisions of the Principal Act, as amended by this Act, shall apply to and in relation to the person named in the certificate, and to and in relation to the certificate, as if the certificate had been issued under the Principal Act as so amended."

This section applies only to persons who, at the time when an officer purported to issue a certificate, were prohibited immigrants or immigrants who might be required to pass the dictation test. The section is intended to make it possible to prevent such immigrants remaining in Australia. The criterion applied by the Parliament is the act by an officer of purporting to issue a certificate of exemption, provided that (*a*) the person named in the certificate was an immigrant, or (*b*) the certificate purported to have been in force at any time within the period of two years immediately preceding the commencement of the Act. Under this section, if an officer "purported to issue" a certificate of exemption to the immigrants mentioned in the section before the commencement of the Act, the certificate is to be treated as if it had been issued under the principal Act—see s. 4 thereof. Such certificates have been executed in the present cases, but not delivered to the plaintiffs and the defendants contend that an officer has "purported to issue" them.

The Commonwealth Parliament may, in my opinion, for the purpose of selecting immigrants to be deported, adopt this or any other circumstance as a criterion as Parliament thinks proper.

A person who is an immigrant may become a prohibited immigrant by the mere declaration of a Minister if Parliament thinks proper to enact such a provision. Parliament can select its own qualifications for entry into Australia. Parliament could exclude all

immigrants or could provide that no person should immigrate into Australia without the consent of the Minister. In my opinion there can be no objection to the validity of a provision which makes the prohibition of entry or remaining in Australia of persons who are immigrants dependent upon any condition which Parliament thinks fit to select.

These provisions have been used in the present cases in the following way. A certificate of exemption was written out before the commencement of the Act for a short period which expired either before or soon after the Act came into force. Then such persons have been treated as falling within s. 4 (4) of the principal Act as amended. The certificates have expired, the Minister has declared the persons named in the certificates to be prohibited immigrants, and therefore, it is contended by the defendants, those persons may be deported from the Commonwealth in pursuance of an order of the Minister.

Section 4 (4) provides that upon the expiration or cancellation of a certificate the person named in the certificate may be declared to be a prohibited immigrant and may be deported. I agree with the submission on behalf of the plaintiffs that the words "upon the expiration or cancellation of any such certificate" do not mean immediately or instantaneously upon such expiration or cancellation. The proper construction of such a provision is that when and after the event of expiration or cancellation has happened the Minister may make the declaration referred to in the subsection: *Ex parte Lesiputty*; *Re Murphy* (1). Upon this interpretation of s. 4 (4) an argument was founded that the section purports to authorize deportation at any time after entry of any person who when a certificate of exemption was issued to him (or when an officer in accordance with the Act purported to issue such a certificate to him) was a prohibited immigrant or a person who could be required to pass a dictation test. It was said that such a person might have a permanent home in Australia and that therefore no law passed under the power to make laws with respect to immigration could validly be applied to him. The result was said to be that the whole Act was invalid.

The argument is that if a person who is a prohibited immigrant or a person who may be required to pass the dictation test under s. 3 of the principal Act makes his permanent home here he places himself beyond the reach of Commonwealth immigration law. This contention raises a very important question. All persons who object to being deported under the immigration law are persons

(1) (1947) 47 S.R. (N.S.W.) 433; 64 W.N. 113.

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Latham C.J.

who want to stay here, and probably most of them have homes here which they regard as permanent—or hope to be permanent. They want to be adopted into and incorporated with the community. It was frankly said in argument that if a person succeeded in obtaining entry into Australia and established what he intended to be a permanent home in Australia within a week of his entry, he became entitled to stay in Australia permanently as a matter of right so far as Commonwealth immigration law was concerned. If this be so the power to make laws with respect to immigration is reduced to a power to prevent entry into Australia—it does not include a power to prevent the settlement in Australia of any persons who contrive to enter Australia if they establish a home here.

It is said by way of concession that entry may be made subject to conditions imposed by law and that upon breach of a condition the entrant may be deported. But such a statement impliedly negatives the proposition which it is supposed only to qualify. If a person can, by his own act in definitely deciding to make his home here and to associate himself with the community, bring his immigration to an end, then no legislation passed under the power to make laws with respect to immigration can thereafter be applied to him. The imposition of conditions breach of which would authorize deportation would in itself involve a denial of the proposition that a person by his own act may become a member of the Australian community so as to become exempt from the application of a law with respect to immigration. In my opinion immigration is an act which, when completed, involves both entry and settlement and under a power to make laws with respect to immigration both entry and settlement can be facilitated or restricted or prevented. I repeat what I said in *O'Keefe* v. *Calwell* (1)—A power to make laws with respect to immigration " . . . is a power to make laws with respect to the whole subject of immigration—with respect to each and every element in immigration. 'Immigrants' include persons who are intending settlers in a country other than their own and seek to enter (or do enter) that country and to remain in it for the purpose of making a permanent home there, or who, having entered another country without any original intention to settle there, do in fact endeavour to remain in that country as members of the community. Control of immigration involves control of the admission of such persons and determination whether such admission is to be allowed to be permanent or only temporary. Such control is the means of determining the composi-

(1) (1949) 77 C.L.R. 261, at pp. 276, 277.

tion of the population of a country in respect of the admission of external elements. Admission of any person not already a member of the community may, under a power to make laws with respect to immigration, be allowed or prevented either completely or partially and subject to conditions as Parliament thinks proper. There could be no effective control of the subject of immigration if it were not possible to limit the entry and stay of persons who claimed that they were only making a short visit, or if it were not possible to deport persons who were allowed into the country only for a specified period and who then changed their minds and wished to remain permanently. Immigration into a country, if completed, involves two elements, (*a*) entry into the country, and (*b*) absorption into the community of the country. Both of these elements can be controlled under a power to make laws with respect to immigration."

No person simply by his own act can make himself a member of the community if the community refuses to have him as a member. The Australian community speaks in respect of immigration through the Commonwealth Parliament. The Commonwealth Parliament may make such laws as it thinks proper in respect not only of an immigrant's entry into Australia, but also in respect of the remaining and settlement in Australia of any persons who have entered Australia as immigrants. The Parliament may deal not only with entry into Australia but also with remaining in Australia and in respect of either matter may impose just such conditions for just such a period as Parliament may choose. It was said in argument that Parliament could fix only a " reasonable period " of probation before allowing a person to become incorporated in the community. In my opinion it is entirely for Parliament, and not for any court, to say what conditions should be imposed upon immigrants in respect of entry into or remaining in Australia. As in the case of every other legislative power, it is for Parliament alone to consider or determine whether legislation which is within power is reasonable.

Section 5 (2) of the principal Act, for example, provides that the dictation test may be applied within five years of entry. If Parliament had fixed a period of fifteen years—or an unlimited period as in the cases dealt with by s. 5 (1)—there is in my opinion no principle which could possibly justify a court in holding such a law invalid because, in the opinion of the court, the period selected was " unreasonable."

The Commonwealth Parliament could in my opinion validly provide for the deportation at any time of persons who at any time have come into Australia as immigrants by applying any *discrimen*

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Latham C.J.

which it thought proper, based, for example, on age, sex, race, nationality, personal character, occupation, time of arrival or on the order of a Minister or of an official, in exactly the same way as it could impose any conditions whatever upon immigrants seeking to enter Australia. Section 5 of the principal Act is an example of legislation of this character.

If the action set out in s. 4 of the 1949 Act and in s. 4 (4) of the principal Act as amended is taken, then any permission to remain in Australia, whether express or implied from inaction, is withdrawn. The continuance of any such permission is entirely a matter for Parliament to determine. Entry into Australia and settlement there cannot limit the power of Parliament, by prospective or retrospective laws, to determine what immigrants shall be allowed to become or to remain members of the Australian community. Even if one Parliament expressly enacted that certain immigrants should be allowed to remain in Australia permanently, a subsequent Parliament could, if it thought fit, repeal that law, withdrawing the permission to remain and providing for deportation. One Parliament cannot, in my opinion, limit the constitutional power of a subsequent Parliament.

Section 4 of the *War-time Refugees Removal Act* validates as at a past time what only "purported" to be the issue of a certificate of exemption. It gives to such "purported issue" as at the time of purported issue the same effect as to an actual issue at that time. Thus the section is retrospective in the strict sense—it changes as at a past time the law which was at that time actually in operation. But this fact does not constitute an objection to the validity of the law: *R.* v. *Kidman* (1).

The plaintiffs contend that an immigrant who establishes a "permanent home" in Australia is entitled to remain here—at least if his entry was not unlawful. The basis of this contention is that when a person who entered Australia as an immigrant acquires a permanent home in Australia he passes beyond the scope of any law (present or future) made with respect to immigration. The position as to a person who was born in Australia and who has retained his home in Australia is clear. His re-entry upon return after absence is not entry as an immigrant: *Potter* v. *Minahan* (2). The question which arises in the present cases is whether a person who did not have a home in Australia who comes here and, so far as he can do so, establishes his home here and decides to stay here, thereby places himself beyond the application of immigration laws. It appears to me that (though this is denied)

(1) (1915) 20 C.L.R. 425.

(2) (1908) 7 C.L.R. 277.

the contention must be the same whether the entry of the person into Australia was lawful or unlawful. A person who enters unlawfully can establish a permanent home here just as completely as a person who enters lawfully. Both equally must, according to the proposition which is the basis of the plaintiffs' argument, be regarded as beyond the scope of any law with respect to immigration. A consistent application of the principle for which the plaintiffs contend also means that a law which provides that immigrants who fail to observe conditions which are imposed upon them by law at the time of their entry can be deported could not validly apply to any such immigrants who established permanent homes here—they would no longer be immigrants and, whatever they did or failed to do, would not be subject to any provisions of any law with respect to immigration. Section 5 (1) of the principal Act provides that certain immigrants can *at any time* be required to pass the dictation test—so that, if they fail upon the test, they can be deported. Upon the argument for the plaintiffs these provisions could not validly be applied in the case of any immigrant who had made his permanent home here.

