[HIGH COURT OF AUSTRALIA.]

CHU SHAO HUNG . . . . . APPLICANT;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES.

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SYDNEY, *April* 30.

MELBOURNE, *June* 9.

Williams A.C.J., Fullagar and Kitto JJ.

Immigration—Immigrants—Dictation test—Failure—Prohibited immigrant—Conviction—Penalty—Imprisonment for six months—Deportation—Release on bond—Power—Discretion of court—Immigration Act 1901-1949 (*No.* 17 *of* 1901—*No.* 31 *of* 1949), *ss.* 5 (2) (6), 7, 7A, 7AA, 8C—*Crimes Act* 1914-1950 (*Cth.*) (*No.* 12 *of* 1914—*No.* 80 *of* 1950), *s.* 20*—*Acts Interpretation Act* 1901-1950 (*No.* 2 *of* 1901—*No.* 80 *of* 1950), *s.* 41.

The provisions of s. 20 of the *Crimes Act* 1914-1950 (Cth.) apply in the case of a conviction under s. 5 (6) of the *Immigration Act* 1901-1949. Therefore a court may release a person convicted under that sub-section, upon his giving security to be of good behaviour and to comply with any conditions which may be imposed.

So *held* by *Fullagar* and *Kitto* JJ. (*Williams* A.C.J. dissenting).

Decision of the Court of Criminal Appeal: *Reg.* v. *Chu Shao Hung* (1953) 70 W.N. (N.S.W.) 92 reversed.

* Section 20 of the *Crimes Act* 1914-1950 provides:—"(1.) If the Court thinks fit to do so, it may release any person convicted of an offence against the law of the Commonwealth without passing any sentence upon him, upon his giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the Court that he will be of good behaviour for such period as the Court thinks fit to order and will during that period comply with such conditions as the Court thinks fit to impose, or may order his release on similar terms after he has served any portion of his sentence. (2.) If any person who has been released in pursuance of this section fails to comply with the conditions upon which he was released, he shall be guilty of an offence. Penalty: Imprisonment for the period provided by law in respect of the offence of which he was previously convicted. (3.) The penalty provided by the last preceding sub-section may be imposed by the Court by which the offender was originally convicted or by any Court of Summary Jurisdiction before which he is brought. (4.) In addition, the recognizance of any such person and those of his sureties shall be estreated, and any other security shall be enforced."

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APPLICATION for special leave to appeal, and APPEAL, from the Court of Criminal Appeal of New South Wales.

Chu Shao Hung, a Chinese national, failed, on 5th September 1952, to pass a dictation test required pursuant to s. 5 (2) of the *Immigration Act* 1901-1949, and on the same day, at Wallerawang, New South Wales, pursuant to s. 5 (6) of that Act, he was convicted of the offence of being a person deemed to be a prohibited immigrant offending against the Act, and was sentenced to be imprisoned in the prison at Long Bay in the said State, there to be kept to hard labour for the space of six months pending deportation.

Upon an appeal by Chu Shao Hung against the severity of the penalty in so far as it involved imprisonment, the chairman of quarter sessions, pursuant to s. 5B of the *Criminal Appeal Act* 1912-1951 (N.S.W.), stated a case for the opinion of the Court of Criminal Appeal. The chairman did not indicate whether he proposed to release Chu Shao Hung on a bond and not to sentence him, if he had the power to do so under s. 20 of the *Crimes Act* 1914-1950 (Cth.).

Of the four questions so referred the question which the parties agreed was the only question which called for an answer was as follows : " Do the provisions of s. 20 of the Commonwealth *Crimes Act* 1914 (as amended) apply to a conviction under s. 5 sub-s. 6 of the Commonwealth *Immigration Act* 1901 (as amended) ? "

The Court of Criminal Appeal (*Street* C.J., *Owen* and *Herron* JJ.) answered the question in the negative, whereupon, by motion on notice, Chu Shao Hung applied to the High Court for special leave to appeal to that Court against the decision of the Court of Criminal Appeal.

In support of the application for special leave to appeal Ronald Brock, solicitor, said by way of affidavit, *inter alia*, that the matter was of considerable importance to Chinese in Australia of whom there was a large number liable from time to time to have the dictation test applied to them under s. 5 (2) of the *Immigration Act* 1901-1949. On conviction of the offence of being deemed a prohibited immigrant the usual sentence imposed was a term of imprisonment for a period of six months pending an order for deportation to be made by the Minister for Immigration. Chinese who were under an order for deportation were usually deported either to Singapore or Hong Kong and in each case it was necessary to apply to the authorities either in Singapore or Hong Kong for a permit to enter the port in question. From his experience in handling applications of that kind, a period of three or four months usually elapsed before approval to such application could be

obtained. The purpose of asking the courts to apply the provisions of s. 20 of the *Crimes Act* 1914-1950 in such cases was to enable the person convicted to be relieved from serving a long term of imprisonment pending his deportation, which through no fault of his own, could not be speedily effected and to enable such person or persons to apply for such permits expeditiously and, at the same time, assist in making their own arrangements, if they so desired, to depart from the Commonwealth in lieu of deportation.

The parties agreed that in the event of special leave being granted the appeal should be disposed of immediately.

