IMMIGRATION RESTRICTION AMENDMENT ACT 1961

As originally enacted, s.5(1) of the Immigration Restriction Amendment Act 1920 stated, in essence,

> . . . no person other than a *person of British birth and parentage* shall . . . enter into New Zealand unless he is in possession of a permit to enter . . . (emphasis added).

Section 5(2) of that Act provided that :

> A person shall not be deemed to be of British birth and parentage by reason that he or his parents or either of them is a naturalized British subject, or by reason that he is an aboriginal Native or the descendant of an aboriginal Native of any dominion other than the Dominion of New Zealand or of any colony or other possession or of any protectorate of His Majesty.

However, the Immigration Restriction Amendment Act 1961, s.2(a) (which came into force on 1 January 1962) amended the first-quoted subsection so that it now reads

> . . . no person other than a *New Zealand citizen* shall . . . enter into New Zealand unless he is in possession of a permit to enter . . . (emphasis added).

Moreover s.2(b) of the 1961 Act repealed the above quoted s.5(2).

What effect, if any, has this change upon the previous law restricting entry into New Zealand ? This is best answered by attempting to classify those persons who were of 'British birth and parentage', and comparing that class with the class of 'New Zealand citizens'.

The sole judicial interpretation in New Zealand of the phrase 'British birth and parentage' is contained in the judgment of Hutchison J. in *Annandale* v. *Collector of Customs* [1955] N.Z.L.R. 168. The appellant in this case was born in Western Samoa. His father was a natural-born British subject, a Scotsman, and his mother a Samoan. It was common ground that by virtue of s.16(3) of the British Nationality and New Zealand Citizenship Act 1948 he was a New Zealand citizen and that he had, in terms of the British Nationality and Status of Aliens (in New Zealand) Act 1928, been a natural-born British subject. The question was whether the appellant was of 'British birth and parentage' within s.5(1) and accordingly entitled to enter into and remain in New Zealand without a permit. The learned judge divided the phrase into two parts : 'of British birth' and 'and parentage'. Speaking of the former he said (at 171) :

> . . . that part of the expression means the same as the words 'natural-born British subject' as those words appeared in Part I of the Second Schedule to the British Nationality and Status of Aliens (in New Zealand) Act 1928. The word 'natural' appears to me to add nothing to the word 'born', to which it is hyphenated, and the two expressions, 'natural-born British subject' and 'of British birth' seem to me to be the same and mean the same.

Now, a 'natural-born British subject' under the abovementioned Act (now repealed) was either

(a) any person (descended from parents of *any* nationality) born within Her Majesty's dominions and allegiance, including persons born on board a British ship; or

(b) any person born outside Her Majesty's dominions whose father was at the time of that person's birth a British subject other than by descent (except where he was in Crown Service).

Thus if the provisions of s.5(1) had read merely 'of British birth' anyone born within Her Majesty's allegiance or having a British father (subject as above) would have escaped its provisions: the child born in Hong Kong of a refugee to the Colony, for example, could not have been refused entry.

However, that wide class was severely narrowed by the latter half of the phrase: 'and parentage'. Mere birth within a British country did not grant unrestricted status: it was further stipulated that the child must be of 'British . . . parentage'. The learned judge continued (ibid):

> I then turn to the second part of the expression, 'and parentage'. That part of the expression, as it seems to me, removes from the category of those who are free from the restriction of s.5 everyone who, while being 'of British birth', as being within the definition of 'natural-born British subject' in Part I of the Schedule to the 1928 Act, is not the child of a British father. It will, therefore, exclude from that category all persons who would have been within para. *(a)* or para. *(c)* of subs.(1) of Part I as having been born within Her Majesty's Dominions [sic] and allegiance or on board a British ship, but who are of foreign parentage.

