

# FEDERAL COURT OF AUSTRALIA

## Save the Children Australia v Minister for Home Affairs [2023] FCA 1343

### SUMMARY

*In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at [www.fedcourt.gov.au](http://www.fedcourt.gov.au) together with this summary.*

In this proceeding, the applicant, Save the Children Australia (**STCA**) sought an order that a writ of habeas corpus issue against the Minister for Home Affairs or the Commonwealth (the **respondents**).

The application related to certain Australian women and their children (34 people in total) who are being detained in North-East Syria in camps including the Al-Roj camp (the **relevant women and children**). It appears that the women are Australian citizens and that their children are either Australian citizens or eligible to become Australian citizens. The relevant women and children are being detained by the Autonomous Administration of North East Syria (**AANES**) and/or its military wing, the Syrian Democratic Forces (**SDF**). AANES and SDF are supported by a coalition of countries known as the Global Coalition against Daesh/ISIS (the **Coalition**), which includes the United States of America, the United Kingdom and Australia.

In practical terms, what STCA is seeking to achieve is to have the Australian Government repatriate (bring to Australia) the women and children who are the subject of this proceeding. The Australian Government did this in October 2022 for four Australian citizen women and their 13 children (a total of 17 people) in a similar plight.

STCA contended that, where it appears that the respondent has control over the detention of the relevant person or, at least, the Court *entertains a doubt* as to whether the respondent has control, the Court can use the “pressure of the writ” to test the truth of the respondent’s assertion of a lack of control. In support of that contention, STCA relied on a series of three decisions of the United Kingdom courts: *Barnardo v Ford* [1892] AC 326; *R v Secretary of State for Home Affairs; ex parte O’Brien* [1923] 2 KB 361; and *Rahmatullah v Secretary of State for Defence* [2012] UKSC

48; [2013] 1 AC 614. STCA contended that, in the present case, it appears that the respondents have control over the detention of the relevant women and children or, at least, there is doubt as to whether the respondents have control.

The respondents contended that the evidence established that they do not have control over the detention of the relevant women and children and, therefore, the writ of habeas corpus should not issue. The respondents contended that the three cases relied on by STCA are distinguishable.

The Court has concluded that the respondents do not have control over the detention of the relevant women and children. Accordingly, the Court has decided that a writ of habeas corpus should not issue.

In the alternative, STCA sought judicial review of a decision, said to have been made by the respondents, not to repatriate (or seek the repatriation of) the relevant women and children. The Court has concluded that it is not satisfied that any such decision has been made. Accordingly, this part of the application has been rejected.

In the further alternative, STCA sought judicial review of a failure by the respondents to make a decision whether or not to repatriate (or seek the repatriation of) the relevant women and children. This part of the application was premised on there being a requirement to make such a decision. The Court has concluded that it is not satisfied that there is any such requirement. Accordingly, this part of the application has also been rejected.

It follows that the application is to be dismissed.

The reasons of the Court are to be published, on a confidential basis, to the parties. The parties will then have a period of time to review the judgment to consider whether to apply for confidentiality orders in respect of any part of the judgment. Once that process has occurred, the judgment will be published to the public (either in full or in a redacted form).

**MOSHINSKY J**  
**3 NOVEMBER 2023**