

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 26/02/2020 4:15:15 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: VID1392/2019
File Title: DBE17 (BY HIS LITIGATION GUARDIAN MARIE THERESA ARTHUR) v COMMONWEALTH OF AUSTRALIA
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 26/02/2020 4:46:03 PM AEDT

Registrar

Important Information

As required by the Court's Rules, 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 and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 17
Rule 8.05(1)(a)

Amended statement of claim

No. VID 1392 of 2019

Federal Court of Australia
District Registry: Victoria
Division: General

DBE17 (by his Litigation Guardian Marie Theresa Arthur)

Applicant

The Commonwealth of Australia

Respondent

The Applicant

1. The Applicant (**DBE17**) is a minor and sues by his litigation guardian Marie Theresa Arthur.

The Group Proceeding and the Group Members

2. DBE17 brings this proceeding as a group proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on behalf of himself and every other person who:
 - a. between 27 August 2011 and 25 February 2020 inclusive (**the Relevant Period**) was in detention for more than two working days in any part or parts of Australia purportedly pursuant to s 189 of the *Migration Act 1958* (Cth) (**Migration Act**);
 - b. was not detained because that person held a visa under the *Migration Act* that was cancelled or purportedly cancelled under the *Migration Act*;
 - c. did not, at any time after arriving in Australia, return voluntarily to their country of origin or former habitual residence;
 - d. was not at any time since 27 August 2011 removed from Australia to that person's country of origin or former habitual residence without later re-entering Australia;

Filed on behalf of (name & role of party)	DBE17 by his Litigation Guardian Marie Theresa Arthur, Applicant		
Prepared by (name of person/lawyer)	Nicole Lees		
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- e. was not detained after being a lawful non-citizen (as defined in s 13 of the *Migration Act*) who remained outside detention without a valid visa, unless that person was, at any later time, granted a visa described in s 35A of the *Migration Act*; and
- f. has not, at any time, received an adverse security assessment under the *Australian Security Intelligence Organisation Act 1979* (Cth),

(collectively, **Group Members**).

- 3. There were more than seven Group Members as at the commencement of this proceeding.

Subgroups

- 4. Further to the matters in paragraph 2, DBE17 brings this proceeding on behalf of himself and all those Group Members who during all or part of the Relevant Period that each was in Australia were minors, being persons who had not reached the age of 18 years (**Minor Group Members**).

Particulars

- (i) At common law, a person is a minor until they attain the age of 18 years.
 - (ii) Under s 5 of the *Migration Act*, a person is a "minor" if they are less than 18 years old.
 - (iii) DBE17 was born on 19 September 2013, and therefore was a Minor Group Member from 19 September 2013 until the end of the Relevant Period.
- 5. Further to the matters in paragraphs 2 and 4, DBE17 brings this proceeding on behalf of himself and all those Group Members who arrived in Australia after 12 August 2012 and, if that person arrived in Australia:
 - a. before 1 June 2013, met the definition of 'offshore entry person' under the *Migration Act*; and
 - b. on or after 1 June 2013, met the definition of 'unauthorised maritime arrival' under the *Migration Act*.

(**Designated Regional Processing Cohort Group Members**).

Particulars

Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013 (Cth).

6. Further to the matters in paragraphs 2, 4 and 5, DBE17 brings this proceeding on behalf of himself and all those Group Members who were released from detention because each received a visa under the *Migration Act* (**Visa Group Members**).

The Respondent

7. The Respondent (**Commonwealth**) is capable of being sued by reason of ss 56 and/or 64 of the *Judiciary Act 1903* (Cth).
8. During the Relevant Period, the Commonwealth department responsible for the administration of the *Migration Act* (**the Department**) was:
 - a. between 17 August 2011 and 17 September 2013, known as the Department of Immigration and Citizenship;
 - b. between 18 September 2013 and 19 December 2017, known as the Department of Immigration and Border Protection; and
 - c. from 20 December 2017, known as the Department of Home Affairs.
9. The Commonwealth is vicariously liable for the acts and omissions of its servants and agents, including officers and employees of the Department.

The Detention of DBE17 and Family Members

10. On or about 26 July 2013, DBE17's father (**F**) and mother (**M**) arrived in Australia together with DBE17's sister (**AS**), at which time M was pregnant with DBE17.
11. On 19 September 2013, DBE17 was born in the Royal Darwin Hospital.
12. On 23 September 2013, DBE17 and M were transferred to Darwin Airport Lodge.
13. On or about 18 October 2013, DBE17, F, M and AS were transferred from Darwin Airport Lodge to Christmas Island.
14. Between 18 October 2013 and about 19 August 2014, DBE17, F, M and AS remained in detention on Christmas Island.

