

[HIGH COURT OF AUSTRALIA.]

JERGER . . . . . PLAINTIFF ;

AGAINST

PEARCE . . . . . DEFENDANT.

THE KING

AGAINST

LLOYD AND OTHERS.

H. C. OF A. *Alien—Deportation—Order for deportation—Validity—War—Termination—Proclamation of Governor-General—Validity of Commonwealth legislation—Defence power—Aliens Restriction Order 1915 (Orders in Council of 27th May 1915 and 1st March 1916), par 2j—War Precautions Act 1914-1918 (No. 10 of 1914—No. 37 of 1918), sec. 2 (2)—The Constitution (63 & 64 Vict. c. 12), sec. 51 (vi.).*  
1920.  
MELBOURNE,  
July 14, 15,  
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Par. 2j of the *Aliens Restriction Order 1915* authorizes the Minister for Defence to “order the deportation of any alien.”  
*Held*, that such order need not be in any particular form, and, if from the words used it clearly appears that the Minister directs the deportation, that is a sufficient order.

Sec. 2 (2) of the *War Precautions Act 1914-1918* provides that “For the purposes of this Act, the present state of war means the period from the fourth day of August one thousand nine hundred and fourteen, at the hour of eleven o’clock post meridiem reckoned according to Greenwich standard time, until the issue of a proclamation by the Governor-General that the war between His Majesty the King and the German Emperor and between His Majesty the King and the Emperor of Austria King of Hungary has ceased.”

*Held*, that the section is within the power conferred on the Commonwealth Parliament by sec. 51 (vi.) of the Constitution to make laws with respect to the naval and military defence of the Commonwealth.

*Ferrando v. Pearce*, 25 C.L.R., 241, and *Farey v. Burvett*, 21 C.L.R., 433, followed.



MOTION for interim injunction and order *nisi* for habeas corpus.

An action was brought in the High Court by a writ issued on 9th July 1920 by Charles Jerger against the Honourable George Foster Pearce, Minister of State for Defence of the Commonwealth, by which the plaintiff claimed a declaration that the War Precautions Regulations 1915 are no longer in operation and are *ultra vires* the Constitution, and an injunction restraining the defendant, his agents or servants from taking any action or step interfering with the personal liberty of the plaintiff and compelling him to leave Australia, and from authorizing or permitting any military or naval authority to arrest the plaintiff or to interfere with his personal liberty.

Leave was given on 13th July 1920 to serve short notice of motion for an interim injunction in the terms of the writ until trial of the action.

On 13th July 1920 Charles Jerger and Edmund Leo Henry applied for and obtained from the High Court an order calling upon Captain Longfield Lloyd, Intelligence Section, General Staff, 2nd Military District; Major Edwin Hamilton Serle, and Lieutenant-Colonel John Ernest Robertson, the officer commanding at the Queenscliff Barracks, to show cause why a writ of habeas corpus should not issue directing them to produce the body of Charles Jerger before the Court.

The motion for interim injunction and the order *nisi* for habeas corpus were heard together by *Starke J.*

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*Ryan K.C.* and *Owen Dixon*, for the plaintiff and the applicants.

*Latham*, for the defendant and the respondents.

*Cur. adv. vult.*

STARKE J. read the following judgment:—The Reverend Father Charles Jerger instituted an action in the High Court on 9th July 1920 against the Minister for Defence of the Commonwealth, claiming a declaration that the War Precautions Regulations 1915 are no longer in operation and are *ultra vires* the Constitution, and an injunction restraining the defendant, his agents or servants from

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taking any action or step interfering with the personal liberty of the plaintiff and compelling him to leave Australia and from authorizing or permitting any military or naval authority to arrest the plaintiff or to interfere with his personal liberty. Leave was given on 13th July 1920 to serve short notice of motion for an interim injunction in the terms of the writ until the trial of the action, and notice of motion was given accordingly. On 13th July 1920 Father Jerger and Edmund Leo Henry also applied for and obtained from this Court an order calling upon Captain Lloyd, Major Serle and the officer commanding at the Queenscliff Barracks to show cause why a writ of habeas corpus should not issue directing them to produce the body of Father Jerger before this Court. Both the motion for the interim injunction and the order to show cause involved the same matters of law, and were heard together on 14th and 15th July 1920.

It was alleged on the part of Father Jerger and Edmund Leo Henry that the Minister of Defence had ordered the deportation from Australia of Father Jerger and that the officers named in the order to show cause were detaining him for the purpose of carrying out the Minister's order. It must not be taken for granted that this Court has a general power to direct the issue of writs of habeas corpus under sec. 33 of the *Judiciary Act*, but I apprehend that the Court has jurisdiction to exercise this power in aid of its appellate or original jurisdiction. In the present case it was suggested that the deportation of Father Jerger was directed and his detention maintained under the *Aliens Restriction Order* 1915, reg. 2J, and that the *War Precautions Act* 1914-1918, under which the order was made, or at all events sec. 2 (2) of that Act, was beyond the legislative power of the Commonwealth. Consequently it was said that the case was a matter arising under the Constitution or involving its interpretation, and so within the original jurisdiction of the Court (*Judiciary Act*, sec. 30). It was on this basis that the order to show cause was granted. It was not disputed before me that Father Jerger was an alien—a subject of the German Empire—and, indeed, so much was decided in other proceedings in this Court sitting in Full Court.\*

\* See 27 C.L.R., 526.



