

# REINVENTING THE KISCH CASE

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I have always been intrigued by the first line of Kafka's tale *The Trial*<sup>4</sup>, a sentence suggesting that the law is a labyrinth, a shadowy realm where half-shut doors occasionally afford a glimpse of justice, but more by chance, it seems, than by design *Someone must have been telling lies*

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- \* The Hon Justice Nicholas Hasluck Supreme Court of Western Australia
- 1 *The King v Wilson and Another, Ex parte Kisch* [1934] 52 CLR 234; *The King v Carter, Ex parte Kisch* [1934] 52 CLR 221; *The King v Dunbabin, Ex parte Kisch* [1935] 53 CLR 434; *The King v Fletcher and Another, Ex parte Kisch* [1935] 52 CLR 248.
- 2 Kercher, B *An Unruly Child A History of Law in Australia*. Sydney: Butterworths 1995 149.
- 3 Hasluck, N *Our Man K* Ringwood, Victoria: Penguin 1999
- 4 Kafka, F *The Trial* Hammondsworth, Middlesex: Penguin, 1953.

*about Joseph K, for one fine morning, without having done anything wrong, he was arrested* Within this cave of shadows, we are led to believe, the normal, cheerful, wayward habits of mankind will be transformed by sophistry, and reappear in startling guises

Five years ago, on the way to Kafka's birthplace in the old city of Prague, I came across a plaque that set me thinking about Australian habits, and the mysteries of our own legal system. It gave a brief account of the career of Egon Erwin Kisch, a writer born nearby whom had won renown as a foreign correspondent after the Great War and pioneered the genre known as a foreign correspondent after the Great War and pioneered the genre known as "reportage" Having glanced at the sculpted image of the man in question - a far away look in the eyes, a lavish moustache - I might have passed on. But no. The name brought back memories. The Kisch case!<sup>5</sup> Yes, I recalled, Katherine Susannah Prichard from the Fellowship of Writers in Perth had played a part in the controversy. And one of my lecturers at law school was involved. He had written articles, signed petitions, denounced the Immigration Act

The "rampaging reporter", Egon Erwin Kisch, came to Australia by ship in November 1934. Refused permission to land at Fremantle, he bypassed the ban by leaping ashore at Melbourne, a jump that left him on crutches, hobbled by legal proceedings<sup>6</sup> that took him all the way to the High Court. When the plea against him of "subversive activities" was thrown out, he was charged with failing to pass a dictation test of the kind used to enforce the White Australia policy - in the case a test in Scottish Gaelic was a way round the unwanted visitor's formidable skills as a linguist fluent in eleven languages

It struck me, as I wandered through the streets of Prague, that Kisch, the antipodean litigant, had all the traits of a character dreamed up by Kafka. To my surprise, it then turned out - at a museum further on - that they had both attended the Altstadter Gymnasium in the old city. There, at the turn of the century, the schoolmasters were obliged to sign the praises of the Habsburg monarchy, and to wear the plumed headdress of the ancient empire on ceremonial occasions. The stuff that dreams are made up of

I could see a novel in this. Back in Australia, I set to work on what has now become a recently published book called *Our Man K*<sup>7</sup> I give

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<sup>5</sup> *The King v Wilson and Another, Ex parte Kisch* (1935) 52 CLR 234

<sup>6</sup> *The King v Carter, Ex parte Kisch* (1934) 52 CLR 221; *The King v Fletcher and Another, Ex parte Kisch* (1935) 52 CLR 248; *The King v Dunbabin, Ex parte Kisch* (1935) 53 CLR 434

<sup>7</sup> Hasluck, N. *Our Man K* Ringwood Victoria: Penguin, 1999

the tale a contemporary twist by looking at those facets of the Kisch affair that are relevant today – not just the vagaries of the legal system, which are much the same from one era to the next, but the way in which controversies force us to take stock of our current situation, and to speculate about the future.

The Kisch case, the Petrov affair, the Whitlam dismissal – the ambiguities at the heart of these great disputes were accompanied by unforgettable images: a man on crutches, a tearful woman dragged aboard a plane, a deposed Prime Minister on the steps of Parliament House. Certain stories seemed destined to pass into popular mythology from the outset, and thus, in reinventing the Kischean shenanigans down under, in seeking to add another layer to the Australian legend, I have allowed myself a degree of poetic licence. According to Gore Vidal, that sardonic connoisseur of American Skulduggery, a novelist should try to stay within the framework of “agreed facts” He acknowledges, however, that some truths about history can only be expressed in a veiled fashion, by exaggeration, by imagining the answer

Inevitably, it seems, the boundaries between truth and fiction are never far apart. The most striking passage of the Starr report<sup>8</sup>, for example, was President Clinton’s complaint to one of his aides: “*I feel like a character in a novel. I feel like someone that is surrounded by an oppressive force that is creating a lie about me and I can’t get the truth out. I feel like that character in the novel Darkness at Noon*”<sup>9</sup>

To this day, it is not known why exactly Kisch was banned. The indications are that although, outwardly, he came to Australia to address an Anti-war Congress, he was in fact working for Stalin’s Comintern. Indeed, in Kisch’s own account of his trip, *Australian Landfall*<sup>10</sup>, he reveals, perhaps inadvertently, that he was a close friend of the Comintern’s principal agents in Paris, Willi Munzenberg and Otto Katz. On the other hand, according to Arthur Koestler, who knew all the leading figures on the left in the 1930s, Kisch was essentially an irrepressible satirist. To allow for this possibility, I have, in addition to mentioning his Marxist leanings, portrayed Kisch in my novel as a writer with long-standing literary connections, not only to his former classmate, Franz Kafka, but also to a group of hacks and poets who argue feverishly with each other at the fictional Café Arco.

Centenary Celebrations? An Australian republic? Self-determination? Contemporary themes, or wild talk at Café Arco? As Kisch himself

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<sup>8</sup> Starr, K W. Starr Report: *The Official Report of the Independent Counsel Investigation*. California: Rocklin, 1998.

<sup>9</sup> Koestler, A. *Darkness at Noon*. New York: The Macmillan Company, 1941.

<sup>10</sup> Kisch, E. *Australian Landfall*. Sydney: Australian Book Society 1969.

observed in *Australian Landfall*. "History repeats itself - first as tragedy; then as farce" <sup>11</sup> Was this because his leap ashore at Melbourne coincided with the state of Victoria's Centenary Celebrations, and the arrival of John Masefield, the reigning Poet Laureate? All history is contemporary history, as Gore Vidal has noted, open to interpretation in the light of current concerns

As my story began to assume its final form - the genre known as "faction" - I couldn't help wandering at times whether it was me, the author, not Egon Kisch, who was being reinvented. So much research; so many echoes. Was my novel simply a figment of someone else's imagination? A skit dreamed up by two mischievous classmates, Kisch and Kafka, perhaps, as they sit behind their desks at the Altstadter Gymnasium in Prague? Yes, I can see them there, the two practical jokers, as the aged schoolmaster abandons the counterfeit equation scribbled on the blackboard in order to admonish the unruly class. "Someone must have been telling lies ..."

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<sup>11</sup> Kisch, E. *Australian Landfall* Sydney: Australian