

# The saga of Egon Kisch and the White Australia Policy

By the Hon Keith Mason QC<sup>1</sup>

The new Commonwealth Parliament was dominated by spokesmen for White Australia and its first great debate involved the *Immigration Restriction Act 1901*<sup>2</sup> and the *Pacific Island Labourers Act 1901*. Support for restrictive measures was overwhelming and nakedly racist. For example, Alfred Deakin spoke of ‘the desire that we should be one people and remain one people without the admixture of other races,’<sup>3</sup> although he added that: ‘It is not the bad qualities but the good qualities of the alien races that make them dangerous to us.’<sup>4</sup> Another speaker (George Pearce) retorted bluntly that ‘The chief objection is entirely racial’.<sup>5</sup> Isaac Isaacs declared that ‘I am prepared to do all that is necessary to insure that Australia shall be white, and that we shall be free for all time from the contamination and the degrading influence of inferior races’.<sup>6</sup>

There was, however, disagreement about ways and means. Some speakers favoured the honesty of exclusion of non-white immigrants in specific terms. But the policy that would prevail involved a ‘dictation test’, following a model first used in Natal in 1897 and already current in New South Wales, Tasmania and Western Australia. This stemmed partly from an independent desire for amicable relations with Asian countries and partly from sympathy with the wish of the British Government (based on its Asian commitments) that such a system be used in preference to an expressly racist basis of exclusion.<sup>7</sup> This latter argument was very much a two-edged sword given the strength of sentiment that the new Commonwealth should not bow to British influence.

As finally enacted, the officer administering the test was authorised to choose any passage in any European language. This outcome was achieved by defining ‘prohibited immigrant’ to include ‘any person who fails to pass the dictation test: that is to say, who, when an officer... dictates to him not less than fifty words in any prescribed language, fails to write them out in that language’.<sup>8</sup> The procedure thus became ‘merely a polite method of exclusion at the discretion of the government’.<sup>9</sup> No one passed the dictation test after 1909. This is hardly surprising given the lengths to which officials went. For example, a Japanese fisherman who entered Australia illegally in 1915 and was discovered fourteen years later was set a test in Greek, administered by a local Greek restaurateur.

One thing was, however, entirely clear from the debates and the choice of ‘European’ as the basic language criterion: it was aimed at non-Whites. Accordingly, there was an outcry when a test (in Italian) was administered to an Indian-born, white woman who was a British subject and distantly related to the English Lord Chancellor Viscount Cave. Mabel Freer’s real problem was that she intended to marry her Australian travelling companion, a

Lieutenant Dewer, who was still married but seeking to divorce his Australian wife. It seems likely that members of the Dewer family got the ear of Minister Paterson, persuading him that she was ‘undesirable’ on a scattergun of grounds that were never substantiated. The true reason for her exclusion was that her entry threatened to lead to the dissolution of a ‘perfectly good Australian marriage’.<sup>10</sup> Despite the backing of the *Daily Telegraph* which funded unsuccessful High Court *habeas corpus* proceedings before Evatt J, Mrs Freer was bundled out of the country. By keeping Mrs Freer on board the ship as it steamed towards New Zealand the family managed to crush the shipboard romance. By the time she got back to Australia there was no opposition to her return, but no engagement to marry either.<sup>11</sup>

*His story shows how (in contrast to some nations) Australian courts can respond extremely promptly if they are required to quell a controversy involving personal liberty. It also shows that prolonged litigious drama can focus criticism and ridicule upon the Executive government when it fails to get its way.*

One of the last sustained defences of the White Australia Policy came from Sir John Latham, who had retired as chief justice of the High Court in 1952. His paper ‘Australian Immigration Policy’ was published in *Quadrant* in 1961.<sup>12</sup> The dictation test was repealed in 1958 but the White Australia Policy was not officially dismantled until 1973. During its currency it produced a lot of litigation, none more engrossing than the saga involving a white, quintessentially European, Egon Kisch.

Kisch ‘achieved celebrity during a visit to Australia of less than six months, chiefly because of the government’s failure to prevent it’.<sup>13</sup> His story shows how (in contrast to some nations) Australian courts can respond extremely promptly if they are required to quell a controversy involving personal liberty. It also shows that prolonged litigious drama can focus criticism and ridicule upon the Executive government when it fails to get its way. The saga would pit the youthful Robert Menzies, then attorney-general, against Herbert Vere Evatt, then in his youthful judicial prime.

Kisch was Czech, Jewish and a communist. In Nazism’s early days, he was gaoled and then expelled from Germany for his

### The Hon Keith Mason QC, 'The saga of Egon Kisch and the White Australia Policy'

anti-fascist writings. Left-wing groups in Australia decided to organise a rally in Melbourne against fascism and to invite Kisch to be a principal speaker. The rally was designed as a counterpoise to a function promoted by the conservative Melbourne establishment to celebrate the city's centenary, with the Duke of Gloucester as the guest of honour.

