

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.



Form NCF1

Concise Statement

No. _____ of 2023

Federal Court of Australia
District Registry: VIC
Division: General

Save the Children Australia
Applicant

Minister for Home Affairs and another
Respondents

The remaining Australian women and children

- 1 For the past few years, women, who are Australian citizens, and their children, who are either citizens or eligible to become citizens, have been detained in the north-east of the Syrian Arab Republic (**Syria**) by or under the authority of the Autonomous Administration of North East Syria (the **AANES**) and/or its military wing, the Syrian Democratic Forces (the **SDF**) in camps including Al-Roj (the **Australian women and children**).
- 2 In October 2022, the Second Respondent (also referred to below as the Commonwealth **Executive**) requested that the AANES release and facilitate the repatriation of certain Australian women and children, and then facilitated the repatriation of those Australian women and children (the **repatriated Australian women and children**; the Executive's decision to repatriate them, the **Repatriation Decision**).
- 3 Other Australian women and children remain in detention, including in Al-Roj camp (the **remaining Australian women and children**), including those named in the Annexure to this concise statement, in respect of whom the Applicant is authorised to seek relief in the nature of habeas corpus (the **STCA-authorised remaining Australian women and children**).
- 4 Particulars of the STCA-authorised remaining Australian women and children, including names, dates of birth, and particulars of Australian citizenship where known, are as set out in the Annexure. Particulars of the other remaining Australian women and children are known, or able to be ascertained, by the Respondents.

The Non-repatriation Decision

- 5 On 19 May 2023, following much correspondence between the Applicant and the Respondents about the repatriation of the remaining Australian women and children, the Applicant wrote to the First Respondent to ask that the Executive make a decision about

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them equivalent to the Repatriation Decision (a **further repatriation decision**). The request attached: (1) a statement by the Applicant's CEO, Mat Tinkler (the **Tinkler Statement**), with Annexure; (2) an expert report prepared by Professor Michael A Newton (the **Newton Report**); (3) an expert report, and supplementary expert report, prepared by Dr Anan Alsheikh Haidar (the **Haidar Reports**); and (4) an expert report prepared by former Ambassador Peter Woodward Galbraith (the **Galbraith Report**). Noting the long period of time the Executive had had to consider making a further repatriation decision, the Applicant requested that a decision be made by 26 May 2023. The Applicant stated that if the First Respondent failed by 26 May 2023 to make, or to decide to not make, a further repatriation decision, the Applicant would infer, having regard to the time the Executive had had to make a further repatriation decision, that the Executive had decided to not make a further repatriation decision. The Applicant sent the First Respondent a supplementary letter on 23 May 2023.

- 6 On 26 May 2023, an officer of the Second Respondent wrote to the Applicant, informing it that he was unable to respond to the request. In all the circumstances set out in the Tinkler Statement, it may be inferred that the First Respondent, or another officer of the Second Respondent, has decided not to make a further repatriation decision for the remaining Australian women and children (the **Non-repatriation Decision**).
- 7 The only reasons provided in the 26 May 2023 letter for not having made a further repatriation decision were "[r]epatriations are a complex undertaking and at all times the focus is on the safety and security of all Australians as well as the safety of those who would be involved in any operation".

Contextual facts

- 8 In about June 2014, the Islamic State in Iraq and the Levant (**ISIL**, also known as Islamic State and Islamic State in Iraq and Syria), then operating in parts of Syria, proclaimed itself a "caliphate". In September 2014, the United States of America announced the formation of and established a global coalition to defeat ISIL (the **Coalition**). Australia was, and remains, a member.
- 9 In 2015, the SDF was formed. The SDF has had, and continues to have, an arrangement with the Coalition (the **Arrangement**). From its formation, and with support from the Coalition under the Arrangement, the SDF took control of areas of north-east Syria, expanding its control over time, including capturing Raqqa city in 2017 and Baghuz, the last ISIL stronghold, in March 2019.
- 10 Thereafter, thousands of Syrian nationals, as well as Iraqi nationals, and nationals of many other foreign states, were interned in camps operated by, or under the authority of, the AANES and/or the SDF, pursuant to the Arrangement. These foreign nationals included the Australian women and children.

The detention is unlawful and arbitrary

- 11 The detention of the remaining Australian women and children, including the STCA-
authorised remaining Australian women and children, in Al-Roj camp, is unlawful and
arbitrary: see the Haidar Reports.

The Respondents have control

- 12 The AANES and/or the SDF are maintaining the detention of the remaining Australian
women and children in Al-Roj pursuant to the Arrangement: see the Newton Report.
- 13 Pursuant to the Arrangement, the AANES and/or the SDF will, on request by the
Executive, release the remaining Australian women and children from their detention,
and facilitate their repatriation by the Executive: see the Galbraith Report; the Tinkler
Statement. This is demonstrated by the effective implementation of the Repatriation
Decision.
- 14 It follows that the Executive has control (at least *de facto* or practical control) over the
detention of the remaining Australian women and children.