L. C. Badham Q.C. (with him *W. J. Lee*), for the applicant. However reputable he may be as a citizen any immigrant may, under s. 5 (2) of the *Immigration Act* 1901-1949, within the period mentioned, be required to pass the dictation test, and upon failure he is deemed to be a prohibited immigrant and is guilty of an offence against the Act. The penalty therefor is set out at the foot of sub-s. (6) of s. 5, which, by virtue of s. 41 of the *Acts Interpretation Act* 1901-1950, means the maximum penalty. The only power in the court, the judicial power, as regards that sub-section is limited to the first four words, namely, " Imprisonment for six months ". That means that the court may imprison the person deemed to be a prohibited immigrant for a period not exceeding six months. The provision in the sub-section as to deportation from the Commonwealth is a purely executive power with which the court has nothing to do. Whether he does or does not make such an order is entirely a matter for the Minister. The Minister may make a deportation order immediately the immigrant is sentenced. The words " any imprisonment " in s. 7AA means any imprisonment which the magistrate chooses to impose within the limits of his discretion. The penalty at the foot of sub-s. (6) being, by the operation of s. 41 of the *Acts Interpretation Act* 1901-1950, a maximum penalty, the chairman of quarter sessions has both an inherent and a statutory power to release an offender on a conditioned bond, whatever the conditions may be, e.g., he had power to release the applicant on a bond conditional upon the applicant leaving the Commonwealth within a stated time. Sections 7 and 7AA of the *Immigration Act* 1901-1949 do not indicate that that Act is a particular code dealing with immigration and depriving the magistrate of all discretion or jurisdiction in the mater of quantum of penalty. Every person who, having been deemed to be a prohibited immigrant, is entering or found within the Commonwealth comes within s. 7.

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[Dr. *F. Louat* Q.C. There was not any argument addressed to the court below on behalf of the Crown that the penalty in s. 5 (6) is a fixed penalty. Whether it be a fixed penalty or not is irrelevant to this question.]

The Minister has a special power under s. 8c to keep a person in such custody as he chooses after that person has been released, or pending deportation. The only part of sub-s. (6) of s. 5 which concerns the court is the words " Imprisonment for six months ". That is a maximum penalty, therefore the court can impose any penalty it pleases under six months. Section 20 of the *Crimes Act* 1914-1950 is applicable to a case under s. 5 (6) of the *Immigration Act*. The release power given to the court under s. 20 relates to any person convicted of an offence against the law of the Commonwealth. Right through the *Immigration Act*, however free from blame some of the various persons who are liable to be convicted of being prohibited immigrants may be, the words used are "charge", " offence ", " penalty " and " imprisonment ", words which are apt only to describe the condition of a person who has been convicted of an ordinary offence. Section 9A of the *Immigration Act*, a somewhat similar provision to but rather clearer than s. 5 (6), was dealt with in *R.* v. *Booth* (1). In *Byrne* v. *McLeod* (2) it was held that in that case the only judicial discretion left to the court was to fix a penalty of not less than £50 nor more than £500, but that the remainder of the section amounted to a mechanical application of the penalty which must be imposed. In that case in addition to the words " Imprisonment for six months " were the words " and, in addition or in substitution for such imprisonment, deportation from the Commonwealth pursuant to an order made in that behalf by the Minister ". By virtue of s. 20 of the *Crimes Act* a magistrate, or a chairman of quarter sessions may allow a person out on a recognizance, and he may attach to the recognizance any conditions that he thinks fit. The power of a chairman of quarter sessions, or a magistrate, is twofold, namely under s. 20, and the inherent power (*R.* v. *Spratling* (3)). Section 7A of the *Immigration Act* has nothing whatever to do with the power of the court to inflict penalties, or with whether or not the magistrate or the person deciding the matter finally can release the convicted person on his own recognizance. The object of that section is only to prevent or to provide against people entering frivolous appeals and then, possibly, not appearing upon the hearing of the appeal to the great inconvenience of other people. The power of

(1) (1947) 48 S.R. (N.S.W.) 16, at p. 18; 64 W.N. 188, at p. 189.
(2) (1934) 52 C.L.R. 1.
(3) (1911) 1 K.B. 77.

deportation is general in ss. 7 and 8c. The term of six months, imprisonment is not a fixed and invariable term. If the judgment appealed from is correct this convicted person, the applicant, may be kept in custody of some kind or another, either by the judicial power, or by the magisterial power, for an indefinite period. A person should not be deprived of his liberty unless the legislature has so expressed in unequivocal terms. It would be stretching the language of the sections to mean a supposed policy or attitude, a departmental or governmental attitude towards these cases.

[WILLIAMS A.C.J. referred to *Koon Wing Lau* v. *Calwell* (1).]

The *Immigration Act* was not a code within itself, nor was it the method of formulating a policy. The legislation should be taken as it is and interpreted in the light of all the known rules of legal interpretation. Under s. 20 the convicted person can be bound over on any condition thought fit, including a condition that he leave the Commonwealth.

Dr. *F. Louat* Q.C. (with him *J. K. W. Cowie*), for the respondent. The question of whether the penalty mentioned at the foot of sub-s. (6) of s. 5 of the *Immigration Act* 1901-1949 is a fixed penalty is an irrelevant question that does not arise for decision for the purpose of deciding whether s. 20 of the *Crimes Act* 1914-1950 applies. It is not of the respondent's argument to say that it is a fixed penalty in order to reach that result. It is not conceded that it is not a fixed penalty. The question here is simply the question whether the powers of s. 20 of the *Crimes Act* are available to the magistrate when a conviction is made under s. 5 (6) of the *Immigration Act*. There is, obviously, not any question of inherent power involved. It is a question of this ancillary statutory power existing or not. The question of statutory construction is one which is clearly resolved by the application of the maxim *generalia specialibus non derogant*. There is to be found on a comparative examination of the function of s. 20 of the *Crimes Act*, and the scope and purpose of the *Immigration Act*, a scheme and purpose which is so special and so clearly adapted for a special purpose expressed in the *Immigration Act*, that there is not any room for the assumption that the general words which introduce s. 20, "an offence against the law of the Commonwealth", bring it in to apply to convictions under the *Immigration Act*. There is evident in the sections of the *Immigration Act* a controlling purpose that once a person has been convicted of being a prohibited immigrant

(1) (1949) 80 C.L.R. 533.

