FAMILY LAW ACT 1975

FAMILY COURT OF AUSTRALIA
AT SYDNEY

FILE NO: ADF 1807 of 2003

BETWEEN **HR & DR**
[Applicants]

AND **MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS**
[Respondent]

Date of Hearing: ***Wednesday 5 August 2003***

Date of Judgment: ***Thursday 14 August 2003***

JUDGMENT OF THE HONOURABLE JUSTICE CHISHOLM

APPEARANCES: Mr B. McQuade of counsel, instructed by Mr M. Boehm [of Denise M. Rieniets & Associates, 1/19 Market Street, Adelaide SA 5000] appeared on behalf of the applicants.

Mr Basten QC, and Mr Kennett of counsel, instructed by Ms E. Reed [of Australian Government Solicitor, DX 105 Adelaide SA.] appeared on behalf of the respondent.

Ms A. Brown, solicitor, [of Family Law Practice Division, Legal Services Commission of S.A. DX 104 Adelaide, SA.] appeared as separate representative for the children.

HR AND DR AND THE MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

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Catchwords:

JURISDICTION OF FAMILY COURT OF AUSTRALIA – children - powers of Family Court to make interim orders in its welfare jurisdiction – migration - children and parents held in immigration detention – application to restrain Minister from retaining family in detention centre and place them in the community - whether making of orders precluded by Migration Act 1958 s 474 – whether Family Court has power to make orders supervising the Minister's detention of parents as well as children

The application was brought by members of a family in immigration detention under the Migration Act 1958. They sought three interim orders against the Respondent Minister.

Order 1 was, in substance, that while the applicants and their three children remained in immigration detention, the Respondent would be restrained from placing or keeping them in the Baxter Detention Centre, or any other detention Centre, or such other place referred to in subparagraphs (b)(i), (ii) and (iii) of the definition of "immigration detention" contained in s. 5 of the Migration Act.

Order 2 was, in substance, that while the applicants and their three children remained in immigration detention, the Respondent be ordered to accommodate them for the purposes of immigration detention at a specified address, or such other place as the Court might order, to be held by an individual, Ms T.H., as an officer or on behalf of an officer within the meaning of paragraph (f) of the definition of "officer" in section 5 of the Migration Act; and that for these purposes T.H. be authorised by the Respondent so to do, and the

Respondent do all things necessary to authorise the premises as a place of detention within the meaning of (b)(v) of the definition of "immigration detention" contained in section 5 of the Migration Act 1958.

Order 3 was, in substance, that while the applicants and their three children remained in immigration detention, the Respondent be ordered to provide them with such medical and other services as the applicants' medical advisers, the Department of Human Services, the Child and Adolescent Mental Health Service, and the Department of Family and Youth Services may from time to time recommend.

The Minister opposed the application. The Child Representative supported it.

Background

The family had come to Australia by boat in December 2000 and made application for asylum. On 5 January 2001 the family was placed in immigration detention at Woomera Immigration and Reception Centre (Woomera IRPC). They continued there until some time after July 2002. At that time the mother and the children were transferred to the Woomera Housing Project ("the Housing Project"). The husband remained in the detention centre and in March 2003 he was transferred to the Baxter Immigration Facility.

The family having arrived in Australia unlawfully, they were, in the words of the Migration Act, "unlawful non-citizens". Having failed to obtain a visa and having failed to have the decision reversed by the Immigration Tribunal, they were, as a matter of law, liable to be removed from Australia "as soon as reasonably practicable". But they remained in Australia, in detention, because they had pending proceedings in the High Court, and it was understood to be the Minister's policy not to remove people in that situation until all the Court proceedings had been finally concluded.

There was extensive evidence about the facilities and services available for the family while in detention under the present arrangements, about the experiences the family has had while in detention, medical and other professional opinion about the health needs of the family, and about the support the family might have available to it if it is placed in the community as the applicants sought. The evidence, although untested, strongly suggested

that the children have had highly damaging experiences in their time in Australia, and the experts had consistently called for them to be released from detention centres.

Held:

1. The provisions of s 474 of the Migration Act, by which the Minister's decision *"is final and conclusive"*; and *"must not be challenged… or called in question in any court"* applied, and prevented the Court from making the orders sought. There was no basis for concluding that there was any "jurisdictional error" or other reason for concluding that the section does not apply.

   Plaintiff S157/2002 v Commonwealth of Australia (2003) 195 ALR 24, and *B and B and Minister for Immigration and Multicultural and Indigenous Affairs* [2003] Fam CA 451, 19/6/03, discussed.

2. The orders sought, by applying to adult members of the family rather than being limited to children, were outside the scope of the Court's powers under s 67ZC or 68B or otherwise under the Family Law Act 1975.

   B and B and Minister for Immigration and Multicultural and Indigenous Affairs [2003] Fam CA 451, 19/6/03, discussed.

3. The Court therefore had no power to make the interim orders sought by the applicants.

4. In addition, the evidence did not support the making of the third order.

5. The Court expressed the hope that the Minister would "give careful and compassionate consideration to the urgent needs of this unfortunate family".

1. INTRODUCTION

1. In these interim proceedings the applicants, who are parents of three children, are being held in immigration detention, as are their children. The family is from Iran. They came here some years ago as asylum seekers. They have however been unsuccessful in obtaining a protection visa, which is the visa that applies to refugees. Their position under the immigration law, expressed in simple terms, is that they are to be "removed" (in ordinary terms, deported) from Australia, and it seems that they will be, unless either they succeed in their High Court proceedings or the Minister changes his mind and decides to grant them a visa. It would be wrong of me to comment on the likelihood of either of these things happening.

2. The orders sought by the applicants were re-drafted a number of times, but the final version is contained in a document handed to the Court on 7 August, which I have placed with the file. The orders sought are as follows (with some minor editing for clarification):

    1. That whilst the applicants and their three children, or any one of them, remain in immigration detention, the Respondent, his servants, agents, employees and contractors be restrained and an injunction is hereby granted restraining them from placing or keeping the Applicants and their three children, or any of them in, in the Baxter Detention Centre, or any other detention Centre, or such other place referred to in subparagraphs (b)(i), (ii) and (iii) of the definition of "immigration detention" contained in s. 5 of the Migration Act 1958.

    2. That whilst the applicants and their three children, or any one of them, remain in immigration detention, the Respondent, his servants, agents, employees and contractors accommodate each of them for the purposes of immigration detention at [specified address] ("the premises") or such other place as this Honourable Court may from time to time order, to be held by T.H. as an officer or on behalf of an officer within the meaning of paragraph (f) of the definition of "officer" in section 5 of the Migration Act; and that for these purposes T.H. be authorised by the Respondent so to do, and the Respondent do all things necessary to authorise the said premises as a place of detention within the meaning of (b)(v) of the definition of "immigration detention" contained in section 5 of the Migration Act 1958.

    3. That whilst the applicants and their three children, or any one of them remain in the immigration detention, the Respondent, his servants, agents, employees and contractors provide them with such medical and other

services as the Applicants' medical advisers, the Department of Human Services, the Child and Adolescent Mental Health Service, and the Department of Family and Youth Services may from time to time recommend.

3. These orders would require the Minister to house the family in a residential address in Adelaide rather than in a detention centre, and would require the Minister to provide such medical services as may be recommended by the applicants' medical advisers and some other entities.

4. The Minister opposed the application. The children's representative supported the applicant's case.

5. In their original Application, filed on 11 July 2003, the applicants sought orders that the family should be released from immigration detention. However they did not press this aspect of the application in these interim proceedings. Thus the applicants do not, in these interim proceedings, seek an order releasing any member of the family from immigration detention.[1]

6. There has not been a final hearing yet. These are interim proceedings, raising the question what should happen between now and the final hearing. No date has yet been set for the final hearing, but it is likely to be some months away, at least.

7. The issues raised by this case are novel and difficult. There is a large amount of evidence about the experiences the family has had in detention, the services that are now available and those that might be available if the Court makes the orders, and the current state of the family. As will be seen, the evidence indicates that they have had terrible experiences in detention, and they now are in a serious state of mental ill health and distress. For many months, indeed for over two years, a number of highly qualified medical experts have been urging that they be released into the community, saying that their mental health is at risk unless this happens. On any view, this is a serious and worrying case.

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[1] I should also note that no submissions were made for the applicants in support of that part of the original application that sought orders requiring the respondent to refer to members of the family by

8. The issues I have to address are not only factual ones. There is a real question whether I have power to make the sort of orders the applicants seek. The Minister's submission in short, is that these questions are for him alone to determine, and the Court has no role.

9. In a recent decision the Full Court of the Family Court held that in some circumstances the Court can make orders relating to the care of children in immigration detention.[2] The Minister has in effect appealed to the High Court against that decision, and the Full Court has considered the issues so important that it has granted a certificate that has the effect that the appeal must be heard by the High Court. I am told that the High Court appeal has been set down for hearing on 30 September 2003, although it is not known, of course, when the decision will be handed down. Until that decision is delivered it is my obligation to apply the law as stated by the Full Court. This was accepted in the submissions on all sides.

10. The present case, however, raises issues that were not determined by the Full Court in the different circumstances of *B and B*. While it is clear that the Full Court determined that the Court has power to make *some* orders relating to the care of children in immigration detention, there are difficult questions about whether it can make the orders sought by the applicants here. For one thing, the orders would involve giving directions about the care of adult family members in detention, and it may be questioned whether the Court's power is limited to requiring the Minister to do things in relation to children, but not adults. There are also issues about the significance of section 474 of the Migration Act, the "privative clause" – a section that is intended to limit the scope of court intervention in immigration decisions.

11. The case proceeded in the orthodox way for interim matters, without cross-examination. No formal objections to any evidence were taken.

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their names rather than by number. I did not understand it to be pressed, at least for the purpose of these interim proceedings.

2 *B and B and Minister for Immigration and Multicultural and Indigenous Affairs* [2003] Fam CA 451, 19/6/03, Nicholson CJ, Ellis and O'Ryan JJ ("*B and B*").

12. For reasons that will appear, I have reached the conclusion that as a matter of law it is not open to me to make the orders sought by the applicants. However in case I am wrong about this I will deal with the factual material, so that if the matter comes before a Full Court and an appeal is upheld, the Full Court will be able, if it thinks appropriate, to make orders.

The factual background

13. The family consists of the parents and their three children. The eldest child, R.H., was born on 4 April 1984 and is now 19 and is therefore an adult. The second child, G.H., was born on 26 June 1998 and is now 15. The youngest child, A.H., was born in September 1998 and is thus nearly five years of age.

14. The family came to Australia by boat in December 2000 and made application for asylum. On 5 January 2001 the family was placed in immigration detention at Woomera Immigration and Reception Centre (Woomera IRPC). They continued there until some time after July 2002. At that time the mother and the children were transferred to the Woomera Housing Project ("the Housing Project"), which had opened in August 2001. The Housing Project is described in some detail below.

15. The husband remained in the detention centre. In March 2003 he was transferred to the Baxter Immigration Facility ("Baxter"), which had opened in early September 2002. Baxter is also described below. (The Woomera IRPC effectively closed in April 2003.) As a result, the husband has been separated from the rest of his family since some time after July 2002, approximately a year.