The contrary view which I have stated, namely, that the Commonwealth Parliament may validly make laws with respect to the remaining in Australia of any persons who at any time have entered Australia as immigrants and may provide for their deportation, is, however, said to be excluded by the decisions of this Court in the cases of *Potter* v. *Minahan* (1) and *Ex parte Walsh & Johnson*; *In re Yates* (2).

It is argued that *Potter* v. *Minahan* (1) decided that any person who established a permanent home in Australia could never thereafter lawfully be treated as an immigrant into Australia. But in fact the decision in *Potter* v. *Minahan* (1) related only to a person born in Australia who was *returning to his home* in Australia. He did not enter Australia originally as an immigrant—he was born here. Such a person upon birth becomes a member of the community and, if he has not abandoned such membership, and after a temporary absence comes back to the community to which he already belongs, he is not an immigrant into that community. But *Potter* v. *Minahan* (1) did not profess to state exhaustively what constituted a home in Australia or to specify the means by which a person not born in Australia might acquire such a home. *Griffith* C.J. was careful to endeavour to prevent misconception as to the extent and significance of the principle upon which the case was decided.

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

(2) (1925) 37 C.L.R. 36.

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Latham C.J.

He said (1) :—" It is not necessary in the present case to inquire whether the right to regard a particular part of the earth as ' home ' can be acquired otherwise than by birth ; or whether it can be lost by a change of residence ; or whether if lost it can be re-acquired ; and in any of those cases, by what means."

Minahan was born in Australia. The majority of the Court held that Australia had remained his home notwithstanding absence for a substantial period in China.

But it is said that *Walsh & Johnson's Case* (2) has decided that a person who once succeeds in getting into Australia can, by deciding to become a member of the community and acting accordingly by settling here, remove himself from the scope of any law passed under the power to make laws with respect to immigration. This, as already stated, might happen within a few days of his entry.

Walsh came to Australia in 1893 before the enactment of the Constitution. It was therefore held by all the members of the Court that he could not be regarded as an immigrant into the Commonwealth of Australia. Johnson came to Australia in 1910. He became naturalized and settled here and the Court held, for varying reasons, that he could not be deported. But *Walsh & Johnson's Case* (2) is not a clear decision that a person by his own act and his own determination to remain in Australia can become entitled to remain in Australia against the will of the Commonwealth Parliament.

It is necessary to examine *Walsh & Johnson's Case* (2) carefully in order to ascertain what exactly was decided by a majority of the Court. *Knox* C.J. stated one proposition which entirely supports the plaintiffs' argument :—" It seems to me to follow from the opinions expressed in that case [*Potter* v. *Minahan* (3)], that a person who has originally entered Australia as an immigrant may, in course of time and by force of circumstances, cease to be an immigrant and become a member of the Australian community. He may, so to speak, grow out of the condition of being an immigrant and thus become exempt from the operation of the immigration power " (4). I suggest with respect that this statement goes beyond what was decided in *Potter* v. *Minahan* (3) and that the effect of that decision is more accurately stated in what the Chief Justice also says—" the decision in *Potter* v. *Minahan* (3) shows that, when the person seeking to enter the Commonwealth is a member of the Australian community, his entry is not within the power to make laws with respect to immigration " (5). *Potter* v. *Minahan* (3) has in my

(1) (1908) 7 C.L.R., at p. 289.
(2) (1925) 37 C.L.R. 36.
(3) (1908) 7 C.L.R. 277.
(4) (1925) 37 C.L.R., at p. 64.
(5) (1925) 37 C.L.R., at pp. 64, 65.

opinion no bearing upon the question as to how, otherwise than by birth, a person may acquire a permanent home in Australia so as to become a member of the community or upon the question whether a person who enters Australia as an immigrant can place himself outside the application of immigration law by establishing a permanent home here.

Isaacs J., with whose reasons for judgment *Rich* J. agreed, was of opinion—" Once an immigrant always an immigrant "—that is, that persons who were once immigrants continued at all times, whatever they might do, to be subject to the power to make laws with respect to immigration. These learned judges were of the opinion, with which I agree, that that power enabled Parliament to deal with both the entry of immigrants into Australia and the settlement of immigrants in Australia, and to impose such conditions upon either entry or settlement as Parliament should think proper.

Higgins J. was of opinion that the legislation under consideration was not a law with respect to immigration but with respect to deportation—that immigration meant " the act or action of immigrating, the movement of persons from some other country into Australia " (1). It is not clear that any other member of the Court agreed with this limited view of the meaning of " immigration," which would appear to exclude the element of settlement as part of a completed act of immigration which could be either allowed or prevented. *Higgins* J. held that the provision for deportation applied to " members of the Australian community " and was therefore invalid (2). But as to Johnson, who came to Australia after 1901, *Higgins* J. said (3):—" It is true that Johnson established his home, became a member of the Australian community, long before s. 8AA ; but I am not justified in saying that a Federal Act cannot be made retrospective (see *R.* v. *Kidman* (4)). But there are no words in the section or in the Act which make the provisions of the section retrospective so as to apply to Johnson's immigration—his act of immigrating, his movement into Australia —in 1910."

As there were no retrospective provisions in the relevant provisions of the Act, his Honour held that Johnson could not lawfully be deported. Thus *Higgins* J. was not prepared to hold that retrospective legislation could not provide for the deportation of a person who, not being born in Australia, had entered Australia even though he had established a home here. Section 4 of the

(1) (1925) 37 C.L.R., at p. 110.
(2) (1925) 37 C.L.R., at p. 112.
(3) (1925) 37 C.L.R., at pp. 124, 125.
(4) (1915) 20 C.L.R. 425.

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Latham C.J.

Immigration Act 1949 is retrospective legislation of the character which his Honour was not prepared to hold to be invalid.

Starke J., referring to earlier cases, said (1):—"Now, here, I think, is foreshadowed a clear principle, namely, that those who 'originally associated themselves together to form' the Commonwealth and those who are 'afterwards admitted to membership' cannot thereafter, upon entering, or crossing the boundary of, Australia, from abroad, be regarded as immigrating into it unless in the meantine they have in fact abandoned their membership."

He dissented from the opinion of *Higgins* J. as to the power to legislate retrospectively (1). The proposition stated refers to persons who have been "admitted to membership" of the community known as the Australian people. There is here no suggestion that a person may admit himself to membership. It is, in my opinion, for Parliament to determine, if it chooses to do so, whether a person shall or shall not be so admitted, and what Parliament grants, Parliament may withdraw.

Thus, analysis of the decision in *Walsh & Johnson's Case* (2) shows that only *Knox* C.J. fully supports the proposition for which the plaintiffs contend, namely, that no person who has immigrated into Australia can be deported under a Federal immigration law if he has established a permanent home in Australia. For the reasons which I have stated, the power to make laws with respect to immigration is not, in my opinion, limited in the manner suggested. It is wide enough to enable the Commonwealth Parliament to make laws with respect to the entry and the settlement or remaining in Australia of all persons who enter Australia who, upon a first entry, are not returning to Australia as their permanent home. Accordingly I am of opinion that the *Immigration Act* 1949 is valid in its application to prohibited immigrants and to immigrants who may be required to pass the dictation test even though such immigrants may, after their first entry, have acquired permanent homes in Australia.

I now answer the question which I reserved for consideration in relation to the *War-time Refugees Removal Act* 1949. That question is whether the Act applies only to persons who could have been prevented under the *Immigration Act* from entering Australia at the time when they entered during the period of hostilities. The *War-time Refugees Removal Act* does not apply to persons who were born in Australia—s. 4 (1) (*e*). But it does apply to other persons coming within pars. (*a*), (*b*) or (*c*) of s. 4 of the Act. Such persons (whether aliens or not) may be persons

(1) (1925) 37 C.L.R., at p. 137. (2) (1925) 37 C.L.R. 36.

who, though not born in Australia, have a permanent home here, e.g. a married woman not born in Australia, who is a British subject, whose husband has a domicile in England, but who herself has a permanent home in Australia.

For the reasons which I have stated the Commonwealth Parliament can, in my opinion, validly legislate, under the power to make laws with respect to immigration, to prevent the entry of any immigrants and to deport them after entry even if they have established a permanent home in Australia. Any person not born in Australia came into Australia as an immigrant. The entry into Australia of a person not born in Australia, whether with or without an intention to settle here, can be prevented under a law with respect to immigration : *Chia Gee* v. *Martin* (1). Thus, upon their first entry into Australia, all the persons to whom the Act applies could have been prevented from entering. This proposition completes my reasons for reaching the conclusion that the Act is a valid exercise of the power to make laws with respect to defence.

I am therefore of opinion that the *War-time Refugees Removal Act* is valid legislation, being a law with respect to defence, aliens and immigration. The power to make laws with respect to immigration is, in my opinion, sufficient in itself to authorize the enactment of all the provisions of the Act.

In the cases in the Melbourne Registry I think the best course to adopt is to declare that the *War-time Refugees Removal Act* 1949 and the *Immigration Act* 1949 are valid and to remit the cases to the learned judge for trial.

In the cases in the Sydney Registry *Williams* J. has submitted the following questions to the Full Court :—

Ng Kwan & ors v. *The Commonwealth & anor.*

" 1. Whether the *Immigration Act* 1901-1949, or alternatively Section 4 or alternatively sub-section (4) thereof, is beyond the powers of the Parliament of the Commonwealth and invalid."

Answer—No, to each alternative.

" 2. Whether Section 4 of the *Immigration Act* 1949 (No. 31 of 1949) is invalid."

Answer—No.

" 3. Whether the action of an authorized officer in writing out and signing a form of Certificate of Exemption in respect of a person who is a prohibited immigrant or a person who might be required to pass a dictation test without delivery or notification of the same to such person is the issue or purported issue of a Certificate

(1) (1905) 3 C.L.R. 649.

