[HIGH COURT OF AUSTRALIA.]

GRIFFIN . . . . . APPLICANT;

AND

WILSON AND ANOTHER . . . . . RESPONDENTS.

REMOVAL OF CAUSE FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1935.

SYDNEY, *April* 8.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Immigration—Prohibited immigrant—Dictation test—Evidence—Burden of proof—Averments in information—"Found within the Commonwealth"—Immigration Act 1901-1933 (*No.* 17 *of* 1901—*No.* 37 *of* 1933), *secs.* 5 (1), (2), (3), 7*—*Judiciary Act* 1903-1933 (*No.* 6 *of* 1903—*No.* 65 *of* 1933), *sec.* 40.

The evidentiary provisions of sub-sec. 3 of sec. 5 of the *Immigration Act* 1901-1933, apply only to offences created under sub-secs. 1 and 2 of that section, and are inapplicable to a prosecution under sec. 7 of the Act.

*The *Immigration Act* 1901-1933, by sec. 5, provides, so far as material, as follows:—"(1) Any immigrant who—(*a*) evades or has, since the commencement of the *Immigration Restriction Act* 1901, evaded an officer; (*b*) enters or has, since the commencement of" that Act, "entered the Commonwealth at any place where no officer is stationed; (*c*) obtains or has, since the commencement of" that Act, "obtained entrance or re-entrance into the Commonwealth by means of any certificate, credentials or identification card which was not issued to him or is forged, or has been obtained by false representations; (*d*) has been admitted temporarily into the Commonwealth in pursuance of any special arrangement between the Commonwealth Government and any other Government and fails to observe the conditions of his admission; or (*e*) has been admitted into the Commonwealth as an indentured labourer for service in the pearling industry and is deemed by the Minister to be an undesirable person, may, if at any time thereafter, he is found within the Commonwealth, be required to pass the dictation test, and shall, if he fails to do so, be deemed to be a prohibited immigrant offending against this Act. (2) Any immigrant may at any time within five years after he has entered the Commonwealth be required to pass the dictation test, and shall if he fails to do so be deemed to be a prohibited immigrant offending against this Act. (3) In any prosecution under either of the last two preceding sub-sections, the averment of the prosecutor, contained in the information, that the defendant is an immigrant who—(*a*) has evaded an officer; (*b*) has entered the Commonwealth at a

APPLICATION under sec. 40 of the *Judiciary Act* 1903-1933 for the removal to the High Court of a cause pending in the Supreme Court of New South Wales, and APPEAL.

In an information laid by Richard William Wilson, an officer of the Customs Department, it was alleged that one Gerald Griffin was a prohibited immigrant within the meaning of the *Immigration Act* 1901-1933, in that he was an immigrant who had entered the Commonwealth within five years before failing to pass the dictation test, and that within five years after he had entered the Commonwealth, namely, on 26th November 1934, he was required at Sydney, New South Wales, to pass the dictation test within the meaning of the Act and failed to do so, and on the said date was found within the Commonwealth in contravention of the Act. At the hearing before the magistrate, counsel for Griffin claimed that the information disclosed two offences, one under sec. 5 (2), and the other under sec. 7 of the Act. Counsel for the informant stated that the only offence charged was that created by sec. 7, and that the remainder of the matter contained in the information was by way of averments. The evidence showed that on 26th November 1934 Griffin appeared at the Central Police Court, Sydney, on another charge. He was remanded. Whilst formal matters with regard to bail were being attended to, Griffin was taken to a near-by room where a passage of sixty-two words in the Dutch language was read to him by an officer of the Customs Department, as a dictation test under the

place where no officer is stationed; (*c*) has obtained entrance or re-entrance into the Commonwealth by means of any certificate, credentials or identification card which was not issued to him or is forged or was obtained by false representations; (*d*) has been temporarily admitted into the Commonwealth in pursuance of a special arrangement between the Commonwealth Government and another Government and has failed to observe the conditions of his admission; (*e*) has been admitted into the Commonwealth as an indentured labourer for service in the pearling industry and is deemed by the Minister to be an undesirable person; or (*f*) has entered the Commonwealth within five years before failing to pass the dictation test, shall be deemed to be proved in the absence of proof to the contrary by the personal evidence of the defendant either with or without other evidence." By sec. 7:—"Every prohibited immigrant entering or found within the Commonwealth in contravention or evasion of this Act shall be guilty of an offence against this Act, and shall be liable upon summary conviction to imprisonment for not more than six months, and in addition to or substitution for such imprisonment shall be liable pursuant to any order of the Minister to be deported from the Commonwealth. Provided that the imprisonment shall cease for the purpose of deportation, or, subject to authority being granted by the Minister, if the offender finds two sureties each in a sum of one hundred pounds and each approved by the Collector of Customs . . . for his leaving the Commonwealth within one month."