The rights of these citizens and the correlative functions of the Executive

- 15 The remaining Australian women and children, as citizens (or as persons eligible for
citizenship as the children of citizen mothers), have a right to return to Australia as a
safe haven in their need: *Potter v Minahan* (1908) 7 CLR 277 at 295 (Griffith CJ), 305
(O'Connor J); *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at [31], [74]
(Kiefel CJ, Keane and Gleeson JJ); *Universal Declaration of Human Rights*, art 13(2).
The Executive also has a correlative function of taking steps to aid them and facilitate
their return.
- 16 While and the longer the remaining Australian women and children are unlawfully and
arbitrarily detained in Al-Roj camp, they face an increasing risk of serious harm or death,
or cruel, inhuman or degrading treatment. As such, Australia has an obligation to ensure
they have an effective remedy: *International Covenant on Civil and Political Rights*,
arts 2(3), 6, 7, 9 and 12; *Convention on the Rights of the Child*, arts 4, 6 and 37.
- 17 In all of the circumstances, the Executive has a protective function in respect of the
remaining Australian women and children, including a function to make a further
repatriation decision.
- 18 By reason of the above matters, the Executive, by making the Non-repatriation Decision,
or alternatively by failing to make a further repatriation decision, is arbitrarily causing the
ongoing unlawful detention of the remaining Australian women and children, in a manner
not authorised by any law of the Commonwealth.

Habeas corpus

- 19 The Court has a function and duty to review the lawfulness of the detention of Australian
citizens, and where detention is unlawful, to grant appropriate remedies to secure their
release. The most appropriate is the writ of habeas corpus.

- 20 The Court may issue the writ where: (1) a *prima facie* case of unlawful detention of a citizen is shown; (2) a *prima facie* case is shown that a person over whom the Court has jurisdiction has control (including *de facto* control) over the detention, in that they have the power to bring the citizen before the Court.
- 21 Alternatively, the Court may issue the writ where: (1) a *prima facie* case of unlawful detention of a citizen is shown; (2) a *prima facie* case is shown that a person over whom the Court has jurisdiction has *de facto* control over the detention, in that they have power under an arrangement, in which both the person and the detainer are participants, to bring the citizen before the Court.
- 22 Here, there is no reason why the issue of the writ would be inapposite to the exercise of judicial power.
- 23 By reason of the matters in [1]–[18], the evidence, in this case, establishes that the conditions in [20], alternatively [21], are met. The writ should issue.

Judicial review

- 24 Alternatively, in making the Non-repatriation Decision, the First Respondent or the Second Respondent took into account a prohibited consideration, acted for an ulterior purpose, or acted unreasonably.
- (1) The only reasons given in the 26 May 2023 letter for not having made a further repatriation decision were “[r]epatriations are a complex undertaking and at all times the focus is on the safety and security of all Australians as well as the safety of those who would be involved in any operation”.
 - (2) As to complexity, there is no legal or factual impediment to the early repatriation of the remaining Australian women and children: the Repatriation Decision effected the repatriation of the repatriated Australian women and children, and there is no reason a further repatriation decision would not be similarly effective for repatriation of the remaining Australian women and children.
 - (3) As to the safety and security of Australians or others who would be involved in the repatriation of the remaining Australian women and children, any such concerns did not prevent the Repatriation Decision, and nothing has changed such that any such concerns could rationally now prevent a further repatriation decision.
 - (4) As to the safety and security of Australians arising not from the repatriation operation but from the return of the remaining Australian women and children to Australia, neither the Constitution nor any law of the Commonwealth authorises the Executive to participate in maintaining the unlawful detention of Australian citizens by a foreign power outside Australia, for the purpose of protecting the safety and security of other Australian citizens. This would be a prohibited consideration or an improper purpose.

(5) It may be inferred from the 26 May 2023 letter, and all other relevant publications and communications of the Executive since the Repatriation Decision (as set out in the Tinkler Statement and contained in its annexure) that there is no other operative reason or purpose for the Non-repatriation Decision, or alternatively for failing to make a further repatriation decision.

25 Alternatively, if the First Respondent and the Second Respondent have failed to make a further repatriation decision, in all the circumstances, they are required to properly consider the request in the 19 May 2023 and 23 May 2023 letters from the Applicant, and to make a decision whether or not to make a further repatriation decision.

Relief sought

26 By reason of the matters above, the Applicant seeks the following orders.

- (1) A writ of habeas corpus issue in respect of the remaining Australian women and children, alternatively the STCA-authorized remaining Australian women and children.
- (2) On the return of the writ, an order in the nature of habeas corpus in respect of the remaining Australian women and children, alternatively the STCA-authorized remaining Australian women and children.
- (3) Alternatively to (1) and (2), a declaration that in making the Non-repatriation Decision the First Respondent or another officer of the Second Respondent took into account a prohibited consideration, acted for an ulterior purpose, or acted unreasonably.
- (4) Alternatively to (3), a declaration that in failing to make a further repatriation decision, the First Respondent or the Second Respondent acted for an ulterior purpose, or acted unreasonably.
- (5) Alternatively to (4), mandamus, alternatively an injunction, compelling the First Respondent or the Second Respondent by an appropriate officer to properly consider the 19 May 2023 and 23 May 2023 letters from the Applicant and to make a decision whether or not to make a further repatriation decision.
- (6) Such further or other relief as this Honourable Court deems fit.
- (7) The Respondents pay the Applicant's costs.

