Federal Court of Australia

Minister for Immigration, Citizenship and Multicultural Affairs v SZRWS [2023] FCAFC 83

|  |  |
| --- | --- |
| Appeal from: |  |
|  |  |
| File number(s): |  |
|  |  |
| Judgment of: | **PERRAM, PERRY AND THAWLEY JJ** |
|  |  |
| Date of judgment: | 30 May 2023 |
|  |  |
| Catchwords: | **MIGRATION** - appeal from orders of the Federal Circuit and Family Court of Australia (Division 2) - where Commonwealth policy restricts certain food being brought into immigration detention centres by visitors - whether s 273(1) of the *Migration Act 1958* (Cth) authorises contracted third party to exclude visitors in accordance with policy - power to establish and maintain detention centre |
|  |  |
| Legislation: | *Migration Act* *1958* (Cth) ss 5(1), 189(1), 196(1), 273(1), 273(2), 252G |
|  |  |
| Cases cited: | *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98; 257 FCR 1  *SZRWS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3)* [2022] FedCFamC2G 447; 369 FLR 167 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 55 |
|  |  |
| Date of hearing: | 28 November 2022 |
|  |  |
| Counsel for the Appellants: | Mr P Herzfeld SC with Ms A Hammond |
|  |  |
| Solicitor for the Appellants: | Australian Government Solicitor |
|  |  |
| Counsel for the Respondent: | Mr M Seymour with Ms M Gerace |
|  |  |
| Solicitor for the Respondent: | Holding Redlich |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 513 of 2022 |
|  | | |
| BETWEEN: | MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS  First Appellant  COMMONWEALTH OF AUSTRALIA  Second Appellant  SECRETARY OF DEPARTMENT OF HOME AFFAIRS  Third Appellant | |
| AND: | SZRWS  Respondent | |

|  |  |
| --- | --- |
| order made by: | PERRAM, PERRY AND THAWLEY JJ |
| DATE OF ORDER: | 30 MAY 2023 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Orders 1 and 3 of the judgment given on 10 June 2022 and Order 2 of the judgment given on 2 August 2022 be set aside and in place thereof order that:
   1. the third further amended application be dismissed;
   2. the applicant pay the respondents’ costs.
3. The respondent pay the appellants’ costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# INTRODUCTION

1. The Commonwealth has established and maintained a number of immigration detention facilities around Australia. Unlawful non-citizens are detained in these facilities. They include detainees who have been convicted of criminal offences. **Serco** Australia Pty Ltd is contracted by the Commonwealth to provide services to detainees in immigration detention facilities. Serco is also contracted to manage visitors to facilities. Under the contract, Serco is required to undertake all administration relating to visits to facilities including providing visitor entry application forms and information regarding conditions of entry, the screening of visitors and refusing entry to any visitor who refuses to comply with entry requirements.
2. Serco has contractual obligations relating to the provision of food to detainees within the facilities. The contract includes requirements regarding the provision of culturally appropriate food and tailoring food to meet specific dietary requirements. Of particular relevance to the present case, Serco is required under the terms of the contract to prepare and supply food that meets the requirements of Halal. Serco is also required to provide tea, coffee, water and biscuits, and arrange for the provision of other food and beverage vending machines in the visitor areas of each facility, for purchase by detainees or visitors.
3. The Department maintains a “Detention Services Manual” which contains policies applicable to immigration detention. Chapter 8 is entitled “Items not permitted in immigration detention facilities”. Part 12 of Chapter 8 addresses what kinds of food can be brought by visitors into the visitors’ area of a detention centre (**outside food policy**). This appeal is concerned with Part 12’s stipulation that visitors can bring food with into the visitors’ area “if they strictly comply” with the following condition:

The food is commercially packaged and labelled, factory sealed, has a visible and valid expiry date and its prescribed name is easily identifiable and complies with the Australia New Zealand Food Standards Code.

