

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S169/2014

BETWEEN:

CPCF

Plaintiff

and

MINISTER FOR IMMIGRATION AND
BORDER PROTECTION

First defendant

and

THE COMMONWEALTH OF AUSTRALIA

Second defendant

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DEFENCE TO THE AMENDED STATEMENT OF CLAIM

To the amended statement of claim dated 21 July 2014 the defendants say as follows:

20 Jurisdiction

1. They admit paragraph 1.
2. There is no paragraph 2.

Parties

3. As to paragraph 3:
 - (a) they admit sub-paragraph (a) and say that the Australian border protection vessel is referred to herein as **the Australian vessel**;
 - (b) they admit that the plaintiff is a person of Sri Lankan nationality and Tamil ethnicity, and that he is one of 157 passengers on the Australian vessel who were previously on an Indian flagged vessel which departed Pondicherry, India (**the Indian vessel**), but otherwise do not admit sub-paragraph (b);
 - (c) they admit sub-paragraph (c);

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- (d) save that they do not admit that any person from the Indian vessel is a family member of the plaintiff, they admit sub-paragraph (d);
- (e) save that they admit that by sub-paragraph (e) the plaintiff makes the claim there alleged, they do not admit sub-paragraph (e);
- (f) as to sub-paragraph (f):
 - (iA) they admit that the plaintiff does not wish to return to Sri Lanka;
 - (i) as to sub-paragraph (i), they say that Australia has assumed a non-refoulement obligation at international law as alleged therein but say that that obligation:
 - 10 (A) does not apply in respect of a person unless and until that person reaches Australia's territorial sea; and
 - (B) in the premises of sub-paragraph (A), does not apply in respect of the plaintiff or any other person from the Indian vessel;
 - (ii) as to sub-paragraph (ii), they say that Australia has assumed a non-refoulement obligation at international law not to return a person to a place where they would be at real risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment;
 - 20 (iii) as to sub-paragraph (iii), they say that Australia has assumed the obligations at international law alleged therein but say that those obligations do not include a non-refoulement obligation;
 - (iv) as to sub-paragraph (iv), they say that Australia has assumed a non-refoulement obligation at international law as alleged therein;
 - (v) as to sub-paragraph (v), they say that Australia has assumed the obligations at international law alleged therein (so far as they apply) but say that those obligations do not include a non-refoulement obligation, and in any event are not relevant to the plaintiff as he is an adult; and
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(vi) otherwise, they do not admit sub-paragraph (f);

(g) as to sub-paragraph (g):

(i) they say that, to the extent that a non-refoulement obligation as alleged in sub-paragraph (f) of the amended statement of claim forms part of customary international law, obligations of Australia at international law, whether assumed by treaty or forming part of customary international law, do not form part of the common law of Australia;

(ii) in the premises of sub-paragraph (i) above, they deny sub-paragraph (g).

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4. They admit paragraph 4.

5. They admit paragraph 5.

6. There is no paragraph 6.

Taking of the plaintiff into Commonwealth custody or control

7. As to paragraph 7:

(a) they refer to and repeat paragraph 3(b) above;

(b) they say that the vessel referred to in the amended statement of claim as "the Asylum Vessel" is referred to herein as "the Indian vessel";

(c) they say that the intended destination of the Indian vessel was Christmas Island;

(d) they say that the plaintiff, and the other persons from the Indian vessel, did not, and do not, hold visas entitling them to travel to or enter Australia;

(e) they say further that any admission herein to an allegation in the statement of claim referring to "the Asylum Vessel" should not be taken as an admission that that vessel, or any of the people on that vessel, claim or are entitled to claim asylum of any kind from any country under the domestic law of that country or international law; and

