

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

NO S 169 OF 2014

**BETWEEN:**

**CPCF**  
First Plaintiff

**AND:**

**MINISTER FOR IMMIGRATION AND  
BORDER PROTECTION**  
First Defendant

**THE COMMONWEALTH OF AUSTRALIA**  
Second Defendant

**SPECIAL CASE**

Pursuant to r 27.08 of the *High Court Rules 2004* (Cth), the plaintiff and the defendants agree in stating questions of law for the opinion of the Full Court. This special case states the facts considered by the parties to be necessary to enable the Full Court to decide those questions. The agreement of the parties to the facts stated in the special case is not to be taken to be agreement to the relevance of those facts.

**The parties**

1. The first defendant is and was at all material times an officer of the Commonwealth within the meaning of s 75(v) of the Constitution, a Minister of State appointed under s 64 of the Constitution and the Minister responsible for administering the Maritime Powers Act and the *Migration Act 1958* (Cth) ("**the Migration Act**").
2. The plaintiff is a person of Tamil ethnicity and Sri Lankan nationality.

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3. At no material time has the plaintiff had an Australian visa permitting him to travel to or enter Australia.
4. The plaintiff was a passenger on an Indian flagged vessel (the "**Indian vessel**") which left Pondicherry, Republic of India ("**India**") in June 2014. The plaintiff was one of 157 persons who were on the Indian vessel.
5. The intended destination of the Indian vessel was Christmas Island. Christmas Island is part of Australia. None of the persons on board the Indian vessel had any right to enter Australia.
6. The plaintiff claims that he is a "refugee" within the meaning of Art 1 of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (together "**the Refugees Convention**"), in that he claims to have a well-founded fear of persecution in Sri Lanka.
7. The plaintiff also claims that he was a person in respect of whom Australia owed non-refoulement obligations:
  - (a) under or to the effect of Art 33(1) of the Refugees Convention, Art 7 of the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ("**the ICCPR**") and Art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ("**the CAT**");
  - (b) where there is a real risk of the plaintiff suffering persecution as defined in the Refugees Convention or significant harm of the kind described in Art 7 of the ICCPR and Art 3 of CAT by being

refouled, directly or indirectly, to Sri Lanka prior to his protection claims being determined in accordance with law.

(together “**the non-refoulement obligations**”).

8. India:
- (a) acceded to the ICCPR on 10 April 1979;
  - (b) became a signatory to the CAT on 14 October 1997, but has not deposited an instrument of ratification;
  - (c) is not a party to the Refugees Convention.

#### **The events**

9. The Indian vessel was a “foreign vessel” within the meaning of s 8 of the *Maritime Powers Act 2013* (Cth) (the “**Maritime Powers Act**”).
10. On or about 26 or 27 June 2014, a person on the Indian vessel called the Australian Maritime Safety Authority (**AMSA**) and requested assistance, and AMSA informed other Australian government authorities.
11. On or about 28 June 2014, the Commonwealth despatched a navy vessel and an Australian customs vessel towards the Indian vessel.
12. On 29 June 2014, in Australia's contiguous zone (as defined in s 8 of the *Maritime Powers Act*), the Indian vessel was intercepted by an Australian border protection vessel (the “**Commonwealth ship**”) approximately 16 nautical miles from Christmas Island.
13. On 29 June 2014, following the interception of the Indian vessel by the **Commonwealth ship**:

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- (a) the person in command of the Commonwealth ship (the “**authorising officer**”) 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 within the meaning of s 9 of the Maritime Powers Act;
  - (b) maritime officers (within the meaning of s 104(1) of the Maritime Powers Act) from the Commonwealth ship boarded the Indian vessel;
  - (c) a maritime officer from the Commonwealth ship detained the Indian vessel;
  - (d) a maritime officer from the Commonwealth ship detained all the persons on the Indian vessel;
  - (e) 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; and
  - (f) the plaintiff, and all the other 156 persons from the Indian vessel, were removed from the Indian vessel and placed onto the Commonwealth ship.
14. The maritime officers on navy vessels and Australian customs vessels perform their duties and exercise their powers, including their powers under the Maritime Powers Act, in the context of a chain of command in which they are governed by orders and instructions from superior or senior officers.
15. Upon the detention of the Indian vessel on 29 June 2014, the plaintiff became a person to whom s 72 of the Maritime Powers Act applied.

