

## Casenote

# KAMASAE v COMMONWEALTH OF AUSTRALIA & ORS [2017] VSC 537

Last updated: 1 June 2018

## Facts

### The Plaintiff

Majid Kamasae, an Iranian man, arrived in Australia in August 2013 and became an 'unauthorised maritime arrival' under s 5AA of the *Migration Act 1958* (Cth) ('the Act'). He was taken into custody in Darwin before being transferred to Manus Island, for 'regional processing', pursuant to s 198AD(2) of the Act. He was detained at the Manus Regional Processing Centre ('MRPC') for approximately 11 months.<sup>1</sup>

Mr Kamasae suffered serious burns to his face, neck and hands at age 15 in Iran. He had undergone over 30 surgical procedures to treat or manage these injuries before arriving in Australia. He experienced severe pain and irritation to his skin, as well as other physical and psychological injuries, during his detention at the MRPC. He was transferred to Melbourne for medical treatment in July 2014.<sup>2</sup>

On 19 December 2014, Mr Kamasae commenced group proceedings against the Commonwealth of Australia and its contracted service providers, G4S Australia, and Transfield Services (Australia) Pty Ltd (now called Broadspectrum Services Pty Ltd). Broadspectrum joined Wilson Protective Services PNG Pty Ltd, a security services subcontractor.<sup>3</sup>

### The Claim

#### Claim in negligence

The plaintiff bought a case against the defendants on his own behalf and on behalf of all person who at any time during the period 21 November 2012 until 19 December 2014 ('the negligence claim period') were:

- detained by or on behalf of the Commonwealth pursuant to the *Migration Act*; and
- as detainees, were taken by officers of, or on behalf of, the Commonwealth from Australia to Papua New Guinea (PNG); and
- were detained at the MRPC; and
- suffered personal injury (including but not limited to psychological or psychiatric injury) as a result of the conduct of the defendants.<sup>4</sup>

## Claim of false imprisonment

On 26 April 2016, the Supreme Court of Papua New Guinea ('PNG') ruled that the transfer to and detention of asylum seekers at the Centre was a breach of their rights to personal liberty guaranteed by the PNG Constitution.<sup>5</sup> Following that decision, Mr Kamasae amended his statement of claim to add a claim to seek damages for false imprisonment on behalf of all persons who at the time during the period 21 November to 12 May 2016 ('the false imprisonment claim period') were confined at the Centre by or on behalf of the defendants.<sup>6</sup>

### **The Class**

There were originally 1,905 people in the class<sup>7</sup> however participating group members reduced to 1,695 by the time the settlement was confirmed.<sup>8</sup> Group members were composed of persons from approximately 18 countries.<sup>9</sup> 19 group members were minors at the time of the proceedings.<sup>10</sup> Some were within Australia and others had returned to their country of origin or another country. Five group members died after the action was commenced and before the settlement was reached.<sup>11</sup>

The Court approved live streaming of the trial, noting that group members were dispersed around the globe.<sup>12</sup> The Court considered the high degree of public interest in making this decision.

### **The Settlement**

Following a process of mediation, the proceeding was settled by the parties in July 2017 for a payment of AUD \$70 million to group members.<sup>13</sup> A separate sum of money (AUD \$20 million) was agreed between the parties for the plaintiff's lawyers' costs including the costs of administering the Settlement Distribution Scheme ('SDS').

The SDS includes the following features:

- (a) an allocation to each participating group member a pro rata share of the \$70 million, represented by that group member's allocation of 'points' divided by the total number of points allocated to all participating group members;
- (b) a group member's 'points' are assessed and allocated for each type of claim – that is, the false imprisonment claim and the negligence claim;
- (c) all group members will be allocated points for the false imprisonment claim, but only those group members whose documented medical and like records evidence a physical and/or psychological injury experienced at the Centre will be entitled to negligence claim points;
- (d) the assessment of negligence claim points will be made by reference to categories of physical and psychological injury, defined by descriptive integers designed by the plaintiff's lawyers, each group member being assigned the highest level of injury by reference to those integers;
- (e) the injury assessment will be conducted 'on the papers' by the plaintiff's solicitors, and will not be made through any interview process or by independent medical examination and report;

