

NOTICE OF FILING

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Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
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



Dated: 18/03/2020 4:23:33 PM AEDT

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

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.

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Form 33
Rule 16.32

Defence to 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

To the applicant's amended statement of claim dated 26 February 2020, the Commonwealth says as follows:

NB: Unless otherwise stated, terms defined in the statement of claim have the same meanings when used in this defence.

1. It admits paragraph 1.
2. To paragraph 2:
 - (a) it says that sub-paragraph 2(a) is embarrassing insofar as no pleaded claim is brought in respect of Group Members who:
 - (i) were in detention between 27 August 2011 and 12 August 2012 (inclusive); and
 - (ii) are not Visa Group Members; and
 - (b) otherwise, it does not plead to the allegations in paragraph 2 as no allegation is made against it.
3. It admits paragraph 3.
4. It does not plead to paragraph 4 as no allegation is made against it.

Filed on behalf of the respondent
Prepared by: Dejan Lukic
AGS Lawyer within the meaning of s 551 of the *Judiciary Act 1903* (Cth)

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5. To paragraph 5:
 - (a) it refers to and repeats sub-paragraph 2(a) above; and
 - (b) otherwise, it does not plead to paragraph 5 as no allegation is made against it.
6. To paragraph 6:
 - (a) it refers to and repeats sub-paragraph 2(a) above; and
 - (b) otherwise, it does not plead to paragraph 6 as no allegation is made against it.
7. It admits paragraph 7.
8. It admits paragraph 8.
9. To paragraph 9:
 - (a) it admits that it is vicariously liable for the acts and omissions of its servants and agents, including officers and employees of the Department of Immigration and Border Protection, when those acts or omissions are undertaken in the course of their duties for and on behalf of the Commonwealth; and
 - (b) otherwise, it denies the allegation in paragraph 9.
10. It admits paragraph 10.
11. To paragraph 11:
 - (a) it refers further to paragraph 17 below; and
 - (b) otherwise, it admits the allegation in paragraph 11.
12. It refers to sub-paragraphs 17(c)-(e) below and otherwise admits paragraph 12.
13. It refers to sub-paragraphs 17(c)-(d) below and otherwise admits paragraph 13.
14. It refers to sub-paragraphs 17(c)-(d) below and otherwise admits paragraph 14.
15. To paragraph 15:
 - (a) it says that DBE17, F, M, and A remained in detention on Christmas Island until 20 August 2014;

- (b) it says that DBE17, F, M, and A were transferred from Christmas Island to Perth Immigration and Residential Housing (**PIRH**) on 20 August 2014;
 - (c) it says that DBE17, F, M, and A were subsequently transferred from PIRH to Wickham Point Alternative Place of Detention (**WPADP**) on 21 August 2014;
 - (d) it says that DBE17, F, M, and A were then transferred from WPADP to Bladin Alternative Place of Detention (**BAPD**) on 23 August 2014;
 - (e) refers to sub-paragraphs 17(c)-(d) below; and
 - (f) otherwise, it admits the allegation in paragraph 15.
16. To paragraph 16:
- (a) it admits that DBE17, F, M, and A were released from BAPD into the community on 15 January 2015; and
 - (b) it refers to sub-paragraphs 17(c)-(d) below.
17. To paragraph 17:
- (a) it says, from his birth, DBE17 has been an 'unauthorised maritime arrival' within the meaning of the Migration Act;
 - (b) it says, from his birth until 15 January 2015, DBE17 was an 'unlawful non-citizen' within the meaning of the Migration Act;
 - (c) it says, by reason of sub-paragraph 17(b) above, DBE17 was required to be detained from his birth under the Migration Act until the grant of the visa referred to in sub-paragraph 17(m) below;
 - (d) it says, DBE17 was detained under s 189 of the Migration Act on 11 October 2013;
 - (e) it says, prior to 11 October 2013, DBE17 remained in the custody of M and F, each of whom were 'unlawful non-citizens' and 'unauthorised maritime arrivals', and each of whom were detained under s 189 of the Migration Act;
 - (f) it says further that, by reason of sub-paragraph 17(a) above, upon being detained, DBE17 was, under s 198AD(2) of the Migration Act, liable to be taken

from Australia to a 'regional processing country' as soon as reasonably practicable;

- (g) it says further that at all times between 19 September 2013 and until 15 January 2015, DBE17 was part of a family group comprising M, F, and DBE17's sister, A;
- (h) it says further that at all times between 11 October 2013 and until 15 January 2015 DBE17 was detained, together with the other members of his family, at various locations within Australia;
- (i) it says further that at no time between 11 October 2013 and 15 January 2015 did it become reasonably practicable to remove DBE17 to a 'regional processing country':
 - (i) in that period the available regional processing countries were Papua New Guinea and Nauru;
 - (ii) in the period 11 October 2013 and 15 January 2015, DBE17 could not be removed to Papua New Guinea, as it was available only for the accommodation of single adult males;
 - (iii) at all times in the period 11 October 2013 and 15 January 2015, DBE17 was a newborn and then infant dependent upon his family and mother, in particular, and could not reasonably practicably be removed to Nauru or any other available 'regional processing country' other than together with the other members of his family group, particularly his mother;
 - (iv) between October 2013 and 11 April 2014, the Government of Nauru would not accept the transfer of minors under the age of four; and
 - (v) further, in the period between 19 September 2013 and 15 January 2015, the removal to a regional processing country of the family group comprising DBE17, F, M and A was not reasonably practicable by reason of the need for medical and/or dental and/or psychological treatment in Australia for one or more members of the family group;
- (j) it says that on 14 April 2014, Maurice Blackburn Lawyers sought an undertaking that DBE17 and his family members would not be removed from Australia until completion of the '*B9*' proceeding;