16. 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 India.
17. As at 1 July 2014, the Australian government had no agreement or arrangement in place with the government of India for the persons from the Indian vessel to be taken to India.
18. The decision to take the plaintiff and other persons from the Indian vessel to India did not rely upon any adverse information personal to the plaintiff or any of the other passengers from the Indian vessel.
19. In taking the plaintiff and other passengers from the Indian vessel to India, the maritime officers on the Australian vessel were implementing a Government policy of general application, the specific application of which to the passengers from the Indian vessel had been confirmed by the National Security Committee of Cabinet. The relevant policy was to the effect that anyone seeking to enter Australia by boat without a visa will be intercepted and removed from Australian waters.
20. Between 1 July 2014 and about 23 July 2014, maritime officers on the Commonwealth ship implemented the decision to take the plaintiff and the other persons from the Indian vessel to India by:
  - (a) between 1 July 2014 and about 10 July 2014, causing the Commonwealth ship to travel towards India, and continuing to detain the plaintiff and the other persons from the Indian vessel on the Commonwealth ship during that period;
  - (b) between about 10 July 2014 and about 22 July 2014, after the Commonwealth ship arrived near India, continuing to detain the plaintiff and the other persons from the Indian vessel on the Commonwealth ship while waiting for it to become practicable to

complete the taking of those persons to India, the duration of that wait being influenced by the absence of the favourable weather conditions required to make it safe to disembark the persons from the Indian vessel, the time required to conduct diplomatic negotiations between Australia and India (including the time required to arrange and undertake meetings at a Ministerial level) and, between about 18 July 2014 and 21 July 2014, the travel and other steps required for the re-provisioning of the Commonwealth ship.

21. On or about 23 July 2014, the First Defendant decided that, for operational and other reasons, it would not be practicable to complete the process of taking the plaintiff and the other persons from the Indian vessel to India within a reasonable period of time, and that those persons should be taken to the Territory of the Cocos (Keeling) Islands.
22. Between 23 July 2014 and 27 July 2014, maritime officers on the Australian vessel implemented the decision referred to in paragraph 20 above by:
  - (a) taking the plaintiff and the other persons from the Indian vessel to the Territory of the Cocos (Keeling) Islands; and
  - (b) continuing to detain the plaintiff and the other persons from the Indian vessel during the voyage to the Territory of the Cocos (Keeling) Islands.
23. On 27 July 2014, the plaintiff and the other persons from the Indian vessel were taken to a place in the migration zone, namely the Territory of the Cocos (Keeling) Islands, at which time they were detained under s 189(3) of the Migration Act by an officer or officers as defined under s 5 of the Migration Act.

24. While the plaintiff and the other persons from the Indian vessel were on board the Commonwealth ship between 29 June 2014 and 27 July 2014:
- (a) after leaving Australia's contiguous zone, the Commonwealth ship was located at all times outside that zone until it returned to that zone on 27 July 2014;
  - (b) there were 35 maritime officers and 21 contracted crew on the Commonwealth ship;
  - (c) there were 157 persons from the Indian vessel on the Commonwealth ship;
  - (d) none of the maritime officers or crew on the Australian vessel spoke Tamil, and they could communicate with the plaintiff and the other persons from the Indian vessel only through three of the persons from the Indian vessel who spoke both English and Tamil;
  - (e) there was a significant risk that, if the persons from the Indian vessel were informed that they were being taken to India, some of those persons would take steps to prevent their effort to reach Australia from being thwarted, including by threatening or engaging in self-harm, refusing to comply with lawful directions from the crew or other actions that may have jeopardised the safety of the Australian vessel, one or more maritime officers, and/or one or more passengers from the Indian vessel;
  - (f) none of the persons from the Indian vessel engaged or threatened to engage in self-harm, refused to comply with lawful directions from the crew, or engaged in other actions that