16. The evidence about the experiences of the family in detention is considered below. It is sufficient to note here that the mother and A.H. were admitted to the Helen Mayo House, part of the Glenside Hospital complex in Adelaide, on 20 February 2003, and were returned to the Housing Project on 7 March 2003.

17. The present situation, therefore, is that the father is detained at Baxter. The mother, also in detention, lives with the three children at the Woomera Residential Housing Project. The arrangements provide for the husband to visit the mother and the children twice a week. The arrangement is that the mother and children are transported to

Baxter on Friday nights, and return on Sundays. In addition, the father is able to visit the family at the Housing Project each Wednesday, during the day. However as will be seen difficulties have arisen in this regard.

18. There was little in the way of specific evidence about the immigration status of the family. However I understand the situation to be as follows. The family having arrived in Australia unlawfully, they are, in the words of the Migration Act, "unlawful non-citizens". Having failed to obtain a visa and having failed to have the decision reversed by the Immigration Tribunal, I believe they are subject to the provisions of section 198(6) of the Act. They fall within that sub-section because they are detainees, they have made a valid application for a visa, and the grant of the visa has been refused and the application "finally determined" (a phrase that is defined to mean that they have been unsuccessful before the Tribunal). As a result, as a matter of law "an officer must remove" them, "as soon as reasonably practicable". Nevertheless they remain in Australia, in detention, because they have proceedings pending in the High Court, and I understand it to be the Minister's policy not to remove people in that situation until all the Court proceedings have been finally concluded.

19. As I have indicated, there have been proceedings before the Tribunal and before the Federal Court, and the Full Court of the Federal Court, in all of which the family was unsuccessful in obtaining a visa. The decision of the Full Court of the Federal Court was delivered in December 2002. On 4 March 2003, the father later filed an application in the High Court for special leave to appeal from the decision of the Full Federal Court. He has filed a Summary of Argument and Notice of Appeal and the respondent's solicitor, Ms Reed, understands that the application for special leave is likely to be heard early in the year 2004.

2. THE EVIDENCE

20. In this section I will review the relevant evidence. I will consider first the evidence about the facilities and services available for the family while it is in detention under the present arrangements; then the evidence about the experiences the family has had while in detention; then the evidence of medical and other professional opinion about

the family; and then the extensive evidence about the support the family might have available to it if it is placed in the community as the applicants seek.

THE FACILITIES AVAILABLE THROUGH THE MINISTER FOR THE FAMILY IN DETENTION

Mr Wallis' evidence

21. Mr Wallis is the departmental manager of the Baxter Immigration Detention Facility. He has held that position since July 2002 and has had previous experience as a business manager of an immigration reception and processing centre. His role at Baxter is to manage and oversee what he refers to as "the delivery of immigration business". He also has the oversight of the same business at the Woomera residential Housing Project, which is about 2 hours drive north of Baxter.

22. Mr Wallis's evidence may be summarised as follows.

Baxter

23. The Baxter facility is about 10 kilometres from the city of Port Augusta. It commenced operating in September 2002. There are a little under 300 persons detained there at present. They comprise 225 adult males, 28 adult females, 26 male children and 15 female children. It has a total capacity of 1217 persons. Mr Wallis says it is "a purpose-built immigration detention facility".

24. The facility is divided into 10 separate self-contained and secure residential compounds. It has common facilities such as the school, the visitors centre, gymnasium, kitchen and interview centre. The entire facility is secured behind the perimeter fence. Mr Wallis says it is designed so that the perimeter fence is not generally visible from the residential compounds.

25. Within each residential compound there are rooms for recreation and cable television, table tennis tables, and pool tables. Each residential compound has a first aid station and officers station which is staffed 24 hours per day. The compound in which the father is detained as "a sewing room, children and adults computer room and laundry". It has external views. Each resident is accommodated in a single room with an ensuite bathroom. All rooms are air-conditioned and heated and have hot and cold running

water. Detainees are allowed to have their own television, VCRs, computers and so on in their own accommodation. They are also permitted to have vegetable gardens within the compound and there is such a garden in the compound in which the father is detained. There is a "large lawned area which has shaded outdoor eating and seating areas, and children's playground".

26. As to communications, Mr Wallis says there are two telephones in each compound which operate with phone cards available for use by detainees. There are two other cordless phones for incoming calls for detainees. There are also post boxes and a "complaints" box. Information about the complaints procedures and the role and procedures of the Human Rights and Equal Opportunity Commission, and the Commonwealth ombudsman, power "prominently displayed" in a number of languages including the language of the father.

27. The common facilities are outside the residential compounds. Bus transport is provided to the detainees to the relevant common facility at allotted times; for example, taking the children to and from school at the beginning and end of the school day.

28. As part of a strategy to reduce the risk of child abuse, single males are not accommodated in the same residential compounds as families with children.

29. As to visitors, there is a Visitors Centre where the detainees are able to take people who visit them from outside the facility. Visits are arranged by appointment and 42 hours of visiting time is provided for each week.

30. Meals are provided for detainees. The central kitchen is staffed predominantly by detainees. There is a rule against cooking in the residential rooms; the rule is "aimed at reducing the risk of fire and at maintaining hygiene". The meals are prepared in a common kitchen and delivered to the residential compound, being served to other residents by the detainees who have been allocated that task. They can be eaten in a number of areas or in the detainees' rooms. Mr Wallis says that meals are served over a period of an hour to an hour and a half "So families are able to choose and have control over when they eat and with whom". Mr Wallis provides further detail to the

effect that the food is nutritious and that appropriate provision is made for the detainees religious and cultural preferences.

31. As to health care, Mr Wallis's evidence is that Baxter has a fully equipped medical centre on-site and is in close proximity to the hospital at Port Augusta. The medical centre employs general nurses and counsellors. A psychologist is on duty Monday to Friday from 8 a.m. to 4:30 p.m., and he or she coordinates the mental health team, which consists of the psychologist and two registered nurses with postgraduate qualifications in mental health nursing. The team prepares and implements counselling programs for detainees requiring their intervention. In addition, general practitioners visit the daily and are on call at any given time. A specialist psychiatrist attends for a day once a month, and other medical specialists visit the centre from time to time. Mr Wallis gives some further details about other health related facilities.

32. As to religion, Mr Wallis says that all the detainees are permitted the free exercise of their faith, and provides some further details.

33. As to recreation the available activities are said to include, among other things a gym, Tai Bo, gardening, sports competitions, and video and bingo nights. There are also school holiday programs and adult education programs.

The Woomera Residential Housing Project

34. The Woomera Residential Housing Project is described as "a secure cluster of eight 3-bedroom houses" which are leased from the Department of Defence (they formerly housed Defence families). The facility, which takes up a residential block in Woomera, has no wire fencing, but is surrounded by "a lower-level garden fence". There are currently 21 residents there, comprising nine women, nine girls and three boys. The common areas of the facility and the perimeter are under video surveillance, but the inside of the houses is not. The facility has a visitors house where the residents are able to meet with "external visitors". Only family members on the visits from Baxter, however, are permitted to enter the compound.

35. Residents do their own cooking and laundry in each of the houses each house having a kitchen and separate bedrooms. The detainees are provided with some money and they

can purchase their own groceries and incidentals during weekly shopping trips to a shopping centre. Each house is occupied by a family unit.

36. In relation to health matters, there is a first aid and nursing station which is staffed during the day and there is a local general practitioner on call. The resident nurse works in conjunction with the mental health team at Baxter. There is a hospital at Woomera. Residents are permitted free exercise of their faith and are able to attend available services in Woomera, where they also have access to recreational facilities. They must, however, be accompanied at all times by guards when they are outside the compound. There is "a program of escorted outings to the town facilities", and a program developed to occupy the children during school holidays with extended excursions in the local areas and impromptu outings at times.

37. As to education, Mr Wallis says that all school-aged and kindergarten age children in the Housing Project attend the local school and receive an education in accordance with the South Australian curriculum. There are also some adult education classes. Mr Wallis says that the guards "regularly escort the residents on walks around the township with their own pet dogs." One of the boys is said to attend football training with the local Australian Rules team on a weekly basis. Some other educational and recreational activities are also described.

38. Mr Wallis gives some details about the educational arrangements for the three children. R.H. is said to no longer attend the school "because she is 18". However, says Mr Wallis, there is a teacher at the Housing Project who provides lessons to her. He also says that they have applied for and had approved a Red Cross teaching package which provides an educational and information package for R.H. to do lessons for Years 11 and 12. He says that the teacher at the Housing Project will provide tutoring. G.H. attends the local school every weekday and, Mr Wallis says, "is doing very well in school". A.H. attends kindergarten at Woomera School every weekday and, Mr Wallis says, interacts well with other school children and plays with other children.

39. Mr Wallis says that both Baxter and the Housing Project were planned, and are organised and operated, "so as to allow family units to continue functioning, and to

provide children with access to schooling and other services to provide for their development and protection".

Mr Monaghan's evidence

40. Mr Monaghan is a nurse employed by ACM management. He has been employed at Baxter as a nurse since October 2002. His affidavit makes use of files and reports relating to the family. In the first part of the affidavit Mr Monaghan sent out information about the medical centre its equipment, and the services it provides. I take this into account but I do not think it is necessary to spell it out for the purpose of this judgement. No criticism was made in the submissions about the adequacy of these provisions.

EXPERIENCES OF THE FAMILY IN DETENTION FACILITIES

The mother

41. The mother's affidavit is short and may be summarised as follows. Firstly, she says that she agrees with the facts stated by the father in his affidavit to the extent that the facts stated are within her knowledge.

42. The mother says in her affidavit of 21 June 2003 that "until recently" three families consisting of seven people lived in the three-bedroom home, and she and her three children occupied one bedroom. However, she says that one family has recently moved from the house and she and her family now occupy two rooms. She says "there is no privacy". She says, in the next sentence, that on the occasions that they are permitted to leave the premises they must be accompanied "by everyone else in the house at that time including guards". It is not possible in these interim proceedings to do more than note that there may be some inconsistencies between this evidence and the evidence led on behalf of the Minister.

43. The mother says:

> *"I find it difficult to properly care for the children when my husband and I are separated for so long. When the family was still together my husband was able to help me in the education of my children as well as in the day-to-day responsibilities of parenting and now he is not. Furthermore my children and I miss him deeply at times when he is not there. We are unable to properly function as a family. I have*

repeatedly asked for alternative housing as there is an empty project opposite but my request for us to shift there have been ignored."

The father

44. The father provided a fairly detailed affidavit which annexes various reports and other documents by apparently independent people. I would summarise his evidence as follows.

45. The father was born in Iran in the 1957. The parents married on 21 June 1982. In Iran, he was a teacher in a secondary school. The father says, without providing details, that he is and "anti-regime Muslim" and that in Iran he suffered discrimination and harassment, and arrest and torture. He describes his arrival in Australia very briefly:

"consequently I fled Iran with the rest of my family and arrived in Australia by boat in December of 2000".