- (k) it says further that an undertaking in the form contemplated by sub-paragraph 17(j) above was given by the Department on 16 April 2014 and was renewed (from time to time) until 30 January 2015;
 - (l) it says that in such circumstances it was not reasonably practicable to remove DBE17 and his family group to a 'regional processing country' at any time between 16 April 2014 and 15 January 2015 because to do so would have been in breach of the undertakings sought by DBE17 and his family and given by the Department and/or Minister from time to time;
 - (m) it says that on 15 January 2015 DBE17 and his family were released from immigration detention as the holders of visas granted on that date a consequence of Ministerial intervention pursuant to s 195A of the Migration Act;
 - (n) in the premises, DBE17 was not unlawfully detained under the Migration Act during the period 19 September 2013 and 15 January 2015; and
 - (o) it otherwise it admits the allegation in paragraph 17.
18. To paragraph 18:
- (a) insofar as the paragraph refers to the detention of DBE17, it says that DBE17 was detained by officers within the meaning of s 5 of the Migration Act acting pursuant to s 189 of the Migration Act;
 - (b) insofar as the paragraph relates to Group Members, to the extent that any Group Member was detained in immigration detention within the meaning s 5 of the Migration Act, they were detained by officers within the meaning of s 5 of the Migration Act or persons directed to accompany and restrain that Group Member acting pursuant to s 189 of the Migration Act; and
 - (c) otherwise denies the allegations in the paragraph.
19. To paragraph 19:
- (a) it says that paragraph 19 is vague, ambiguous and embarrassing, and liable to be struck out
 - (b) it denies each allegation in sub-paragraph 19(a) and (b);
 - (c) it refers to and repeats paragraph 17 above;

- (d) it says further that the detention of unlawful non-citizens under s 189 of the Migration Act is authorised and required, and in that sense “lawful” until:
 - (i) a detaining officer no longer holds the relevant knowledge or reasonable suspicion that the person is an unlawful non-citizen; or
 - (ii) one of the events in s 196(1) of the Migration Act occurs;
 - (e) it says that it is not a requirement for the lawfulness of the detention of a non-citizen that, in addition to compliance with the terms of s 189 of the Migration Act, actions of officers must have attributed to them a purpose pleaded in sub-paragraphs 19(a) or (b), or any other purpose;
 - (f) it says that, in so far as paragraph 19 alleges that detention is only authorised under the Migration Act if it is in fact done for the purposes referred to in sub-paragraphs 19(a) and (b), the paragraph is contrary to the Migration Act and is embarrassing and fails to disclose a reasonable cause of action and is liable to be struck out;
 - (g) it says further that the only purported visa application made by DBE17 in the period 19 September 2013 to 15 January 2015, was made on 11 July 2014 and was incompetent by operation of s 46A of the Migration Act; and
 - (h) it says further that the alleged unlawful detention of any Group Member must depend upon their individual facts and circumstances.
20. To paragraph 20:
- (a) it admits that activities directed to the purposes pleaded in paragraph 19 must be carried out as soon as reasonably practicable;
 - (b) it says that the limits of detention of any particular unlawful non-citizen are enforced by requiring officers to act in accordance with their duties under the Migration Act;
 - (c) it refers to and repeats sub-paragraphs 19(c), (d) and (e) above; and
 - (d) otherwise, it denies each allegation in paragraph 20.
21. To paragraph 21:

- (a) it says the allegation is embarrassing and liable to be struck out because:
 - (i) it is hypothetical;
 - (ii) it is in terms unrelated to the particular circumstances of DBE17 and his family group or any Group Member;
 - (iii) no factual basis is identified for the alternative periods pleaded;
 - (iv) it does not allege any facts or put any identifiable proposition of law; and
 - (v) it is contrary to the proper construction of the Migration Act;
 - (b) under cover of those objections, it refers to and repeats paragraph 20 above; and
 - (c) otherwise, it denies each allegation in sub-paragraph 21(a) through (h).
22. To paragraph 22:
- (a) it says that the allegations in this paragraph are incomprehensible, ambiguous and embarrassing and liable to be struck out; and
 - (b) under cover of those objections, it denies each allegation in sub-paragraphs 22(a) and (b).
23. To paragraph 23:
- (a) it says the allegation is embarrassing and ambiguous and liable to be struck out;
 - (b) it says that the allegation is contrary to the express allegation in paragraph 19 and embarrassing and liable to be struck out for that reason also;
 - (c) under cover of those objections, it says that the detention of unlawful non-citizens under s 189 of the Migration Act is authorised and required, and in that sense “lawful” until:
 - (i) a detaining officer no longer holds the relevant knowledge or reasonable suspicion that the person is an unlawful non-citizen; or