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he shall not be set at liberty except at the discretion of the Commonwealth, that is, pending the term of his imprisonment he shall not be set at liberty except at the discretion of the Commonwealth exercised through its Ministers and officers. The words "such imprisonment" in the penalty provision to s. 5 (6) of the *Immigration Act* implies that there has to be imprisonment. The deportation power is to be available in addition to or in substitution for a bond or some terms or conditions of release; it is to be in addition to or in substitution for imprisonment. So whether the penalty be fixed or not, or whether the magistrate must impose six months or must only impose a shorter period, he must impose imprisonment. Section 7AA of the *Immigration Act*, from the point of view of the purpose or object of it, is the analogous provision to s. 20 of the *Crimes Act*, but conditioned for the particular purpose that has to be served under the first-mentioned Act. An implication arises from s. 7AA that not only is s. 20 of the *Crimes Act* not applicable but the purpose of s. 20 has been taken care of, conditioned, to apply to the particular kind of immigration offence. The purpose of the dictation test is a means of condition of implementing immigration policy (*O'Keefe* v. *Calwell* (1)). Section 7AA is a specially adapted provision because it provides that the imprisonment is to cease for the purpose of deportation, or otherwise, if the Commonwealth Executive is satisfied that the person should be set at liberty.

[FULLAGAR J. It is very unlikely that a magistrate should be intended to have power to release a person on his own bond alone and at the same time that this power should be given to the Minister.]

With respect I adopt what your Honour says. It is most unlikely. When s. 7A is taken with it the construction contended for becomes clearer still. With regard to any other kind of offender, the *Justices Act* 1902-1951 (N.S.W.) provides that he may be released on his recognizances and the magistrate can fix the security, but s. 7A is to exclude the *Justices Act* provision applied by the *Judiciary Act* 1901-1950 to a Commonwealth offence. It is not excluded to the extent that it is no longer possible for a magistrate, having convicted a person under s. 7 or s. 5 (6) to be at liberty to set him free on his own recognizance while he lodges an appeal to quarter sessions. The *Immigration Act* has taken charge of the magistrate's power at a critical point, the point of release, even pending an appeal, of the convicted person and provides that that is not to happen except certain things be complied with. The legislation is obviously closely concerned with the terms and conditions on which

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

a person can be set at liberty after he has been convicted. Section 7AA is intended to be the whole provision by which a person can be set at liberty once he has been convicted. By the amendment made in 1935 s. 5 (6) was inserted. There then became two sections, each of which could afford an independent ground of prosecution and conviction. By " any imprisonment " in s. 7AA the legislature intended " imprisonment under either one or the other provision ". Although the change was deliberate the change can be explained on one hypothesis, although there may be others. A person who is deemed to be a prohibited immigrant and who is prosecuted under s. 7 can be sentenced to something less than six months' imprisonment. It may have been thought by the legislature to have been proper to alter " the imprisonment " to " any imprisonment " if it had been supposed by the legislature up to then that what it had said was that there could only be six months' imprisonment imposed. The word " any " does not materially help the applicant. Section 20 of the *Crimes Act* is grossly inapt to apply to an immigration conviction, and, because of the considerations it depends upon, it highlights the probability that s. 7AA was intended to be a substitute for it and to be the whole provision of the *Immigration Act* on that subject. Section 20 is concerned with what is the almost invariable type of offence, some kind of misbehaviour, some kind of misdemeanour, the contravention of a law imposed for the general governance of the community. The words " comply with such conditions as the Court thinks fit to impose " connect the whole question of the kind of conduct that the person has to assume and carry out to the court, even though that conduct may be very germane to the considerations of s. 7AA and s. 7 about seeing that he is where he can be found ; because the court can, for example, impose a condition that he is to leave the Commonwealth. Section 8C means, if the Minister after conviction makes an order, whether in addition or in substitution for the imprisonment, the convicted person can be immediately detained ; so that if there did exist a power to apply s. 20 of the *Crimes Act* it would be a power which could be rendered nugatory at the will of the Commonwealth Executive ; and is it probable when a provision of this kind is put in and when s. 7AA is also there, that the legislature intended the court order to be set at nought by the intervention of the Executive—particularly as it might cut through any conditions that the *Justices Act* might have created or imposed. The *Crimes Act* is not uncognizant of the *Immigration Act* and its problems. Section 7AA provides a means for a person who has been convicted being set at liberty. Section 20 was designed for a juristic purpose.

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That section is concerned with lapses from proper conduct. Once the matter is committed to the discretion of a magistrate to release a person on any conditions he the magistrate thought fit, and on such security as he thought fit, that becomes directly contrary to the careful provisions in s. 7AA and s. 7A, about the nature of the security that must be found. Section 20 of the *Crimes Act* provides that it might be any security that the court thinks fit. Both s. 7A and s. 7AA involve the occasion for giving security ; and both require that those securities shall have Commonwealth approval. The special problems peculiar to tracing persons who are permitted to go at liberty, for deportation purposes and implementing the immigration policy, present real and practical difficulties which require the special provisions in s. 7A and s. 7AA. The relationship of s. 20 of the *Crimes Act* should be considered in that light.

L. C. Badham Q.C., in reply. The sections should be interpreted as they appear, and not in such a way as may be desired to attain a certain effect. The penalty in s. 6 of the *Immigration Act* 1901-1949 should be contrasted with the penalty in s. 9A of that Act. The penalty in s. 6 does but the penalty in s. 9A does not conform to s. 41 of the *Acts Interpretation Act* 1901-1950 : see *R.* v. *Booth* (1). A maximum penalty is also provided in s. 18 which shows that there is a general scheme of maximum penalties running through the Act. The words " any imprisonment " in s. 7AA are equally susceptible of the interpretation " if there is any imprisonment imposed ". Section 20 of the *Crimes Act* 1914-1950 (Cth.) does not merely involve a case where a person is required to be of good behaviour in respect of a particular offence, a requirement could be that the person convicted leave the Commonwealth within a certain period. The judicial power and the administrative power are entirely separate, but so far as the judicial power is concerned, if it is sought to take away the discretion in s. 20 of the *Crimes Act* or make it inapplicable to s. 5 (6) of the *Immigration Act*, then the legislature should do it by words which do not leave any doubt as to their meaning. The question in the stated case should be answered : Yes.