46. In the following paragraphs he gives evidence in general but vivid terms of very serious matters. He writes: -

Whilst in detention at Woomera each of us were exposed to riots, fires, "symbolic dying" (people digging graves and lying in them), suicide attempts, self-harming behaviour, hunger strikes, protests, violence and humiliation. My daughters were subjected to sexual harassment."

47. The father goes on to say that from the start of the immigration detention he and his family have been subjected to being harassed by other detainees "in respect of our dress, our religion and our culture".

48. The father refers to an event on the 3 February 2001 in which, he says, R.H. was "sexually assaulted in our presence by another male detainee". He says that in addition, this person pushed his daughter and made offensive remarks to her and to other members of his family.

49. The father says that in December 2001 A.H. saw ACM officers come in anti-riot clothes, beat people with batons, and saw people toppled by the use of water cannon and lying motionless on the ground. After that, the father says, A.H. started bed-wetting, ate poorly, was clingy, cried at night, stuttered, and was unable to play. The

father says that A.H. expressed fears of "the fire engine" and became afraid of any vehicle noise.

50. The father says that following the initial rejection of the family's claim for asylum, he became "extremely distressed". He says he cut himself on the neck and arms and wanted to die. He says that at that time the ACM officers threatened to beat him with batons. He says they threw him in a car by force, and took him to the Woomera police station where he was held in a solitary police cell for three days and nights. He says that on the first night all his clothes were taken away and he had to sleep naked. After this event, he says, "my daughters told me that they wished I had killed them rather than trying to kill myself".

51. He goes on to describe G.H. crying "day and night" and suffering from nightmares, being unable to wake in the mornings, having no energy, and constantly thinking of suicide. He says that R.H. was unable to sleep at night was unable to wake in the morning, or to eat, and lost weight. The father then refers to various medical assessments, which I will deal with elsewhere in this judgement.

52. The father says, in relation to the early part of the year 2002, that R.H. "engaged in self harming behaviour on more than one occasion by slashing her upper arm and engaged in hunger strikes."

53. The father refers to being removed in about March 2003 from Woomera to the Baxter detention centre, where he remains. The father says that on each weekend his wife and children are able to visit him at Baxter. However, he says, "my two daughters have not attended at Baxter for some time". He indicates, however, that his wife and A.H. arrive at Baxter at 5 p.m. on Friday and stay with him through until 9 a.m. on Sunday. He then accompanies them back to the Housing Project, and remains there with them until about 4 p.m., when he returns to Baxter. Also, he says that on Wednesdays he is taken to the Housing Centre to see his wife and the children, and remains there for about 3 1/2 hours.

Mr Monaghan's affidavit about the treatment received by the family while in detentiion

54. Mr Monaghan's affidavit contains some material on the treatment received by this family.

55. The mother, who is described as having had a history of depression and anxiety, was admitted to Helen Mayo House which is part of the Glenside hospital complex in Adelaide on 20 February 2003, together with A.H.. She returned to the Housing Project on 7 March 2003. During the course of her detention several notifications had been made by ACM and the Department because the mother had been abusing all three of her children. As a result of reports of abuse the Department recommended a short term safety plan being implemented immediately. A written agreement was signed on the recommendation of the Department and a copy is annexed to the affidavit.

56. Mr Monaghan says that since this was done, on 3 June 2003, there have been no reports of abuse. She has had various appointments with the Department, Dr L. and a nurse, and has reported that she is not abusing the children any more. Mr Monaghan says that the approach taken in treating the family is referred to as a "wellness" approach, which means that the family are treated as if they are well. Mr Monaghan says that over the last couple of months this approach has resulted in significant improvement in the well-being of all of the family, including the mother. He gives details of the medication and medical treatment that is provided to the mother. The medication includes an antidepressant as a sedative, and antibiotics and pain killers associated with dental treatment she has had.

57. The oldest child, R.H., is on medication for depression. Mr Monaghan notes that she has a history of self harm, the last time being on 12 April 2003 when she drank some shampoo but, Mr Monaghan says, she has not had a recent history of self harm.

58. G.H. is also on medication for depression. She is said to have last harmed herself in November 2002 when she drank shampoo. Since then there have been no other reports of self-harm. Mr Monaghan notes that A.H. has been vaccinated and has received dental work and is regularly reviewed by Dr L.

59. He says the whole family attend an appointment with their case officer at the mental health service each month and that the South Australia and Family and Youth Service are also regularly involved with the family. He says that all members of the family are seen by a specialist as required and a nurse is available 24 hours a day seven days a week for any emergencies or medical treatment required for the mother and children at the Housing Project.

THE MEDICAL AND OTHER EXPERT EVIDENCE

60. I will now deal with the extensive medical evidence relating to this unfortunate family, taking the reports in chronological order.

THE PSYCHIATRIC REPORT OF 12 FEBRUARY 2002

61. This is a psychiatric report on the family by Dr D. and Dr M, Child and Family Psychiatrists. The authors describe the parents as "progressive Muslims who are out of favour with the regime and were excluded from positions and opportunities for this reason". At the time of the interview, they had been at Woomera for just over a year. All the children "are adversely mentally affected by this experience, hearing and witnessing the December 2001 riots and fires and previous riots at the Woomera IRPC. The children were also "profoundly affected by their parents sense of hopelessness, despair and guilt following the long period of incarceration and an increasingly uncertain future". Asked whether they had any past history of depression in Iran, they said that despite the troubles they had a "sweet life" there and had made a mistake in coming to this country.

62. A.H. and was then aged three. The father told the interviewers that he had seen officers come in anti-riot clothes, beating people with batons and had seen people toppled by the water cannons and lying motionless on the ground. This account corresponds with the father's affidavit. The authors said that during the interview A.H. was very quiet and stayed close to his mother at all times; his play was constrained and he soon lost interest.

63. G.H. was "frequently tearful during the interview". She said that she cried often, day and night, and could not sleep. She also spoke of nightmares that made her fearful of

sleep, and said that she often did not get to sleep until 4 a.m. She " repeatedly dreamed and visualised scenes of her father being covered in blood". She was unable to wake in the mornings, had no energy, and was unable to concentrate and to relax. The authors said that she had "no leisure activities" and did not socialise. They continued:

> *"She is angry and feels isolated that many of their other friends from the camp have been given visas but their family is still in detention. She said that she could not make any new friends: "what is the point, they will just go as well".*

64. The authors reported that no schooling had been available for the last seven months. At that time there had been a "language school", lasting two weeks but the teacher did not know the relevant languages and of the course had been "useless". The authors continue:

> *"There was nothing to do, life had no meaning and she lost hope that anything could change. She constantly thinks of suicide. She is sad and angry that she has lost all her friends. She said 'my brother doesn't know what a flower is like, only dust.' He has never seen a park, and has never eaten fruit."*

65. Later in the report, the authors relate that G.H. drew a crying bird in a cage, with padlocks of the cage door. She said vehemently, "this is not how I feel, this is how I am."

66. R.H. was described as having similar symptoms to her sister but hid her feelings from the rest of the family (G.H. said that she could tell when R.H. was crying at night because the bed would rock). During the interview, R.H. was quiet and smiling a lot of the time but "appeared anxious". She said, among other things, that she had stopped writing her diary because it made her recall the events of her father's suicide attempt, "and other sad things". At one point, R.H. drew lines of razor wire across the page and said, "All I can think about is the fence and us behind it".

67. The authors then summarise the interview with the father, referring to matters described by the father in his affidavit. They quoted him as saying, "eight years of witnessing war and blood in my country are better than one year in this camp". They wrote:

> *Throughout the interview he was depressed with little facial expression and occasional tears. He expressed considerable guilt about bringing his family into*

these circumstances. He showed the scars that resulted from his suicide attempt and was angry, describing unjust treatment he felt the family had received".

68. Moving on to the mother's interview, the authors referred to her having to cope for everyone as well as handling her own worries and sadness:

> *"when the girls were crying separately each night, she brought them altogether so they were not alone. She, like R.H., did not want to worry the others with her problems and only cried in the shower."*

Diagnosis

69. Under the heading "Diagnosis/Assessment", the authors write that all the family have been profoundly affected by over 12 months in immigration detention. The humiliations and restrictions of the detention environment, uncertainty about the future, loss of friends and of hope, exposure to riots and fires and for the children and their father; despair, lack of schooling or other activities to be involved in have contributed to their current distress.

70. The mother and G.H. were "overtly depressed and expressed suicidal ideation". They had symptoms to suggest major depression, including poor concentration, no enjoyment or motivation, guilty and angry preoccupations and sleep and appetite disturbance. Their affect during the interview was sad and despairing. The father's significant suicide attempt had increased the distress and trauma of other family members.

71. The authors thought that R.H. was coping with her despair and distress in a more internalising and avoidant way, but her depression was no less significant. She also had symptoms of post traumatic stress, including repetitive and intrusive thoughts or images of her father's suicide attempt, disturbed sleep and concentration, and emotional numbing. Both girls, the authors wrote, "are profoundly affected by the violence and despair in the adults around them."

72. The authors thought that the mother was less overtly depressed but contributed least to the discussion and was harder to assess. They said that she was "using her energy to attempt to support her husband and children in an intolerable situation".

73. The authors' comments on A.H. require quotation in full:

"A.H. has become regressed and withdrawn since the last lot of riots and fires. His behaviour was withdrawn and cautious and his speech and vocalisations were like those of a younger child. At an age when imaginative play is usually well developed, his family report that he is "unable to play, scared and clingy". During the interview he remained watchful and made only tentative and repetitive movements with his toy car. He has been traumatised by the recent riots and fires in the centre, but is also affected by the mental state of his caregivers. He is a child unable to make sense of his environment except through the reactions of his family. What he sees there is despair and hopelessness. This can have profound developmental implications if prolonged. The physical and emotional environment is not conducive to safe play and development for a three-year old and contributes to his difficulties."

74. In conclusion, the authors write:

Our assessment is that the whole family are suffering varying degrees of post traumatic stress, depression and suicidality, which are directly attributable to their prolonged time in Woomera IRP.

Recommendations

75. The authors' describe their recommendations as "made within the current context of mandatory detention of asylum seekers in Australia." They may be summarised as follows.

76. Clarification of the family's immigration status should "occur as soon as possible to remove uncertainty about their future and clarify their options".

77. While this is occurring, the family should be released from detention to live in the community with culturally appropriate supports. This could occur immediately. The severity of depression, despair and suicidality in the father and both girls "must be considered a psychiatric emergency".

78. If this could not occur immediately then the family should be moved to "a less harsh and isolated centre where they can receive visits and have adequate medical and psychiatric treatment and follow-up". There also needs to be appropriate provision of education and recreation for the older girls and appropriate opportunities for safe play and exploration for A.H..

79. All family members needed adequate ongoing psychiatric assessment and treatment. It was probable that the father and both his daughters would benefit from appropriate,

monitored treatment with antidepressant medication, in the context of ongoing counselling and support.