The other material facts were as follows:—(1) On 1st April 1920 the following memorandum was forwarded from the Prime Minister's Department to the Department of Defence:—"With reference to previous correspondence regarding Father Charles Jerger, I desire to inform you that the files relating to this man were forwarded to the Secretary of the Attorney-General's Department for review, and he has now reported as follows:—'There is convincing evidence that Father Jerger, a German born, and producing no proof of naturalization, was, during the War, an active propagandist against the cause of the Allies. I see no reason for disagreeing with the recommendation of the Aliens Board that he be deported; and I recommend his deportation accordingly.' The Prime Minister has approved of the recommendation that Father Jerger be deported. Your files relating to this case are returned herewith." (2) On this memorandum the Minister for Defence—the defendant in the action—indorsed and signed the following minute:—"Sec. Noted. For necessary action as to deportation.—G. F. Pearce. 9/4/20." This minute does not seem to have been communicated to Father Jerger; but the following letter was written to him by Captain Lloyd of the Intelligence Section, 2nd Military District, on 12th May 1920:—"You are hereby informed that instructions have been received for you to prepare to leave Australia for Germany by the s.s. *Maine* which is due to arrive at this port about 17th May 1920 and unless notified to the contrary in the meantime you will please make all necessary arrangements in that connection. The date of sailing has not yet been definitely fixed, but you will be fully advised when you are required to attend at this office to receive your final instructions thereto." It is not disputed that Father Jerger did not leave the Commonwealth. (3) Father Jerger was, pursuant to the already mentioned minute of the Minister, taken into custody and detained by Major Serle until he could conveniently be conveyed to and placed on board a ship about to leave the Commonwealth, (4) Major Serle is a competent military authority within the meaning of reg. 2J, and he is one of the officers to whom the order to show cause was addressed. (5) The other officers to whom the order to show cause was addressed—Lieutenant-Colonel Robertson, the officer

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commanding at Queenscliff, and Captain Lloyd—do not detain and have never detained Father Jerger.

On these facts it was, in the first place, contended that the minute indorsed by the Minister on the aforesaid memorandum did not constitute an order within the meaning of reg. 2J. It was said to be a mere direction to the Secretary to prepare or put in train an order for deportation. But the regulation requires no particular form of words in the order, so long as it clearly appears that the Minister directs the deportation of the alien. The minute does, in my opinion, contain a clear direction or order of the Minister that Father Jerger be deported. The order is no doubt the foundation of deportation, but the point is unsubstantial. The Minister could, at any time, make a formal order as in *Ferrando v. Pearce* (1). An interim injunction would thus be rendered ineffective, and detention might be justified on a return to any writ of habeas corpus. At the same time I think it advisable that somewhat more formal orders for deportation should be framed than that put forward in the present case.

The main argument, however, attacked the validity of the *War Precautions Act* 1914-1918. In view of the cases of *Farey v. Burvett* (2) and *Ferrando v. Pearce* (3), the learned counsel who appeared for Father Jerger could not contend that reg. 2J was beyond the legislative powers of the Commonwealth. Indeed, in *Ferrando v. Pearce* the validity of this very regulation was upheld. As the argument was originally stated, I gathered that sec. 2, sub-sec. 2, of the *War Precautions Act* 1914-1918 was the object of attack, but ultimately the validity of the whole Act was attacked, and I think this was inevitable, for “the present state of war,” referred to in sec. 2, sub-sec. 1, is defined in sub-sec. 2. The relevant section, which I take from the 1918 reprint of the Statutes (see vol. XVI., pp. 231-232), is as follows:—“2 (1) This Act shall continue in operation during the continuance of the present state of war and for a period of three months thereafter or until the thirty-first day of July one thousand nine hundred and nineteen, whichever period is the longer, and no longer. (2) For the purposes of this Act, the

(1) 25 C.L.R., at p. 243.

(3) 25 C.L.R., 241.

(2) 21 C.L.R., 433.



present state of war means the period from the fourth day of August one thousand nine hundred and fourteen, at the hour of eleven o'clock post meridiem reckoned according to Greenwich standard time, until the issue of a proclamation by the Governor-General that the war between His Majesty the King and the German Emperor and between His Majesty the King and the Emperor of Austria King of Hungary has ceased." It was contended that the defence power of the Commonwealth could not warrant the authority conferred upon the Governor-General to declare by proclamation the date of the cessation of the war. Such a power enabled the Governor-General, so it was said, to extend a state of war into a time of actual peace. And it was insisted that a state of peace actually subsisted at the time of the hearing before me, and that the legislation could not therefore be now supported or maintained in force as an exercise of the defence power of the Commonwealth. I deal with the latter branch of the argument first.