Cur. adv. vult.

June 9.

The following written judgments were delivered :—

WILLIAMS A.C.J. This is a motion on notice by a Chinese immigrant for special leave to appeal from an order of the Supreme Court of New South Wales sitting as the Court of Criminal Appeal answering

(1) (1947) 48 S.R. (N.S.W.) 16 ; 64 W.N. 188.

in the negative a question asked in a case stated by a chairman of quarter sessions for the opinion of that Court pursuant to s. 5B of the *Criminal Appeal Act* 1912-1951 (N.S.W.). The question is as follows: "Do the provisions of s. 20 of the Commonwealth *Crimes Act* 1914 (as amended) apply to a conviction under s. 5 sub-s. (6) of the Commonwealth *Immigration Act* 1901 (as amended)?"

The question raises a point of general public importance in the administration of the immigration laws and special leave should be granted if we disagree with the Supreme Court. It has been fully argued on the merits so that if special leave is granted we can also dispose of the appeal.

The short facts are that the immigrant was given a dictation test under s. 5 (2) of the *Immigration Act* 1901-1949 which he failed to pass and was prosecuted before a magistrate under s. 5 (6) of that Act and sentenced to six months' imprisonment. He appealed against the severity of the sentence to quarter sessions and the chairman stated the above case for the opinion of the Supreme Court. The chairman did not indicate whether he proposed to release the immigrant on a bond and not to sentence him if he had the power to do so under s. 20 of the *Crimes Act* 1914-1950. In my opinion he has no such power. Section 20 applies in terms to any person convicted of any offence against the law of the Commonwealth and the immigrant was convicted of such an offence. The section must therefore apply to a conviction under s. 5 (6) of the *Immigration Act* unless the provisions of that Act are sufficient to imply an intention to the contrary.

In my opinion these provisions are sufficient for this purpose. The giving of a dictation test to an immigrant is not for the purpose of testing his education. It is given so that his failure to pass the test (and it can be assumed that he will fail), will convert him into an immigrant deemed to be a prohibited immigrant offending against the Act. Such a person is under s. 5 (6) guilty of an offence. The footnote to the sub-section is as follows: "Penalty: Imprisonment for six months, and, in addition to or in substitution for such imprisonment, deportation from the Commonwealth pursuant to an order made in that behalf by the Minister". That footnote must, in accordance with s. 41 of the *Acts Interpretation Act* 1901-1950, be read as indicating that any contravention of the sub-section shall be punishable upon conviction by a penalty not exceeding six months' imprisonment. The conviction and imposing of a sentence of imprisonment is an exercise of judicial power and could only be done by a court, whereas the decision to deport is

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an executive act, but the footnote states specifically that the power of the Minister to deport is in addition to or in substitution for such imprisonment and is therefore in terms conditional upon the court imposing a sentence of imprisonment. The court has power to impose a nominal term of imprisonment only, but it must be assumed that courts will act reasonably and that, unless it was clear that an immigrant who gained his liberty could easily be found and re-arrested, the court would impose a sufficient sentence to allow the Minister to decide whether to make an order for his deportation when pursuant to s. 7AA of the *Immigration Act* the imprisonment would cease for the purpose of deportation. If the sentence was insufficient to keep the immigrant in gaol pending arrangements for his deportation, he could be arrested and kept in custody under s. 8C of the *Immigration Act*.

The *Immigration Act*, in ss. 7AA and 7A, contains specific provisions subject to which an immigrant who has been convicted of an offence under s. 5 (6) may be released on bail if he does not appeal and pending the hearing of his appeal if he appeals. These specific provisions, coupled with the footnote to s. 5 (6), appear to me to provide a complete code where an immigrant is convicted of an offence under s. 5 (6) of the Act. He must first be convicted and sentenced to a term of imprisonment because both conviction which justifies a sentence of imprisonment and imprisonment are conditions precedent to the exercise of the executive power to deport. He must be kept in prison for the period of his sentence unless he is deported or he is let out on bail pursuant to s. 7AA or s. 7A. Section 20 of the *Crimes Act* contemplates that a person who is released upon giving security to be of good behaviour shall remain at liberty and not be imprisoned for the offence of which he has been convicted provided he behaves and performs the conditions subject to which he has been released. But if an immigrant convicted under s. 5 (6) was so released, even where a condition of his release was that he should leave the Commonwealth within a certain period, the Minister could nevertheless decide compulsorily to deport the immigrant and arrest and detain him pending deportation under s. 8C of the Act. The bonds of the sureties under s. 20 of the *Crimes Act* would then be liable to be estreated, although it was the action of the Minister which prevented the immigrant from complying with the condition upon which he had been released by the court.

For these reasons I am of opinion that the Supreme Court was right and special leave to appeal should be refused.

FULLAGAR J. In this case I agree generally with the judgment of my brother *Kitto* but I wish to add certain observations.

Section 20 of the *Crimes Act* 1914-1950 is quite general in terms. In terms it applies to every person convicted of an offence against the law of the Commonwealth. It cannot, in my opinion, be held inapplicable to an offence created by a particular Act unless provisions are found in that Act which exclude it expressly or by necessary implication. If it is not expressly excluded, it is not to be held excluded unless it is reasonably clear that its application would lead to some inconsistency or incongruity.

Section 5 (6) of the *Immigration Act* 1901-1949 is a very badly constructed and confused provision. It creates an offence (an offence, of course, against the law of the Commonwealth) and concludes: "Penalty: Imprisonment for six months, and, in addition to or substitution for such imprisonment, deportation from the Commonwealth pursuant to an order made in that behalf by the Minister". It thus treats as co-ordinate two things which are not co-ordinate but are of a radically different nature. The imposition of a sentence of imprisonment is a judicial act: the making and the carrying out of an order for deportation are executive acts. What the provision must, I think, be taken to mean is that, after conviction, the court may impose a sentence of imprisonment and the Minister may make an order for deportation and carry that order into effect. The words used cannot, in my opinion, fairly be taken to mean more than that. I am quite unable to accept the view that the imposition of a term of imprisonment by the court is a condition of the Minister's power to deport.