80. The final paragraphs of the report are as follows (original emphasis):

> ***There is no point in the latter recommendations if the family remained at Woomera IPRC, an environment that is isolating and traumatic for them and where there is inadequate mental health treatment.***
>
> *As the means of hastening the above, the family could be notified to the SA Minister of Community Services as "children at risk" in the hope that South Australian Service is able to act on the referral.*
>
> *That failing progress on the above, that the children and families situation be notified to the offices of Amnesty International.*

THE REPORT OF V.S., MAY 2002

81. On 22 May 2002 Ms V.S., Senior Clinician, provided a confidential report to the Manager at the Woomera IRPC relating to the family. The seven page report mentions that the family were referred to the Child Adolescent Mental Health Services via Dr M and her colleagues and that the referral was "further endorsed" by CO.S., ACM Medical Services Co-ordinator. The report notes that the family was seen on 7, 14 & 21 May 2002. After noting the family background the report says, in a paragraph in bold type:

> ***"All the children are adversely affected by these experiences. They have not only endured the trauma of others but also are profoundly affected by their parent's (sic) sense of hopelessness, despair and guilt. I interviewed each family member and the following were noted and disclosed:"***

82. The report then presents information on each of the family members.

> *"R.H. exhibits symptoms of depression. Her expressions of anxiety, despair and ongoing self-harming behaviour are major concerns. She said that she had attempted to harm herself on more than one occasion. She pointed out to me and showed me her previous attempts of self-harm, which were 10 healed scars to her left upper arm. Risk assessment dated 7/5/02, 14/5/02, 15/05/02 indicated that she is at high-medium risk of continuing self-harm. This is clearly associated with the fact of her detention. The ongoing stress of detention environment, the inability of her parents to contain their own stress to detention and legal indeterminacy of their situation. Furthermore, her expressions of suicide and self-harming behaviour are further exacerbated with the other detainees' (sic) plights of distress and their*

attempts to harm themselves. R.H. disclosed that she participates in symbolic hunger strikes. Parents said they do not encourage nor support R.H. or G.H. to participate in hunger strikes. Parents raised concern that R.H. doe not eat properly and appears to have lost considerable weight since her detention.

Since detention, parents disclose that R.H. has not had the opportunity to attend regular schooling. They indicated that there was a language school for a short time, but this did not continue. R.H. describes her life in detention as being meaningless, without hope and full of despair and constant rejection."

R.H. said she finds it difficult to sleep of night time and lives in constant fear of violent outbreaks of other detainees and riots……"

G.H.

83. The report says that G.H. presents with the same clinical picture as R.H. with significant symptoms of depression, anxiety, suicidality, despair, disturbed sleep, headaches and emotional resistance. A "noted concern" is the development of what the report calls "emotional resistance" manifested in such statements as "I can not appreciate any social outing once I am out of the detention because this feeling is only temporary and not free air for me to breathe". The report goes on to note that G.H. said that she was very sad and angry that other families are being released and given visas; many of her friends have left and she does not understand why her family remains in the detention centre.

A.H.

84. The report notes that A.H. "presents with high risks of developmental harm and trauma-related harm". The report goes on to refer to the parents' reports about A.H. expressing himself in anger and with oppositional defiance and says:

"Despite their attempts to discipline by explaining and role modelling appropriate social interaction towards others A.H. continues on with no positive regard to his parent's advice. The parents are emotionally unavailable and irritable, which might have created a difficulty in managing the normal oppositional behaviour of this child."

85. The report then notes the parents' account of A.H.'s phobic and panic reaction to any truck coming within the compound. The author notes that on observation, A.H.'s verbal interaction with his family was very limited and he tendered to favour non-verbal communication. When she presented him with play activities such as a train set, he played with no aspiration and soon lost interest.

The Parents

86. Both parents are said to present with varying degrees of distress. The father described symptoms of depression and insomnia, saying that he had constantly suicidal thoughts and self harming behaviour and an inability to control his frustration. Both parents expressed concerns that they felt "powerless as parents" in such an environment. They had expressed concern about themselves as a family and feel a great deal of tension among each other.

87. The report goes on to refer to the fact that the family have been attending fortnightly sessions since the involvement of CAMHS. Both children complained of headaches and other symptoms and G.H. required frequent use of Panadol. The father had been commenced on medication to help with his depression, anger and suicidality. The mother was described as becoming mentally and physically exhausted in an attempt to support her husband and children.

88. The report indicates how these things have affected the family's interaction. It states:

> *"In wanting to keep a level of hope for her family, [the mother] did not want to speak openly in front of the children or her husband of her concerns about this intolerable situation. [the mother] is very concerned about her husband's past suicide attempts and is scared to think what might happen next or how much more he can endure."*

"Child protection which place R.H., G.H. and A.H. at risk of further harm".

89. Under this heading, the report continues:

> *"The abovenamed children need protection from all forms of mental and physical violence. Clearly parents who are depressed and disempowered are less able to protect their children. In addition violent events in detention centres are without doubt placing the children at risk of further harm and can be a dangerous environment for children to exist.*
>
> *These children present with ongoing issues of exposure and subjection to adult violence, sexual harassment, riots, hunger strikes, symbolic acts of dying, self-mutilation and attempted suicide by themselves, including their parents and other detainees.*

90. The report goes on to say that both girls have suffered from inadequate education and leisure activities. The report mentions an example where G.H. was ordered to get off her bike by a guard and was said to have felt extremely embarrassed and felt like a

"criminal". At this stage she said that she did not feel comfortable returning to the school program.

91. The report notes that the parents describe A.H. as being "cautious and clingy". He is constantly surrounded by traumatising events to the point where when he hears a disturbance he has learnt to call out "who has killed themselves this time?". The mother says that while there is a play group for A.H. to attend she "does not feel comfortable in attending."

92. In the concluding part "Summary of Assessment and Recommendations", the main points appear to be as follows. Ms S. says that there are a number of medical and psychological aspects affecting this family that "require urgent review". The whole family is described as presenting with "varying degrees of post-traumatic stress, depression and suicidality, which are clearly attributed to their prolonged time in the Woomera Detention Centre and further compounded by the legal indeterminacy…….". G.H. and R.H. were described as being "at ongoing risk of further harm of suicide and at significant risk of long-term mental health problems."

93. Ms S. notes that with the current state of indeterminacy it is difficult for the family to make any therapeutic progress. Nevertheless she recommends that therapeutic contact should be continued "in the hope that it may be useful for forming a therapeutic alliance for successful work in a more supportive environment".

94. In an important statement, Ms S. says that

> *"CAMHS is of the opinion that it is not possible to treat post-traumatic stress, suicidality and depression within a detention centre environment."*

95. The report goes on to say that it is important to advocate for the release of the children with the parents as separation from them would potentially cause further trauma, anxiety and developmental and attachment issues. The higher degree of stress in the family, and the parents suffering from symptoms of depression, anxiety, suicidal ideations are said to place the parents "at risk of further harm and jeopardise their ability to parent". In the concluding paragraph Ms S. writes :

"It is my opinion that to delay action on this matter will only result in further harm to the HR family. I recommend that the whole family be urgently released from the detention centre environment on medical, psychological and compassionate grounds. The family needs to be in a less harsh and isolated centre where they can receive adequate ongoing medical health treatment and follow-up, receive educational, recreation and cultural supports.

THE REPORT OF JULY 2002

96. This is a report by Dr M of 8 pages, based on an interview of 3 July 2002. Dr M reports that the interview with the whole family lasted about 90 minutes and "both the teenage girls and parents appeared exhausted and unwell during the interview. They reported that they had been participating in the hunger strike for the last 10 days and had only taken water during this period."

A.H.

97. The mother describes her concerns about A.H., aged at that time about 3 ½. She says that he does not know how to speak yet, that he is "very nervous for attention" and for the previous nine months since the riots and fires, he had suffered enuresis, whereas he was previously toilet trained. She said that he had observed other detainees cutting themselves and was now "very afraid of blood" and had recently had an anxiety attack and been very distressed after scratching himself. Dr M says that during the interview he was observed initially to be very clingy and unsettled and later to be disruptive and oppositional in his behaviour, walking in and out of the rooms and smacking the chairs the adults were sitting in. In a sentence that may be a telling portrayal of the difficulties the parents face, she writes:

"His parents had difficulty summoning the energy to respond to him and his father rapidly became irritable, then tearful".

98. Dr M's diagnosis is that A.H. has regressed and developed anxiety symptoms and enuresis since exposure to violence in Woomera some months previously and his speech may also be delayed. She says "A.H. is not able to be treated within the detention environment".

The mother

99. In relation to the mother, Dr M refers to her medical problems and the effect of the hunger strike. Her appearance had aged since six months previously and she was more tearful. Dr M says that however, she was very careful to contain expressions of her distress to times when the children were out of the room and said "she continue to try to hide her tears from them". She and her husband expressed anxiety about A.H. saying, "Even if we get out of here he will be damaged long term. We fear he will become a criminal. We have made him like this. All normal future has been removed. We fear for what he will become".

100. Dr M's diagnosis of the mother is that she has symptoms of major depression, persistent insomnia, anhedonia, weepiness and a sense of hopelessness. She too is said to be "not able to be treated within the detention environment."

The father

101. The father appeared "particularly gaunt and exhausted and spoke very little during the interview although he occasionally wept and spoke about the similarities between the times he was arrested and tortured in Iran and "what is happening now in Australia". He also spoke of his constant intrusive fears about his children harming themselves and nightmares and intrusive thoughts about the torture he had experienced in Iran. Dr M refers to his concerns about the children and his medication. She wrote that during the interview he sat with his head in his hands or slumped on the table for most of the time and occasionally wept. He initiated no conversation and appeared exhausted and significantly aged. Dr M's diagnosis was that he had persisting symptoms of major depression and post traumatic stress disorder, despite treatment with appropriate medication and family support therapy for several months. She said that he too is not able to be treated in a detention environment.

R.H.

102. The report of the interview with R.H. follows similar lines and I do not think it necessary to describe all the details. She said that the hunger strike was "a way of calming me down and being able to get rid of the pain". She spoke of intrusive thoughts of witnessing other detainees who had hung themselves or cut themselves or

thrown themselves onto the fence and "all the blood" and spoke of suicide perhaps being a better alternative. She said,

> *"Once I cut my arm with a razor blade. I used to look down on people who did this and now I have gone as low as that".*

103. She reported continuous intrusive thoughts of suicide and self-harm. During the interview she spoke quite freely, frequently wept and her affect was alternatively angry and despairing.

104. Dr M also describes R.H. as having symptoms of major depression and post traumatic stress disorder and notes that her symptoms have persisted despite appropriate treatment with medication and supportive family therapy. She says that R.H. too is not able to be adequately treated in the detention environment.

G.H.

105. Dr M's comments are along similar lines, noting an inability to sleep, frequent intrusive thoughts and images relating to exposure to riots and fires and suicidal and self-harming acts by other detainees. G.H. said that children as young as 8 or 12 were "cutting themselves and writing in blood". She said that she was unable to concentrate, felt no energy, interest or motivation and was frequently tearful. She asked what was the point in her life. Again Dr M described the medication that G.H. was having and reached a similar diagnosis as R.H..

106. The report then speaks of the family's views to their visits to Ms S. in Port Augusta. G.H. said, among other things, "when we go the officers are behind us and people are looking at me. I want to yell at them. I feel so ashamed….."