This pleading was prepared by Peter Morrissey SC, Emrys Nekvapil SC, Rachael Taylor, Nicholas Petrie and Katharine Brown.

Certificate of lawyer

I, Moustafa Kheir, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation therein.

Date: 5 June 2023

A handwritten signature in black ink, appearing to read 'M Kheir', written in a cursive style.

Signed by Moustafa Kheir

Lawyer for the Applicant

Schedule

No. of 2023

Federal Court of Australia
District Registry: Victoria
Division: General

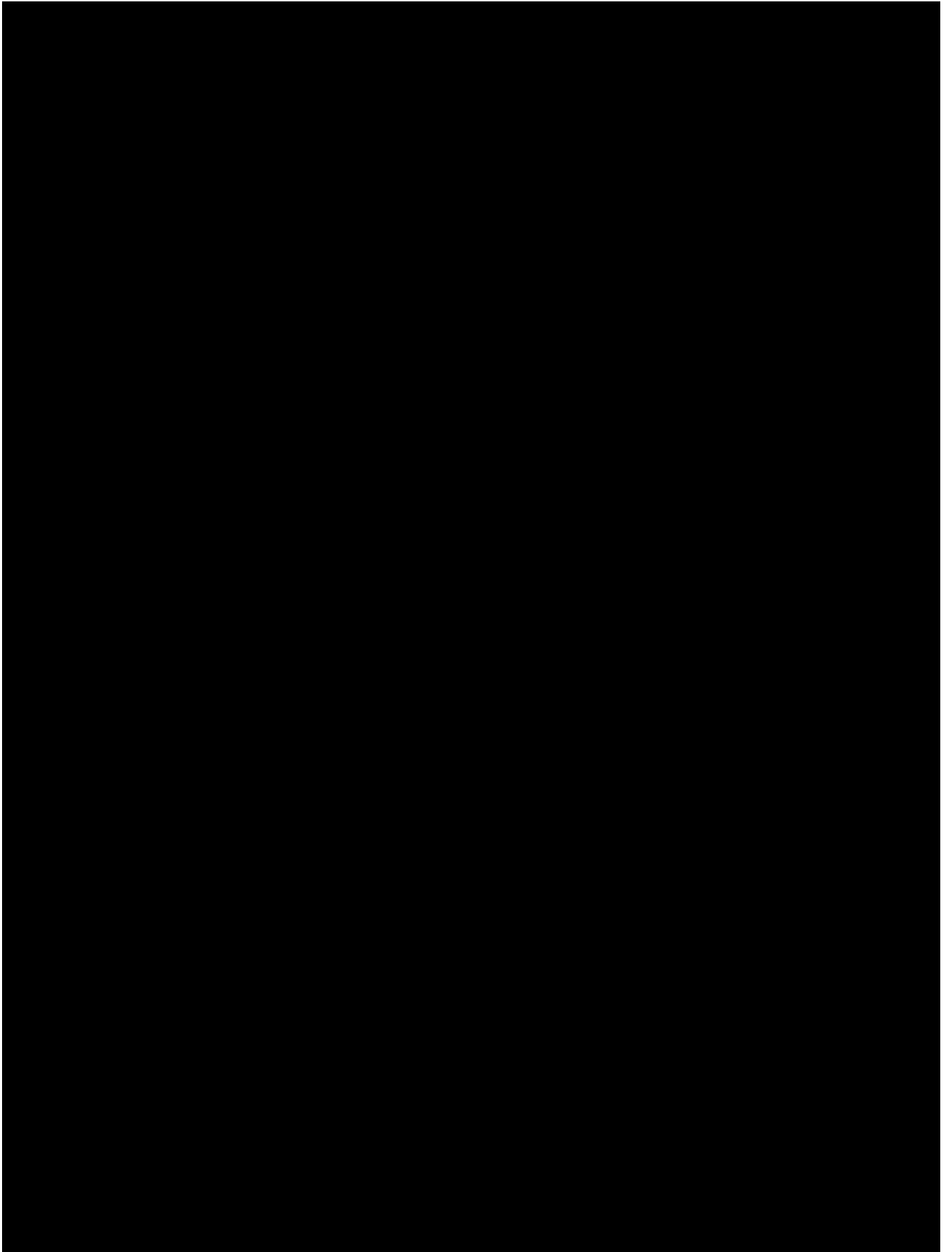
Respondents

Second Respondent: Commonwealth of Australia

Date: 5 June 2023

CONFIDENTIAL ANNEXURE

The Applicants do not intend to disclose this annexure unless considered and approved by a judge.



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