

NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged: Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 1/12/2023 9:22:23 AM AEDT
Date Accepted for Filing: 1/12/2023 10:04:04 AM AEDT
File Number: VID1006/2023
File Title: SAVE THE CHILDREN AUSTRALIA v MINISTER FOR HOME AFFAIRS & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing: To Be Advised
Time and date for hearing: To Be Advised
Place: To Be Advised



Sia Lagos

Registrar

Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.

Form 122
Rules 36.01(1)(b); 36.01(1)(c)



Notice of appeal

No. VID403 of 2023

Federal Court of Australia
District Registry: Melbourne
Division: General

On appeal from the Federal Court

Save the Children Australia

Appellant

Minister for Home Affairs and Another (named in Schedule)

Respondents

To the Respondents

The Appellant appeals from the judgment and orders as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing: [Registry will insert time and date. NOTE: This would usually be the date of the next callover]

Place: 305 William St, Melbourne, VIC, 3000

Date: 1 December 2023

Signed by an officer acting with the authority
of the District Registrar

3447-4809-9113v1

Filed on behalf of (name & role of party)	Save the Children Australia, the Appellant		
Prepared by (name of person/lawyer)	Moustafa Kheir		
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[Version 2 form approved 09/05/2013]



The Appellant appeals from the orders and judgment of the Federal Court given on 3 November 2023 at Melbourne.

Grounds of appeal

1. The primary judge erred in finding, incorrectly on the evidence admitted, that the Respondents did not have control over the detention of the relevant women and children (TJ, [12](a), [104], [108]), including by finding:
 - a. there is no agreement or arrangement to repatriate the remaining Australian women and their children (TJ, [57], [106], [108]); and/or
 - b. the Australian government does not “otherwise have control over the detention of the relevant women and children” (TJ, [108]).
2. Alternatively, the primary judge erred in making factual findings that were not open on the evidence, or were plainly unreasonable, namely that the Respondents did not have control over the detention of the relevant women and children (TJ, [12](a), [104], [108]), including by finding:
 - a. there is no agreement or arrangement to repatriate the remaining Australian women and their children (TJ, [57], [106], [108]); and/or
 - b. the Australian government does not “otherwise have control over the detention of the relevant women and children” (TJ, [108]).
3. The primary judge, being satisfied on the balance of probabilities that the Australian government did not have control of the relevant women and children, nevertheless:
 - a. erred at law in finding that, for this reason, the writ should not issue to “test whether the respondent’s contention (of lack of custody or control) is correct” (TJ, [12](a), [108]; see also [103](e)); and/or
 - b. erred in finding, incorrectly on the evidence admitted, that the evidence did not disclose sufficient doubt as to whether the Respondents have control over the detainees (and could therefore produce the relevant women and children to the Court) to issue the writ; and/or
 - c. erred in making factual findings that were not open on the evidence, or were plainly unreasonable, namely that the evidence did not disclose sufficient doubt as to whether the Respondents have control over the detainees (and could therefore produce the relevant women and children to the Court) to issue the writ.



4. The primary judge erred in law by treating originating or previous custody or control as determinative of or central to his Honour's determination of:
 - a. whether the Australian government has control over the detention of the relevant women and children; and/or
 - b. whether, regardless of the finding referred to in ground 4(a), the writ should issue nevertheless (TJ, [107]).
5. The primary judge erred in law in distinguishing the cases relied on by the Appellant on the basis they involved originating custody or control (TJ, [107]).
6. As a result of each or any of these errors, the primary judge erred in finding that the writ of habeas corpus should not issue (TJ, [12](a), [110]) and in dismissing the application (Order 1), in circumstances where:
 - a. issuing the writ was the correct or unique outcome which was required of the primary judge; or
 - b. not issuing the writ was an outcome which was not open, or not reasonably open, to the primary judge.

Orders sought

1. The appeal be allowed.
2. The orders made 3 November 2023 be set aside and in lieu thereof the following orders be made:
 - a. A writ of habeas corpus issue in respect of the **remaining Australian women and children**,¹ alternatively the **STCA Women and Children**.²
3. In the alternative to Order 2, the proceeding be remitted to a single judge of the Federal Court to be determined according to law.
4. The Respondents pay the Applicant's costs of the proceeding at first instance as agreed or taxed.
5. Costs of the appeal.

¹ As referred to in TJ, [2] and [3](b).

² As defined at TJ, [3](a).

**Appellant's address**

The Appellant's address for service is:

Place: Hyde Park Towers, Ground Floor, S.2, 148A Elizabeth Street, Sydney, NSW, 2000

Email: mkheir@birchgrovelegal.com.au

The Appellant's address is 33 Lincoln Square South, Carlton, VIC, 3053 .

Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 1 December 2023

A handwritten signature in blue ink, appearing to read 'R Howell'.

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Signed by Birchgrove Legal
Solicitors for the Appellant

Date: 1 December 2023



Schedule

No. VID403 of 2023

Federal Court of Australia
District Registry: Melbourne
Division: General

Respondents

Second Respondent: Commonwealth of Australia

Date: 1 December 2023