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- (f) otherwise, they do not admit paragraph 7.
8. They admit paragraph 8.
9. They admit paragraph 9.
10. They admit paragraph 10.
11. They admit paragraph 11 but say further that an Australian customs vessel was also despatched.
12. They admit paragraph 12.
13. There is no paragraph 13.
14. There is no paragraph 14.
- 10 15. There is no paragraph 15.
16. Save that they do not admit that any person from the Indian vessel is a family member of the plaintiff, they admit paragraph 16, and say further that the following events occurred on 29 June 2014 in the sequence alleged below:
- (a) the person in command of the Australian vessel authorised the exercise of maritime powers in relation to the Indian vessel, on the basis that he suspected, on reasonable grounds, that the vessel was involved in a contravention of the *Migration Act 1958* (Cth) (**the Migration Act**) within the meaning of s 9 of the Maritime Powers Act;
- (b) maritime officers from the Australian vessel boarded the Indian vessel;
- 20 (c) a maritime officer from the Australian vessel detained the Indian vessel;
- (d) a maritime officer from the Australian vessel detained the persons on board the Indian vessel;
- (e) the persons from the Indian vessel were embarked onto the Australian vessel; and
- (f) a pump failure caused the engine on the Indian vessel to seize and started a small fire in the engine house, which caused irreparable damage to the engine and rendered the vessel unseaworthy.

17. There is no paragraph 17.
18. As to paragraph 18:
- (a) they do not admit that any person from the Indian vessel is a family member of the plaintiff;
 - (b) they refer to and repeat sub-paragraphs 16(d) and (e) above; and
 - (c) otherwise, they deny paragraph 18.
19. There is no paragraph 19.
20. There is no paragraph 20.
21. As to paragraph 21:
- 10 (a) they admit that the plaintiff and the other persons from the Indian vessel are continuing to be detained on the Australian vessel;
- (b) they say that the process of taking the plaintiff and the other persons from the Indian vessel to a place is not yet complete;
- (c) they do not admit that any person from the Indian vessel is a family member of the plaintiff; and
- (d) otherwise, they deny the paragraph.
22. There is no paragraph 22.

Detention of the plaintiff

23. They admit paragraph 23.
- 20 24. Save that they do not admit that any person from the Indian vessel is a family member of the plaintiff, they admit paragraph 24.
25. They do not admit paragraph 25.
26. They do not admit paragraph 26.
27. They admit that the plaintiff and other persons from the Indian vessel are unable safely to leave the Australian vessel without the consent of the defendants and otherwise deny paragraph 27.

28. Save that they do not admit that any person from the Indian vessel is a family member of the plaintiff, they admit paragraph 28.
29. As to paragraph 29, they admit that the plaintiff does not reside in the same room on the Australian vessel as persons whom he claims are his family members, but say that all of the persons from the Indian vessel reside in one of three rooms and that families cannot be accommodated together while maintaining appropriate separation between men, women and children.
- 10 30. Save that they do not admit that any person from the Indian vessel is a family member of the plaintiff, they admit paragraph 30 and say further that, subject to weather, the plaintiff (and each other passenger on the Australian vessel) is permitted approximately three hours' outside during the day in natural light for meals, but that it would be unsafe to give the passengers (including children) unrestricted freedom to move about the vessel.
31. As to paragraph 31:
- (a) they admit that some of the personnel on the Australian vessel are persons who would fall within the definition of "officer" in s 5(1) of the Migration Act if that Act were applicable to the circumstances of the plaintiff;
- 20 (b) they deny that the Migration Act is applicable to the circumstances of the plaintiff and, in particular, that the plaintiff or any other person from the Indian vessel is detained pursuant to that Act;
- (c) they do not admit that any person from the Indian vessel is a family member of the plaintiff; and
- (d) otherwise, they deny paragraph 31.
32. As to paragraph 32:
- (a) they refer to and repeat paragraph 31 above, and deny sub-paragraph (a); and
- (b) they deny sub-paragraph (b).

33. Save that they do not admit that any person from the Indian vessel is a family member of the plaintiff, they refer to and repeat paragraphs 23 to 32 above and otherwise admit paragraph 33.
34. They do not admit paragraph 34.
35. Save that they do not admit that any person from the Indian vessel is a family member of the plaintiff, they admit paragraph 35.
36. There is no paragraph 36.
37. Save that they do not admit that any person from the Indian vessel is a family member of the plaintiff, they admit paragraph 37.
- 10 38. They do not admit paragraph 38.
39. They do not admit paragraph 39.
40. As to paragraph 40:
- (a) they admit that the Republic of Nauru has not assumed all of the international law obligations set out in paragraph 3(f) of the amended statement of claim;
 - (b) they say that the Republic of Nauru has assumed the international law obligations set out in sub-paragraphs 3(f)(i), (iv) and (v) of the amended statement of claim; and
 - (c) they otherwise deny paragraph 40.
- 20 41. As to paragraph 41:
- (a) they admit that the Independent State of Papua New Guinea has not assumed all of the international law obligations set out in paragraph 3(f) of the amended statement of claim;
 - (b) they say that the Independent State of Papua New Guinea has assumed the international law obligations set out in sub-paragraphs 3(f)(i), (ii), (iii) and (v) of the amended statement of claim; and
 - (c) they otherwise deny paragraph 41.
42. They deny paragraph 42.