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Latham C.J.

of Exemption to such person within the meaning of Section 4 of the *Immigration Act* 1949 (No. 31 of 1949)."

This question requires the interpretation of the words in s. 4—" purported to issue a certificate of exemption to a person named in the certificate." The words are not " signed " or " purported to make a certificate in respect of a person." The word " issue " involves the idea of something passing from one person to another, sending forth, delivering. A document which is at all times retained by a person in his own sole control cannot be said to have been issued by him. He might execute or create the document and then decide not to give it to anybody. In such a case he would not have issued the document or even have purported to issue it. " Purporting to issue to a person named " involves some attempt to give the certificate to that person. Bringing the certificate into existence does not in itself amount to purporting to issue it. In my opinion Question 3 should be answered—No.

" 4. Whether the *War-time Refugees Removal Act* 1949 is beyond the powers of the Parliament of the Commonwealth and invalid or alternatively whether Sections 4, 5 and 7 thereof or any of them is beyond the powers of the Commonwealth and invalid."

Answer—No, to each alternative.

Li Hop & ors. v. *The Commonwealth & anor.*

" 1. Whether the *War-time Refugees Removal Act* 1949 is beyond the powers of the Parliament of the Commonwealth and invalid or alternatively whether Sections 4 and 5 thereof, or either of them, is beyond the powers of the Commonwealth and invalid."

Answer—No, to each alternative.

Lee Wing & ors. v. *The Commonwealth & anor.*

" 1. Whether the *Immigration Act* 1901-1949, or alternatively Section 4 or alternatively sub-section (4) thereof, is beyond the powers of the Parliament of the Commonwealth and invalid."

Answer—No, to each alternative.

" 2. Whether Section 4 of the *Immigration Act* 1949 (No. 31 of 1949) is invalid."

Answer—No.

" 3 Whether the action of an authorized officer in writing out and signing a form of Certificate of Exemption in respect of a person who is a prohibited immigrant or a person who might be required to pass a dictation test without delivery or notification of the same to such person is the issue or purported issue of a Certificate of Exemption to such person within the meaning of Section 4 of the *Immigration Act* 1949 (No. 31 of 1949)."

Answer—No.

I now consider the questions added to the cases in the Sydney Registry upon the request of the defendants—

"(*a*) Whether the action of an authorized officer in writing out and signing for the purpose of creating an effective document a document extending the period of operation of a Certificate of Exemption is, without delivery or notification of the same to such person, the extension of a Certificate of Exemption within the meaning of Section 4 (2) of the *Immigration Act* 1901-1949."

Section 4 (2) of the said Act provides that a certificate of exemption "shall be expressed to be in force for a specified period only, but the period may be extended from time to time by the Minister or by an authorized officer." The Minister or an authorized officer may "issue" a certificate of exemption under s. 4 (1) and may "extend" the period during which the certificate is expressed to be in force. There is no requirement that the extension of time shall be noted on the certificate or that any document shall be issued to any person by reason of or in connection with the extension of time. Whether or not the time has been extended is a question of fact. The question is not whether the person interested has been told that the time has been extended.

In my opinion this question should be answered—Yes.

"(*b*) Whether the action of an authorized officer in writing out and signing for the purpose of creating an effective document a form of Certificate of Exemption in respect of a person who is a prohibited immigrant or a person who might be required to pass a dictation test is, without delivery or notification of the same to such person, the issue or purported issue of a Certificate of Exemption within the meaning of Section 4 of the *Immigration Act* 1949."

Answer—No—for reasons stated in relation to Question 3 in Ng Kwan's case. The intention of an officer in writing out, signing and creating a document has no bearing upon the question whether the officer, after creating a document, issued it or purported to issue it to a particular person.

The costs of the references in all the cases should be costs in the actions or the habeas corpus proceedings, as the case may be.

RICH J. In *In re Walsh and Johnson*; *Ex parte Yates* (1), I took a wide view of the range of the immigration power, s. 51 par. (xix.) of the Constitution, but a narrower view was taken by the majority of the Court. I have since considered that the majority view should be accepted as settling the meaning of the power.

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

H. C. OF A. 1949. KOON WING LAU v. CALWELL.

I have had the opportunity of reading the judgment of *Williams* J., which appears to me to proceed on this basis, and I agree with it and with the answers to the questions contained in it.

DIXON J. These matters are references to the Full Court under s. 18 of the *Judiciary Act* 1903-1948. The references which were all heard together were made in various proceedings instituted by a number of persons of Chinese race against whom deportation orders have been made by the Minister of Immigration. The purpose of the proceedings is to prevent the carrying out of the orders. Some of the orders were made under sub-s. (4) of s. 4 of the *Immigration Act* 1901-1949 as amended by No. 31 of 1949 and others under the *War-time Refugees Removal Act* 1949 (No. 32 of 1949).

The validity of the orders is attacked upon the grounds first that the material provisions of each statute are unconstitutional and void and second that in any event upon the facts of individual cases the statutory provisions do not authorize the deportation orders.

The considerations affecting the validity of the sections of the *Immigration Act* and of the *War-time Refugees Removal Act* are different and the two statutes must be discussed separately. I shall deal first with the former. In no small degree the validity of the provisions introduced into the *Immigration Act* by No. 31 of 1949 depends upon the interpretation placed upon them and it is better to state what I think is their meaning and effect before speaking of their constitutional validity.

The title of No. 31 of 1949 is the *Immigration Act* 1949 and its evident purpose is to alter s. 4 of the *Immigration Act* 1901-1948 so as to exclude the interpretation placed upon it by this Court in *O'Keefe* v. *Calwell* (1), and to validate certificates of exemption which had already been issued but which under that decision would be invalid. The point decided in the case was that a certificate of exemption did not affect the person to whom it was issued with rights and liabilities unless at that time he was a prohibited immigrant or a person deemed to be a prohibited immigrant offending against the provisions of the Act and as such liable to be prohibited from entering or remaining in the Commonwealth without a certificate. The liability of importance with which a certificate of exemption does affect a person to whom it is properly issued arises upon the expiration or cancellation of the certificate. Subsection (4) of s. 4 provides that on either of those events the person named in the certificate if found within the Commonwealth may

(1) (1949) 77 C.L.R. 261.

be declared by the Minister to be a prohibited immigrant and may thereupon be deported from the Commonwealth in pursuance of an order of the Minister. The decision in *O'Keefe* v. *Calwell* (1) meant that the persons who by receiving an exemption certificate had incurred this liability were those and only those who at the time of the issue of the certificate were already prohibited immigrants or deemed to be prohibited immigrants. Where there was no other existing ground for treating a person as a prohibited immigrant but failure to pass the dictation test, it meant that the dictation test must have been administered before the issue of the certificate of exemption. Otherwise the issue of the certificate would have no consequences.

To remedy this, Act No. 31 of 1949 took two steps. One was to replace sub-s. (1) of s. 4 with a new sub-section. The new sub-section provides that the Minister or an authorized officer might issue a certificate of exemption in the prescribed form authorizing the person named in the certificate (being a prohibited immigrant or an immigrant who may be required to pass the dictation test) to enter or remain in the Commonwealth. The new sub-section goes on to say that the person named in the certificate shall not, while the certificate is in force, be subject to any of the provisions of the Act restricting entry into or stay in the Commonwealth.

The second step taken by Act No. 31 of 1949 was to provide for the validation of a certificate of exemption issued before the Act came into force, that is before 12th July 1949. To this end s. 4 of that Act enacts that the certificate shall be deemed to have been validly issued and the provisions of the *Immigration Act* 1901-1948 as amended by No. 31 of 1949 shall apply to and in relation to the certificate, as if the certificate had been issued under the *Immigration Act* 1901-1948 as so amended. It is upon this provision that the orders of deportation made under the *Immigration Act* depend for their validity. But s. 4 attaches conditions to the operation of the provision and much hangs upon the conditions. Extracted from the section the material conditions attached may be stated thus—(1) a person thereunto empowered by the legislation must have purported to issue a certificate of exemption; (2) he must have purported to do so before 12th July 1949; (3) he must have purported to issue such certificate of exemption to the person named therein; (4) that person must at the time have been a prohibited immigrant or an immigrant who might be required to pass the dictation test; (5) one or other of two additional requirements must be satisfied; viz. either (a) the person named in the

(1) (1949) 77 C.L.R. 261.

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Dixon J.

certificate must be an immigrant on 12th July 1949, or (b) the certificate must have purported to have been in force at a time within the period of two years immediately preceding 12th July 1949. As I understand it, these two additional requirements are taken to reflect a view that, having regard to the invalidity of the certificates of exemption under the decision in *O'Keefe* v. *Calwell* (1), it might be considered possible for an immigrant, notwithstanding that he held a certificate, so to establish himself in Australia as his home by 12th July 1949 that he could no longer be described as an immigrant for the purposes of the immigration laws. In that contingency s. 4 is not to apply to him unless, according to the tenor of the certificate, either alone or possibly as extended, it was in force during some part of the two years ending 12th July 1949.

Primarily the liability to deportation of the parties to these proceedings against whom orders of deportation have been made under the *Immigration Act* turns on the meaning, application and validity of s. 4 of Act No. 31 of 1949. But that section applies the legislation (consisting of the *Immigration Act* 1901-1948 as amended by No. 31 of 1949) " as if the certificate had been issued under " the *Immigration Act* 1901-1948 as so amended. Section 4 of the *Immigration Act* 1901-1949 is therefore so to speak incorporated, and accordingly the meaning and validity of its provisions, so far as material, are drawn in question. I do not think that sub-s. (1) of s. 4 of the Act of 1901-1949 is material and in any case I can see no ground for doubting its validity. As for its meaning, apart from the reference to prohibited immigrant and immigrant, terms depending for their interpretation on other provisions of the Act, the only doubts appear to be whether a certificate may be issued without application and what amounts to the " issue " of a certificate. The latter doubt has, however, been raised with respect to the same expression in s. 4 of Act No. 31 of 1949, though I think without much justification, and the former doubt more properly concerns the operation of that section. They are matters with which I shall deal in relation to s. 4. But there are other sub-sections of s. 4 of the Act of 1901-1949 upon which questions have arisen that are material. Sub-section (2) provides that the certificate shall be expressed to be in force for a specified period only, but the period may be extended from time to time by the Minister or by an authorized officer. Sub-section (4), as I have already said, provides for deportation by ministerial order " upon the expiration or cancellation of any such certificate."