15. Sometime between 19 and 23 August 2014, DBE17, F, M and AS were transferred from Christmas Island to Bladin Alternative Place of Detention near Darwin and were detained at Darwin Airport Lodge until 15 January 2015.
16. On 15 January 2015, DBE17, F, M and AS were released from detention following the grant of a temporary visa to or in the name of each of them.
17. In the premises, DBE17 was in detention at all times between 19 September 2013 and about 15 January 2015 (the **DBE17 Detention**).

Detention

18. The DBE17 Detention and the detention of Group Members was done by the Commonwealth.

Visa Group Member False Imprisonment

19. The only purpose for the DBE17 Detention and the detention of each Visa Group Member was to:
 - a. receive, investigate and determine an application for a visa permitting that person to enter and remain in Australia; or
 - b. determine whether to permit a valid application for a visa from that person,(collectively, **the visa purposes**).
20. The DBE17 Detention and the detention of each Visa Group Member was only lawful for the period of time for which one of the visa purposes was being pursued and carried into effect as soon as was reasonably practicable.

Particulars

Sections 36, 37, 46A, 189, 195, 195A, 196, 198 and 198AD of the *Migration Act*, and noting especially any visa given under ss 36 and 37, including the subclass 070 Bridging (Removal Pending) visa.

21. At all relevant times, it was reasonably practicable to pursue and carry into effect each of the visa purposes within:
 - a. 48 hours;
 - b. alternatively, 2 working days;

- c. alternatively, 4 working days;
- d. alternatively, 7 working days;
- e. alternatively, 14 days;
- f. alternatively, 28 days;
- g. alternatively, 90 days;
- h. alternatively, 6 months;

of the commencement of detention (collectively, **the visa process period**).

22. By reason of the matters in paragraphs 19 to 21, the detention of DBE17 and each Visa Group Member for a visa purpose was unlawful outside the duration of the visa process period process other than for any period:
- a. when the relevant person was the subject of a residence determination pursuant to s 197AB of the *Migration Act*; or
 - b. only if the Visa Group Member was not a person who was previously the subject of a decision against the criteria in s 36 of the *Migration Act* after the commencement of s 36(1C) of the *Migration Act*, starting when that Visa Group Member was referred to an officer for the purpose of making a decision under s 501 of the *Migration Act* and ending when any of:
 - i. a finding was made that the relevant Visa Group Member:
 - 1. passes the character test under s 501 of the *Migration Act*; or
 - 2. should be granted a visa notwithstanding that the group member fails the character test under s 501 of the *Migration Act*; or
 - ii. a lawful decision to refuse the relevant group member a visa under s 501 of the *Migration Act* was made.

Particulars

- (a) Insofar as DBE17 was ever detained for a visa purpose, such purpose was initiated on 12 January 2015, following which DBE17 was granted a Bridging E (subclass 050) visa and a Temporary Safe Haven (subclass 449) visa, and was released from detention as a result, on 15 January 2015.

- (b) There was no lawful detention of DBE17 outside these dates.

Designated Regional Processing False Imprisonment

23. In respect of:
- a. DBE17 and each Designated Regional Processing Cohort Group Member who was also a Visa Group Member, if, in the alternative to the matters in paragraphs 19 to 22, there was another purpose for their detention, then that other purpose of their detention was; or
 - b. each Designated Regional Processing Cohort Group Member who was not also a Visa Group Member, the only purpose of their detention was,

removing each of them from Australia to a regional processing country pursuant to Division 8, Subdivision B of the *Migration Act*, being Papua New Guinea and Nauru (the **removal purpose**).

Particulars

- (a) Instrument of designation of the Republic of Nauru as a regional processing country under subsection 198AB(1) of the *Migration Act*, dated 10 September 2012.
 - (b) Instrument of designation of the Independent State of Papua New Guinea as a regional processing country under subsection 198AB(1) of the *Migration Act*, dated 9 October 2012.
 - (c) Letter from the Department to Maurice Blackburn dated 16 October 2014 concerning DBE17.
24. The detention for the removal purpose was only lawful for so long as the removal purpose was:
- a. pursued and carried into effect by the Commonwealth as soon as reasonably practicable; and/or
 - b. capable of fulfilment.

Particulars

Sections 189, 196 and 198AD of the *Migration Act*.