It appears then, that the effect of s.5(1) (considered apart from s.5(2)) was to restrict the entry of all persons not descended from *British fathers*. (A few minor exceptions in the shape of seamen, servicemen, diplomats, and persons exempted by the Governor-General by Order in Council or by the Minister of Customs would have

to be admitted to any such rule under s.13 of the Immigration Restriction Act 1908, and under ss.6,7 of the 1920 Amendment.) The discrimination made is clear: persons whose fathers were British subjects (with the exceptions noted) could enter without restriction (regardless of where they were born), whereas persons of non-British parentage were subject to restriction (whether they were British subjects or not). No discrimination is made amongst the peoples of the Commonwealth itself: a descendant of a British African or Asian father is as much 'of British birth and parentage' as an Englishman himself. It was only persons of non-Commonwealth parentage who were debarred from free entry.

Precisely what effect s.5(2) should have had on that situation is obscure. The intention of the Legislature appears to have been the exclusion of naturalized persons or their descendants and 'aboriginal Natives' or their descendants of any Dominion other than New Zealand from the class of persons 'of British birth and parentage' who were permitted unrestricted entry under s.5(1). This was, it is believed, interpreted in practice as denying free entry to 'non-whites'. Whether such an intention was effected by the language of the subsection, however, is open to grave doubt.

In one view, the subsection is meaningless owing to a misplacing of the word 'not'. It reads :

> A person shall not be deemed to be of British birth and parentage by reason that ....

Does this make sense? If the classes of persons later mentioned are of British birth and parentage, it is nonsensical to talk of their being *deemed* to be such. One cannot help feeling what is really meant is

> A person shall be deemed not to be of British birth and parentage if ....

Furthermore, the interpretation of s.5(1) in *Annandale's* case renders the reference to naturalized persons in s.5(2) redundant. To be of British birth and parentage, and thus a free entrant, descent from a British father was necessary; and this a naturalized person would not have had. The draftsman either did not appreciate the effect of s.5(1), as expounded by Hutchison J., or did not object to redundancy.

The final difficulty is one of definition. By what criteria was one to judge who was an

> aboriginal Native or the descendant of an aboriginal Native of any dominion other than the Dominion of New Zealand or of any colony or other possession or of any protectorate of His Majesty ?

One view would have it that, for example, a Scotsman (e.g. Annandale's father) being

a descendant of the aboriginal natives of Scotland, the Picts, might come within this definition. It is submitted this is a little far-fetched, since Scotland is not usually considered to be a dominion, colony, possession, or protectorate, of Her Majesty. A 'possession' is perhaps a possibility, but the eiusdem generis rule of statutory construction would militate against any interpretation in that sense. It might be retorted that every good Scotsman knows England to be much more a possession of Scotland than vice versa. The real difficulty lies in deciding when an African or Asian native inhabitant of a Commonwealth country is to be classed as an 'aboriginal Native' or a descendant of an 'aboriginal Native' : if he or his fathers were inhabitants when the British came ? That would remove the majority of the Chinese and Indians in Malaya and Fiji from the status of aboriginal Natives, since the large majority have immigrated since the beginning of British rule in those territories. Are the negroes of the West Indies really aboriginal natives ? They are certainly not the earliest inhabitants ! It is submitted that such a vague term cannot be satisfactorily defined.

It seems then, that the theoretical effect of the subsection is difficult to asertain. It was not interpreted in *Annandale's* case. In practice, however, no qualms were felt about its application. It was pragmatically interpreted as further restricting the category of unrestricted immigrants under s.5(1), a view which secured judicial support from Hutchison J. (at 171) :

> Further restrictions of the class of persons who are free from the requirement of permits under s.5(1) are imposed by subs. (2) .... [T]he imposition by subs. (2) of these further restrictions seems to me to be entirely consistent with the approach to the expression 'of British birth and parentage' being made on the basis that 'of British birth' establishes the wide class and that 'parentage' and the terms of subs. (2) operate then to restrict the width of it.

The administering Department interpreted 'aboriginal Native' as meaning a Commonwealth citizen of African or Asian ethnic grouping, and considered the subsection to be effective in removing such persons from the category of persons entitled to free entry under s.5(1).