(1) (1949) 77 C.L.R. 261.

Now the first matter that has arisen on these provisions concerns the possibility of extending the period of a certificate of exemption after it has expired and, further, the possibility of extending the period to a date already past at the date of the extension. In considering whether such an extension is competent, the nature of the exemption as well as its effect must be taken into account. The purpose of the exemption is to except the immigrant from the provisions of the law which exclude him or require his deportation and would expose him to deportation, arrest and perhaps punishment. Its effect is to so except him and also to place him at the end of the period of immunity under an immediate liability, at the discretion of the Minister, to deportation. All this points to something which has a prospective operation. A retrospective certificate can produce only the effect of a remission of past sins. If a certificate has been allowed to expire there is no difficulty in issuing a fresh one for a prospective period. While the fresh one is in force, in the words of sub-s. (1), " the person named in the certificate shall not . . . be subject to any of the provisions of this Act restricting entry into or stay in the Commonwealth." Further to extend a certificate for a retrospective period would operate to advance the date of its expiry, one of the events " upon " which the Minister may proceed to make a deportation order. If the lapse of time after the occurrence of that event affects the power to make a deportation order, a matter which raises a separate question, the result would be to make a retrospective extension a means of reviving a lost power. Finally, as a matter of words, when you speak of " extending a period " you naturally mean that without a break in continuity the termination of the period shall be deferred to another fixed point of time. In my opinion sub-s. (2) of s. 4 does not authorize the extension of a period that has expired to a date already past or at all.

The next question which arises is that already mentioned, whether after the expiration or cancellation of a certificate the Minister may, without any limitation of the time that elapses, at any date, however distant, act under sub-s. (4) and make a declaration that the person is a prohibited immigrant and order his deportation. The word " upon," in the expression " upon the expiration or cancellation " does not, I think, mean immediately upon and, as the Supreme Court of New South Wales has decided, it does mean " after " : *Ex parte Lesiputty* ; *Re Murphy* (1).

But, in accordance with the ordinary rule, that must be taken to mean within a reasonable time after the expiration and cancel-

(1) (1947) 47 S.R. (N.S.W.) 433 ; 64 W.N. 113.

H. C. OF A. 1949. KOON WING LAU v. CALWELL. Dixon J.

lation of the certificate of exemption. What is a reasonable time will depend upon all the facts, including the conduct of the person named in the certificate. It does not necessarily mean that by successfully evading the authorities for a long period of time, he can escape from the operation of sub-s. (4). But the operation of sub-s. (4) is limited to a reasonable time after the expiry or cancellation of the certificate.

I now turn to the questions of interpretation which arise in s. 4 of Act No. 31 of 1949 although they have counterparts or analogies in sub-s. (1) of s. 4 of the *Immigration Act* 1901-1949. The first is what amounts to "issue" of a certificate. Like the question of retrospective extension, this arises partly because of an attempt by the authorities to impose upon the parties dealt with under the *Immigration Act* a liability to deportation which would result from the expiry or cancellation of a valid certificate. Certificates were issued without application: they were extended without application: they were extended retrospectively, sometimes to a past date. Certificates were written out in the office and not delivered to or otherwise placed in the possession of the persons named therein. Some were told of the certificates by letter; others were not told at all. This took place on the eve of the Act No. 31 of 1949 becoming law.

But both questions arise in part from the fact that those impugning the validity of the legislation, profiting no doubt by the illustrations the course pursued by the authorities furnishes, seek to push the meaning of the provisions so far that they transgress the limits of legislative power.

Now the only place where the question of what amounts to "issue" has any application to the facts of these proceedings is in s. 4 of Act No. 31 of 1949. For we are not concerned with any certificates "issued" after 12th July 1949 when sub-s. 1 of s. 4 of the *Immigration Act* came into operation. Section 4 of Act No. 31 of 1949, however, does make the "purported issue" of a certificate before that date a condition of its application. But in express terms it practically removes all doubt as to what it means by "issue" although perhaps not by "purported." For it says "where a person (thereunto empowered) purported to issue a certificate of exemption *to a person* named in the certificate." Plainly enough a certificate is not "issued" to the person until it is delivered to him, which means that it must pass from the possession of the authorities either into his manual custody or under his control or into his legal possession so as to be at his command.

Although the words " to the person named in the certificate " do not occur in sub-s. (1) of s. 4 of the *Immigration Act* 1901-1949 I have no doubt that the word " issue " in that sub-section bears the same meaning. In s. 4 of Act No. 31 of 1949 the word " purported " is used because certificates of exemption that had been issued were invalidated owing to the persons named therein not being prohibited immigrants and not being deemed to be prohibited immigrants offending against the Act. It was not a question whether the pieces of paper had been " issued." The section means " where in issuing the document, they purported to issue a certificate of exemption" and it should I think be so understood. But probably that is not important because, in any view it is impossible to treat the act of the officers in making out certificates of exemption without delivering them to the parties as a " purporting to issue " them, whether letters were or were not written to the Chinese stating that this had been done.

As to the question whether an application is required before a certificate of exemption is issued, it is necessary to distinguish between sub-s. (1) of s. 4 of the *Immigration Act* 1901-1949 and s. 4 of Act No. 31 of 1949. The distinction is necessary because of the word " purported." Independently of what regulations may say, I think that it is quite clear that unless the person named in the certificate has applied for it or unless, the application being waived by the authorities, he accepts the certificate when " delivery" is tendered, the certificate has not been validly issued. The person named in the certificate must seek it or consent to receive it. That appears to me clear enough so far as sub-s. (1) goes. But the word " purported " has made me hesitate a little about s. 4 of Act No. 31 of 1949. Is there room for a purported issue which is not an issue because the person named therein will not consent to receive it ? Such a situation is difficult to imagine. On the whole I think that s. 4 ought not to be taken as contemplating it. What I have already said is perhaps a sufficient reason for so concluding, namely that the word " purported " is really pointed not at the act of issue but at the certificate.

There is a question whether sub-s. (2) of s. 4 of the *Immigration Act* 1901-1949 permits the extension of the period for which a certificate of exemption is granted without the person named in the certificate applying for the extension. The section treats the grant of a certificate and its extension as things done for the benefit of the immigrant. In truth they are for his advantage, because without them he either is or is liable to become a prohibited immigrant. It is only because of the situation produced by lapse

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Dixon J.

of time that they may seem to wear a different aspect. On the whole I think that the Act does not contemplate the thrusting of an extension upon an unwilling immigrant I think that an extension could hardly be treated as made until it was communicated. The liabilities of the holder of the exemption are affected by its lapse or its prolongation. The better view appears to be that, like the issue of the certificate in the first place, an extension is not effective unless it has either been applied for or else, having been communicated to the holder of the certificate, he accepts the extension either expressly or by conduct.

Adopting the foregoing interpretation of the provisions I do not think that there is any solid ground for denying validity to them in substance.

There is a serious question about so much of s. 4 of Act No. 31 of 1949 as appears to seek to include persons named in a certificate that, according to its purport, has been in force at some time within two years notwithstanding that the person has ceased to be an "immigrant." But otherwise that section and s. 4 of the *Immigration Act* 1901-1949 are, in my opinion, clearly within the power to make laws with respect to immigration. Sub-section (1) of the latter provision does no more than authorize the authorities to grant a licence to a person who chooses to accept it to enter or remain in Australia notwithstanding that he is an immigrant who otherwise is either prohibited or liable to the dictation test. It is undeniable that that is a law with respect to immigration. Sub-section (2) of s. 4 is not open to any constitutional objection, unless it be on the ground that, contrary to the interpretation I have placed upon the sub-section, it authorized the Minister or his officers to extend the period of a certificate of exemption without the assent and against the will of the person named therein with a view to postponing the date upon which the powers conferred by sub-s. (4) would arise and thus holding its future exercise in reserve. It is sufficient to say that upon the proper interpretation of the sub-section I do not think that it does authorize such a course. But I am by no means satisfied that the provision would be invalid even if it did authorize the authorities to extend the period of a certificate of exemption against the will of the person exempted. No doubt it would be true that, combined with sub-s. (4), sub-s. (2) would then operate to enable the authorities to hold deportation in reserve and by extending the period as often as it expired to do so indefinitely. It is contended that this would mean that if an immigrant, by making his permanent home in Australia and identifying himself with the community, had withdrawn himself

from the application of the legislative power with respect to immigration, he would nevertheless fall within the operation which this construction would give to sub-s. (2) and sub-s. (4) in combination. The foundation of this argument is to be found in the views expressed in *Ah Sheung* v. *Lindberg* (1), *Potter* v. *Minahan* (2), and *Ex parte Walsh and Johnson* ; *In re Yates* (3), concerning the position of those who belong to the Australian community. It seems to be acknowledged that in so far as a law purports to prevent the entry into the Commonwealth of such a person or to authorize his expulsion, it is not a law with respect to immigration. But there does not appear to be any general agreement as to the tests for the application of this very vague conception. Whatever may be the tests for ascertaining whether a man belongs to the Australian community, I see no reason for saying that a law which denies to an immigrant liberty to enter or remain in the country unless he obtains a permit is not a law with respect to immigration because it gives to the authorities power to extend the permit from time to time if no limit upon the number or period of the extensions is imposed. It is a law with respect to immigration because it takes the immigrant before he has settled in the country and provides that he shall enter or remain conditionally. The condition it imposes is in effect that he shall go out when the authorities withdraw their consent to his remaining. Sub-section (4) of s. 4 is not in my opinion invalid. If it left the person named in an expired or cancelled certificate of exemption liable for the rest of his life to expulsion it might perhaps conflict with the principle for which reliance is placed upon the decisions mentioned, the principle that the immigration power will not support a law for the deportation of persons who have settled in Australia so as to have become members of the Australian community. But sub-section (4) of s. 4 does not leave a person mentioned in an expired or cancelled certificate liable to deportation longer than a reasonable time after the expiry or cancellation of the certificate.