43. They deny paragraph 43, and say further that, in so far as the plaintiff alleges a breach of international law, that allegation is not justiciable in this Court.

Treatment of the plaintiff on board the Australian vessel

44. As to paragraph 44:

(a) they deny sub-paragraph (a), and say that the plaintiff was asked a range of questions concerning his personal and biographical details;

(b) save that they do not admit that any person from the Indian vessel is a family member of the plaintiff, they admit sub-paragraph (b), but say that three of the persons from the Indian vessel speak English as well as Tamil and have acted as interpreters; and

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(c) as to sub-paragraph (c):

(i) they admit sub-paragraph (i);

(ii) they do not admit sub-paragraph (ii); and

(iii) they admit sub-paragraph (iii) but refer to and repeat paragraph 44(b) above.

45. They admit paragraph 45.

46. There is no paragraph 46.

The taking decision

47. As to paragraph 47:

20 (a) they admit that on 1 July 2014 the National Security Committee of Cabinet decided that the plaintiff and the other persons from the Indian vessel should be taken to a place other than Australia;

Particulars

Public interest immunity prevents the provision of particulars of the decision.

(b) they say that maritime officers on the Australian vessel implemented that decision by exercising their powers under s 72 of the Maritime Powers Act, including by:

(i) causing the Australian vessel to commence to travel towards the place to which the plaintiff and the other persons from the Indian vessel were to be taken in accordance with the decision referred to in sub-paragraph (a) above; and

(ii) detaining the plaintiff and the other persons from the Indian vessel while they remain on the Australian vessel; and

10 (c) otherwise, they deny paragraph 47.

The defendants' power to take the plaintiff and the other persons from the Indian vessel

48. They admit paragraph 48.

49. They admit paragraph 49.

50. They deny paragraph 50 and say further that:

(a) any obligation to afford procedural fairness in the exercise of power under s 72(4) is excluded as a matter of the proper construction of the Maritime Powers Act;

20 (b) there was no obligation to afford procedural fairness in the exercise of the non-statutory executive power alleged at paragraph 52 below; and

(c) further or alternatively, in all of the factual circumstances, there was no obligation to afford procedural fairness of the kind alleged or otherwise to the plaintiff with respect to the place to which he was to be taken in accordance with the decision referred to in paragraph 47(a) above.

51. As to paragraph 51:

(a) there is no sub-paragraph (a);

- (b) they deny sub-paragraph (b) and say further that:
- (i) the Maritime Powers Act authorises the exercise of powers in relation to a foreign vessel at a place between Australia and another country provided the powers are exercised in accordance with *inter alia* s 41 of the Act;
 - (ii) they will rely on the full terms and effect of the Maritime Powers Act, in particular the full terms and effect of ss 41 and 72;
 - (iii) one circumstance in which power under s 72(4) may be exercised in the contiguous zone of Australia is to investigate a contravention of a customs, fiscal, immigration or sanitary law prescribed by the regulations that occurred in Australia or to prevent a contravention of such a law occurring in Australia; and
 - (iv) if power under s 72(4) is so exercised, its operation is not confined to the period in which the person in respect of whom the power is exercised is in the contiguous zone of Australia, because the power may be exercised to take the person to a place outside Australia;
- (c) they deny sub-paragraph (c), and refer to and repeat sub-paragraph (b) above;
- (d) subject to reference to the full terms and effect of the Maritime Powers Act, they admit sub-paragraph (d);
- (e) they deny sub-paragraph (e);
- (f) they deny sub-paragraph (f);
- (g) there is no sub-paragraph (g);
- (h) they deny sub-paragraph (h);
- (i) they deny sub-paragraph (i);
- (j) they deny sub-paragraph (j);
- (k) there is no sub-paragraph (k);

- (l) as to sub-paragraph (l):
 - (i) they admit that any exercise of power under s 72(4) of the Maritime Powers Act must be within the bounds of legal reasonableness; and
 - (ii) otherwise, they deny sub-paragraph (l);
- (m) they deny sub-paragraph (m); and
- (n) they deny sub-paragraph (n).