1. Part 12 contains an exemption for “special purpose food”, which includes birthday cakes and food processed or manufactured for consumption by infants and persons suffering medical conditions that require altered and tailored food.
2. Serco is contractually obliged to implement the outside food policy.
3. The practical consequence of the foregoing is that detainees, including the respondent, are not able to receive homemade food unless the exemption applies, which requires approval before a visit.
4. The policy was challenged by SZRWS in the Federal Circuit and Family Court of Australia (Division 2). The challenge was successful: *SZRWS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 3)* [2022] FedCFamC2G 447; 369 FLR 167. The primary judge made the following declaration:
5. The Court declares that the decision to introduce the Outside Food Policy the subject of the Third Further Amended Application is a policy not supported by the *Migration Act 1958* (Cth) and is invalid.
6. As will be explained, the making of the policy was a lawful exercise of executive power. The policy is not invalid. The real issues concern the lawfulness of actions which would be taken by Serco in complying with the policy in accordance with its contractual obligations. The issue is not hypothetical because the respondent to the appeal is being held in immigration detention at the Villawood Immigration Detention Centre. He wishes his family members to bring him home cooked food. This is not happening because of the policy. His reasons for this are related to his religious practices and health. It was not suggested on the appeal that his concerns are not real or that he lacks standing to seek relief in relation to the outside food policy.
7. The Minister put his case in two ways:
8. First, he contended that the Commonwealth did not require statutory authority to refuse entry to its land. The Commonwealth has the common law right to exclusive possession of the land, which includes the right to exclude any person from the land for any reason or no reason at all. The Minister contended that the right to exclusive possession had not been abrogated or relevantly modified.
9. In the alternative, he contended that he had statutory power to exclude visitors in accordance with the outside food policy by reason of ss 189(1), 196(1) and 273(1) of the ***Migration Act*** *1958* (Cth). The Minister did not rely on s 252G as a source of power.
10. For the reasons which follow, s 273(1) provides power to exclude visitors in accordance with the policy. It is unnecessary to reach a conclusion as to whether the exclusion of visitors is in any event lawful under the common law or lawful under ss 189(1) and 196(1).
11. Before turning to s 273(1), it is useful to understand a little about the reasoning behind, and genesis of, the outside food policy.

# BACKGROUND TO THE OUTSIDE FOOD POLICY

1. In early 2016, a working group within what was then the Department of Immigration and Border Protection carried out a review of the approach taken to food being brought into detention facilities by visitors, referred to as “outside food”. The working group was comprised of public servants employed by the Department in the Detention Future Operations, Detention Services and Detention Policy teams and employees of Serco. The Chair of the working group was the Superintendent, Detention Future Operations Section in the Detention Operations Command of the Detention and Offshore Operations Division in the Australian Border Force.
2. The Chair of the working group gave evidence at trial which included evidence relating to various concerns which had been raised with her in her capacity as Chair of the working group. The suggestions which were made were directed at three principal matters: the prevention of contraband being brought into facilities; addressing health and safety issues; and preventing items being used as currency in the facilities. It is relevant to note that, at the time, there was a rising number of detainees in detention centres who had been convicted of criminal offences.
3. The first meeting was held on 21 January 2016. At that meeting it was agreed that other stakeholders needed to be consulted, including Detention Health.
4. The second meeting of the working group was held on 5 February 2016. The Chair presented three policy alternatives. The working group endorsed the approach that is largely reflected in the outside food policy to allow visitors to bring outside food into detention facilities provided that it is sealed, commercially packaged, within its expiry date and consumed in the visitors’ area. All food admitted to the visitors’ area was to be screened on entry. The two other alternatives to the outside food policy considered by the working group involved either completely prohibiting outside food or operating a canteen in visitation areas. Both of these alternative approaches were rejected. A complete ban on outside food being introduced into detention facilities was rejected as it may have led to adverse mental health outcomes for detainees.
5. The Chair gave evidence that the working group did not consider allowing home-cooked food to be a feasible option because it would not prevent the introduction of drugs hidden in outside food because of practical and technological limitations in the screening process. Further, the Department would not have any insight into how the food was prepared, whether it was prepared with out-of-date ingredients and whether it had been stored and transported at safe temperatures. The Department had no capacity to protect detainees from food borne illnesses introduced through outside food. The concerns which had been expressed included concerns about cooked food being taken back to rooms rather than being consumed in the visiting area.
6. The working group considered the effect the new policy would have on long-term detainees, which then formed a small part of the detainee population. The working group considered that the potential impact on this group was mitigated by: the policy’s express contemplation of exceptions, especially for special occasions; the contractual requirements for Serco to provide culturally appropriate food under the contract; and the discretion that immigration detention facility superintendents would retain to admit outside food within the terms of the new policy.
7. On 5 March 2016, the Deputy Commissioner Operations endorsed a recommendation to implement a standard operating procedure for outside food, referred to as the “outside food policy”. The Minute containing the recommendation noted by way of background that there was “no nationally consistent application concerning the introduction of food items that can be brought into detention centres via visitors, mail or detainees” and that the “lack of national consistency results in a risk to the good order, safety and security of the detention network”. It concluded:

… After extensive consultation the following standard operation procedure (SOP) is proposed:

A. Visitors are permitted to bring outside food into the visitors’ areas that strictly comply with the following conditions:

* The food is not classified as a prohibited, excluded or controlled item
* The food is commercially packaged and labelled, factory sealed, has a visible and valid expiry date and its prescribed name is easy identifiable and complies with the Australia New Zealand Food Standards Code
* The food’s packaging is made of carton or soft plastic
* Food is not contained in any metal or glass packaging
* The amount of food is proportionate to the needs, duration and intent of the visit
* The food is consumed in the visits areas only. Any leftover food must be disposed of at the end of the visit or removed from the premises by the visitor

B. Additionally:

* All food brought in by visitors will be subjected to screening
* No outside food is permitted to enter accommodation area of the IDF
* Food items are not permitted to enter the Network via mail

C. Exceptions:

* Birthday cakes and special purpose foods are allowed in the visits areas provided that approval has been sought and granted prior to visit.

1. The outside food policy was approved on 27 May 2016, effective 1 July 2016.

# SECTION 273 OF THE MIGRATION ACT

1. The main provisions of the Migration Act of central relevance to the appeal are ss 189(1), 196(1) and 273.
2. Section 189(1) provides:

**189 Detention of unlawful non-citizens**

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non‑citizen, the officer must detain the person.

1. Section 196(1) provides:

**196 Duration of detention**

(1) An unlawful non‑citizen detained under section 189 must be kept in immigration detention until:

(a) he or she is removed from Australia under section 198 or 199; or

(aa) an officer begins to deal with the non‑citizen under subsection 198AD(3); or

(b) he or she is deported under section 200; or

(c) he or she is granted a visa.

1. Section 273 provides:

**273 Detention centres**

(1) The Minister may, on behalf of the Commonwealth, cause detention centres to be established and maintained.

(2) The regulations may make provision in relation to the operation and regulation of detention centres.

(3) Without limiting the generality of subsection (2), regulations under that subsection may deal with the following matters:

(a) the conduct and supervision of detainees;

(b) the powers of persons performing functions in connection with the supervision of detainees.

(4) In this section:

***detention centre*** means a centre for the detention of persons whose detention is authorised under this Act.

1. Section 5(1) incudes:

***detain*** means:

(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.

1. The term “immigration detention” extends beyond, but includes a detention centre established under the Migration Act, including a detention centre established pursuant to the power in s 273(1).
2. Each of these sections assumes that the Commonwealth has power to operate detention centres.
3. Section 273 was considered by the Full Court in ***ARJ17*** *v Minister for Immigration and Border Protection* [2018] FCAFC 98; 257 FCR 1. At issue in that case was the question of whether there was power to dispossess detainees of their mobile phones and SIM cards. Absent statutory power, the compulsory taking of detainees’ mobile phones and SIM cards would be tortious, constituting a trespass or conversion of the property of the detainees. Given this, the power to dispossess the detainees of their mobile phones and SIM cards would need to be sufficiently unambiguous. No member of the Full Court considered that the power existed.
4. One of the sources of statutory power put forward by the Minister in *ARJ17* was s 273(1). Rares J considered the scope of s 273(1) concluding that it authorised detention centres to be established and physically maintained, but not operated. His Honour stated:

[63] The respondents contended that the power s 273(1) comprehended all that the regulation making power in s 273(2) and (3) entailed within the word “maintained”. They argued that the word “maintained” gave the Governor-General power to require officers to implement a policy of removing mobile phones from all detainees in detention centres.