I turn to the question of the validity of s. 4 of Act No. 31 of 1949. It is a validating provision, and, as I have construed it, the assumption upon which it proceeds is that in fact certificates of exemption have been issued to persons named in them, but they have failed as certificates of exemption because those persons were not within the category described in sub-s. (1) of s. 4 as that sub-section stood in the *Immigration Act* 1901-1948. Such certificates it then validates. It seems to me that prima facie such a law is a law with respect to

(1) (1906) V.L.R. 323 ; 4 C.L.R. 949.
(2) (1908) 7 C.L.R. 277.
(3) (1925) 37 C.L.R. 36.

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

DIXON J.

immigration. It is so because it deals with the effect of a document issued to immigrants as a permit to remain. On the interpretation of the section that I have adopted, there is in my opinion no tenable objection to its validity except that to which I have already referred. I mean the objection that by including certificates which according to their purport have been in force at some time within two years from the commencement of the Act, as well as certificates naming persons who are immigrants at the commencement of the Act, the provision assumes to affect persons who have become members of the Australian community. It must not be forgotten that the part of the section on which this objection is based does nothing but restrict the operation of the validating words to two cases instead of leaving them to operate generally. If they had been left to operate generally the validation would have done no more than produce retrospectively the precise situation which in the view of the minority of the Court (consisting of the Chief Justice and myself) then existed according to the interpretation of sub-s. (1) of s. 4 of the Act of 1901-1948 which in *O'Keefe* v. *Calwell* (1) commended itself to them. In other words it would be nothing but a provision saying that the certificates erroneously issued shall have the same effect as if they had been issued under the present sub-s. (1). I do not see why that should not be valid.

The two cases to which the general operation of the provision is restricted are expressed as follows:—"Where . . . (*a*) the person named in the certificate was, at the commencement of this Act, an immigrant; or (*b*) the certificate purported to have been in force at any time within the period of two years immediately preceding the commencement of this Act". It is easy to see why when analysed this has been taken to suggest an intention to embrace cases where the person who was an immigrant when the certificate was issued has since become a member of the Australian community within the conception to which I have referred. But, after all, the effect of par. (*b*) is no more than to say that if a de facto but invalid certificate of exemption was ostensibly in force at some time during the preceding two years then the person named therein shall be dealt with as if it were valid. If a reasonable time has elapsed since it went out of force he is no more under a liability to deportation than would be a person in the like position whose certificate was validly issued.

The real question is whether such a law is a law upon the subject of immigration. I do not see why it should be denied the description. Clearly it is not true that all persons who fall

(1) (1949) 77 C.L.R. 261.

within par. (*b*) are outside the immigration power. Many of them would also fall under par. (*a*). If it is found that a person is within the description of par. (*b*) and yet falls outside the application of the immigration power he will of course not be affected by the section. But none of the cases before the Court exhibits a state of facts which would remove the party from the operation of the constitutional power and I do not see why the section should be held invalid because it is conceived to be possible that such a case might arise. I do not find it easy to see how such a case would arise but if it does I think that s. 15A of the *Acts Interpretation Act* 1901-1948 would at once save the validity of the section and exclude the case from its operation.

For the reasons I have stated I think that s. 4 of the *Immigration Act* 1901-1949 and s. 4 of the *Immigration Act* 1949 are valid.

It is now necessary to consider the validity of the *War-time Refugees Removal Act* 1949. Briefly stated this Act provides for the deportation, at the discretion of the Minister, of persons falling under any one of three categories set out in the Act and not falling within a set of qualifications or exceptions.

There are two grounds of objection taken to the validity of the enactment or material parts of it. The first is that a law for the deportation of persons under two of the three categories cannot find support from any legislative power of the Commonwealth. The second is that the provisions for the detention of the deportees pending deportation are so widely drawn that the deportees might be held indefinitely in custody, no steps being taken to deport them.

The categories are set out in the first part of s. 4 (1) of the Act. It is not denied that the first category is within power. It is " every person who entered Australia during the period of hostilities and is an alien." " Period of hostilities " means the period from 3rd September 1939 to 2nd September 1945. It is conceded that a law for the deportation of such persons is a law with respect to aliens and I shall assume that it is so. The second category is of persons who during the period of hostilities, entered Australia as a place of refuge by reason of the occupation, or threatened occupation, of any place by an enemy, and have not left Australia since they so entered.

In my opinion a provision for the deportation of such persons can be supported as a law with respect to defence.

The state of facts upon which the provision will operate is well known. Numbers of fugitives entered Australia as the Japanese advanced in South-East Asia and the Pacific. They were of course

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Dixon J.

let in wherever they arrived and the situation made this inevitable. They were harboured as refugees and they were fugitives from the enemy who was menacing our shores. The paragraph covers such persons, but it is drawn so as to cover persons who came in at an earlier date as refugees from the Germans and Italians and others who came in at a later date, if any there were, when the Japanese advance had ceased and the tide had turned. The immigration laws were, however, relaxed or abandoned in both cases and the reason was that, because of the character of the conflict, the behaviour of our enemies, our duties to our allies, and the practical exigencies of the war, no other course could be pursued. A situation was thus caused in the course of the war and as part of its conduct which had to be dealt with as policy might dictate at the end of the war, and this we may assume was generally recognized at the time. Litigation before the Court has shown that for some time the Department of Immigration has sought to deal with the situation under the existing laws relating to immigration. Repatriation of many of the refugees was not practicable immediately after hostilities closed, not only because of lack of transport but also because of the state of the countries concerned. The failure later to find in the *Immigration Act* a sufficient means of dealing with the refugees who remained led to the passing of the *Immigration Act* 1949 and the *War-time Refugees Removal Act* 1949. In the meantime a considerable time had elapsed but the delay is explained by the facts I have stated. In these circumstances I think that the inclusion of the persons mentioned in par. (*b*) of s. 4 (1) of the latter Act is within the defence power. It is a piece of legislation dealing with the present residual form of a situation arising in the course of the war by reason of the exigencies of the war, a situation which has not been earlier dealt with owing for a time to causes directly associated with the war and afterwards owing to a mistaken reliance upon the sufficiency of the existing law. I think this comes within the principles we have attempted to lay down with respect to the use of the defence power in the period after hostilities have closed.

Paragraph (*c*) of s. 4 (1) includes a category of persons whose presence in Australia is due to the war but the cause of their coming is described less definitely. Their entry must have been during the period of hostilities. But according to the paragraph it is enough if it were by reason of any other circumstances attributable to the existence of hostilities. In spite of some uneasiness because of the vagueness of this description I have come to the conclusion that the paragraph is valid. It is really no more than an attempt

to devise a description that would cover all others who were let in under the pressure of like circumstances at the same time. The same considerations are applicable and I think this, too, is valid.

It is now necessary to turn to the provisions concerning the holding of the deportee in custody until deportation. Section 5 is as follows :—" The Minister may, at any time within twelve months after the commencement of this Act, make an order for the deportation of a person to whom this Act applies and that person shall be deported in accordance with this Act."

Section 7 (1) then provides :—" A deportee may—(a) pending his deportation and until he is placed on board a vessel for deportation from Australia ; (*b*) on board the vessel until its departure from its last port of call in Australia ; and (c) at any port in Australia at which the vessel calls after he has been placed on board, be kept in such custody as the Minister or an officer directs."

" Deportee " is defined to mean " a person for whose deportation the Minister has made an order under this Act."

The argument is that there is nothing to prevent the Minister making a deportation order and giving a direction as to the custody in which the deportee is to be held and leaving him there for life or indefinitely. I take the words with which s. 5 concludes to refer to the procedure set out in s. 7 (1). The language is imperative. In s. 7 (1) (*a*) I think that the words " pending deportation " imply purpose. The two provisions together mean that a deportee may be held in custody for the purpose of fulfilling the obligation to deport him until he is placed on board the vessel. It appears to me to follow that unless within a reasonable time he is placed on board a vessel he would be entitled to his discharge on habeas. In these circumstances the provision is, I think, a law with respect to the removal of the alien or refugee and falls within the respective powers justifying that removal. It may be remarked that s. 7 is based on s. 8c of the *Immigration Act*, which hitherto has escaped challenge.

In my opinion the material provisions of the *War-time Refugees Removal Act* 1949 are valid.

It remains for me to state what in my opinion is the result upon these references to the Full Court which ensues from the views I have expressed both as to validity and as to interpretation. For this purpose it is necessary to separate the proceedings that we have heard together. In the three actions which came before *Williams* J. his Honour referred specific questions to the Court. In those cases it will be enough to say how I would answer those questions. For they explain themselves.

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Dixon J.

In the action *Ng Kwan and others* v. *The Commonwealth* (No. 25 of 1949) I would answer the questions as follows:—

1. Section 4 of the *Immigration Act* 1901-1949 is not beyond the powers of the Parliament and is valid.

2. Section 4 of the *Immigration Act* 1949 (No. 31 of 1949) is valid.

3. The action of an authorized officer in writing out and signing a form of certificate of exemption in respect of a person who is a prohibited immigrant or a person who might be required to pass a dictation test without delivery or notification of the same to such person is not the issue or purported issue of a certificate of exemption to such person within the meaning of s. 4 of the *Immigration Act* 1949 (No. 31 of 1949).

4. Sections 4, 5 and 7 of the *War-time Refugees Removal Act* 1949 (No. 32 of 1949) are not beyond the powers of the Parliament and are valid.

In *Li Hop and others* v. *The Commonwealth and others* (No. 26 of 1949), the only question is the same as the fourth of the foregoing questions and I answer it in the same way.