107. Under the heading "Assessment", Dr M draws together some of the strands of the report, noting that the family's psychological condition had deteriorated since January and that the adolescents in particular currently saw the hunger strike as a way of acting on their suicidal ideation.

108. Nevertheless Dr M wrote:

"This family have considerable strengths. They are close and committed to each other. They are all intelligent and [the father] and [the mother] have attempted to be adequate parents in an intolerable and traumatising environment. Because they are committed parents, their sense of guilt and despair about the current circumstances compounds their own sense of hopelessness."

109. Dr M then has a major heading "Urgent Recommendations". The opening sentence emphasised by bold type, is:

The situation of this family represents a medical and psychiatric emergency. *The illness of both parents and both teenagers and the developmental and behavioural difficulties displayed by A.H., she wrote, "cannot be adequately addressed in the detention environment. This is in part because the detention environment with constant exposure to the despair and self-destructive acts of other residents, is the source of significant trauma to all members of this family".*

110. More specifically, Dr M , having made the point that it was "extremely important" for the family to remain together, wrote:

1. This family should be immediately removed from the detention context.

2. Until this is possible, they should be moved to live in the Woomera Housing Project……

111. Other recommendations dealt with medication and assessment 'until this is possible". Her conclusion was that:

"Urgent steps should be made to remove the family intact from the detention environment to a context where they can receive appropriate level of support and treatment and are no longer exposed to the ongoing trauma that detention in Woomera represents to them."

THE DEVELOPMENTAL TEAM ASSESSMENT REPORT

112. Next, there was a report by a developmental assessment team expressing concerns about a number of aspects about A.H.'s developmental status. It is not necessary to set out the detail.

REPORT OF DR B. AND DR J.

113. The next report is a joint report of Dr B., fellow in Child Psychiatry and Dr J, Head of the Department of Psychological Medicine at the Womens and Childrens Hospital Adelaide. The report, dated 23 October 2002, is addressed to the Manager of the

Woomera IRPC. The letter is written to inform the manager of the outcome of a televideo conference with the family on 16 October 2002 and their recommendations flowing from it.

114. In relation to A.H. the report is that he has continued to display aggressive play and is being very demanding towards his mother. An example of his destructive play was that he was playing with a fire truck and said that his fire truck was "dead" and "wanted to die" later on he attempted to "hang the fire truck from the side of the bed". Even more distressing, at another time he brought a doll to show to his mother and said that the doll wanted to slash herself on the arm. The report goes on to refer in somewhat similar terms to earlier reports of the "extreme degrees of distress" expressed by the two girls. R.H. was still described as having thoughts of deliberate self-harm and suicide. A particular stressing factor that in the current accommodation arrangements three families were living in one house. It included seven people, all from different ethnic backgrounds and different cultures.

115. The father was described as being particularly worried about the future of the children and is blaming himself for their transition into Australia and subsequent traumatisation they have experienced. The situation appears to have led to constraints within the family as the report states:

> *"both girls have felt increasing distance from their mother and the current arrangements is (sic) for them to sleep in a different house every night. They have no hope for the future and they feel that nothing can improve their situation at present".*

116. The authors write:

> *"In summary, as well as his significant cognitive developmental problems, A.H. displays a behaviour that is consistent with a diagnosis of Oppositional Defiance Disorder. This has occurred in the context of severe emotional and psychological trauma. With acquisition of language skills he is able to verbalise them now and hence act on them. G.H. and R.H. are experiencing significant neurovegetative changes in the context of a depressive mood consistent with a diagnosis of Major Depressive Disorder. They are particularly feeling hopeless and helpless about the future and this has resulted in significant reduction in their self esteem."*

117. The authors go on to make various recommendations "with the aim of improving the mental well-being of these children." The recommendations may be summarised as

follows. There should be increased liaison from CAMHS. There should be increased contact between the children and their father, preferably outside the detention centre on a daily basis. There should be greater support for the family which would benefit from individual housing where there is greater privacy. Possible transfer back to the detention centre in Port Augusta was said not to benefit the family and to be a step backwards." To provide greater educational opportunity for the children (sic) in particular the girls, with "may include re-location to Adelaide where they could have access to language centres and schooling in the main stream society."

THE ASSESSMENT REPORT BY DR J. AND B.P.

118. The next report, dated 10 February 2003, is an assessment report of the family prepared by Dr J. and B.P., a senior psychologist at CAMHS. The bulk of the report occurs under a heading "current concerns".

119. In relation to A.H., the concerns include reports in February 2003 from G.H. that the mother "hits A.H. a lot, sometimes very hard". There is further detail about the mother hitting the children and leaving bruises and hitting the child in front of other people which G.H. indicated was very shameful for herself and her siblings. The mother had reported in early January 2003 that "she found it very difficult to control the behaviour of the children without [the father] being present." The girls reported that they did most of the caring for A.H. and that if he needed help he got it from them rather than from the mother. This is supported by the fact that "observations during sessions indicated that A.H. would usually approach his sisters for help or attention, and not his mother." Further details include reports that A.H. "hits people a lot" and does not have any children his own age with whom to interact, and that A.H. "frequently asks where his father is and when is he going to see him again".

120. In relation to the mother, there are reports from the children that "she cries all the time" and does not talk much and has not cooked anything for a long time. During these sessions the mother cried intermittently, made little eye contact and "displayed flat affect and psychomotor retardation". The mother reported stress arising from a conflict between the family and one of the other families with whom they share the house.

121. In relation to the concerns about the girls, G.H. reported that there was so much fighting with another family that "she cannot stand it any more and that she needs a rest". G.H. reported that she is sad most of the time and is having bad dreams and wakes a lot during the night. She also reports that "she gets further distressed when her sister says that she is going to kill herself". R.H. reports similar problems. Both girls "reported that they were also very distressed about not being engaged in any formal education." R.H. reports that "she had not done any schooling for two years and believed that doing some schooling would provide her life with some purpose".

122. Another significant matter is raised under the heading "concerns regarding [the father] and contact visits". The girls reported that it was difficult to visit the father because going to the detention centre brought back "many bad memories" and G.H. said that she got bad headaches after visiting the centre. Despite this they reported that they do not see the father as much as they would like. The father himself appeared sad and tired and indicated that he worried a lot about the future of his family and that he was feeling powerless to do anything to improve the situation for them.

123. After a section summarising these matters, the report concludes with a series of recommendations. The first is that the mother and A.H. be admitted to Helen Mayo House to provide the mother with support and to address her depression and inability to attend to the needs of the children. Next a recommendation was that the family be housed separately from the other families. Next, that the girls should have access to appropriate educational opportunities: "preferably, accessing educational opportunities would involve relocation to Adelaide where they would have access to language centres and other appropriate education facilities or alternatively, access to distance education would be beneficial." The report finally recommends a substantial increase in the contact between the children and the father outside the detention centre, preferably daily contact.

OTHER REPORTS

124. There is a report from Dr H.G. dated 18 November 2002 reporting on an assessment of the mother at the Woomera Hospital on 15 November. He says that she presented as a generally subdued, quiet, pleasant, well mannered 34 year old young woman" and

despite her limited English he and she were able to establish satisfactory rapport. The doctor writes that she presented as "a sad wistful young woman who was clearly and appropriately not happy with her present situation" but was nevertheless coping despite the difficulties. She gave the overall impression that she was doing her best for her family and was troubled by having a 17 year old daughter who was not currently receiving any schooling but who was clearly in need of some schooling and training.

125. There is a one-page report, dated 17 March 2003, about a number of difficulties encountered by the family when the mother and A.H. were in Helen Mayo House. (The reasons for the mother's hospitalisation in Helen Mayo House are stated in the letter of Dr J. of 7 February 2003.) These difficulties involved apparent inconsistencies about who was allowed to attend and a last minute change about whether the family could stay at a particular hotel on one occasion. Remarkably, the letter says that there was an incident where a photo that was taken of A.H. at kindergarten was destroyed by ACM staff and HMH nursing staff.

126. The report says that "understandably this was very disturbing for [the mother]" and made it difficult for the staff to manage on the ward. They say that in their previous experience there had been no such difficulties with photos of detainees, their children and the public.

127. The concluding paragraph is as follows:-

> *"Generally when we are treating someone with a mental illness we attempt to give them consistent, reasonable information and conditions as we find this promotes security and trust. Helen Mayo House staff became distressed and frustrated when confronted by the inconsistencies in regulations presented by ACM and we can expect that for [the mother] with her mental illness they would create an even greater distress and frustration."*

128. Next, there is a "Discharge Summary" relating to the mother's discharge from the Helen Mayo House in March 2003. It indicates that some progress was made: her mood was said to have improved slightly and she seemed to gain some appetite and enjoy A.H.'s progress and increasing activity. Some passages in the discharge summary are important as indicating the relationships between the family members. The report, by a psychiatric registrar, says that discussions revealed that the mother

was deeply concerned for the health and future of the family and felt very guilty for having placed them in what she believes is a hopeless and destructive position. However, there was "never any anger or aggression displayed towards staff". When she was very distressed she did not interact with A.H. but she was never physically or verbally abusive. An improvement in the mother's mood was "mainly attributed" to the fact that the family was briefly re-united in Helen Mayo House: "consistently the family showed genuine concern and care for each other and gave the impression of a very strong resilient group of people who have been placed under extraordinary stress".

DR J.'S EVIDENCE

129. The evidence of Dr J. is of particular importance. He is the Senior Child Psychiatrist and Head of the Department of Psychological Medicine in at the Womens and Childrens Hospital Adelaide. He is well qualified academically and by reason of his experience and has taught and published in the area of general psychiatry and on matters relating to children and adolescents.

130. In his affidavit, dated 31 July 2003, Dr J. says that he has met the family from time to time and has been asked by the relevant authorities in the State to examine and assess their psychological functioning, in particular the two girls. He says he last met the children in Port Augusta on 20 May 2003 and he attaches his report of that date. He writes "I continue to remain concerned about the health of this family and the negative impact detention has on their functioning. In particular, I believe that that their mental health will deteriorate further in the current environment, possibly leading to irreversible psychological damage."

131. It is difficult to overstate the force of Dr J.'s report of 21 May 2003. It consists of a letter written to the Department of Human Services. In his opening paragraph he says "I write to you directly to bring your attention to a situation that I believe is approaching the status of a psychiatric emergency".

132. G.H., interviewed alone, expressed a range of concerns about her mother's violence. G.H. was not sleeping well, had a poor appetite and was having bad dreams. She

denied suicidal intent, but Dr J. thought this "sounded somewhat unconvincing". The child "fears for all her family members". She was worried about her brother and concerned that his aggressive behaviour leads to punishments which are damaging to him for example "she described guards putting him out in the dark when he had been violent". She said that her mother did not really want to return to Helen Mayo house because "she doesn't like being separated from her family". She was also worried about her older sister, who "does not show her distress but cries in bed at night when she thinks everyone else is asleep".