The effect aimed at (and in practice largely achieved) by s.5 as a whole was, therefore, the exclusion of three groups :

(1) persons born outside the Commonwealth of non-Commonwealth parentage;

(2) persons born within the Commonwealth of non-Commonwealth or of African or Asian (in an ethnic sense) fathers who were British subjects; and

(3) naturalized British subjects or their descendants

In addition, however, persons born *within* the Commonwealth (other than New Zealand) (and who were accordingly British subjects) of fathers who were not British subjects were also, according to the interpretation placed on s.5 by Hutchison J., restricted entrants. It is those three groups which will be taken as the class subject to restriction under the former law; but before passing to a comparison with the class under the Immigration Restriction Amendment Act 1961 a brief mention will be made of three anomalies under the old law.

The extraordinary situation could have existed whereby a New Zealand citizen would have been a restricted entrant, whereas a foreigner (i.e. non-British subject) would not. A child born in New Zealand to a non-British father who was not of diplomatic status or an enemy alien would be a New Zealand citizen in terms of s.6 of the British Nationality and New Zealand Citizenship Act 1948. Yet, along with naturalized New Zealand citizens he would have lacked the attribute of British parentage, and thus have been technically a restricted entrant. The threat of this was real enough to prompt the enactment of s.3 of the Immigration Restriction Amendment Act 1959, which in effect provided that no New Zealand citizen could be a restricted entrant and which, incidentally, removed one of the few inequalities attaching to the status of naturalized citizenship.

Secondly, a person descended from a British father who subsequently lost his British citizenship (e.g. by renunciation or deprivation) would apparently have been eligible for free entry. Though neither a British subject nor a New Zealand citizen he would still have been 'of British birth and parentage'.

Finally, the vagueness of 'aboriginal Native' may well have given a strong advantage to persons in, say, the position of a third generation Malayan Chinese. Such a person would not be an aboriginal native of Malaya, or the descendant of one, and thus would not be excluded under s.5(2). He would be of British birth and his father would be British: he would therefore qualify under s.5(1). He may well have been an unrestricted entrant, while his fellow citizen of Malay extraction would be subject to restriction under s.5(2). That possible interpretation must have caused the authority administering the Act considerable anxiety when the number of persons in Malaya, Singapore, and the Borneo territories alone who were not on that view of the statute excluded from unrestricted entry by s.5(2) were calculated.

The Immigration Restriction Amendment Act 1961 laid down that (subject to s.13 of the principal Act and s.7 of the 1920 Amendment) only 'New Zealand citizens' would be entitled to unrestricted entry. A reasonably comprehensive classification of this status is contained in the British Nationality and New Zealand Citizenship Act

1948; and certainly a much more definite class of unrestricted entrants is thus established. It is clear, however, that the effect of this change is even further to restrict entry into this country.

The major result is that no Commonwealth citizens or British subjects who are citizens of another part of the Commonwealth may now enter New Zealand without a permit, unless they happen also to be New Zealand citizens. A further result is that the anomalous class of persons who were not British subjects but might have been of British birth and parentage are now definitely restricted entrants.

It remains only to pass a concluding comment on the deeper implications of the change. The amendment was passed through the Legislature largely under a Statutes Amendment Bill of many clauses and with virtually no comment apart from the remarkable statement by the Attorney-General, the Hon J. R. Hanan :

> This will remove all racial discrimination from the rules governing immigration into New Zealand. (28 November 1961, vol. 329, New Zealand Parliamentary Debates, p. 3822).

On its surface this short Act seems innocuous enough. Its similarity in effect, however, to the recent and highly controversial Commonwealth Immigrants Act 1962 (U.K.) – both restrict the entry of all Commonwealth peoples other than New Zealand and United Kingdom citizens respectively and leave the issue of permits to the complete discretion of the Government – is to say the least, interesting. The New Zealand Act does at least have the merit of clarifying a branch of the law that was exceptionally untidy and full of anomalies.

R. A. McG.