In *Lee Wing and others* v. *The Commonwealth and others* (No. 27 of 1949) there are three questions. They are identical with the first three of the foregoing questions and I answer them in the same way.

In the five actions and five applications for habeas corpus which came before me I referred the proceedings to the Full Court without asking specific questions.

These ten proceedings relate to five Chinese each of whom brought an action and applied for habeas. Four of them, Koon Wing Lau, Tsui Yue Shing, Cheung Poy, and Loy Fook, say they were born in Hong Kong and are British subjects. If this is correct they do not fall within par. (*a*) of s. 4 (1) of the *War-time Refugees Removal Act* 1949 and a deportation order made against any of them could not be supported if it depended upon that paragraph. But Koon Wing Lau, Tsui Yue Shing and Cheung Poy together with Lee Dai, on their own showing, were evacuated to Australia from Nauru under threat of a Japanese attack. They therefore fall under par. (*b*) of s. 4 (1).

In the cases of Koon Wing Lau and Cheung Poy declarations have been made by the Minister that they fall under that provision. No such declaration has been made in the case of Tsui Yeu Shing but he has been declared a prohibited immigrant and that would make it immaterial. Cheung Poy, however, claims to have left Australia after his first entry and to have re-entered it later in circumstances to which par. (*b*) of s. 4 (1) is inapplicable. Lee

Dai does not claim to be a British subject and he has been dealt with under par. (*a*) of s. 4 (1). Loy Fook claims to be a British subject. Declarations have been made that he falls under par. (*b*) as well as (*a*). But he claims that the facts never brought him within par. (*b*) and that in any case he subsequently left Australia and re-entered in circumstances to which the paragraph does not apply.

The Commonwealth does not accept the facts set up by these plaintiffs or applicants and it is apparent that, at all events in the case of Cheung Poy and Loy Fook, their liability to deportation under the existing orders depends upon the facts. If such issues of fact are to be fought, they should be decided by a single judge.

I would make declarations of the validity of ss. 4, 5 and 7 of the *War-time Refugees Removal Act* 1949 and of s. 4 of the *Immigration Act* 1901-1949 and of the *Immigration Act* 1949. With these declarations I would remit the ten matters for further hearing before a single judge.

The defendants requested that a further question should be decided in the references by *Williams* J. It asks in substance whether a certificate of exemption may be extended without either delivery or notification of the extension to the person named in the certificate. For the reasons I have given I think that an extension cannot be forced upon the holder of a certificate and therefore would decide the question in the negative.

In all cases I would make the costs of the references costs in the cause.

McTIERNAN J. I agree with the reasons and conclusions of the Chief Justice. I add for myself a brief observation on the power in s. 51 (xxvii.) of the Constitution. This is a plenary power to legislate with respect to immigration and emigration. The doctrine that there is a limitation on this power which restricts it to the making of laws, applying to a person who immigrated into Australia, from the time he entered until " he becomes a member of the Australian community," whatever that phrase means, fails to give an ample meaning to the language of the power and denies its plenary nature: such a person in truth is in the field marked out by the power as long as he is within the territorial jurisdiction. I refer, of course, only to a person who immigrated since the Commonwealth came into existence. The interpretation of s. 51 (xxvii.), which *Isaacs* J. gave in *Ex parte Walsh and Johnson* ; *In re Yates* (1), is, in my opinion, to be preferred to any other interpretation in the case.

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

H. C. OF A. 1949. KOON WING LAU v. CALWELL.

WILLIAMS J. These actions and applications for writs of habeas corpus which have been heard together raise a number of questions relating to the *War-time Refugees Removal Act* 1949 and the *Immigration Act* 1901-1949 and in particular s. 4 of the principal Act as amended by s. 3 of the *Immigration Act* 1949 and s. 4 of the *Immigration Act* 1949. The first actions and applications for writs of habeas corpus (which I shall call the Melbourne proceedings) are in the interlocutory stage and have been directed to be argued before the Full Court under s. 18 of the *Judiciary Act* 1903-1948. The remaining actions (which I shall call the Sydney actions) are also in the interlocutory stage and certain questions of law have been directed to be argued before the Full Court under the same section. During the argument these questions were varied and other questions added by the consent of the parties. In the Melbourne proceedings it was agreed during the argument that, after any questions of law arising in the proceedings had been answered by the Full Court, the proceedings should be remitted to a single Justice to try any issues of fact which still remained for determination.

The questions of law that arise in the Melbourne proceedings relate principally to the *War-time Refugees Removal Act* 1949. The first question is whether this Act is beyond the powers of the Commonwealth Parliament and invalid, or alternatively whether ss. 4, 5 and 7 thereof or any of them are or is invalid. Two subsidiary questions which arise if s. 4 is held to be valid, are (1) whether the word " entered " in the section refers only to a voluntary entry into Australia or includes an involuntary entry due to enemy action; (2) whether the expression " has not left Australia since he so entered " in s. 4 (1) (*b*) and (*c*) means has not left Australia on any occasion since he so entered or has not left Australia at the time the Act came into force, that is on 12th July 1949. These subsidiary questions can be disposed of immediately. I can see no reason why the word " entered " in s. 4 should be restricted to mere voluntary entry into Australia during the period of hostilities. In my opinion the word " entered " should be given its ordinary natural grammatical meaning, and this meaning is wide enough to include any form of physical entry into Australia during the period of hostilities whether voluntary or involuntary. I am also of opinion that the expression " has not left Australia since he so entered " should also be given its ordinary natural grammatical meaning so that if a person left Australia after he first entered it during the period of hostilities and then returned to Australia,

he is not a member of the class of persons defined in s. 4 (1) (*b*) or 4 (1) (*c*).

I shall now proceed to discuss the constitutional validity of the Act and of the sections under challenge. The Act applies to three classes of persons who entered Australia during the period of hostilities, that is between 3rd September 1939 and 2nd September 1945, not being persons excepted by s. 4 (1) (*d*), (*e*), (*f*) or (*g*). Section 4 has no operative effect in itself. It simply defines the classes of persons all or any of whom may be deported if the Minister at any time within twelve months after the commencement of the Act makes an order for their deportation. They are plainly, I think, three severable classes, so that the invalidity of the Act with respect to any class would not affect its validity with respect to the other classes. In my opinion legislation with respect to persons in class 1 (*a*), that is to say with respect to every person who entered Australia during the period of hostilities and is an alien at the commencement of the Act other than aliens excepted by pars. (*d*), (*e*), (*f*) and (*g*), is legislation with respect to aliens and is therefore authorized by s. 51, par. (xix.) of the Constitution. The provisions of ss. 4 (1) (*b*) and 4 (1) (*c*) are wide enough to include British subjects. The defendants contend that the Act in its application to these classes is authorized by the defence power, s. 51, par. (vi.) of the Constitution, or alternatively by the immigration power, s. 51, par. (xxvii.) of the Constitution. The defence power is a very wide power during hostilities but contracts rapidly after hostilities have ceased. The inclusion of these classes in the Act could only be justified under the defence power if such legislation fell within the ambit of that power on 12th July 1949. In my opinion this depends upon whether the continued presence in Australia after 12th July 1949 of persons who entered Australia during the period of hostilities could reasonably be considered to be a threat to the safety of Australia in the event of some future war. Class 4 (1) (*a*) deals with aliens, so that, as I have said, classes 4 (1) (*b*) and 4 (1) (*c*) are aimed at British subjects. The persons included in these classes have been allowed to reside here unmolested for nearly four years after hostilities have ceased, and may have acquired a domicile of choice in Australia and severed their connection with any other community. But it is submitted that, in spite of any intervening circumstances, they are still within the range of the defence power simply because they entered Australia during the period of hostilities as a place of refuge by reason of the occupation or threatened occupation of any place by an enemy, or by reason of any other circumstances attributable to

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Williams J.

the existence of hostilities. Possibly such legislation might have been enacted under the defence power immediately after the conclusion of hostilities, but its initiation four years later could not, in my opinion, be justified as an exercise of the defence power. Further, I am of opinion, for reasons which I shall state later, that such legislation could not be justified as an exercise of the immigration power since the classes defined in ss. 4 (1) (*b*) and 4 (1) (*c*) could include persons who were beyond the reach of this power on 12th July 1949. I am therefore of opinion that the *War-time Refugees Removal Act* is only valid in its application to the class defined in s. 4 (1) (*a*) of the Act.

Section 3 of the *War-time Refugees Removal Act* provides that a deportee means a person for whose deportation the Minister has made an order under the Act. Section 5 provides that the Minister may, at any time within twelve months after the commencement of this Act, make an order for the deportation of a person to whom this Act applies and that person shall be deported in accordance with this Act. This section imposes a duty on the Minister to see that a person for whose deportation the Minister has made an order shall be deported in accordance with the Act. The words "in accordance with the Act" refer to the sections of the Act which follow. Section 7 (1) (*a*) provides that a deportee may, pending his deportation and until he is placed on board a vessel for deportation from Australia, be kept in such custody as the Minister or an officer directs. The Act does not provide that a deportee shall be deported from Australia within a specified period. It was submitted that under this provision a deportee could be kept in custody indefinitely and never deported, so that it is not a law with respect to the deportation of aliens at all but a law which in substance and effect authorizes the indefinite incarceration of the members of a certain class of persons. But a deportee may only be kept in custody pending his deportation and until he is placed on board a vessel for deportation from Australia, so that, if it appeared that a deportee was being kept in custody not with a view to his deportation but simply with a view to his imprisonment for an indefinite period, the custody would be illegal. This fact might be difficult to prove but the omission to fix a period within which the deportee must be placed on board a vessel for deportation from Australia is not sufficient, in my opinion, to prevent s. 7 (1) (*a*) being a law with respect to aliens. It would obviously be difficult to fix such a period. Each case must depend on its own facts. A court is loath to see any person committed to gaol without trial, and would be on the alert to see that the power

conferred on the Minister or an officer to keep a deportee in custody pending deportation was used for that purpose and no other purpose. Section 7 (1) (*a*) is, in my opinion, a valid exercise of the power conferred on the Commonwealth Parliament by s. 51, par. (xix.) or alternatively by s. 51, par. (xxxix.) of the Constitution.