133. However, when interviewed R.H. was "quite forthcoming in saying how miserable she is". She has become anxious and irritable. She said that she had been allowed some schooling but "does not find this helpful". She believes that initially being told that she could not attend school was the turning point and that she has never really recovered from this distress. She spent between a week and two weeks in her bed after being told that she could not attend school, although she has now emerged and participates more in family life and in the limited schooling available to her. She remains miserable and "misses her father but can't face going to spend time in detention to be with him". Dr J. says that her father later confirmed that he would not want his family to be reunited by the rest of the family coming to Baxter because he feels the environment is unsuitable for children.

134. In his final paragraph, Dr J. writes:

> *It has been disturbing to witness the deterioration in G.H. and R.H.'s functioning and well-being. My view is that they are now very close to decompensation. In spite of CAMHS Country putting maximum energy into this family, and FAYS repeatedly responding to our notifications, the family's mental health is going backwards. The situation is now urgent, if not a psychiatric emergency. Both girls are manifesting in emerging suicidal and self-destructive behaviour but more worrying there is a sign of breakdown in their resilience - those positive aspects of their functioning that have helped them to survive the experience until now. Furthermore the mother's condition has apparently seriously deteriorated and the degree of abuse in the family seemed to be escalating.*

135. Under the heading "Recommendations" Dr J. writes that R.H. needs "immediate access to a meaningful educational experience, not just to provide educational opportunities but to restore some meaningfulness and structure to her life". Further, as

a matter of urgency A.H.'s safety must be assured in a way that does not involve further disintegration of the family. The most effective way of ensuring his safety would be to re-unify the family as a whole outside of the detention centre.

In his final paragraph Dr J. writes:

> *I wish to emphasise that these are matters of life and death in importance, given the degree of abuse and the self-destructive intent. It would be irresponsible not to intervene as a matter of urgency.*

MORE RECENT EVIDENCE

136. Although Mr Basten QC did not seek to deny the seriousness of the problems the family faces, he did point to some evidence led by the Minister suggesting that the situation had improved.

137. It is difficult to assess these matters in the absence of more details and more recent evidence. I am concerned, however, that the evidence led by the Minister mainly tends to deal in very general terms with the services provided. It does not much address the extent to which the services have really had an impact on the members of this family.

138. Although I accept that things have been done, no doubt to address the problems of the family, the evidence does not satisfy me that the situation today is other than desperate. Dr J.'s evidence shows, I think, that in May 2003 the situation was still a desperate one: a matter, Dr J. says, of "life and death".

139. Although there was no specific reference to them in the oral submissions, some of the notes attached to the affidavit of N.B. are relevant and require comment.

140. There is a summary of a session with the family dated 30 May 2003. The father reported that things were getting harder and harder every day and that they were worried about being deported. The mother, when interviewed alone, reported that the well-being of each family member is getting worse "because of the bad news". It is not quite clear what this refers to, but I assume it has to do with the mother's perception that she is not likely to succeed in obtaining asylum in Australia. The mother reported that A.H. "is very angry and his aggressive toward other children" and was learning some of the aggressive behaviour from her. She reported that it gives her

pleasure to hit the child and, the notes state, she "indicated that hitting A.H. is not just about her getting her anger out and that it is also about her enjoying it".

141. The mother said that the girls did not want to go and visit the father at Baxter primarily because A.H. fights with another boy in the father's compound, indicating that this boy's father was encouraging the conflict between the boys.

142. The psychologist discussed the negative effects of hitting children. The mother reported that she was aware of these factors but she "just can't help it". The mother also spoke about another child being a bad influence on A.H.. The mother told the psychologist that she "has no one that she can talk to" and that the only time she has to herself is after 9 p.m.. There is then a discussion of ways in which the mother might try to stop hitting the child.

143. The most recent document is a phone call from C.S. at FAYS on 4 June 2003. She reported that the mother had not been successful in restraining herself, and was "slapping him every day" (I take this to refer to A.H.). It reports the setting up of a safety plan, which involves the mother being "under 15 minute observations". The note concludes that C.S. reported that they had discussed with the mother the possibility of A.H. spending more time with the father.

PROPOSED SUPPORTS FOR THE FAMILY IF THEY BECOME RESIDENT IN ADELAIDE

144. The evidence on behalf of the applicants includes evidence by a qualified dentist, and a qualified medical practitioner to the effect that they would be willing to provide free services to the family if the family were accommodated in the Adelaide metropolitan area.

145. On behalf of the applicants, T.H. says she is a member of the group of concerned individuals and that she and other members of this circle have been in close contact with the family during their time in detention. She says that she would be willing to be "the nominated officer" for the family. She says that a three-bedroom home in the Adelaide metropolitan area, owned by Mission South Australia, is available for immediate use by the family and could be used by them "as long as is required". The

Circle of Friends would pay the rent. She gives some further details about how the support of the family would be financed.

146. Ms H. explains that there is a telephone connected for incoming and outgoing and emergency calls and there is a public telephone across the road. She identifies a number of members of the Circle who would be prepared, on a roster basis, to visit the family and take family members to appointments, shopping excursions and social outings. She says that the houses are located on a public bus route which passes by a kindergarten, public secondary school and travels into the metropolitan area.

147. She says that she has made inquiries about educational opportunities for each of the children and sets them out, nominating a school for G.H., a kindergarten for A.H. and proposing that R.H. should attend a TAFE. She says that each of the institutions referred to is "experienced in dealing with people seeking asylum in Australia and are sensitive to their needs". Additional English language and mathematics tuition would be available from members of the Circle.

148. Ms H. gives some further details about support that might be available in relation to medical care and nutrition and food storage needs, and says that the family could attend either of two mosques in the area.

3. LEGAL ISSUES

149. The principal legal issue was whether the Court has power, or jurisdiction,[3] to make the orders sought by the applicants.

150. There are, I think, three relevant matters that were canvassed in argument. The first is whether section 474 of the Act prevents the Court from making the orders sought by the applicants. The second is whether the Court's power extends beyond making orders that deal with children, and includes orders that deal with adults as well (in this case, the parents, and the adult child R.H.). The third comprises a number of other difficulties Mr Basten raised about the making of the orders.

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[3] The submissions do not require the difference between these concepts to be discussed.

IS THE COURT PRECLUDED FROM MAKING THE ORDERS BY SECTION 474 (THE PRIVATIVE SECTION)?

Introduction

151. Mr Basten referred to the scheme of the Migration Act, and in particular section 474, in opposition especially to the first two orders sought by the applicants. He submitted, in effect, that such orders would interfere with decisions made by the Minister that are protected by section 474, and thus could not or should not be made.

152. So far as it is relevant, section 474 is as follows (emphasis added):

Part 8 - Judicial Review Division 1 - Privative Clause Decisions under Act are final

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section:

privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation. (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

(3) A reference in this section to a decision includes a reference to the following:

(a) granting, making, suspending, cancelling, revoking or refusing to make an order or determination;

(b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);

(c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;

(d) imposing, or refusing to remove, a condition or restriction;

(e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article;

(g) doing or refusing to do any other act or thing;

(h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;

(i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;

(j) a failure or refusal to make a decision.

(4) For the purposes of subsection (2), a decision under a provision, or under a regulation or other instrument made under a provision, set out in the following table is not a privative clause decision: … [There is then a list of provisions none of which is presently relevant. Subsection (5) is not relevant.]

153. The applicants' position is that section 474 does not operate to prevent the court from making the orders. I think there are two main aspects of the arguments. The first aspect comprises some arguments about the interpretation of section 747. The second involves reliance on some passages in *B and B*, particularly paragraph 399, which arguably suggest that section 474 may not apply to proceedings such as the present. However the submissions raise questions about what was meant by this passage, and it will be necessary to consider it carefully. It is appropriate to deal first with the other arguments, and to consider the general law of privative clauses, before returning to this question.

Does Section 474 apply to the Family Court exercising jurisdiction under section 67ZC (the welfare jurisdiction)?

154. Mr McQuade submitted that there is nothing in section 474 that expressly refers to the Family Court exercising its welfare jurisdiction. This is of course true. However as Mr Basten pointed out, it does not show that the section has no application. The section does not list *any* specific courts or types of jurisdiction to which it applies. It is in general terms. When it refers to "any court" it obviously includes the Family Court. There is no basis for reading section 474 as applying to various other courts, but not to the Family Court exercising welfare jurisdiction. And if the answer were as simple as that, the Full Court would have said so in *B and B*. So I do not accept this argument.

Do the proceedings involve a "privative clause decision" under section 474(2)?

155. The two relevant components are that there is a decision, and that it is made "under this Act".

156. As to the first, by subsection (3) "decision" includes refusing to do things and failing or refusing to make a decision. In this case, it is clear that the Minister is refusing to make the decisions involved in orders 1 and 2 sought by the applicants. So it seems clear that there is a decision in terms of section 474.

157. Is it made "under the Act"? I will deal later with authorities that suggest a particular limited meaning of this phrase. However as a matter of ordinary language, the decision seems clearly one that is made "under this Act". The Act specifically enables the Minister to approve in writing "another place" in which a person can be held in immigration detention.[4] The applicants want him to do this, and he is refusing. That refusal seems clearly to be a decision under the Act. Similarly, the applicants want the Minister to appoint a particular person, Ms H. as an "officer", something the Act specifically provides for,[5] and he is refusing to do so. Again, that seems clearly to be a decision under the Act.

Does the decision fall within the words of section 474(1)?

158. The next question is whether the decision is protected by section 474(1). Mr McQuade pointed out that this case does not involve the sorts of proceedings mentioned in (c). However by paragraph (a) the decision is "final and conclusive". Applied to this case, that means that the Minister's refusal to approve the proposed address, and to appoint Ms H, is "final and conclusive". It would seem clearly contrary to that for the Court to reverse it by making such orders itself, or by requiring the Minister to do so. Similarly, the Minister's decision, the refusal to do those things, "must not be challenged … or called in question". That seems precisely what the applicants are seeking to do.

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4 Section 5, definition of "immigration detention", paragraph (v).

5 Section 5, definition of "officer", paragraph (f).

159. Thus on a simple reading of the words, the orders sought by the applicant cannot be made because section 474 forbids the Court from doing so. Despite Mr McQuade's submissions, I can see no ambiguity or reason to doubt this when one looks at the words of section 474.

160. Although these simple arguments do not persuade me that section 474 does not apply, it is necessary to consider more complex matters relating to the interpretation of the section.

Should section 474 be read down? Application of the law on privative clauses

161. The law on privative clauses has recently been authoritatively stated by the High Court; as it happens, in a decision on section 474.[6] The judgments occupy 72 closely argued pages, but the conclusions can be briefly stated for the purposes of this case.

162. Firstly, section 747 cannot validly exclude the High Court's jurisdiction given by the Constitution: the Parliament does not have power to do that. However the High Court rejected the suggestion that the section purports to do that, and is therefore invalid. It held that the section is valid, but that its operation is limited - at a minimum - to what is Constitutionally valid.

163. While holding that the section is valid, the High Court referred to a body of authority on the interpretation of such clauses as section 474. The judgment indicates a number of limitations not apparent from the words of section 474 when taken out of context.