52. They deny paragraph 52, and say that the non-statutory executive power of the Commonwealth extends to:

- 10 (a) preventing non-citizens from entering Australia; and
- (b) doing all things incidental to that objective, including taking them to a place other than Australia.

Alleged unlawfulness of not taking the plaintiff and other persons from the Indian vessel to Australia

53. As to paragraph 53:

- (a) they refer to and repeat paragraph 47;
- (b) they deny that there was any lack of authority under s 72(4) of the Maritime Powers Act; and
- 20 (c) they say that public interest immunity otherwise prevents them from pleading to paragraph 53.

54. As to paragraph 54:

- (a) they refer to and repeat paragraphs 47 and 52 above;
- (b) they deny that the plaintiff, or any other person on the Indian vessel, was in need of rescue or that he or she was a person in distress at sea; and
- (c) otherwise, they deny paragraph 54.

55. There is no paragraph 55.

56. They deny paragraph 56, and refer to and repeat paragraph 50 above.
57. They deny paragraph 57.
58. There is no paragraph 58.
59. As to paragraph 59, they deny that any such decision was made, and otherwise deny paragraph 59.
60. They deny paragraph 60.
61. As to paragraph 61:
- (a) they refer to and repeat paragraph 47;
 - (b) they deny that there was any lack of authority under s 72(4) of the Maritime Powers Act; and
 - (c) they say that public interest immunity otherwise prevents them from pleading to paragraph 61.
62. They deny paragraph 62.
63. As to paragraph 63:
- (a) they deny that the plaintiff (or any other person from the Indian vessel) has been, or is to be, detained indefinitely;
 - (b) they refer to and repeat paragraphs 7(d), 47(b), 51(m) and 59 above;
 - (c) otherwise, they deny paragraph 63.
64. They deny paragraph 64, and refer to and repeat paragraph 52 above.
65. There is no paragraph 65.
66. There is no paragraph 66.
67. There is no paragraph 67.

Alleged unlawfulness of the plaintiff's detention

68. As to paragraph 68:

- (a) they say that s 72(4) of the Maritime Powers Act requires a maritime officer who detains a person pursuant to that sub-section to take the person, or cause the person to be taken, to a place within a reasonable time (being a time that may be longer than the period necessary to travel to that place);
- 10 (b) they say further that the period of detention authorised by s 72(4) of the Maritime Powers Act is the same as the period identified in sub-paragraph (a) above;
- (c) they say further that an exercise of power under s 72(4) of the Maritime Powers Act must be for a proper purpose, having regard to the Maritime Powers Act as a whole; and
- (d) otherwise, they deny paragraph 68.

69. As to paragraph 69:

- (a) they deny sub-paragraph (a);
- (b) they deny sub-paragraph (b);
- (c) they deny sub-paragraph (c), and refer to and repeat paragraphs 63 and 68(c) above; and
- 20 (d) they deny sub-paragraph (d), and refer to and repeat paragraph 68(b) above.

70. As to paragraph 70:

- (a) they admit that s 75(1) of the Maritime Powers Act does not render lawful any restraint on liberty not authorised by ss 72(4) and (5) of the Maritime Powers Act; and
- (b) otherwise, they deny paragraph 70.

71. As to paragraph 71:

- (a) they admit sub-paragraph (a);

- (b) they admit that s 75(2) of the Maritime Powers Act does not prevent the plaintiff from invoking the High Court's power to issue habeas corpus, but otherwise deny sub-paragraph (b); and
- (c) they admit that s 75(2) of the Maritime Powers Act does not prevent the plaintiff from commencing proceedings to quell a controversy as to the lawfulness of his detention and otherwise deny sub-paragraph (c).

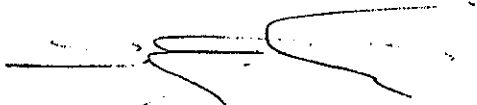
72. They deny paragraph 72, and refer to and repeat paragraph 52 above.

73. They deny paragraph 73, and refer to and repeat paragraphs 68–72 above.

Relief sought

- 10 74. They deny that the plaintiff is entitled to any of the relief sought in paragraphs 74–81 or any other relief.

Date: 22 July 2014



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