I pass now to the questions asked in the Sydney actions as varied and added to during the argument. These questions are as follows : (1) whether the *Immigration Act* 1901-1949, or alternatively s. 4 or alternatively sub-s. 4 thereof, is beyond the powers of the Commonwealth Parliament and invalid. But no argument was, and I should think that no argument could be, submitted that the whole of this Act is invalid. The real attack was made on s. 4. This section has been amended since *O'Keefe* v. *Calwell* (1), by s. 3 of the *Immigration Act* 1949. Sub-section (1) now provides that " The Minister or an authorized officer may issue a certificate of exemption in the prescribed form authorizing the person named in the certificate (being a prohibited immigrant or an immigrant who may be required to pass the dictation test) to enter or remain in the Commonwealth, and the person named in the certificate shall not, while the certificate is in force, be subject to any of the provisions of this Act restricting entry into or stay in the Commonwealth." Sub-sections (2) and (3) are the same as before. Sub-section (4) now provides that " Upon the expiration or cancellation of any such certificate, the Minister may declare the person named in the certificate to be a prohibited immigrant and that person may thereupon be deported from the Commonwealth in pursuance of an order of the Minister." Sub-sections (5) and (6) are the same as before. Mr. *Barwick* relied upon the decision of the Supreme Court of New South Wales in *Ex parte Lesiputty* ; *Re Murphy* (2), to found an argument that the word " upon " in s. 4 (4) in its context means " after," so that sub-s. (4) enables the Minister at any length of time after the expiration or cancellation of a certificate to declare a person to be a prohibited immigrant and order his deportation from the Commonwealth. The result would be that a person to whom a certificate of exemption was once issued would be a person who upon its expiration would remain for all time liable to be declared a prohibited immigrant and deported from the Commonwealth. I agree with Mr. *Barwick* that if this is the true construction of sub-s. (4), it is not legislation authorized by s. 51, par. (xxvii.) of the Constitution. The immigration power is not, in my opinion, a power which authorizes the Commonwealth Parliament to

(1) (1949) 77 C.L.R. 261.

(2) (1947) 47 S.R. (N.S.W.) 433 ; 64 W.N. 113.

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Williams J.

legislate on the basis that because a person is once an immigrant he is always an immigrant in the sense that he remains forever subject to the power.

I regard *Ex parte Walsh and Johnson* ; *In re Yates* (1), as a definite decision of this Court that the immigration power does not authorize Parliament to legislate with respect to persons who originally immigrated to Australia but have since become members of the Australian community. *Knox* C.J. (2), said: "If the question be whether he is entitled to remain in Australia, or, stated otherwise, whether he may be lawfully expelled from Australia under a law made under the authority of this power (that is the immigration power) and of this power only, the question for decision is whether he is, at the time when it is sought to expel him, a person who is not a member of the Australian community and who is therefore subject to the immigration power." *Higgins* J. (3), said: "If this view is right—if this is not a law with respect to immigration at all, but a law for the deportation of residents who have been immigrants—sec. 8AA cannot be valid by virtue of the power conferred by sec. 51 (xxvii.)." *Starke* J. (4), said: "Now here, I think, is foreshadowed a clear principle, namely that those who 'originally associated themselves together to form' the Commonwealth and those who are 'afterwards admitted to membership' cannot thereafter, upon entering, or crossing the boundary of Australia, from abroad, be regarded as immigrating into it unless in the meantime they have in fact abandoned their membership. They have never been within, or else have passed beyond, the range of the power: it has never operated, or else has become exhausted. Of course, conditions may be attached to persons immigrating into Australia, upon entry, and so long as they remain within the range of the power. But the undoubted power of Parliament to pass retroactive laws was pressed upon us. It may, no doubt, provide that immigration laws shall operate from a time past, but how can it make them operate over persons who are beyond the range of the power before the retroactive law is made? The law is not then, in my opinion, a law with respect to immigration, but a law for bringing again within the field of immigration persons who have passed, and were allowed by law to pass, beyond its borders."

In *O'Keefe's Case* (5) *Latham* C.J. said: "Laws with respect to immigration may properly control, not only the act of entry

(1) (1925) 37 C.L.R. 36.
(2) (1925) 37 C.L.R., at p. 62.
(3) (1925) 37 C.L.R., at p. 110.
(4) (1925) 37 C.L.R., at p. 137.
(5) (1949) 77 C.L.R., at p. 276.

into Australia, but also the conditions upon which persons not already members of the Australian community may be permitted to remain in Australia." His Honour (1) said: "Immigration into a country, if completed, involves two elements, (*a*) entry into the country, and (*b*) absorption into the community of the country. Both of these elements can be controlled under a power to make laws with respect to immigration." In *O'Keefe's Case* (2) *Dixon* J. said: "After what was said about the power and the Act by *Cussen* J. in *Ah Sheung* v. *Lindberg* (3) and by this Court in *Chia Gee* v. *Martin* (4), *Potter* v. *Minahan* (5) and *R.* v. *MacFarlane*; *Ex parte O'Flanagan and O'Kelly* (6), it seems impossible to do other than treat the power over immigration as relating to all movement of strangers into the Commonwealth independently of the intention of the persons who enter. So long as the new arrival is a stranger and not one of the people of Australia the legislature may deal with the question whether he enters and on what terms he enters or remains. See particularly per *Starke* J. in *R.* v. *MacFarlane*; *Ex parte O'Flanagan and O'Kelly* (7). The Act is construed accordingly. See per *McMillan* J. in *Mann* v. *Ah On* (8)."

The Commonwealth Parliament has, of course, the power to impose reasonable conditions which must be complied with before a person who enters Australia may be allowed to become such a member. I adhere to the statement in *O'Keefe's Case* (9): "It is within the constitutional powers of the Commonwealth Parliament under the immigration power, s. 51, par. (xxvii.), to fix a reasonable period of probation during which immigrants who have been admitted into Australia should continue to be subject to the risk of becoming prohibited immigrants and not be allowed to acquire the rights and privileges and immunity from deportation of members of the Australian community: *R.* v. *MacFarlane*; *Ex parte O'Flanagan and O'Kelly* (10)." But in my opinion a law with respect to immigrants cannot apply to persons who are no longer immigrants, and persons are no longer immigrants who have entered and completed their settlement in accordance with the immigration laws in force prior to this completion. I agree that the Commonwealth Parliament may under the power prevent persons entering Australia at all either for a temporary purpose or with a view to making their permanent homes here. The law may authorize a person to enter the country for a temporary purpose at the end of which he must depart. But

(1) (1949) 77 C.L.R., at p. 277.
(2) (1949) 77 C.L.R., at p. 288.
(3) (1906) V.L.R. 323.
(4) (1905) 3 C.L.R. 649.
(5) (1908) 7 C.L.R. 277.
(6) (1923) 32 C.L.R. 518.
(7) (1923) 32 C.L.R., at p. 580.
(8) (1905) 7 W.A.L.R. 182.
(9) (1949) 77 C.L.R., at p. 294.
(10) (1923) 32 C.L.R., at p. 533.

H. C. OF A. 1949. KOON WING LAU v. CALWELL. Williams J.

a law which allows a person to enter and stay in Australia indefinitely but prevents him from ever becoming a member of the Australian community is not a law with respect to immigration, because the essence of immigration is the entry by a person into a country in order to make that country his permanent home. A law with respect to immigration is therefore a law which regulates the right to immigrate, so that on compliance with its conditions the immigrant becomes a member of a new community and no longer an immigrant.

Section 4 (1) of the *Immigration Act* 1901-1949 authorizes the Minister or an authorized officer to issue a certificate of exemption authorizing the person named in the certificate (being a prohibited immigrant or an immigrant who may be required to pass the dictation test) to enter or remain in the Commonwealth. The person named in the certificate whilst it is in force is not subject to any of the provisions of the Act relating to entry into or stay in the Commonwealth. I can see no reason why an immigration law should not provide that a person who applies for and accepts such a certificate should during its currency either original or extended remain an immigrant. But I do not see how such a law could provide that after its expiration he should be kept indefinitely in a different position to any other immigrant with respect to the right to become a member of the Australian community, and thereby progress beyond the reach of the immigration power. Accordingly I agree with Mr. *Barwick* that if s. 4 (4) means that just because a person has been issued with a certificate of exemption the Minister may at any length of time after its expiration declare him to be a prohibited immigrant and order that he be deported from the Commonwealth, the section could apply to persons who had become members of the Australian community between the date of the expiration of the certificate and the date of the declaration and that such a law would be beyond the immigration power. I agree with the Supreme Court in *Lesiputty's Case* (1) that "upon" means "after" but it does not, in my opinion, mean an indefinite time afterwards but within a reasonable time afterwards: *Folkhard* v. *Metropolitan Railway Co.* (2). The Minister may make the declaration upon either the expiration or cancellation of the certificate. Presumably a certificate would not be cancelled except for good cause and with a view to a declaration being made. I think that the sub-section means that the declaration must be made immediately or within a reasonable time after the expiration or cancellation of the certificate.

(1) (1947) 47 S.R. (N.S.W.) 433; 64 W.N. 113.

(2) (1873) L.R. 8 C.P. 470.

So construed, s. 4 is, in my opinion, a valid exercise of the immigration power. It only authorizes a Minister or authorized officer to issue a certificate of exemption to persons who are within the range of the power, that is to say, to prohibited immigrants or immigrants who may be required to pass the dictation test. It is, as I have said, within the power for the Commonwealth Parliament to provide that such persons shall remain immigrants whilst the certificate or extension thereof remains in force and to provide that upon its expiration or cancellation, that is immediately or within a reasonable time afterwards, the Minister may declare the person to whom it was issued to be a prohibited immigrant.