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jeopardised the safety of the Australian vessel, any maritime officers or any passengers from the Indian vessel;

- (g) the maritime officers on the Australian vessel were aware of the policy referred to in paragraph 19 above;
- (h) the plaintiff was asked questions concerning his personal and biographical details, but was not:
  - (i) asked why he left Sri Lanka;
  - (ii) asked why he left India;
  - (iii) asked whether he claims to be a person in respect of whom Australia owes any of the non-refoulement obligations;
  - (iv) asked where he wants to go;
  - (v) informed of any matter concerning his detention or movement;
  - (vi) provided with any opportunity to be heard on any matter concerning his detention or movement;
- (i) the plaintiff (together with a significant number of other persons from the Indian vessel) was permitted to speak to his lawyers by telephone, with the aid of a telephone interpreter. The plaintiff's interviews with his lawyers occurred:
  - (i) on 12 July 2014, for a period of 57 minutes;
  - (ii) on 22 July 2014, for a period of 46 minutes;
  - (iii) on 25 July 2014, for a period of 45 minutes.



25. If, following the detention of the Indian vessel on 29 June 2014, the plaintiff had been taken to a place in the migration zone, he would have been detained on arrival pursuant to s 189 of the Migration Act, and would have been subject to the operation of the regional processing provisions in Part 2, Division 8, Subdivision B of the Act.

### Questions

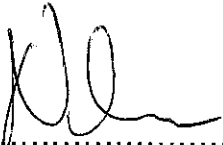
The following questions are stated for the opinion of the Full Court:


- (1) Did s 72(4) of the Maritime Powers Act authorise a maritime officer to detain the plaintiff for the purpose of taking him, or causing him to be taken, to a place outside Australia, being India:
  - (a) whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations;
  - (b) in implementation of a decision by the Australian Government that the plaintiff (and others on the Indian vessel) should be taken to India without independent consideration by the maritime officer of whether that should be so; and
  - (c) whether or not, prior to the commencement of the taking of the plaintiff to India, an agreement or arrangement existed between Australia and India concerning the reception of the plaintiff in India?
- (2) Did s 72(4) of the Maritime Powers Act authorise a maritime officer to:
  - (a) take the steps set out in paragraph 20 in implementing the decision to take the plaintiff to India;

- (b) detain the plaintiff for the purposes of taking the plaintiff to India?
- (3) Did the non-statutory executive power of the Commonwealth authorise an officer of the Commonwealth to:
  - (a) take the steps set out in paragraph 20 for the purpose of preventing the plaintiff from entering Australia;
  - (b) detain the plaintiff for the purposes of taking the plaintiff to India?
- (4) Was the power under s 72(4) of the Maritime Powers Act to take the plaintiff to a place outside Australia, being India, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?
- (5) Was any non-statutory executive power of the Commonwealth to take the plaintiff to a place outside Australia, being India, for the purpose of preventing the plaintiff from entering Australia, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?
- (6) Was the detention of the plaintiff unlawful at any, and if so what period, from 1 July 2014 to 27 July 2014 and if so are they entitled to claim damages in respect of that detention?
- (7) Who should pay the costs of this special case?

- (8) What if any order should be made to dispose of the proceeding or for the conduct of the balance (if any) of the proceeding?

Dated: 21 August 2014

  
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Solicitor for the Plaintiff

  
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Andras Markus  
A Solicitor employed by  
Australian Government Solicitor  
Solicitor for the Defendants