The Full Court took the view that the words "Penalty: Imprisonment for six months" meant that a conviction must necessarily be followed by a sentence of imprisonment for a term of six months. In other words, it was held that the words prescribed a minimum, as well as a maximum, penalty. This view may not be necessarily decisive of the question of the applicability of s. 20 of the *Crimes Act*, but, in any case, I am, with respect, unable to accept it. I am not able to see any real reason for saying that the construction of the words in question is not governed by s. 41 of the *Acts Interpretation Act* 1901-1950, which requires those words to be construed as providing for a maximum penalty. The Full Court considered that the expression "imprisonment for *not more than* six months", which occurs in s. 7, was to be contrasted with the language used in s. 5 (6). The difference in language is, as *Kitto* J. has pointed out, explained by the fact that s. 7 was originally enacted before, and s. 5 (6) not until after, the enactment of what is now s. 41 of

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the *Acts Interpretation Act* 1901-1950. And the difference in language seems indeed rather to support the inference that the same thing is intended, not that different things are intended. If s. 5 (6) and s. 7 dealt with mutually exclusive subject matters, the contrast might indeed support the inference that different meanings were intended. But the two provisions appear to overlap, the ground covered by s. 7 including the whole of the ground covered by s. 5 (6). In these circumstances the presumption must be that the same penalty is intended for the same offence. There is also a reason of substance for supposing that the penalty prescribed by s. 5 (6) should be a maximum penalty and not a fixed penalty. For s. 5 (6) operates to create a number of offences which would naturally be regarded as of differing degrees of seriousness. In each case the decisive element in the offence itself is failure to pass a dictation test. But a case in which the person charged had entered the Commonwealth lawfully, and was guilty merely by virtue of the application of s. 5 (2), might well be regarded as meriting a less severe penalty than a case in which the person charged had entered by means of a forged passport and was guilty by virtue of the application of s. 5 (1) (*c*).

The argument that s. 20 of the *Crimes Act* does not apply to cases under s. 5 (6) of the *Immigration Act* rests mainly on the inference that the judicial power to order imprisonment is given in aid of the executive power to order deportation, and on inferences from the provisions of ss. 7AA and 7A of the *Immigration Act*.

It is, I daresay, true to say that the power to impose a sentence of imprisonment on a person convicted under s. 5 (6) or s. 7 was not given to the courts without regard to the possible desirability of keeping a convicted person in custody pending a decision of the Minister as to his deportation. But I can see no justification for saying that herein lay the sole purpose of that power. Such a consideration may account for the fact that no power is given to impose a fine on a convicted person. But the fact remains that what the courts are empowered to do is to impose a sentence, a punishment. What is to be imposed follows on a conviction for an offence, and is, in name and in substance, a penalty. I can find no reason for saying that this penalty is of any nature different from that of any other penalty which may be imposed on conviction of an offence against the law of the Commonwealth.

There is, I think, considerable force in the argument based on ss. 7AA and 7A. But I think the most that can be said is that these sections suggest, to one reading them in their present form, that those responsible for them had not in mind the provisions of s. 20

of the *Crimes Act*. Actually the substance of what is now s. 7AA appeared in the original Act of 1901. Section 7A was inserted by s. 5 of the Act of 1925. The *Crimes Act* was first enacted in 1914, and the original enactment contained s. 20 in a form which has not been altered in any material respect.

There is no necessary inconsistency or incongruity in the existence of s. 20 of the *Crimes Act* alongside s. 7AA or s. 7A of the *Immigration Act*. Section 7AA provides that " any imprisonment " imposed for an offence against s. 5 or s. 7 shall cease " for the purpose of deportation " or if the offender, with the authority of the Minister, finds two approved sureties in a prescribed amount for his leaving the Commonwealth within a prescribed period. This provision applies if a sentence of imprisonment is imposed by the court. It does suggest that any release after conviction is to be at the discretion of the Minister. But this is not, in my opinion, enough to exclude the application of s. 20 of the *Crimes Act*. If that section is applied, the condition of the application of s. 7AA is not fulfilled. The case is not one in which " any imprisonment " is imposed, and s. 7AA simply does not apply. Section 7A provides that, where a person is convicted under s. 5 or s. 7 and appeals against his conviction, he is not to be released on bail except on certain conditions which involve approval of sureties by the Collector or a Sub-collector of Customs. Again the provision suggests that any release after conviction is not to be at the mere discretion of the court. But again this is not, in my opinion, enough to exclude s. 20 of the *Crimes Act*. Bail pending appeal is necessary only if a sentence of imprisonment is imposed. If s. 20 of the *Crimes Act* is applied, no bail is necessary, and s. 7A simply has no application. Section 20 can live alongside s. 7AA, and can live alongside s. 7A. And, unless it is impossible for s. 20 to live alongside either s. 7AA or s. 7A, neither of those sections, in my opinion, affords sufficient reason for excluding the application of s. 20 to convictions for offences against s. 5 or s. 7.

The case is clearly, I think, of sufficient importance to justify the granting of special leave. In my opinion, special leave to appeal should be granted, and the appeal allowed.