But the word " issue " in s. 4 connotes to my mind that the Act intends that the certificate is to be a document which is delivered to a person. It is a document which a person is to possess. Section 16 of the principal Act provides that the Governor General may make regulations, not inconsistent with the Act for, *inter alia*, imposing and regulating charges for certificates granted under this Act or the regulations and prescribing the forms of certificates to be granted under this Act or the regulations. The Act therefore contemplates that a certificate will be a document for which a charge may be made. A person who is to be charged for a document is usually a person who applies for and is entitled to delivery of the document upon payment of the charge. Regulation 39 of the *Immigration Regulations* (S.R. 1932 No. 103) provided that the certificate of exemption referred to in s. 4 of the Act might be in accordance with form D. The form of certificate in these regulations had a note that it must be retained by the person to whom it is issued while he or she remains in Australia, but must be returned to the Customs authorities at the expiration of the stated period of exemption or on the holder's departure from the Commonwealth. Regulation 39 was amended by S.R. 1940 No. 144. The following sub-regulation was added to it: " (2) Every person to whom a certificate of exemption is issued shall retain such certificate while he remains in the Commonwealth, but shall return it to an officer forthwith when it expires or is cancelled or immediately prior to his departure from the Commonwealth whichever is the earliest." Form D in the earlier regulations was omitted and a new form inserted in its stead. The new form requires that reg. 39 (2) shall be printed on the back. The regulations therefore require that a person shall retain the certificate in his possession and shall return it to an officer forthwith when it expires. Unless a certificate which is extended is returned to the applicant, he would not be able to retain it or return it on its expiry. For these reasons I am of

H. C. OF A. 1949. KOON WING LAU v. CALWELL. Williams J.

opinion that the certificates of exemption referred to in s. 4 of the principal Act are certificates which have been applied for and delivered to persons who have applied for them, and that the extensions of certificates referred to in the section are extensions which have been applied for by the holders of certificates and which have been noted on the certificates and returned to the holders.

The next question in the Sydney actions is whether s. 4 of the *Immigration Act* 1949 is invalid. This section is obviously intended to overcome the decision of this Court in *O'Keefe* v. *Calwell* (1). I have no doubt that the word " purported " was intended to refer to and validate certificates of exemption which were there held to be invalid because they had been issued to persons who were not " liable to be prohibited from entering or remaining in the Commonwealth " within the meaning of s. 4 of the *Immigration Act* 1901-1948. Section 4 of the *Immigration Act* 1949 applies to two cases (*a*) where the person named in the certificate was, at the commencement of this Act on 12th July 1949, an immigrant; or (*b*) the certificate purported to have been in force at any time within the period of two years immediately preceding the commencement of this Act. In my opinion par. (*a*) which is confined to persons who were still immigrants when the Act came into force is a valid exercise of the immigration power, but par. (*b*) is not a valid exercise of the immigration power because it seeks to bring within it retroactively persons who prior to 12th July 1949 may have become members of the Australian community. I would answer this question by saying that in the case of the persons defined in s. 4 (*a*), s. 4 of the *Immigration Act* is valid but that in the case of the persons defined in s. 4 (*b*), it is invalid.

There are three further questions in the Sydney cases—(1) whether the *War-time Refugees Removal Act* 1949 is beyond the powers of the Parliament of the Commonwealth and invalid or alternatively whether ss. 4, 5 and 7 thereof or any of them are or is beyond the powers of the Commonwealth and invalid. I have already answered this question. The other questions are (*a*) whether the action of an authorized officer in writing out and signing for the purpose of creating an effective document a document extending the period of operation of a certificate of exemption is, without delivery or notification of the same to such persons, the extension of a certificate of exemption within the meaning of s. 4 (2) of the *Immigration Act* 1901-1949; (*b*) whether the action of an authorized officer in writing out and signing for the purpose of creating an effective document a form of certificate of exemption in respect of a person

(1) (1949) 77 C.L.R. 261.

who is a prohibited immigrant or a person who might be required to pass a dictation test is, without delivery or notification of the same to such person, the issue or purported issue of a certificate of exemption within the meaning of s. 4 of the *Immigration Act* 1949. For the reasons already given I would answer both these questions in the negative.

To sum up I would answer the questions asked in the Sydney actions as follows. These questions are set out in the judgment of the Chief Justice and I shall not repeat them but only give my answers.

Ng Kwan & Ors. v. *The Commonwealth of Australia & Anor.*

Question 1—No to each alternative.

Question 2—No with respect to the persons defined in par. (*a*), Yes with respect to the persons defined in par. (*b*).

Question 3—No.

Question 4—Yes, except with respect to the persons defined in s. 4 (1) (*a*).

Li Hop & Ors. v. *The Commonwealth of Australia & Anor.*

Question 1—Yes, except with respect to the persons defined in s. 4 (1) (*a*).

Lee Wing & Ors. v. *The Commonwealth of Australia & Anor.*

Question 1—No to each alternative.

Question 2—No with respect to the persons defined in par (*a*), Yes with respect to the persons defined in par. (*b*).

Question 3—No.

I would answer each of the questions referred in the Sydney actions upon the request of the defendants—No.

WEBB J. I agree with the answers proposed by the Chief Justice.

The content of the defence power varies : during war it comprises a greater number of subject matters than during peace, e.g., petrol rationing is part of the content of the defence power during war but not during peace. But the content of the immigration power is constant. However, whether the content of a power varies or is constant, legislation to be valid must be confined to a subject matter which is part of the content of a power at the time the legislation is enacted; but the persons, things and circumstances which in turn form the content of such a subject matter, and with which the legislation deals, may vary from time to time during the period of operation of the legislation. A person may be within the range

H. C. OF A. 1949.

KOON WING LAU v. CALWELL.

Webb J.

of the legislation today and beyond it tomorrow. But it was held in *R.* v. *Kidman* (1), that legislation may be made retrospective to any date since Federation. In that case acts which did not constitute an offence when done were made criminal by a provision of the *Crimes Act* made retrospective to a time before the doing of the acts: a conspiracy to defraud the Commonwealth entered into before the legislation was enacted and which was not a crime when completed was made criminal *ex post facto*. It follows, I think, that legislation under the immigration power can be made retrospective to attach consequences to acts of immigration completed before the legislation is enacted, and is not confined to attaching consequences or further consequences to acts of immigration not yet completed. I think then that the *Immigration Act* 1949 and the *War-time Refugees Removal Act* 1949, which attach consequences to past acts of immigration and not merely further consequences to acts of immigration still incomplete, are nevertheless valid.

It becomes unnecessary to decide whether the *War-time Refugees Removal Act* is within the defence power; but I am unable to see how it could be within the defence power in 1949, nearly four years after the cessation of hostilities, to deport from Australia persons who had become members of the Australian community when the Act was passed, or who have since become members. Whether a refugee has become a member is a question of fact. If the arrival of these people in Australia as a result of our own or our enemies' war activities increased the population beyond the capacity of the country there might be a justification for legislation to relieve the situation, even to the extent of deporting war-time refugees who had become members of the Australian community. But such is not the case. Australia is not over-populated. I do not see how the deportation of members of the Australian community, simply because they were war-time refugees, can form a subject matter within the content of the defence power when their presence here is not a harmful result, but may be a beneficial result, of war, and their deportation is not required in the interests of defence. However as to those persons who are not, or have not, qualified to become members of the Australian community, I think that their deportation may still be the subject of valid legislation under the defence power. Their presence here is wholly the result of the operations of war, and is as visible and tangible, and in the opinion of Parliament, may be as undesirable, as the unrepaired damage done by enemy bombing to an Australian city, and may be as validly

(1) (1915) 20 C.L.R. 425.

dealt with under the defence power. (*R.* v. *Foster*; *Ex parte Rural Bank of New South Wales*; *Wagner* v. *Gall*; and *Collins* v. *Hunter* (1)).

I think then that the *War-time Refugees Removal Act* of 1949 is wholly valid under the immigration power, and is valid under the defence power as regards those war-time refugees who are still such, i.e., who have not become members of the Australian community. It is also valid as regards all who are aliens, without any exception.

I agree with the judgment of the Chief Justice on other questions raised.

Koon Wing Lau & Ors.
v.
Calwell & Ors.

Causes Nos. 14, 15, 16, 17, 18, 25, 26, 27, 28 *and* 29 of 1949 (*Principal Registry*),

Declare that the War-time Refugees Removal Act 1949 *and the Immigration Act* 1949 *are valid. Costs of proceedings before Full Court to be costs in the respective causes. Cases remitted to be dealt with by a single Justice consistently with this declaration.*

Ng Kwan & Ors.
v.
The Commonwealth & Anor.

Causes Nos. 25, 26 and 27 *of* 1949 (*New South Wales Registry*).

Questions referred answered as follows:—

Ng Kwan v. *The Commonwealth & Anor.* (*No.* 25).

1. *No, to each alternative.*
2. *No.*
3. *No.*
4. *No, to each alternative.*

Li Hop & Ors. v. *The Commonwealth of Australia & Anor.* (*No.* 26).

1. *No, to each alternative.*

Lee Wing & Ors. v. *The Commonwealth of Australia & Anor.* (*No.* 27).

1. *No, to each alternative.*
2. *No.*
3. *No.*

(1) (1949) 79 C.L.R. 43.

H. C. OF A. 1949. KOON WING LAU v. CALWELL.

Further questions in each of the said causes Nos. 25, 26 *and* 27 *answered as follows :—*

(*a*) *Yes.*

(*b*) *No.*

Cost of proceedings before Full Court to be costs in the respective causes.

Solicitors for the plaintiffs and prosecutors: in the Melbourne proceedings, *F. E. O'Brien*; in the Sydney actions, *W. C. Moseley*, Sydney; *Mervyn Finlay & Co.*, Sydney.

Solicitor for the defendants and respondents: *G. A. Watson*, Crown Solicitor for the Commonwealth.

E. F. H.