H. C. OF A. 1935. GRIFFIN v. WILSON.

Immigration Act. Griffin did not write anything on the paper with which he had been supplied. The officer then said:—"You have failed to pass the dictation test. You are now a prohibited immigrant." Evidence was given by the officer that Griffin arrived at Sydney shortly after 3 o'clock p.m. on 2nd November 1934, as a passenger on the s.s. *Monowai*, and that he left Sydney at about 3.45 p.m. on the same day on the s.s. *Marama*. Evidence was not given by or on behalf of Griffin. There was not any evidence to show where Griffin was born; where he had his home; or whether he had returned from a short, or lengthy, sojourn overseas; that he was an immigrant; or that he had been within the Commonwealth for a specified period. The magistrate held that there was evidence that Griffin had entered the Commonwealth within five years before the dictation test. It was submitted on behalf of Griffin that, in the circumstances, he was not "found" within the Commonwealth within the meaning of sec. 7 of the *Immigration Act*, and also that the averment provisions of sec. 5 of the Act did not apply to an offence charged under sec. 7. The magistrate held that Griffin was a prohibited immigrant within the meaning of secs. 3 (*a*) and 5 (2) of the Act, and that he was at the relevant date and time found within the Commonwealth in contravention of the Act. He further held that the information was for one offence only. Griffin was convicted and sentenced to a term of imprisonment. He appealed to the Supreme Court of New South Wales by way of case stated, the question for determination being whether the magistrate's determination was erroneous in point of law. In the opinion of the Supreme Court the question should be answered in the negative, but it refrained from making any order pending the making on Griffin's behalf of an application to the High Court for the matter to be removed to that Court under sec. 40 of the *Judiciary Act* 1903-1933. *Evatt* J., to whom the application was made, referred the matter into the Full Court of the High Court, and it now came on for hearing.

G. Lytton Wright, for the applicant. The provisions of sub-sec. 3 of sec. 5 of the *Immigration Act* 1901-1933 apply only to offences charged under sub-secs. 1 and 2 of that section, and are inapplicable

to offences charged, as here, under sec. 7 of the Act. The offence created by sec. 7 is distinct and separate from offences created under sec. 5 (1) and (2). As the averment provisions of sec. 5 (3) do not apply, there is not any evidence that the applicant is an immigrant; therefore the prosecution must fail. The provisions of the Act which purport to authorize the imposition of a term of imprisonment upon failure to pass the dictation test, without an opportunity being afforded to the person concerned voluntarily to leave the Commonwealth, are not a valid exercise of the immigration power, and are *ultra vires*. An *inter se* question of the constitutional powers of the Commonwealth and the State is involved in this matter. The position here is somewhat different from that present in *James* v. *South Australia* (1). In the circumstances the applicant was not "found" within the Commonwealth. He did not flout the Act. He had not had an opportunity of leaving the Commonwealth.

RICH J. We think the matter should be removed to this Court under sec. 40 of the *Judiciary Act* 1903-1933.

G. Lytton Wright. The information disclosed two offences, that is, one under sec. 5 (2), and the other under sec. 7 (*Ex parte Everingham* (2); *Johnson* v. *Needham* (3); *R.* v. *Hammick*; *Ex parte Murdoch* (4)). Upon a prosecution under sec. 7 it must be proved by affirmative evidence that the person charged is a prohibited immigrant; recourse cannot be had to sec. 5 (3). Sec. 7 relates to sec. 3 of the Act. An almost similar point was dealt with in *Williamson* v. *Ah On* (5). The operation of sub-sec. 3 of sec. 5 is expressly limited to prosecutions under sub-secs. 1 and 2 of that section. The statutory provision which purports to authorize the imposition of a term of imprisonment upon failure to pass the dictation test is invalid.

The Commonwealth is not empowered to interfere with the liberty of the subject in this way (*Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (6)).