KITTO J. This is an application for special leave to appeal from a rule of the Supreme Court of New South Wales sitting as the Court of Criminal Appeal. The rule answered in the negative the following question which had been submitted to the Court in a case stated by a chairman of quarter sessions :—" Do the provisions of s. 20 of the *Crimes Act* 1914 (as amended) apply to a conviction

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under s. 5 sub-s. (6) of the Commonwealth *Immigration Act* 1901 (as amended) ? "

Section 20 of the *Crimes Act* 1914-1950 is a general provision, expressed to apply in respect of any person convicted of an offence against the law of the Commonwealth. It authorizes the court, if it thinks fit to do so, to release any such person without passing sentence upon him, upon his giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court that he will be of good behaviour for such period as the court thinks fit to order and will during that period comply with such conditions as the court thinks fit to impose. The section also authorizes the court to order the release of any such person on similar terms after he has served any portion of his sentence. It goes on to provide, *inter alia*, that if any person who has been released in pursuance of the section fails to comply with the conditions upon which he was released, he shall be guilty of an offence, and liable to imprisonment for the period provided by law in respect of the offence of which he was previously convicted.

Sub-section (6) of s. 5 of the *Immigration Act* 1901-1949 provides that any person who is, by virtue of the section, deemed to be a prohibited immigrant offending against the Act shall be guilty of an offence ; and at the foot of the sub-section appear the words : " Penalty : Imprisonment for six months, and, in addition to or substitution for such imprisonment, deportation from the Commonwealth pursuant to an order made in that behalf by the Minister ".

A person convicted under s. 5 (6) is, of course, convicted of an offence against the law of the Commonwealth. Prima facie, therefore, the provisions of s. 20 of the *Crimes Act* empower the court, without passing any sentence upon him, to order his release upon giving security for his good behaviour and for his compliance with such conditions as the court thinks fit to impose. If this presumptive construction is to be rejected, it must be for the reason that there is to be found in the *Immigration Act* an expression or an implication of a contrary intention. Nowhere in the Act is such an intention expressed, but the court is invited to hold that the necessary implication may be found by a consideration of ss. 7, 7AA, and 7A, together with s. 5 itself. Moreover, it is said, the conviction of an offender under s. 5 (6) is provided for primarily in order to facilitate deportation, and the imprisonment which may be imposed in the event of such a conviction is intended, not as a punishment, but as a means of keeping the convicted person in custody while the Minister considers whether his deportation

should be ordered. Security for good behaviour, the argument proceeds, is altogether inappropriate in the case of a conviction which does not connote any criminality in conduct; and a power to release a convicted person upon giving such security would be inconsistent with the primary object of detention pending a decision on the question of deportation.

It should be recognized at once that an "offence" under s. 5 (6) does not necessarily involve any element of wrongdoing. A person is deemed, by virtue of s. 5, to be a prohibited immigrant offending against the Act if he fails to pass a dictation test which he has been required to pass either (under sub-s. (1)) at any time after the happening of any one of certain specified events, or (under sub-s. (2)) within five years after he has entered the Commonwealth. His offence under s. 5 (6) is then complete, even though (at least if his case falls under sub-s. (2)) his conduct has been exemplary. His deportation is a matter for executive decision by the Minister, and, if ordered, it does not in any sense partake of the character of a punishment: *Mahler* v. *Eby* (1) cited by *Starke* J. in *R.* v. *Goldie*; *Ex parte Picklum* (2). His imprisonment on conviction, on the other hand, is a matter for the sentence of the court; but there may be no purpose to be served by the imprisonment except that of keeping the "offender" available for immediate deportation in the event of the Minister's deciding upon that course, and it is quite right, therefore, to say that the provision for imprisonment is ancillary to the provision with respect to deportation.

But that is not to say that there is any inherent incompatibility between a conviction under s. 5 (6) and the release of the convicted person on his or her giving security to be of good behaviour and to comply with any other conditions imposed by the court. It may well happen that, by reason of his personal characteristics, state of health or other circumstances the court considers it undesirable to send him or her to gaol, and yet that the court is satisfied that all practical considerations in relation to deportation will be fully met if security is taken that the person will report periodically to the immigration authorities, or will remain in a specified area, or will perform other conditions ensuring his or her instant availability if deportation is ordered, and will be well-behaved while the question of deportation is being considered. It is true that the ancient power of magistrates to bind over to be of good behaviour "all them that be not of good fame" required for its exercise

(1) (1924) 264 U.S. 32, at p. 39 [68 Law. Ed., at p. 554].

(2) (1937) 59 C.L.R. 254, at p. 264.

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some " cause of scandal ", some conduct which was *contra bonos mores* if not actually *contra pacem*: *Blackstone's Commentaries on the Laws of England*, 15th ed. (1809), vol. 4, p. 256; *R.* v. *Sandbach*; *Ex parte Williams* (1). It was a power to oblige those persons whom there was a probable ground to suspect of future misbehaviour " to give full assurance to the public, that such offence as is apprehended shall not happen ": *Blackstone's Commentaries on the Laws of England*, 15th ed. (1809), vol. 4, p. 251. It is not to be supposed that a conviction under s. 5 (6) of the *Immigration Act* would provide an occasion for the exercise of that power. But the power conferred by s. 20 of the *Crimes Act* is not similarly conditioned. It arises, according to the express terms of the section, whenever a person is convicted of an offence against the law of the Commonwealth; and it is obvious that by no means all such offences give cause for apprehension of future misbehaviour. The fact, therefore, that a conviction under s. 5 (6) does not necessarily betoken any wrongdoing affords no ground for treating s. 20 as inapplicable. Nor should I regard that section as inapplicable because of an apprehension, which the learned judges of the Supreme Court appear to have felt, that a bond to be of good behaviour would oblige a person, convicted under s. 5 (6) by reason of having failed to pass a dictation test under s. 5 (2), not to continue to commit or repeat the " offence ". The obligation of such a bond is against actual misbehaviour: *Blackstone's Commentaries on the Laws of England*, 15th ed. (1809), vol. 4, pp. 255, 257; *Lansbury* v. *Riley* (2). Their Honours suggested that there would be no method, short of leaving the Commonwealth, whereby an " offender " convicted under s. 5 (6), if he were to give security for good behaviour, would cease to continue committing the " offence " of which he had been convicted. That is true; but, with respect, I cannot think that it throws any light upon the present problem. It does not mean that the conditions of the bond would be broken automatically, for it has never been held, so far as I can find, that a bond to be of good behaviour may be broken by doing nothing at all.