164. There appear to be two main bases for the distinctive interpretation of privative clauses.

165. Firstly, the legislation must be read as a whole – allowing for the "reconciliation of apparently conflicting statutory provisions".[7] This is necessary because a statute would be contradicting itself if is said that the Minister had certain limited powers, and also said that the Minister could exclusively determine what those powers were: that would give the Minister an *unlimited* power.

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6 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24 ("*Plaintiff S157")*.

7 *Plaintiff S157* at paragraph [60].

166. Secondly, privative clauses will be strictly construed, because it is presumed that the legislature does not intend to cut down the jurisdiction of the courts: the courts will not treat the legislature as intending to do that unless the intention is clearly expressed.[8]

167. As a result, certain things done by the Minister will not be protected by a privative clause like section 474. They are referred to as "jurisdictional errors", and include "a failure to exercise jurisdiction", and "an excess of the jurisdiction conferred by the Act". There may be such an error because of a "failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints'".[9] An administrative decision that involves jurisdictional error is said to be "no decision at all", and is not protected.[10] A decision "flawed for reasons of a failure to comply with the principles of natural justice" is not a privative clause decision, and is thus not protected by section 474.[11]

168. In short, provisions like section 474 are valid, but have an operation more limited than appears from their words when considered out of context.

169. I agree with Mr Basten that all this does not mean that section 474 is to be disregarded. The High Court held that the section was valid. It also held that the section "must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act".[12]

170. Returning to the present case, I do not think there was any submission from Mr McQuade that the Minister's decision here – the refusal to do what the applicants want him to do – fell within any of the categories indicated by the High Court. It was not submitted, for example, that the decisions involved jurisdictional error, or a failure to

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8 Id, at paragraph [72].
9 Id, at paragraph [76].
10 Id, at paragraph [76]
11 Id, at paragraph [83].
12 Id, at paragraph [76].

provide natural justice. Nor is it apparent to me that any of these categories are involved, even on a fairly generous interpretation of them.[13]

171. In the result, therefore, even taking into account the limited operation given to section 474 under the High Court's ruling, section 474 would seem to prevent the Court from making the orders the applicants seek. It is necessary however to consider what was said about section 474 in *B and B*.

The context of the passages in *B and B*

172. Before dealing with the key passages in the Full Court's judgment in *B and B*, it is necessary to say something about the judgment as a whole, to put those passages in context.

173. In that case, at the trial the applicants (children) had sought orders, alternatively under section 68B and section 67ZC, that the respondent Minister should be required to release the applicants from detention at the Woomera Immigration Reception Processing Centre; or that he should be restrained from detaining the applicants pursuant to section 189 of the Migration Act. They also sought a declaration pursuant to the same provisions, that that the detention of the applicants pursuant to section 189 of the Migration Act was contrary to the welfare of the applicants.[14]

174. Early in the judgment, the majority identified the issues before it in the following way:

> … *The issues as we see them are:*
>
> *A. Whether the welfare jurisdiction contained in s.67ZC of the Family Law Act applies to children in South Australia.*
>
> *B. Whether the constitutional basis provided by the marriage and divorce and incidental powers contained in the Constitution is sufficient to enable the Family Court to make orders against third parties for the protection of the children.*

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13 See Dr Caron Beaton-Wells, "Restoring the Rule of Law – Plaintiff S157/2002 v Commonwealth of Australia" (2003) 10 AJ Admin L 125 – 145, especially at 138, discussing *Craig v S.A.* (1995) 184 CLR 163 and *Minister for Immigration etc v Yusuf* (2001) 206 CLR 323.

14 *B and B*, paragraph [15].

C *Whether the external affairs power contained in the Constitution forms an additional source of Commonwealth power that would enable the Court to make orders against third parties for the protection of children.*

D *Whether, the welfare jurisdiction of the Family Court is to be equated with the parens patriae jurisdiction, and in particular, whether it extends to the making of orders against third parties for the protection of children.*

E *Whether having regard to the provisions of the Migration Act, the Family Court of Australia has the power to*

(a) *order the Minister to release the children or*

(b) *to make orders supervising the Minister's detention of the children.*

175. The majority judgment dealt extensively with the scope of the welfare jurisdiction and its existence in South Australia,[15] with the Court's power to make orders directed to or having an impact on third parties,[16] with constitutional issues, which it held did not prevent it from making orders in the proceedings,[17] and with the role of the state child protection services,[18] In the result, their Honours gave affirmative answers to the questions posed in A, B, C and D. No present difficulty arises in relation to these issues.

176. The question in this case relates to the second issue in paragraph E, namely whether the Court has power to make orders supervising the Minister's detention of the children. The issues stated in paragraph E are dealt with later in the judgment under the headings "**Does the Migration Act Curtail the Court's Jurisdiction?**" After reviewing what had been held to that point, the Full Court identified and answered three questions.

177. The first question, whether there was anything in the Migration Act that prevented the court from ordering the release of children who are in immigration detention,[19] received extended discussion.[20] The court referred in particular to section 196 and to

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15 *B and B*, paragraphs 91-138.
16 *B and B*, paragraphs 172-209
17 *B and B*, paragraphs 210-172-209
18 *B and B*, paragraphs 296-310.
19 *B and B*, paragraphs 316, 319.
20 *B and B*, paragraphs 319 – 391.

the Minister's argument that this section deprived the Court of the jurisdiction to release an unlawful non-citizen. The majority concluded that the relevant provisions of the Migration Act did not prevent the court from ordering the release of children from detention where that detention was *illegal.*

178. Having reached that conclusion, the Full Court then wrote, in a paragraph that was the subject of submissions in this case:

> *390. Such a conclusion is not without its practical difficulties, because although the children's detention may be unlawful, this is not to say that that of their parents can be similarly regarded. That issue is not before us. There are however alternatives that could no doubt be canvassed before the trial judge, who can make appropriate orders for the welfare of the children. It is we think, inappropriate for us to embark upon this exercise, because the full facts are not before us by reason of the course taken at trial. Further, consistent with the decision of the Full Court of the Federal Court in* Minister of Immigration & Multicultural & Indigenous Affairs v VFAD of 2002 *(supra) interim orders could be made for the release of the children pending the determination of their capacity to make a request for repatriation…*

179. Their Honours then said that if they were wrong in their view as to the probable unlawful nature of the children's detention, they turned to the "second question as to whether there is room for the operation of the welfare jurisdiction while the children remain in immigration detention".[21] Their Honours had previously identified the third question as "whether these decisions by the Minister as to the treatment of children in immigration detention are decisions affected by section 474 of the Migration Act…"[22] They do not specifically mention the third question again, but it is clear that they intended to deal with the second and third questions in paragraphs 392 to 400.

180. Paragraphs 392 to 396 deal mainly with a decision by Ryan J in *VLAH v Minister for Immigration and Multicultural and Indigenous Affairs*.[23] By way of summary, in that case the applicant was a young man from Iran who had applied unsuccessfully for a

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21 *B and B*, paragraphs 317.

22 *B and B*, paragraphs 318.

23 *VLAH v Minister for Immigration & Multicultural and Indigenous Affairs* [2002] FCA 1554. Paragraph 396 in *B and B* merely mentions another case where the Full Court of the Federal Court rejected a similar argument to that presented in *VLAH*.

protection visa, and had then been unsuccessful in the Refugee Review Tribunal and again in the Federal Court. His position under immigration law was that, having abandoned his appeal in the Federal Court, he was obliged to depart from Australia or present himself to the Department for removal from Australia. However, he obtained a bridging visa on the basis that his physical and mental health had deteriorated while he was in a detention centre. Under the bridging visa, he was released into the community and at the time of the hearing was living in a facility managed by the Uniting Church. He suffered from depression, and in the proceedings before Ryan J he relied on evidence to the effect that his chances of recovery would be much better if he were allowed to stay in the community rather than be returned to the detention centre.

181. The transcript of the judgment does not specify precisely what relief the applicant sought, but I infer that it was an order restraining the Minister from returning him to the detention centre, or something of that sort. The applicant had submitted that he could not lawfully be returned to an immigration centre under the provisions of the Act. In the event, he was unsuccessful: Ryan J ordered that his claim for interlocutory relief should be refused.

182. The applicant had argued that to detain him in a detention centre would go beyond what was constitutionally valid, but was unsuccessful in this regard. However Ryan J said that the selection of a particular mode of detention would be invalid only if it went outside the definition of "immigration detention" in the Act, or if it were made for some ulterior purpose, such as to punish the person. He then considered the terms of the Act. He said that the flexibility in the selection of a mode and place of detention which the various statutory definitions afforded did not restrict the Minister's choice in a particular case, or impose any statutory duty to consider alternative modes of detention.

183. Counsel for the applicant had argued that an implied restriction arises when the Minister is put on notice of the circumstances of a particular non-citizen that would make a particular mode of detention unreasonable in that particular case. However Ryan J held that the Act imposed no such duty on the Minister.

184. Next, the applicant had argued that the potential impact of detention on the applicant could result in its being characterised as "punitive". Ryan J rejected this argument as well, saying that the selection of one from among the available places and modes of detention did not, without more, indicate a purpose to punish or any other ulterior motive. In the final paragraph, Ryan J held that for discretionary reasons he might in any case have refused the application.

185. None of this reasoning seems to me to provide any comfort for the applicants in this case, and indeed section 474 is not mentioned. So far as the report discloses, section 474 was not the subject of any submissions. Ryan J's ruling has no direct relevance to this case, if only because his Honour was not exercising jurisdiction under the Family Law Act. The significance the decision had for the Full Court in *B and B* must be gleaned from the following paragraphs of the majority judgment (to aid the discussion below, I have added numbers to identify the sentences in the quotation of Ryan J's paragraph 14 and emphasised those that seem particularly important):

> *397. In an important passage which has relevance to the present case, Ryan J said at [14]:*
>
> > *"(1) In substance, this is an application contending that any decision (not yet taken) to return the applicant to an immigration detention centre would, having regarding to the consequences for the applicant, be so unreasonable that no reasonable decision-maker could make it. (2) Such an argument could only succeed if the decision were one which this Court has jurisdiction to review. (3) The decision in this case would not be made under an enactment so as to be amenable to judicial review* ***as it is not a decision expressly provided for in the Act. (4) It would be merely a decision giving administrative effect to a mandatory requirement to detain a non-citizen.*** *(5) That is not say that decisions as to where, or under what conditions, non-citizens are housed will always be entirely free from judicial scrutiny. (6) Mr Gunst QC conceded that the Minister owes persons in immigration detention a duty of care. (7)* ***Accordingly, if an actual or apprehended breach of that duty could be demonstrated, interlocutory relief might well be available in this or some other court.*** *(8) However, this is not such a case."*
>
> *398. We agree with Ryan J as to the nature of the decision in question and the fact that it would not be subject to judicial review in the Federal Court. However, we are of the view that it clearly would be subject to review by a court exercising welfare jurisdiction as this Court does in relation to children. This is precisely the type of supervisory jurisdiction that the High*

> *Court envisaged that the Court exercising* parens patriae *jurisdiction would engage in relation to child welfare authorities in* Johnson's *case. (supra). We therefore consider that her Honour was wrong in her conclusions as to the exclusory nature of the provisions of the* Migration Act *in relation to proceedings in the welfare jurisdiction.*
>
> *399. We also think that Ryan J's characterisation of the nature of the decision making process in relation to the place of detention negates any effect of s.474 which we think would have no application to this Court's review of this type of decision of the Minister.*
>
> *400. We consider that if it was to be determined that the continued detention of the children was not unlawful, the Court could not order their release, but could nevertheless give directions in relation to their welfare, including directions as to the nature and type of detention to which they are to be subject, as to medical and other treatment to be made available to them and as to the provision of appropriate education. There may well be other matters relating to their welfare that could be the subject of Court Orders.*

186. Before dealing with these paragraphs, especially paragraph 399, I note that Ellis J, although dissenting on some matters, agreed that in exercising its welfare jurisdiction, the court has the power to make orders covering "the provision of adequate, proper and prompt medical treatment for the children and of ensuring they are not exposed to violence and trauma", these being "matters directly related to their protection and welfare" and matters that arise out of and are aspects of the relevant marriage relationship (these remarks are relevant to the question of constitutional power).[24] Ellis J however did not refer to section 474.