[64] That argument must be rejected. The power conferred by s 273(1) enables the Minister, on behalf of the Commonwealth, to cause detention centres to be established and maintained. The power is addressed to the actions of acquiring, leasing or occupying land and buildings, undertaking any necessary building work (in the sense of construction work) and upkeep (in the sense of maintenance) of the physical land and buildings in which persons in immigration detention can be detained, as the definition of “detention centre” in s 273(4) suggests. In contrast, s 273(2) and (3) enable the Minister to make regulations about how the detention centres operate and provide for their internal governance, including in respect of regulating the conduct and supervision of detainees.

1. Flick J also consideredthat the policy of taking detainees’ mobile phones and SIM cards was not authorised by s 273(1) of the Migration Act. His Honour considered that s 273(1) did not provide a “sufficiently certain source of statutory power to search and remove articles from detainees”, that is, it did not supply power to engage in what would otherwise be a tort: at [108]. His Honour apparently did not agree with the construction of s 273(1) adopted by Rares J, appearing to consider it to be broader, but reaching no firm conclusion, it not being necessary because on no view did s 273(1) authorise property to be taken from detainees.
2. Rangiah J agreed with Flick J without qualification. Rangiah J also agreed “generally” with Rares J and addressed one particular matter of disagreement (which did not concern s 273(1)). What was decided in *ARJ17* was that s 273(1), whatever its scope, did not authorise what would constitute the tortious removal of property from detainees. It was not necessary to the decision to determine whether s 273(1) authorised day to day operations and only Rares J reached a conclusion in that respect.
3. The present case raises a more anodyne question than that raised in *ARJ17*, namely whether s 273(1) authorises the Commonwealth to refuse entry if a visitor insists on bringing certain food into a detention centre.
4. The conclusion reached by Rares J as to the scope of s 273(1) hinged upon the observation that the words “operation and regulation of detention centres” were used in s 273(2) to convey a meaning different to “cause detention centres to be established and maintained” used in s 273(1): *ARJ17* at [66]. His Honour reasoned from this proposition that s 273(1) did not authorise the operation of detention centres.
5. However, whilst “operation and regulation of detention centres” means something different to “cause detention centres to be established and maintained”, it does not necessarily follow from that proposition that s 273(1) does not authorise the operation of detention centres.
6. It was not in dispute in this appeal that the Commonwealth has power to operate detention centres. There is, after all, little point in a statute authorising the construction and physical maintenance of detention centres which cannot then be operated. Likewise, there is little point in supplying power to make regulations about the operation of detention centres – which is what s 273(2) does – if there is no power to operate detention centres.
7. Section 273(1) must be construed in context, which includes:

* Section 189(1) requires an officer to detain a person who the officer knows or reasonably suspects is an unlawful non‑citizen. The word “detain” means “take into immigration detention” or “keep … in immigration detention”. The term “immigration detention” extends beyond, but includes a detention centre established under the Migration Act.
* Section 196(1) requires that an unlawful non-citizen be kept in immigration detention until one of the events specified in the section occurs.
* Section 273(2) furnishes a power to enact regulations which “make provision in relation to the operation and regulation of detention centres”.

