

NOTICE OF FILING

Details of Filing

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File Title:	SAVE THE CHILDREN AUSTRALIA v MINISTER FOR HOME AFFAIRS & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



CONCISE STATEMENT IN RESPONSE

No. VID 403 of 2023

Federal Court of Australia

District Registry: Victoria

Division: General

Save the Children Australia

Applicant

Minister for Home Affairs and another

Respondents

PART A: The material facts giving rise to the claim

A.1 Background and contextual facts

1. The matters in paragraphs [1] to [3] and [8] of the Concise Statement are not disputed, save to say that the Second Respondent (**Commonwealth**) only facilitated the repatriation (as stated in paragraph [2] of the Concise Statement) after the **AANES**¹ agreed, in its absolute discretion, to the request made of it.
2. The Respondents are presently unable to respond to paragraphs [9]-[10] of the Concise Statement because the nature, content and scope of the **Arrangement** are not particularised. However, the Respondents do not dispute that the **SDF** was formed in 2015, that the SDF took control of areas of north-east Syria over time or that thousands of Syrian nationals, as well as Iraqi nationals, and nationals of many other foreign states (including Australia), were held in camps operated by, or under the authority of, the AANES and/or the SDF.
3. The Respondents reserve their position on whether the legality of the detention of the **remaining Australian women and children** by the AANES and/or the SDF is a matter that this Court cannot, or should not, decide by reason of the act of state doctrine or principles of non-justiciability until the allegation by the Applicant about the Arrangement and detention under the Arrangement is clarified. But the Respondents will not otherwise advance any case about the legality of the detention of the remaining Australian women and children by the AANES and/or the SDF.

¹ Terms in bold are defined in the Applicant's Concise Statement and have the same meaning where they appear in this document.

A.2 The Respondents do not have control of the remaining Australian women and children

4. The Respondents do not dispute paragraph [12] of the Concise Statement, save to say that the Commonwealth is unable to respond to the claim that detention is pursuant to the Arrangement. The Respondents deny paragraph [14] of the Concise Statement (which alleges that they have control over the detention of the remaining Australian women and children) and say that they have no such control by reason of the circumstances stated in [5]-[12] below.
5. The Respondents were not responsible for, and did not contribute to, the remaining Australian women and children going to Syria or becoming detained in camps including Al-Roj camp.
6. Since their departure from Australia, the Respondents have not had the remaining Australian women and children in their custody at any time.
7. The camps where the remaining Australian women and children are detained are operated by, or under the authority of, the AANES and/or the SDF. The Commonwealth is not (as part of its role in the Coalition or otherwise) actually, or by *de facto* arrangement, detaining the remaining Australian women and children.
8. There is no agreement or arrangement between the Respondents and AANES and/or the SDF giving the Commonwealth the power or ability to secure or guarantee the transfer or release of the remaining Australian women and children.
9. The Respondents deny paragraph [13] of the Concise Statement, which alleges that AANES and/or the SDF will release the remaining Australian women and children from their detention and facilitate their repatriation by the Commonwealth upon request by the Commonwealth pursuant to the Arrangement. As to that, the Respondents say:
 - a. It is within AANES's power to determine when a foreign national would be released and on what terms;
 - b. AANES has previously set out purported terms upon which it may permit the release of foreign nationals from northeast Syria (the **AANES release conditions**);
 - c. In effect, the AANES release conditions required that:
 - i. The Commonwealth request the release of specified individuals in writing;
 - ii. The Commonwealth agree to repatriate the specified individuals to Australia;
 - iii. An official delegation of Commonwealth officials travel to Qamishli (the *de facto* capital of AANES) to sign arrangements providing for the release of the specified individuals. The officials may be required to participate in media activities or release public statements about the repatriation; and
 - iv. Commonwealth officials attend a location to be agreed with AANES to take personal receipt of the individuals.

- d. AANES has (and, even under the AANES release conditions, maintained) absolute discretion to prescribe conditions upon which it is willing to release the remaining Australian women and children; and
 - e. AANES has (and, even under the AANES release conditions, maintained) absolute discretion to refuse to release the remaining Australian women and children despite any request by the Commonwealth.
10. Even if the AANES release conditions remained current and the Commonwealth was able to accept these (and any other) conditions imposed by AANES, this would not effect the release of the remaining Australian women and children without more. The Commonwealth would need to arrange for their safe repatriation having regard to the security and geopolitical situation that exists at the relevant time. The Commonwealth would also need to make arrangements with other foreign states and authorities to effect that repatriation.
 11. Even if AANES were to release the remaining Australian women and children to Commonwealth officials, the remaining Australian women and children would not be in the custody of, or detained by, the Respondents to allow them to be brought before the Court. Upon release, while they may agree to being escorted to Australia by Australian officials, they would not be in the custody of those officials. Those officials would have no legal power to require the remaining Australian women and children to accompany them to Australia or to the Court.
 12. The fact that the Commonwealth has been permitted by the AANES, in its absolute discretion, to repatriate Australian women and children in the past does not mean that the Commonwealth had then or has now any control over the detention of anyone in camps including Al-Roj. That was not an ongoing arrangement, and those repatriations were permitted at the absolute discretion of the AANES.