- (ii) one of the events in s 196(1) of the Migration Act occurs;
- (d) it says that it is not a requirement for the lawfulness of the detention of a non-citizen that, in addition to compliance with the terms of ss 189 and 198 of the Migration Act, actions of officers must have attributed to them a purpose pleaded in sub-paragraphs 23(a) or (b), or any other purpose;
- (e) it says insofar as paragraph 23 alleges that detention is only authorised under the Migration Act if it is in fact done for the purposes referred to in sub-paragraphs 23(a) and (b), the paragraph is contrary to the Migration Act and is therefore embarrassing and fails to disclose a reasonable cause of action and is liable to be struck out;
- (f) it says further that it was at all times possible that further regional processing countries may be designated and/or that the Minister could exercise his power under s 198AE of the Migration Act to determine that s 198AD did not apply to a Group Member(s) who were unauthorised maritime arrivals; and
- (g) otherwise, it denies each allegation in sub-paragraphs 23(a) and (b).

24. To paragraph 24:

- (a) it says the allegation is embarrassing and liable to be struck out because it is contrary to the proper construction of the Migration Act;
- (b) under cover of that objection, it admits that activities directed to the purpose referred to in paragraph 24 must be carried out as soon as reasonably practicable;
- (c) it says that the limits of detention of any particular unlawful non-citizen are enforced by requiring officers to act in accordance with their duties under the Migration Act;
- (d) in respect to the lawful detention of DBE17 and his family group, it refers to and repeats the matters pleaded at paragraph 17 above;
- (e) it says further that the alleged unlawful detention of any Group Member must depend upon their individual facts and circumstances;
- (f) it refers to and repeats paragraph 23 above; and

(g) otherwise, it denies each allegation in sub-paragraph 24(a) and (b).

25. To paragraph 25:

(a) it says that the allegation is contrary to the proper construction and operation of the Migration Act and is embarrassing and liable to be struck out;

(b) under cover of that objection, it repeats paragraph 24 above;

(c) it denies each allegation in sub-paragraph 25(a) through (c);

(d) it admits that at all relevant times it was not practicable to remove to Nauru or to Papua New Guinea detainees coming within subparagraphs 25(d)(ii)-(iii) of the Amended Statement of Claim or who were children under the age of 4;

(e) it admits that at all relevant times it was not practicable to remove to Nauru or Papua New Guinea detainees who were part of a family unit containing a detainee who came within subparagraphs 25(d)(ii)-(iii) or was a child under the age of 4; and

(f) it otherwise denies the allegations in paragraph 25.

26. To paragraph 26:

(a) insofar as the paragraph relates to DBE17, it refers to and repeats paragraph 17 above;

(b) insofar as the paragraph relates to Group Members other than DBE17, it says the paragraph is vague and embarrassing and liable to be struck out, because it fails to plead any facts that would be relevant to the individual circumstances of Group Members, which are necessary to any consideration of the reasonable practicability of removal; and

(c) it otherwise denies each allegation in paragraph 26.

27. It denies paragraph 27.

28. To paragraph 28:

(a) it refers to and repeats paragraphs 19 and 23 above; and

(b) it otherwise denies each allegation in paragraph 28.

29. It denies paragraph 29.
30. It denies paragraph 30.
31. In addition to the above:
- (a) the ASOC is also embarrassing because it:
 - (i) fails to plead material facts and any comprehensible case in respect of DBE17;
 - (ii) fails to plead a comprehensible case for the claimed Group Members.
32. Further or alternatively, to the extent that any of the claims of DBE17 or any Group Member are brought out of time, the respondent relies upon any applicable and relevant provisions of State and Territory choice of law legislation and the applicable and relevant provisions of, as the case may be, the *Limitation Act 1969* (NSW), the *Limitation of Actions Act 1958* (Vic), the *Limitation of Actions Act 1974* (Qld), the *Limitation Act 1974* (Tas), the *Limitation of Actions Act 1936* (SA), the *Limitation Act 2005* (WA), the *Limitation Act 1985* (ACT), the *Christmas Island Act 1958* (Cth) and the *Limitation Act* (NT), as applied by ss 79 and 80 of the *Judiciary Act 1903* (Cth).

Date: 18 March 2020.



Signed by Dejan Lukic
An AGS Lawyer within the meaning of s 55I
of the *Judiciary Act 1903* (Cth)
Lawyer for the respondents

This pleading was prepared by Geoffrey Kennett SC, Rebecca Howe and Andrew Yuile,
Counsel for the respondent.

Certificate of lawyer

I Dejan Lukic certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 18 March 2020

A handwritten signature in black ink, appearing to be 'Dejan Lukic', written over a horizontal dotted line.

Signed by Dejan Lukic
An AGS Lawyer within the meaning of s 55I
of the *Judiciary Act 1903* (Cth)
Lawyer for the respondents