The federal government under Prime Minister Lyons decided to keep Kisch from landing by invoking the *Immigration Act 1901*. This was at a time when Australian public opinion still trusted the Fascists in Europe more than the Communists. Robert Menzies KC had just come to office as attorney-general of the Commonwealth and his enthusiastic defence of Lyons' policy would prove a baptism of fire. (Following the outbreak of the Second World War, Menzies found it necessary to distance himself from the controversy by claiming that Interior Minister Thomas Paterson was responsible since he had made the initial order to exclude Kisch.)

The first mechanism invoked by the authorities was the power of the minister for immigration to declare someone to be 'undesirable as an inhabitant of, or visitor to, the Commonwealth'. The minister purported to make such a declaration on 18 October 1934 (three weeks before Kisch's ship arrived in Perth) stating that 'in his opinion from information received from another part of the British Dominions through official channels' [Kisch was] 'undesirable as an inhabitant of or visitor to the Commonwealth'.

Kisch, who sailed to Australia on the *Strathaird*, planned to disembark in Perth and cross the continent by train. The captain, Mr Carter, prevented his landing because a customs official told him that the minister for immigration had made such a declaration. Carter kept Kisch on board the ship as it progressed via Melbourne to Sydney despite his unwilling passenger making considerable legal and practical attempts to disembark, as we shall see.

When the ship got to Melbourne, Kisch's growing body of supporters sought *habeas corpus* for his release. The application was refused by 'Iceberg' Irvine, the chief justice of Victoria, on the basis that *habeas corpus* was not available to protect aliens, a proposition that had been denied by the Supreme Court of New South Wales in 1888<sup>14</sup> and that would be shortly disavowed by Evatt J in the High Court.

Kisch then took the law into his own hands, as was his right (if, as was to be shown, he was being unlawfully restrained).<sup>15</sup> He literally jumped ship at the Melbourne dock, in the presence of a large crowd of enthusiastic supporters, falling six metres and breaking his leg. The amusing account about his adventures



Egon Kisch addresses a crowd in Sydney's Domain on the dangers of Hitler's Nazi regime, 17 February 1935. Photo: Sam Hood.

in Australia was punningly entitled *Australian Landfall*. Kisch wrote that 'the high jump from deck to dock was looked upon as a sporting performance by this sport-mad continent.'<sup>16</sup> Kisch's claim that he was entitled to be taken before a court following arrest on shore was ignored. Instead, he was bundled onto a stretcher and put back on board by the police. Before the *Strathaird* sailed, anti-fascist demonstrators stuck labels onto the ship's side: 'Kisch, deported by Hitler, 1933 – by Lyons 1934. Kisch must land.'

By the time the ship got to Sydney, Kisch's supporters had retained AB Piddington KC as his leading counsel. Piddington was by this time in his seventies and no great shakes as a barrister, but this would definitely be his finest hour. He would have made a substantial contribution to the law as a High Court judge if he had weathered the storm surrounding his appointment.<sup>17</sup> He later achieved distinction first as chief commissioner of the Inter-State Commission, then as a Lang-appointed member of the Industrial Commission of New South Wales. He would retire from this office as a matter of principle in protest against the dismissal of Lang by the state governor in 1932 very shortly before he would have qualified for a pension.

Kisch (still trapped on board) moved the High Court for a writ of *habeas corpus* directed at Captain Carter. The Commonwealth intervened in support of Carter, also filing an affidavit with a fresh ministerial declaration under the hand of the new minister, Menzies. While Captain Carter had relied on the earlier declaration made a month earlier and before the ship came into Australian waters, the defendant now pointed

The Hon Keith Mason QC, 'The saga of Egon Kisch and the White Australia Policy'

to a declaration dated 13 November 1934, ie two days before the hearing in Sydney. But when Piddington moved to cross examine Menzies on the new declaration, the fresh affidavit was withdrawn and Captain Carter's legal advisers had to fall back upon the original declaration. In the upshot, the defendant and the Commonwealth offered no evidence to show that there was any information received from the government of the United Kingdom.

Kisch's lawyers relied principally on the argument that the legislation was unconstitutional, but Evatt J would ultimately reject this proposition. Before doing so, he had a quiet word to Piddington's junior and suggested that a different line of argument would be more persuasive, as it turned out to be.<sup>18</sup> In ordering Kisch's release, Evatt rejected Irvine CJ's view that *habeas corpus* was unavailable to an alien.<sup>19</sup> Evatt J also ruled that the ministerial declaration that had been relied upon by Carter (though in statutory form) did not satisfy the requirement that the person to be excluded should be someone 'declared by the minister to be in his opinion, from information received from the government of the United Kingdom ... through official or diplomatic channels, undesirable as an inhabitant of, or visitor to, the Commonwealth'.