1. Sections 189(1) and 196(1) assume that, once established, a detention centre is operational in the sense that it is able to receive, house and provide for detainees. This is the purpose of “establish[ing]” a detention centre. This context suggests that the word “maintain” in s 273(1) is used in the sense of keeping detention centres in an operational state so as to be able to fulfil this purpose and tends against a narrow construction of the word “maintain” in s 273(1) so as to be limited to the maintenance of the physical buildings and land, even though this is one possible meaning of the word. While both possible constructions of the word “maintain” accord with natural and ordinary meanings of the word, the context compels a broader meaning. Nor does the fact that regulations may be made for the operation and regulation of detention centres under s 273(2) mandate that the word “maintain” in s 273(1) should not include the operation and regulation of detention centres. To the contrary the fact that regulations “may”, but not must, be made on this subject-matter implies that it is intended that detention centres may operate without specific regulations being made under s 273(2).
2. The logic of s 273 is that:

* subsection (1) provides power to establish and maintain detention centres – the word “maintained” is used in the sense of keeping that which has been established operating for the purpose for which it was established;
* subsection (2) furthers s 273(1) by specifically authorising the making of regulations in relation to an aspect of maintaining detention centres, namely in relation to the operation and regulation of detention centres.

1. It follows that the “operation and regulation of detention centres” referred to in s 273(2) is a part of maintaining detention centres, the power for which is furnished by s 273(1). In other words, the concept of operating and regulating detention centres is embraced within the broader concept of “maintain[ing]” detention centres.
2. Unlike *ARJ17*, the present case does not involve the mandatory confiscation of any person’s property or the commission of what would be a tort. All that is involved is that a person visiting a detention centre cannot enter the detention centre with certain food. This is not to say anything about the merit of the outside food policy but simply to observe that it is qualitatively different from what was considered in *ARJ17*.
3. Controlling the circumstances in which visitors may enter detention centres is one aspect of maintaining detention centres for the purposes of s 273(1), properly construed, and does not require specific legislative authorisation because visitors have no common law right to enter onto the premises owned by another. Section 273(1) provides power to exclude visitors to detention centres as a part of day to day operations. The Commonwealth could, for example, exclude visitors outside of set visiting hours or visitors who were obviously intoxicated.

# WOULD COMPLIANCE WITH THE POLICY BY SERCO BE LAWFUL?

1. The legal relevance of the outside food policy is that Serco is contractually obliged to act in accordance with it, with the result that visitors to detentions centres will be subject to the consequences of its implementation.
2. The Minister did not contend that the policy was made pursuant to a statutory power. The Minister correctly contended that the making of the policy was an exercise of executive power. The making of the policy was not unauthorised and the policy was not in any way unlawful. It follows that the declaration made by the primary judge should not have been made.
3. The policy provides a lawful reason for refusing entry to land.
4. The policy is not inconsistent with any provision in the Migration Act. In this regard, it is necessary to address s 252G which provides:

**PART 2 – ARRIVAL, PRESENCE AND DEPARTURE OF PERSONS**

**…**

**DIVISION 13 – EXAMINATION, SEARCH, DETENTION AND IDENTIFICATION**

**…**

**252G Powers concerning entry to a detention centre**

(1) An officer may request that a person about to enter a detention centre established under this Act do one or more of the following:

(a) walk through screening equipment;

(b) allow an officer to pass hand‑held screening equipment over or around the person or around things in the person’s possession;

(c) allow things in the person’s possession to pass through screening equipment or to be examined by X‑ray.

(2) ***Screening equipment***means a metal detector or similar device for detecting objects or particular substances.

(3) If an authorised officer suspects on reasonable grounds that a person about to enter a detention centre established under this Act has in his or her possession a thing that might:

(a) endanger the safety of the detainees, staff or other persons at the detention centre; or

(b) disrupt the order or security arrangements at the detention centre;

the authorised officer may request that the person do some or all of the things in subsection (4) for the purpose of finding out whether the person has such a thing. A request may be made whether or not a request is also made to the person under subsection (1).

(4) An authorised officer may request that the person do one or more of the following:

(a) allow the authorised officer to inspect the things in the person’s possession;

(b) remove some or all of the person’s outer clothing such as a coat, jacket or similar item;

(c) remove items from the pockets of the person’s clothing;

(d) open a thing in the person’s possession, or remove the thing’s contents, to allow the authorised officer to inspect the thing or its contents;

(e) leave a thing in the person’s possession, or some or all of its contents, in a place specified by the authorised officer if he or she suspects on reasonable grounds that the thing or its contents are capable of concealing something that might:

(i) endanger the safety of the detainees, staff or other persons at the detention centre; or

(ii) disrupt the order or security arrangements at the detention centre.