A.3 A non-repatriation decision

13. The matters in paragraph [5] of the Concise Statement are not disputed. The Respondents will rely upon the terms of the correspondence for their full force and effect.
14. As to paragraph [6], the Respondents deny that the First Respondent, or another officer of the Commonwealth, has made the alleged **Non-repatriation Decision**. No such decision has been made, and it is not open to infer that one has been made in circumstances where there is no obligation upon the Respondents to make a repatriation decision and no obligation to consider doing so in a reasonable time.
15. As to paragraph [7], the Respondents do not dispute that the 26 May 2023 letter was sent and will rely upon it for its full force and effect. The Commonwealth disputes that the letter contains “reasons” for a decision. The letter from an officer of the Second Respondent to the Applicant on 26 May 2023 (the **letter**) is not a statement of reasons for any alleged non-

repatriation decision. If the letter is found to evidence reasons for such a decision (which is denied), then there is no basis to find that it is the complete set of reasons.

A.5 The rights of citizens and correlative functions of the Executive

16. The Applicant's use of the terminology of a "function" in paragraphs [15] and [17] is impermissibly vague, and the Respondents cannot properly respond to the allegations made against it. The following paragraphs are subject to this caveat.
17. As to paragraph [15] of the Concise Statement, the common law right of Australian citizens to return to Australia is subject to abrogation by legislation and is, in any case, not a right to be returned to Australia. The Executive can take steps to aid and/or facilitate an Australian citizen to return to Australia through diplomatic engagement and by offering consular assistance where possible and subject to any applicable law, but it has an absolute discretion as to if, when and how to do so.
18. As to paragraph [17] of the Concise Statement, the Commonwealth does not owe a duty to protect the remaining Australian women and children. It has no duty to make a repatriation decision. It may, in its absolute discretion, take steps to provide consular assistance to the remaining Australian women and children, but it has no duty to do so.
19. The Conventions referred to by the Applicant at paragraph [16] of the Concise Statement do not provide a basis for the alleged obligation, be it under domestic or international law. An international treaty can only operate as a source of rights and obligations under domestic law if, and to the extent that, it has been enacted by Parliament. Australia's obligations under the *International Covenant on Civil and Political Rights (ICCPR)*, and the *Convention on the Rights of the Child (CRC)* have no independent force in Australian domestic law and cannot be relied upon as a source of rights and obligations as the Applicant seeks to do. Additionally, as a matter of international law, any human rights obligations arising under the ICCPR or the CRC extending outside Australian territory are only owed where the Commonwealth exercises 'effective control'. The Commonwealth does not exercise effective control over the remaining Australian women and children such as to engage the extraterritorial application of Australia's international human rights obligations.
20. The Respondents deny paragraph [18] of the Concise Statement. In the absence of any duty to make a repatriation decision, the making of any purported non-repatriation decision does not amount to positive participation in the detention of the remaining Australian women and children.

Part B: Relief sought by the Applicant, and its legal grounds***B.1. Standing***

21. The Respondents do not take issue with the Applicant's standing to seek a writ of habeas corpus in respect of the STCA-authorized remaining Australian women and children. The Respondents also do not take any issue with the Applicant's standing to seek judicial review of any purported non-repatriation decision.
22. However, the Applicant does not have standing to bring the action for a writ of habeas corpus on behalf of all the remaining Australian women and children who are not the STCA-authorized remaining Australian women and children. They are not before the Court, because the Applicant has no authority to act on their behalf. No order for their release from detention may thus be made.

B.2 Habeas corpus

23. By reason of the matters in [5]-[12] above, the Applicant is not entitled to a writ of habeas corpus and the claim for that relief should be dismissed.

B.3 Judicial review

24. The judicial review claim should be dismissed on the basis that no Non-repatriation Decision has been made.
25. Alternatively, if a Non-repatriation Decision has been made, then the 26 May 2023 letter does not contain the reasons (alternatively, does not contain all the reasons) for that decision. The judicial review claim fails because it is predicated upon that letter containing all the reasons for the alleged decision, when it does not.
26. As to paragraph [25] of the Concise Statement, there is no duty to make a repatriation decision and no duty to consider doing so.

Part C: Remedies sought by the Applicant

27. In response to paragraph [26] of the Concise Statement:
 - a. The Applicant is not entitled to a writ of habeas corpus in respect of the remaining Australian women and children or the STCA-authorized remaining women and children, because the Respondents do not have either actual or *de facto* control of the remaining Australian women and children. Further, no writ of habeas corpus should issue in respect of non-STCA-authorized remaining women and children as they are in no way before the Court.
 - b. The declaratory relief sought should be refused because no Non-repatriation Decision has been made, alternatively no jurisdictional error has been demonstrated in it if one has been made (which is denied).

- c. Mandamus or an injunction should not issue in the absence of any duty to consider the Applicant's 19 May 2023 and 23 May 2023 letters and to make a decision whether or not to make a further repatriation decision.
28. The relief sought in the Originating Application dated 5 June 2023 should be refused with costs.



Hervee Dejean, for and on behalf of:

Craig Lenehan SC
Christopher Tran
Kylie McInnes

Certificate of lawyer

I, Hervee Dejean, certify to the Court that, in relation to the Response to the Concise Statement filed on behalf of the Respondents, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 14 July 2023



Signed by Hervee Dejean

AGS lawyer

for and on behalf of the Australian Government Solicitor

Solicitor for the Respondents