After winning the Sydney *habeas corpus* proceedings, the still injured Kisch was carried ashore by stewards. But he was met on the wharf by police who took him straight to Central Police Station where the Commonwealth authorities tried a completely fresh tack, invoking the dictation test. A police inspector directed Kisch to write down a passage in Scottish Gaelic read to him by a Constable McKay. The passage was read twice, according to Kisch sounding differently the second time around. When Kisch declined to proceed he was arrested and charged with being an immigrant who failed to pass the dictation test who was found within the Commonwealth.

As indicated, this test presented itself as a mechanism for ensuring that would-be immigrants to Australia held minimal educational standards. But it had been designed to keep non-Europeans from entering these shores. Kisch was European to the bootstraps but such was the state of literalist statutory interpretation at that time that no one<sup>20</sup> dreamed of arguing that applying the test to White Europeans was ultra vires because it was foreign to the evident purpose of the original legislation.

A few days later Kisch was carried into a crowded Court of Petty Sessions. He was granted an adjournment and bailed over the protests of the prosecution that argued (contrary to

the laws of gravity) that his ship-jumping showed him to be a flight risk. To the further consternation of the authorities, release on bail enabled him to attend a large protest meeting in the Sydney Domain arranged by the Australian Anti-War Congress attended, on some reports, by over twenty thousand people. Kisch was introduced to the crowd by the elderly Rev Albert Rivett, who had just spoken passionately about the rise of fascism. Rivett thereupon collapsed and died on the spot. After a decent interval Kisch addressed the crowd, telling them, on his own published account, that 'my English is broken, my leg is broken, but my *heart* is not broken: for the task, which I was given to do by the anti-fascists of Europe, is fulfilled when I speak to you, the anti-fascist people of Australia'.<sup>21</sup>

*Kisch was introduced to the crowd by the elderly Rev Albert Rivett, who had just spoken passionately about the rise of fascism. Rivett thereupon collapsed and died on the spot.*

At the trial, Piddington cross-examined Constable McKay about Scottish Gaelic, a language he had last spoken twenty years ago. Piddington also took the point that Scottish Gaelic was not a European language within the meaning of the Act. A retired police inspector, John McCrimmon was then called to prove that McKay spoke correct Scottish Gaelic. He averred this most emphatically but the proceedings lurched into high farce when McCrimmon mistranslated a Scottish Gaelic passage shown to him by the cross-examiner. He translated the sentence: 'As well as we could benefit, and if we let her scatter free to the bad', adding that it was 'not a very moral sentence'. Piddington then gleefully pointed out that what he had shown the witness, with the last word ('Amen') covered up, was the passage from the Lord's Prayer 'Lead us not into temptation, but deliver us from evil.'

Kisch was nevertheless convicted and sentenced to the maximum penalty of six months hard labour. He appealed directly to the High Court which, by majority, ruled that Scottish Gaelic was not 'an European language'.<sup>22</sup> This conclusion so enraged various Scottish residents that angry letters were published in the *Sydney Morning Herald*. One of them was penned by the chancellor of the University of Sydney, Sir Mungo MacCallum,

### The Hon Keith Mason QC, 'The saga of Egon Kisch and the White Australia Policy'

under the nom de plume 'Columbinus'. He wrote:

Some of us may have supposed the Immigration Act was meant to provide a test whereby, even if in a quibbling and pettifogging way, undesirable aliens might be excluded, and that an alien forbidden to land in England might be considered undesirable here. Now we know better. It behoves us to bow down before the court's confident pronouncement: 'We are dictators over all language and above linguistic facts.'

This allowed Kisch to move onto the attack with a charge of contempt by scandalising that almost succeeded. In *R v Fletcher; Ex parte Kisch*,<sup>23</sup> Evatt J dismissed an application to have the editor of the *Sydney Morning Herald* punished for contempt in publishing these letters, although the paper was required to pay the legal costs. Dixon wrote Evatt an approving and reassuring letter.<sup>24</sup>

A second contempt proceeding did result in a conviction when another High Court litigant launched a prosecution against the editor of the *Sun* who was fined for an article that, among other things, asserted that the law which was intended to keep Australia white was in a state of suspended animation owing to the ingenuity of 'five bewigged heads' who had managed to discover a flaw in the Immigration Act. The writer had stated that 'to the horror of everybody except the little brothers of the Soviet and kindred intelligentsia, the High Court declared that Mr Kisch must be given his freedom.'<sup>25</sup>