(5) A person who leaves a thing (including any of its contents) in a place specified by an authorised officer is entitled to its return when the person leaves the detention centre.

(6) However, if possession of the thing, or any of those contents, by the person is unlawful under a Commonwealth law or in the State or Territory in which the detention centre is located:

(a) the thing or the contents must not be returned to the person; and

(b) an authorised officer must, as soon as practicable, give the thing or the contents to a constable (within the meaning of the *Crimes Act 1914*).

(7) A person who is about to enter a detention centre established under this Act may be refused entry if he or she does not comply with a request under this section.

1. Section 252G is found in Division 13 of Part 2 of the Migration Act. Consistently with its title, Div 13 furnishes various powers of examination, search, detention and identification. For example: s 252 provides for the search of persons without warrant in certain circumstances; s 252AA provides a power to conduct a screening procedure; s 252A provides for strip searching; and s 252B provides rules for strip searching.
2. Section 252G applies where a person is “about to enter a detention centre”. It permits various requests to be made of such a person under s 252G(1), (3) and (4). If a request is refused, the person can be refused entry: s 252G(7). The requests include requests for screening a person, for removal of items of clothing and for inspection of property. A person can also be requested to leave property in a specified place, but only if the “the authorised officer … suspects on reasonable grounds that the thing or its contents are capable of concealing something that might” be a danger or disrupt the security or order of the detention centre: s 252G(4). If the person complies with the request, and parts with possession of the property, the property must not be returned to the person if possession of the property is unlawful: s 252G(6).
3. Section 252G does not deal exhaustively with entry to detention centres or the conditions which the Commonwealth could impose on entry or even the requests which could be made before permitting entry. It is not directed to furnishing any person with a right of entry. As mentioned, the Commonwealth could, for example, deny entry to a visitor who sought access outside of visiting hours or who appeared intoxicated.
4. Section 252G does not lead to the result that the Commonwealth is prevented from implementing a policy of refusing entry to visitors bearing particular types of food.
5. To the extent it is relevant, we observe that the evidence established that the policy was reasonably necessary to keep a detention centre safe, ordered and secure, having regard to practical, economical, operational and resourcing considerations.
6. Undesirable things can be put in food (such as weapons or drugs) or the food can be made out of or contain undesirable things (such as poisons or drugs). The evidence revealed a level of ingenuity as to what can be achieved and much is difficult to detect. The risk does not depend on an objective assessment of the particular food. The risk turns on the fact that the food is homemade food and that it is easy to conceal any number of things in homemade food – large or small, solid or liquid.
7. One would not conclude that a policy that all bags be screened was not a reasonably necessary precaution for entry to a detention centre. The question does not depend on an objective assessment of the particular bag. The point is that undesirable things can be placed in bags with the result that all bags should be screened. In many ways food poses a greater risk than the concealment of something in a bag. A bag can be physically inspected. Food can be inspected to an extent, but the more thorough the examination the less likely the food will remain fit for consumption. Staffing and resourcing considerations would make individual assessment impractical and costly.
8. Assessed in the context in which the outside food policy came about, the terms of the policy suggests that it was adapted to what was reasonably necessary having regard to practical and operational considerations. It allows for specific foods in a defined area, provided approval has been sought and obtained before the visit:

Birthday cakes and special purpose foods are permitted in the visitors’ area provided that approval has been sought and granted prior to the visit. Special purpose food includes food processed or manufactured for consumption by infants and persons suffering medical conditions (for example, diabetes) that require altered and tailored food, including prescribed medicines or any other products that are regulated as therapeutic goods or food.

1. On the basis of the arguments put forward in this case, the implementation of the policy by Serco exercising the power to refuse entry where the policy applies would be lawful.

# CONCLUSION

1. It follows that it is not necessary to consider whether the Commonwealth has power to exclude visitors in accordance with the policy by reason of its right to exclusive possession or under ss 189(1) and 196(1).
2. The appeal should be allowed.

|  |
| --- |
| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Perram, Perry and Thawley. |

Associate:

Dated: 30 May 2023