(1) (1927) 40 C.L.R. 1.
(2) (1870) 9 S.C.R. (N.S.W.) 250.
(3) (1909) 1 K.B. 626.
(4) (1918) W.N. 111; 34 T.L.R. 342.
(5) (1926) 39 C.L.R. 95, at p. 129.
(6) (1909) 8 C.L.R. 330, at pp. 409, 410.

H. C. OF A. 1935. GRIFFIN v. WILSON.

A. R. Taylor, for the respondents. The information disclosed only one offence, that is, under sec. 7, that the applicant, a prohibited immigrant, was found within the Commonwealth in contravention of the *Immigration Act*. The form of complaint in *Williamson* v. *Ah On* (1) was in substantially similar terms to the information in this case. The allegation that the applicant was a prohibited immigrant shows that the offence charged was laid under sec. 7. Apart from sec. 5, there is not any power conferred upon the immigration authorities to compel persons who entered the Commonwealth in an abnormal manner to submit to the dictation test. The expression " found within the Commonwealth " in sec. 7 refers to persons who after their entry into the Commonwealth have become prohibited immigrants pursuant to other provisions of the Act, e.g., secs. 3, 5 (1) (*d*), (*e*), and (2). The word " found " refers back to sec. 5. The words " entered," " entering," and " entry " refer to persons who at the time of coming into the Commonwealth are prohibited immigrants. The intention of the Legislature as expressed in sec. 5 (2) was to enable the immigration officers to impose the dictation test, and upon his failure to pass the test a person came within the category of those who, at the time of their coming into or entering the Commonwealth, were prohibited immigrants. The words used are not sufficient to create a special offence. If the operation of sec. 7 were restricted to offences created under that section and sec. 3, the word " found " would be unnecessary. The finding of a person for the purpose of administering the dictation test, plus that person's failure to pass the test, is sufficient to constitute the offence of being a " prohibited immigrant found within the Commonwealth." The provisions of sec. 5 (1) and (2) do not create offences, they mitigate the provisions of sec. 7. The concluding words are not restricted to a reference to sec. 7. The " imprisonment " imposed is merely a form of restricted custody placed upon the prohibited immigrant pending deportation. Without that power the power of deportation cannot be made effective. That power is sufficiently wide to include a power to imprison or to impose restrictive custody in respect of persons proposed to be deported. As regards secs. 5 and 7 the purpose of the Act indicates that deportation should follow as the result of

(1) (1926) 39 C.L.R. 95.

failure to pass the dictation test, not the penalty provided by sec. 18. The information here is similar to the information in *Gabriel* v. *Ah Mook* (1), where the Court held that the averment provisions of sec. 5 (3) could be used in proof of the offence there charged.

In *Ah You* v. *Gleeson* (2) the Court indicated merely that only those averment provisions in force at the date of the particular prohibited immigrant's arrival in the Commonwealth were available upon his prosecution. The respondents are entitled to rely upon averments made under the provisions of sec. 5 (3) in order to prove the offence with which the applicant is charged (*Maher* v. *Young* (3); see also *Ali Abdul* v. *Maher* (4)).

The following judgments were delivered :—

RICH J. An offence is created under sec. 5 (1) and (2) of the *Immigration Act* 1901-1933 to which sub-sec. 3 of that section is referable.

The offence charged in this case is created by sec. 7 to which the averment sub-sec. 3 of sec. 5 does not apply.

The offence in question requires evidence of the ingredients or make-up, and as none was given, and the averment sub-section to which I have referred does not apply, the conviction should be quashed.

Before parting with the case I wish to add this, that the *Immigration Act* 1901-1933 is the result of the *Immigration Restriction Act* 1901 and ten or more amending Acts. The original Act presented difficulties of construction because of apparent incongruities of draftsmanship ; the legislation has become, in the course of amending, most confused—and confusing on many important points—and it well merits the attention of the Legislature.

In consequence of the confused state of this and other Acts of Parliament an unnecessary burden is placed on the Court, whose duty it is to declare the law as it has been expressed without regard to speculation as to how it might have been expressed if fuller consideration had been given to the matter.

In my opinion the question in the case stated should be answered in the affirmative and the conviction quashed.