Menzies made a further declaration of undesirability, relying on updated information that Kisch was banned from entering Britain 'on account of known subversive activities'. A fresh charge was laid in the Court of Petty Sessions. It resulted in a conviction but not before Piddington had protested that counsel for the prosecution, H E Manning KC should not be permitted to appear because, as attorney general for New South Wales, he was the employer of the presiding magistrate. Once convicted, Kisch lodged an appeal to the High Court and was granted bail in the meantime. This allowed him to continue attending political rallies, 'waving his crutches in the air as he spoke of the gathering storm in Europe'.<sup>26</sup> Eventually, as all parties tired of the legal/political battles. A compromise was reached. Kisch would leave Australia voluntarily, legal costs paid and his passport returned. Shortly before his departure he attended a torchlight procession in Melbourne to mark the anniversary of the Reichstag fire.

### Endnotes

1. This is extracted from Keith Mason's forthcoming *Old Law, New Law A Second Australian Legal Miscellany* (2014) The Federation Press.
2. The Act was renamed the Immigration Act in 1918. In 1958 the legislation was replaced by the *Migration Act 1958*. The broad purpose remained the same, despite the three significant name changes.
3. *Commonwealth Parliamentary Debates*, 12 September 1901, p 4804.
4. *Ibid*, p 4812.
5. *Ibid*, p 7160.
6. *Ibid*, p 4845.
7. See Geoffrey Sawyer, *Australian Federal Politics and Law 1901–1929*, Melbourne University Press, 1956, p 23.
8. *Immigration Restriction Act 1901*, s 3. No languages were ever prescribed. In 1905 the Act was amended by stipulating that 'an European language directed by the officer' was deemed to be prescribed. In *Potter v Minehan* (1908) 7 CLR 277, one reason why the prosecution of Minehan (who had assumed his mother's name but whose reputed father was Chinese) failed was that the officer omitted to dictate the passage, choosing instead to read the passage slowly and offer to read it again. Minehan had been handed a pencil and paper, but when he announced that he could not write the passage, he was not given the opportunity to do so by having it slowly dictated to him.
9. Sawyer, *loc cit*. In *The King v Carter; Ex parte Kisch* (1934) 52 CLR 221, Evatt J said (at 230) 'as we all know, the dictation test was a means devised in order to confer a discretion upon the authorities concerned with the administration of the Act.'
10. F K Crowley, *A New History of Australia*, William Heinemann, Melbourne, p 448.
11. See Kel Robertson with Jessie Hohmann and Iain Stewart, 'Dictating to One of 'Us': The Migration of Mrs Freer' (2005) 5 *Macquarie Law Journal* 241.
12. Sir John Latham's paper is largely reproduced in A T Yarwood, *Attitudes to Non-European Immigration*, Cassell Australia, 1968, pp 132–6. For other political interventions by Latham, see Keith Mason, *Lawyers Then and Now*, pp 99–100.
13. *Oxford Companion to Australian History*, 'Kisch, Egon', p 366.
14. *Ex parte Lo Pak* (1888) 9 NSWLR (L) 221; *Ex parte Woo Tin* (1888) 9 NSWLR (L) 493.
15. As Darley CJ reminded Sir Henry Parkes in *Ex parte Woo Tin* when he warned that the blood of any slain police officers would be on Parkes' head if they chose to obey the Premier despite repeated rulings of the Supreme Court ordering habeas corpus.
16. *Australian Landfall*, p 108.
17. See Keith Mason, *Lawyers Then and Now*, p 85 as to his early resignation.
18. Peter Crockett, *Evatt: A Life*, OUP, 1993, pp 84–5 (describing Evatt's conduct as 'neglect[ing] his judicial responsibilities').
19. *R v Carter; Ex parte Kisch* (1934) 52 CLR 221.
20. Not even Evatt J whose views about the scope of administrative law were well ahead of his time.
21. Kisch, *Australian Landfall*, pp 87–8. According to Judge Fricke, *Libels, Lampoons and Litigants*, p 164, Kisch's words inspired the young Wilfred Burchett to take part in his first political demonstration, escorting Kisch from the Domain. The next day Burchett spent time at the public library learning about Kisch. Burchett's later experiences in Nazi Germany consolidated his radicalism. When a magazine asserted that Burchett was a paid agent of Communist governments Burchett launched a famous libel case: see *Burchett v Kane* [1980] 2 NSWLR 266.
22. *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234.
23. (1935) 52 CLR 248.
24. Fricke, *Judges of the High Court*, p 132.
25. *R v Dumbabin; Ex parte Williams* (1935) 53 CLR 434.
26. Nicholas Hasluck, *The Legal Labyrinth, The Kisch case and other reflections on law and literature*, Freshwater Bay Press, 2003, p 13.