The position therefore is that the *Immigration Act* has taken the procedure of the criminal law, the procedure of charge, conviction and sentence, and has made it applicable for the peculiar purposes of the Act; but there is nothing in the nature of those purposes to require the conclusion that that procedure has been adopted with the exception of that feature of it which s. 20 of the *Crimes Act* supplies. Such a conclusion must rest, if it is to be supported at all,

(1) (1935) 2 K.B. 192, at p. 197. (2) (1914) 3 K.B. 229, at p. 234.

on the construction of s. 5 (6) itself, considered in the light of the other sections I have mentioned.

It was along this line, in the main, that the Supreme Court approached the problem. Their Honours construed s. 5 (6) as requiring that a sentence of six months' imprisonment be imposed in every case of a conviction under that sub-section. If that construction be accepted, it follows clearly enough that s. 20 of the *Crimes Act* is by necessary implication excluded. But there are serious objections to this view, and counsel for the Crown offered no argument in support of it in this court or, as we were informed, in the court below. The most obvious, and as I think a fatal, objection is that the penalty provision of s. 5 (6) is enacted in a form which since 1904 has provided the accepted method of taking advantage of the provision of the *Acts Interpretation Act* 1901-1950 that the penalty set out at the foot of a section or sub-section shall indicate that any contravention shall be an offence punishable upon conviction by a penalty not exceeding the penalty mentioned. The provision is now in s. 41 of the *Acts Interpretation* Act 1901-1950, but when s. 5 (6) was enacted, in 1935, it was in s. 3 of the *Acts Interpretation Act* 1904. It is true, as was pointed out in the Supreme Court, that s. 7 of the *Immigration Act* provides a verbal contrast with s. 5 (6), in that it expressly makes the imprisonment it prescribes a maximum sentence only. "Imprisonment for not more than six months" is the expression it uses. But s. 7 was in the Act as originally passed in 1901; and at that time there was no general provision such as that which was to be introduced in s. 3 of the *Acts Interpretation Act* 1904. The difference in verbiage is sufficiently accounted for by that fact and does not suggest a difference in intention. Moreover the history of the *Immigration Act*, to which it will be necessary to refer in a moment, indicates that the consequences of a conviction were intended to be the same under s. 5 (6) as under s. 7.

The relevant provision of the *Acts Interpretation Act* was not adverted to in the reasons for judgment of the Supreme Court, and their Honours were influenced by inferences which they drew from ss. 7AA and 7A. The argument presented for the Crown depends largely upon drawing the same inferences; but it relies upon them, not as showing that the term of imprisonment provided for in s. 5 (6) is a fixed term to be imposed in all cases, but as showing that even though that term is prescribed as a maximum, there must be some term of imprisonment imposed in every case, however short the term may be, and that for that reason s. 20 of the *Crimes Act* is inapplicable. There are some obvious difficulties

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in the way of this contention. The notion that the policy of the sub-section is to provide for keeping the convicted person in custody pending possible deportation must be abandoned if the court is at liberty to fix as short a period of imprisonment as it thinks proper. Indeed if there is no minimum period of imprisonment there seems to be no advantage in denying to the court the power to release on a bond. On the contrary, there is a distinct disadvantage to the immigration authorities, for if in a particular case the court considers imprisonment to be inappropriate it is surely better that the court should have power to bind the convicted person to comply with conditions than that it should have to impose a brief period of imprisonment and leave the convicted person subject to no restriction of movement or conduct thereafter. The provisions which are said to produce this somewhat strange result must now be considered, and it is helpful to consider them in the light of their history.

Section 5 (6) was inserted in the Act by the amending Act No. 13 of 1935, s. 2. Before its enactment the state of the legislation so far as material, was as follows. The *Immigration Act* 1901-1933 dealt with two classes of persons. A person answering one or more of the descriptions contained in s. 3 was " a prohibited immigrant ". An immigrant as to whom any of the facts mentioned in sub-s. (1) or sub-s. (2) of s. 5 existed was, by force of those sub-sections themselves, " deemed to be a prohibited immigrant offending against the Act ". Section 7 provided that a prohibited immigrant entering or found within the Commonwealth in contravention or evasion of the Act should be guilty of an offence against the Act and liable upon summary conviction to imprisonment for not more than six months, and in addition to or substitution for such imprisonment should be liable pursuant to any order of the Minister to be deported from the Commonwealth. There was a proviso to the effect that the imprisonment should cease for the purpose of deportation, or, subject to authority being granted by the Minister, if the offender should find two sureties, each in the sum of £100 and each approved by the Collector of Customs or Sub-collector of Customs at the port concerned, for his leaving the Commonwealth within one month. There was also a provision, in s. 7A, that where a person was convicted under s. 7 and appealed against his conviction, he should not be released on bail unless he should find two sureties, each in the sum of £100 and each approved by the Collector of Customs or Sub-collector of Customs at the port concerned, for his appearance at the hearing of the appeal.