- (f) two processes of review are available; one informal through the provision of corrective information; the other by a more formal review request – both reviews are conducted ‘on the papers’; and
- (g) there will be no requirement for any group member to establish that the particular injury condition was actually caused by their detention – the fact that it was recorded as being experienced *during* detention (from the medical records) will suffice for eligibility for points.<sup>14</sup>

In proceedings on the 27 March 2018, it was reported that about \$67 million of the \$70 million had been distributed to all but 73 of the 1,695 claimants. Justice Cameron Macaulay in the Victorian Supreme Court granted the scheme administrators an extension until 13 April, 2018 to finalise distribution of payments to the remaining claimants. His Honour declined to allow 64 persons, who belatedly sought to participate in the settlement scheme, to share in the settlement distribution.<sup>15</sup>

## Links to case materials

- *Kamasae v Commonwealth of Australia & Ors* (Ruling on the settlement distribution) [2018] [VSC 138](#) (27 March 2018)
- *Kamasae v Commonwealth of Australia & Ors* (Approval of settlement) [2017] [VSC 537](#) (6 September 2017)
- *Kamasae v Commonwealth of Australia & Ors* (No 10) (Issues for trial ruling) [2017] [VSC 272](#) (19 May 2017)
- *Kamasae v Commonwealth of Australia & Ors* (No 9) (Live streaming ruling) [2017] [VSC 171](#) (7 April 2017)
- *Kamasae v Commonwealth of Australia & Ors* (No 8) (Class closure ruling) [2017] [VSC 167](#) (5 April 2017)
- *Kamasae v Commonwealth of Australia & Ors* (No 7) (Stage 3 foreign relations documents ruling) [2016] [VSC 770](#) (16 December 2016)
- *Kamasae v Commonwealth of Australia* (No 6) (Foreign relations & ICRC documents ruling) [2016] [VSC 605](#) (7 October 2016)
- *Kamasae v Commonwealth of Australia* (No 5) (Cabinet documents: substantive ruling) [2016] [VSC 595](#) (7 October 2016)
- *Kamasae v Commonwealth of Australia* (No 4) (PII - Sample foreign relations claims) [2016] [VSC 492](#) (19 August 2016)
- *Kamasae v Commonwealth of Australia* (No 2) (LPP Ruling) [2016] [VSC 404](#) (20 July 2016)
- *Majid Karami Kamasae v The Commonwealth of Australia* (No 1) [2015] [VSC 148](#) (22 April 2015)

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## Endnotes

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- <sup>1</sup> [Manus Island Detention Centre class action - Writ filed 19 December 2014](#), Supreme Court of Victoria
- <sup>2</sup> Ibid.
- <sup>3</sup> Ibid.
- <sup>4</sup> *Kamasae v Commonwealth of Australia & Ors* (No 10) (Issues for trial ruling) [2017] [VSC 272](#) (19 May 2017) at [8]
- <sup>5</sup> [Namah v Pato](#)
- <sup>6</sup> *Kamasae v Commonwealth of Australia & Ors* (Approval of settlement) [2017] [VSC 537](#) (6 September 2017) at [12].
- <sup>7</sup> Ibid at [14].
- <sup>8</sup> *Kamasae v Commonwealth of Australia & Ors* (Ruling on the settlement distribution) [2018] [VSC 138](#) (27 March 2018) at [4]
- <sup>9</sup> *Kamasae v Commonwealth of Australia & Ors* (Approval of settlement) [2017] [VSC 537](#) (6 September 2017) at [14].
- <sup>10</sup> Ibid at [14].
- <sup>11</sup> Ibid at [14].
- <sup>12</sup> [Live streaming](#) of the settlement ruling (6 September 2017)
- <sup>13</sup> *Kamasae v Commonwealth of Australia & Ors* (Approval of settlement) [2017] [VSC 537](#) (6 September 2017) at [5]
- <sup>14</sup> Ibid at [36].
- <sup>15</sup> *Kamasae v Commonwealth of Australia & Ors* (Ruling on the settlement distribution) [2018] [VSC 138](#) (27 March 2018)