(1) (1924) 34 C.L.R. 591.
(2) (1930) 43 C.L.R. 589, at p. 596.
(3) (1931) 31 S.R. (N.S.W.) 363 ; 48 W.N. (N.S.W.) 116.
(4) (1931) 46 C.L.R. 580.

H. C. OF A. 1935. GRIFFIN v. WILSON.

STARKE J. I agree. In my opinion the case is concluded by the opinions expressed in this Court in *Williamson* v. *Ah On* (1) and *Ah You* v. *Gleeson* (2), and in the sense that sub-sec. 3 of sec. 5 only applies to the two preceding sub-sections, and has no application to the offence stated in sec. 7. I would add that in the report of *Ah You* v. *Gleeson* (3), the reference to sec. 7 of the *Immigration Act* 1901-1925 seems to be a misprint, and "sec. 7" should read "sec. 5."

DIXON J. I agree. In my opinion the information was laid under sec. 7, and the prosecutor rightly so stated in the Court below.

Sec. 7 contains its own difficulties when it is applied to cases where an immigrant is prohibited because he fails to pass the dictation test after he lands in Australia. One difficulty lies in the word "found," which is scarcely appropriate, or at any rate is not a natural expression in relation to persons such as the defendant, who was either in custody or almost in custody at the moment that the dictation test was applied to him. He is supposed then immediately to have been "found" as a prohibited immigrant. Putting that upon one side as a minor point, sec. 7 presents another question which has been argued, but which we do not decide or express any opinion about. That question is whether in the case of immigrants who have entered Australia and have resided here, and then have the dictation test administered to them, the provision rendering them liable to imprisonment is within the immigration power.

The prosecution having been launched under sec. 7, the prosecutor relied upon sec. 5 (3) in the place of actual evidence proving the ingredients of the offence created by sec. 7, or some of them. Sub-sec. 3 of sec. 5 by its express words is limited to prosecution under either of the two preceding sub-sections. These words appear to me to be explicit, and not to admit of the construction by which they are applied to a prosecution for an offence created by sec. 7, in which prosecution the ingredients established by sub-secs. 1 and 2 of sec. 5 are relied upon to make out the offence charged. It is possible that the Legislature did not intend this consequence of the language, but it has used language which, in my opinion, admits of no other interpretation.

(1) (1926) 39 C.L.R. 95. (2) (1930) 43 C.L.R. 589.
(3) (1930) 43 C.L.R., at p. 595.

I do not agree with the contention advanced in order to lay a foundation for giving to sub-sec. 3 a different meaning, namely, the contention that there are no offences created by sub-secs. 1 and 2 of sec. 5. I think the language of this section is language which was apt to create offences and which, coupled with sec. 18, succeeded in doing so.

For these reasons, the evidentiary provisions seem to me to be inapplicable to a prosecution under sec. 7, and upon that ground, and that alone, so far as our present decision is concerned, the conviction should be quashed.

EVATT J. I agree with *Rich* J. In my opinion, first, the offence charged against the appellant was under sec. 7; second, sec. 5 (2) creates a separate and distinct offence from that created under sec. 7; and, third, sec. 5 (3) has no application to prosecutions under sec. 7.

The framework of sec. 5 (3) makes the conclusions too clear for argument, but, if authority is needed, the precise points appear to be covered by the remarks of *Rich* and *Starke* JJ. in the case of *Williamson* v. *Ah On* (1), and apparently by an observation of *Isaacs* J. in the same case (2). The appeal should be allowed with costs.

MCTIERNAN J. The decision of *Rich* and *Starke* JJ. in *Williamson* v. *Ah On* (1) with respect to sub-secs. 1 and 2 of sec. 5 was that these sub-sections constitute "separate and distinct offences and are not instances of a general offence constituted by the provisions of secs. 3 and 7." The words of sub-sec. 3 of sec. 5 expressly confine its operations to proceedings under sub-secs. 1 and 2 of sec. 5.

I agree that the prosecution was instituted under sec. 7, and that sub-sec. 3 of sec. 5 does not apply to proceedings under sec. 7.

Question submitted in the case stated answered in the affirmative. Conviction quashed. Respondent to pay the costs of applicant in this Court and the Courts below.

Solicitor for the applicant, *M. E. Rosenblum.*

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

J. B.

(1) (1926) 39 C.L.R., at p. 129.

(2) (1926) 39 C.L.R., at p. 105.