While the Act stood thus, a person who was not a prohibited immigrant under s. 3, but was deemed by force of sub-s. (1) or sub-s. (2) of s. 5 to be a prohibited immigrant offending against the Act, might be dealt with either by means of a prosecution for committing the offence which he was deemed to be committing, or, being found within the Commonwealth, by means of a prosecution for the offence created by s. 7. That sub-ss. (1) and (2) of s. 5 created offences separate and distinct from the offence created by s. 7 was made clear by the case of *Griffin* v. *Wilson* (1) in this Court. It was there decided that certain evidentiary provisions, contained in sub-s. (3) of s. 5, were applicable only if the charge were laid under s. 5, and not if it were laid under s. 7. This was a matter of importance to the immigration authorities, because a prosecution under s. 5 had the disadvantage that a conviction produced no other consequence than liability under s. 18 to a penalty not exceeding £50 and in default of payment imprisonment for a period not exceeding three months. In particular, the conviction did not give rise to any power to deport the offender. A conviction under s. 7, on the other hand, enabled the Minister, as has already been mentioned, to order deportation. It was evidently for the purpose of relieving the immigration authorities from the necessity of choosing either to obtain the evidentiary advantages offered by s. 5 and have no power of deportation on conviction, or to obtain a power of deportation on conviction but enjoy no evidentiary advantages for the purpose of securing the conviction, that the Parliament, only four days after *Griffin* v. *Wilson* (1) was decided, enacted the *Immigration Act* 1935 (Act No. 13 of 1935). The first amendment made by this Act consisted of the addition of the present sub-s. (6) to s. 5. The effect of this was twofold: First, s. 18, which makes a general provision for a pecuniary penalty "where no higher penalty is expressly imposed" became inapplicable to a conviction under sub-ss. (1) or (2) of s. 5, the power of the court on such a conviction being conferred by the words "Penalty: Imprisonment for six months". Secondly, the next words: "and, in addition to or substitution for such imprisonment, deportation from the Commonwealth pursuant to an order made in that behalf by the Minister", created the executive power of deportation which previously did not arise upon such a conviction. The second amendment which the 1935 Act made consisted in the addition to s. 7 of the necessary words to make it apply to a person deemed

(1) (1935) 52 C.L.R. 260.

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to be a prohibited immigrant offending against the Act as well as to a prohibited immigrant entering or found within the Commonwealth in contravention or evasion of the Act. Thus the amendments recognized and preserved the position that s. 5 created offences as well as s. 7; but there is no longer any difference between the two sections in regard to the consequences which they attach to a conviction. To complete the assimilation of the sections in this respect, the amending Act turned the proviso to s. 7 into a separate section numbered s. 7AA, and amended both it and s. 7A to make them apply to a conviction under s. 5 as well as to a conviction under s. 7. Of course s. 7, in so far as it applies to a person deemed to be a prohibited immigrant offending against the Act, now overlaps s. 5; but this serves to stress the improbability of the six months' imprisonment provided for in s. 5 (6) being other than a maximum.

Section 7AA and s. 7A were both relied upon by the Crown, but in my opinion they throw no light on the problem. The former section gives the Minister a power of terminating "any imprisonment imposed" for an offence against s. 5 or s. 7, The power is conferred for the purpose of deportation, or upon approved sureties being found for the offender's leaving the Commonwealth within one month. Thus it merely prevents the imprisonment from standing in the way either of a compulsory deportation or of a voluntary departure which is assured by the finding of the necessary sureties. Section 7A deals with the case where a person who has been convicted under s. 5 or s. 7 is imprisoned and appeals against his conviction. The section contemplates that even such a person may be released on bail pending his appeal, but it makes his release conditional upon his finding approved sureties for his appearance at the hearing of the appeal. This restriction upon the granting of bail pending appeal when a sentence of imprisonment has in fact been imposed seems to me to provide no ground whatever for inferring an intention, contrary to the provision which s. 20 of the *Crimes Act* makes with respect to offences generally, that some term of imprisonment must be imposed on every person convicted under s. 5 (6).

Then a point is made that both in s. 5 (6) and in s. 7 the Minister is empowered to order deportation "in addition to or substitution for" the imprisonment; so that (it is said) a sentence of imprisonment for some term is made a condition precedent to the power of deportation, and, for that reason, deportation being what the legislature was primarily concerned to provide for, there is no room

for the application of a general section of the *Crimes Act* which enables security for good behaviour to be taken instead of sentence being passed. It may be accepted as true that the primary object of the provisions made in the Act, with respect to a prohibited immigrant and a person deemed to be a prohibited immigrant offending against the Act, is to empower the Minister in his discretion to order deportation. But while it is, of course, very convenient in many cases that a person whom the Minister may decide to deport should be taken into custody, that is not by any means the chief object of adopting the procedure of the criminal law. The main advantage which it affords is not the physical advantage of having the person charged under lock and key pending trial or after his conviction, but the legal advantage of having an adjudication by a court, precluding the possibility of its being thereafter held that any condition precedent to the exercise of the power to order deportation has not been fulfilled. Thus it is the conviction and not the sentence that is of primary importance for deportation purposes; what happens to the offender pending the Minister's decision as to whether he should or should not be deported is of secondary consequence. To read the words "in addition to or substitution for such imprisonment" as making the power of deportation conditional upon the imposition of a sentence of imprisonment would be to attribute to the legislature an intention, while legislating on the subject of immigration, to subordinate the deportation of a person for whose deportation the provisions of s. 5 (1) and (2) are devised, to the subsidiary matter of imprisonment for an offence which may be purely notional. The words quoted ought not to be so understood. Rather do they mean that a person convicted shall be liable to deportation as well as to imprisonment, and that the Minister may order deportation either in addition to or in substitution for any imprisonment which the court may impose.

I am unable to see, either in the considerations which influenced the Supreme Court or in those upon which the Crown relies, any sufficient reason for placing upon the *Immigration Act* a construction inconsistent with the application of s. 20 of the *Crimes Act* when a person is convicted of that offence against the law of the Commonwealth of which in certain circumstances s. 5 (6) makes him guilty.

In my opinion special leave to appeal should be granted. As the matter was fully argued, the parties agreeing that in the event of special leave being granted the appeal should be disposed of immediately and without further argument, the appeal should be

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treated as duly instituted and heard *instanter*, and it should be allowed. The rule of the Supreme Court should be discharged and in lieu thereof it should be ordered that Question (1) in the stated case be answered: Yes.

Special leave to appeal granted. Appeal allowed. Rule of the Supreme Court of New South Wales discharged. In lieu thereof order that Question (1) *in the case stated be answered in the affirmative.*

Solicitors for the applicant, *Morgan, Ryan & Brock.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.