25. At all relevant times after 12 August 2012, the removal purpose was not capable of fulfilment and/or was not reasonably practicable to pursue and carry into effect because:

- a. taking DBE17 and any Designated Regional Processing Cohort Group Members to a regional processing country would amount to *refoulement* by reason, among other things, of:
- i. being required by law on arrival in that country to be detained in a regional processing centre indefinitely;
 - ii. the threats, harassment and other mistreatment made against those removed there as members of the particular social group of people seeking asylum who had been transferred from Australia, such mistreatment including:
 1. rape;
 2. sexual abuse;
 3. violent physical attacks;
 4. verbal abuse; and
 5. threats of any of the above; and/or
 - iii. weak and/or absent state institutions, including at times police and/or any judiciary;
 - iv. the absence of any, or any appropriate, accommodation, including by reason of:
 1. being accommodated in a tent or marquee without air-conditioning that was exposed to direct, equatorial sunlight approximately 12 hours each day and tropical rain;
 2. having shared ablution facilities that were not always private;
 3. being required by law to reside in places where there was no, or only limited, effective shelter from the equatorial sun and tropical rain; and/or

in circumstances where both regional processing countries permitted people taken to each country from Australia to reside only on a small, remote island with generally poor infrastructure;

Particulars

Sections 197C, 198(11) and 198AD of the *Migration Act*.

- b. DBE17 and all Designated Regional Processing Cohort Group Members would be unlawfully detained on arrival at either regional processing country;

Particulars

- i. Section 5 of the Constitution of the Republic of Nauru and s 42 of the Constitution of Papua New Guinea.
- ii. The relevant legal arrangements and provisions are set out in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 and *Namah v Pato* [2016] PGSC 13 respectively.
- c. in respect of DBE17 and his family members, and each Designated Regional Processing Cohort Group Member who was also a Minor Group Member and his or her family members, effecting the removal purpose would be contrary to law in that it would result in the continued detention beyond the control of the Commonwealth such that DBE17 or the Minor Group Member would not be detained only as a measure of last resort;

Particulars

Section 4AA of the *Migration Act*; section 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth); Regional resettlement arrangement between Australia and Papua New Guinea, signed in Brisbane on 19 July 2013; Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues signed on 3 August 2013.

- d. in respect of DBE17 and his family members, and each Designated Regional Processing Cohort Group Member who was or had a family member who was:
- i. a child;
- ii. a pregnant woman of over 30 weeks' gestation; or
- iii. carrying a blood borne virus;

neither regional processing country had adequate facilities to accommodate that family, and/or travel to that country was not reasonably practicable during the period that the family had a member or members meeting the description of subparagraphs i, ii or iii.

Particulars

In the letter from the Department to Maurice Blackburn dated 16 October 2014, the Department states that "due to the particular circumstances" of DBE17 and his family "it is currently not reasonably practicable to take them" to either regional processing country.

26. Further and in the alternative to the matters in paragraph 25, the removal purpose was never pursued and carried into effect by the Commonwealth as soon as reasonably practicable.
27. By reason of the matters referred to in paragraphs 25 and/or 26, the detention of DBE17 and each Designated Regional Processing Cohort Group Member for the removal purpose was unlawful.

Unlawfulness

28. DBE17 and the Group Members were detained for the visa purposes and/or the removal purpose, and for no other purpose.
29. By reason of the matters in paragraphs 19 to 22 and 28, further or alternatively 23 to 28, DBE17 and the Group Members were unlawfully detained.

Particulars

- (a) DBE17 was first detained on 19 September 2013 purportedly pursuant to s 189 of the *Migration Act*.
- (b) He was granted a Bridging E (subclass 050) visa and a Temporary Safe Haven (subclass 449) visa, and was released from detention as a result, on 15 January 2015, which process was initiated on 12 January 2015.
- (c) DBE17 was unlawfully detained for a total of 480 days, being all of the days from 19 September 2013 to 12 January 2015, and which were days:
 1. during which he was never detained for a visa purpose that was being pursued and carried into effect as soon as reasonably practicable; and
 2. during which he was never detained for the removal purpose that was capable of fulfilment or reasonably practicable to carry out, or ever pursued and carried into effect as soon as reasonably practicable; and
 3. during which there was no other purpose for his detention that was lawful.

- (d) Particulars in respect of the Group Members will be provided after the trial of DBE17's claim.

30. By reason of the unlawful imprisonment of DBE17 and the Group Members, each has suffered loss and damage.

Particulars

- (a) The loss and damage is the deprivation of liberty brought about by the unlawful imprisonment. DBE17 was unlawfully deprived of his liberty for 480 days.
- (b) Particulars in respect of the Group Members will be provided after the trial of DBE17's claim.

Date: 26 February 2020



Signed by Nicole Lees
Lawyer for the Applicant

This pleading was prepared by Bret Walker of Senior Counsel and Bernard Quinn of Queen's Counsel, and Matthew Albert, Min Guo and Sarah Zeleznikow of counsel.

Certificate of lawyer

I Nicole Lees certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 26 February 2020



Signed by Nicole Lees
Lawyer for the Applicant