It is true that a Treaty of Peace has been made with Germany, and that His Majesty has ordered that 10th January 1920 shall be treated as the date of the termination of war between His Majesty and Germany (see Proclamation, *London Gazette*, 10th February 1920, and by the Governor-General in *Commonwealth Gazette*, 8th March 1920). There has so far been no proclamation of peace or of the cessation of war with Austria-Hungary. No doubt a state of peace may be brought about by a mere cessation of hostilities without any Treaty of Peace, but "owing to the numerous difficulties involved, combatant States have very seldom resorted to this method of withdrawing from war without arriving at some definite and intelligible decision" (see *Termination of War and Treaties of Peace by Coleman Phillipson*, p. 3). The Imperial statute 8 & 9 Geo. V. c. 59, "An Act to make provision for determining the date of the termination of the present war, and for purposes connected therewith," and the Imperial proclamation declaring 10th January 1920 as the date of the termination of the war with Germany, show conclusively, however, that peace with Austria-Hungary was not made at the time of the hearing before me. By sec. 1 (1) of the Imperial statute it is provided that "His Majesty in Council may declare what date is to be treated as the date of the termination of

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the present war, and the present war shall be treated as having continued to and as having ended on that date for the purposes of any provision in any Act of Parliament," &c. And the proclamation of the cessation of war with Germany (*London Gazette*, 20th February 1920) recites that "Whereas treaties of peace with other belligerents not having yet been ratified it is desirable to declare the date of the termination of the war with Germany." The argument on this branch of the case rests upon an unsound basis of fact, and it need not be further considered. It is unnecessary to decide whether the defence power of the Commonwealth cannot be lawfully used in time of peace for the exclusion of aliens from Australia.

I return now to the argument that the *War Precautions Act* is invalid because it authorizes the Governor-General to proclaim the date of the cessation of war with Germany and Austria-Hungary. It is useless, I think, in the present case to contend that sub-sec. 2 of sec. 2, only, is bad because sub-sec. 1 remains and prescribes that the Act shall in any case continue in operation during the continuance of the present state of war, and I have already shown that the state of war still continues. It is clear, I think, that the case of *Ferrando v. Pearce* (1) could not be supported if the argument were sound. And yet *Ferrando v. Pearce* was decided by five Justices of this Court. The exact point now raised was not, I think, expressly mentioned, though it is not likely to have escaped the attention of the Court. My duty is to accept the decision in *Ferrando v. Pearce*, following, as it did, the principles established in *Farey v. Burvett* (2). But I will add that the argument ignores the constitutional provision that the Governor-General is His Majesty's representative in the Commonwealth (see Constitution, chap. 1., sec. 2). If the Act had prescribed that the present state of war meant the period from 4th August 1914 until His Majesty proclaimed that the war had ceased, no question could have arisen. The substitution of His Majesty's representative in the Commonwealth for this executive function is not unconstitutional, and is really covered by the provisions of sec. 61 of the Constitution.

Mr. *Latham* also relied upon the constitutional power to make laws for the peace, order and good government of the Commonwealth



with respect to naturalization and aliens as due warrant for the *War Precautions Act*, sec. 5 (1) (b), and reg. 2J, but I have not thought it necessary to consider this power in the present case.

The deportation of the Reverend Father Jerger is, in my opinion, in accordance with the law of the Commonwealth. The motion for an interim injunction is therefore dismissed with costs, and the order to show cause is discharged with costs.

*Motion for interim injunction dismissed with costs. Order nisi for habeas corpus discharged with costs.*

Solicitors for the plaintiff and the applicants, *Frank Brennan & Rundle*.

Solicitor for the defendant and the respondents, *Gordon H. Castle*,  
Crown Solicitor for the Commonwealth.

B. L.

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BOTTOMLEY . . . . . PLAINTIFF ;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

*Public Service of Commonwealth—Salary of officer—Award of Commonwealth Court of Conciliation and Arbitration—“Travelling time”—“Overtime”—Arbitration (Public Service) Act 1911 (No. 11 of 1911).*

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An award of the Commonwealth Court of Conciliation and Arbitration, as to the members of an organization who were employed in a certain Department of the Public Service, contained the following provisions :—“ For all travelling time an employee shall be paid at ordinary rates to an amount not exceeding one day’s pay in any one day. ‘ Travelling time ’ means time necessarily spent in travelling in excess of the ordinary time of duty if the excess exceed half an hour . . . . It does not include time of travelling in which the employee is required to perform any duty while travelling or to ride a horse or cycle or to walk or drive a vehicle.”