***B and B* as a binding authority**

187. The *ratio decidendi* (reason for deciding) of *B and B*, so far as it is relevant to this case, is that where the detention of children is lawful, the Court cannot order their release, but can "give directions in relation to their welfare, including directions as to the nature and type of detention to which they are to be subject, as to medical and other treatment to be made available to them and as to the provision of appropriate education".

188. A number of matters arise in this case, however, that were not determined in *B and B*.

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[24] *B and B*, paragraphs 421, 428.

189. The first is whether the range of possible orders, or directions, includes orders about the nature and type of detention of the *parents* of children as well as the children, as distinct from orders that were limited to the children themselves. Although Mr McQuade sought to gain some advantage from the third sentence in paragraph 390, previously quoted, I do not think those comments, which are clearly *obiter dicta* (*"That issue is not before us"*), provide real assistance.

190. The second is whether section 474 provides a defence against the orders sought in this case. That question was not addressed by the Full Court in *B and B,* for two reasons. Firstly, although the majority judgment mentions section 474, that section was apparently not relied on either before Dawe J or the Full Court: there is no reference to it in the Full Court's account of the trial judgment, or the notice of appeal or the submissions to it. Secondly, the Full Court did not have occasion to address the particular orders sought in this case.

191. Although therefore I do not think the comment of the majority about section 474 is strictly binding on the application of the section to the circumstances of this case, of course it requires careful consideration.

The interpretation of paragraph 399

192. I have already quoted paragraph 399 of the majority judgment in *B and B,* incorporating Ryan J's paragraph 14. I agree with Mr Basten that in some ways paragraph 14 is a little difficult to follow. However in referring to Ryan J's "characterisation of the decision making process" their Honours seem to have in mind sentences (3) and (4). If so, the characterisation refers to the "decision (not yet taken) to return the applicant to an immigration detention centre" (sentence 1). It seems that Ryan J considered this "merely a decision giving administrative effect to a mandatory requirement to detain a non-citizen" (sentence 4).

193. I confess I am not entirely sure why Ryan J so characterised the decision. However it is clear that the decision is different from the decision of the Minister that is involved in this case. The decision under consideration in this case is the Minister's refusal to appoint a particular person as an officer and to place the family in a particular residence. That decision is, for reasons I have given, clearly an exercise of the

Minister's discretion. Therefore whatever be the reasoning behind Ryan J's characterisation, it does not apply to the present case. And thus, if this is the right interpretation of what the majority said in paragraph 399, their Honours' view about the applicability of section 474 in "this type of decision by the Minister" (ie the type of decision identified by Ryan J) is not relevant to the present case.

194. I have also considered the possibility that the Full Court had in mind sentences 6 and 7 of Ryan J's paragraph 14. That is, the relevant "characterisation" could be of a *decision that involves a breach by the Minister of a duty* of care to persons in immigration detention.

195. There are, however, difficulties for the applicants in this interpretation. There is no reference to section 474 in Ryan J's decision, and I was not directed to any authorities showing that privative clauses do not apply to decisions that involved such a breach. It seems unlikely that the majority would have meant that section 474 does not apply to decisions involving such a breach, because (a) it is not evident that their references to the characterisation of the decision relate to sentences 6 and 7 at all; and (b) their Honours did not discuss the nature of the duty or its breach or explain why such a breach nullifies a privative clause, there being no such suggestion in the leading High Court authority.

196. Another difficulty for the applicants in relying on this interpretation is that the existence of such a duty was *conceded* in *VLAH.* In this case there is no such concession; nor was any evidence or argument addressed to the existence of such a duty. Nor (although there was much criticism of the situation in which the family was placed) was there any submission identifying what such a duty might involve, and in what way it was breached.

Conclusions

197. In my view, having regard to the matters I have canvassed, the most likely interpretation of the Full Court's judgment is that the Family Court can make orders relating to the welfare of children in detention to the extent that those orders do not conflict with section 474. If so, the question in each case will be whether the facts bring the case within one or other of the class of "decisions" to which section 474 does

not apply. The extent of that class of decisions depends on a reading of the High Court's decision, and of later decisions so far as they are consistent with it. For example, it seems that the scope of "jurisdictional error" is a matter on which opinions can differ.[25] Thus in my view in each case, if it otherwise has jurisdiction to make the orders sought, the Court must consider whether section 474 applies.

198. In their application to this case, the relevant words of section 474 are that the Minister's decision *"is final and conclusive"*; and *"must not be challenged… or called in question in any court."* That is precisely what this application asks me to do. In relation to this case, therefore, in my view section 474 clearly applies, for the reasons I have explained. There are important exceptions to that section, but they do not apply here. On the basis of the evidence and argument that has been addressed to me, I see no basis for concluding that there is any "jurisdictional error" or other reason for concluding that the section does not apply.

199. It follows that section 474 prevents me from making the orders sought by the applicants in these proceedings.

WHETHER THERE IS POWER TO MAKE ORDERS ABOUT OTHER FAMILY MEMBERS

200. In case I am wrong about the effect of section 474, I will consider the second issue.

201. As is already clear, *B and B* is authority that the welfare power extends to making orders that children be released from illegal detention, and that (in my view subject to section 474, as I have said) the Court can make orders against the Minister supervising the arrangements for children who are (lawfully) in immigration detention. Does the power extend beyond this, and allow the Court to make orders that have the effect of interfering with the Minister's arrangements for the detention of adult members of a child's family, where all the family members are in immigration detention?

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[25] Dr Caron Beaton-Wells, "Restoring the Rule of Law – Plaintiff S157/2002 v Commonwealth of Australia" (2003) 10 *A J Admin L* 125 – 145.

202. The question arises in this case because what the applicants seek is that the family be reunited and live outside a detention centre. It is not proposed that the children be removed from the detention centre if the parents remain there. This precise question did not arise in *B and B*, because the orders sought in that case related only to the children. Mr McQuade sought to derive some support from paragraph 390, but I do not think that paragraph is of real assistance.

203. For the respondent, Mr Basten said there was no authority for the making of such an order as is proposed here. This is correct so far as I am aware. But the fact that such an order may not have been made in such circumstances is not decisive: it is possible that the order falls within accepted principles under Australian law. There is a first time for everything, and I think it is fair to say that the scope of the Court to make orders relating to children in immigration detention was largely if not entirely untested until *B and B*.

204. The question must therefore be resolved by reference to general principles.

205. For the applicants, Mr McQuade referred to a line of authority emphasising the width of the welfare ("*parens patriae*") power, including *B and B*. For example the Full Court quoted with approval the following statement (adding their own emphasis):[26]

> *"But I can find nothing in the authorities to which I have been referred by counsel or my own researches to suggest that there is any limitation in the theoretical scope of this jurisdiction; or, to put it another way, that the jurisdiction can only be invoked in the categories of cases in which it has hitherto been invoked, such as custody, care and control, protection of property, health problems, religious upbringing and protection against harmful associations. That list is not exhaustive. On the contrary, the powers of the court in this particular jurisdiction have always been described as being of the widest nature.* ***That the courts are available to protect children from injury whenever they properly can is no modern development.****"*.

206. And, to similar effect, a statement by Denning LJ:

> *No limit has ever been set to the jurisdiction. It has been said to extend "as far as necessary for protection and education": see Wellesley v Wellesley by Lord*

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[26] Latey J in *Re X (a minor)* [1975] 1 All E.R. 697, at 699.

Redesdale. ***The court has the power to protect the ward from any interference with his welfare, direct or indirect****."*

207. There is a line of English authority to the effect that orders should not be made in the exercise of the welfare jurisdiction that impinge on the immigration system. But in *B and B* the Full Court emphatically declined to follow them.[27] On the contrary, the majority in the Full Court said:

> *169. It would appear that the English approach is based upon the non-exercise of a discretion rather than lack of power. We are not persuaded by the rationale that has been adopted for the non-exercise of such a discretion where statutory authority has been conferred upon another public official. The assumption appears to be that once this is done then it is a matter for the relevant Minister and not the Courts to supervise the activities of such an official. This seems to us to ignore the fact that the greatest danger to children may arise from the failure of such a public official to pay proper regard for the welfare of children under his/her care and control. This is not intended as a generalised criticism of public officials, the vast majority of whom perform their functions with competence and probity. The same can of course be said of Ministers. However there are some public officials who do not meet these standards and there are some Ministers who do not for various reasons, properly supervise them. Where the welfare of children is involved we are of the view that there are strong reasons why the courts have and should exercise their powers to protect children in such circumstances.*

208. I do not think the decision of the Full Court in *T and F*[28] is of real assistance. In that case, the orders in question were essentially parenting orders; the question was whether the court was inhibited in making them because of their effect on the operation of the witness protection program. In this case, there is no parenting dispute: the question is whether the Court can and should order that the Minister re-house this family in the community.

209. Mr McQuade relied on *Re X,* an English decision that was discussed in *B and B.*[29] In that case the Court of Appeal allowed an appeal against an order that restrained the publication of a book on the basis that the publication might have harmed a child.

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27 *B and B*, paragraphs 156 – 171.

28 *T and F; The Commissioner of the Australian Federal Police and the Children's Representative* (1999) FLC 92-855, considered in *B and B* at [150].

29 *Re X (a minor)* [1975] 1 All E.R. 697, considered in *B and B* at paragraphs [136-7].

However Mr McQuade pointed out, correctly, that the basis of the decision was not a lack of power to make the order; instead, it was based on a balancing exercise, in which the right of freedom of publication was held on the facts to outweigh the interests of the child.

210. *Re X* certainly holds that the welfare power can support orders binding on third parties; and that much is also clear from *B and B*. But it does not follow that all orders directed to third parties that would advance a child's welfare fall within the power.

211. The classic example is the case of a parent in prison. Suppose an application is made in to the Court in its welfare jurisdiction to release the parent from prison because that would be in the interests of the child. Such an order would, let us assume, advance the child's interests, and would be directed to a third party. But it would clearly fall outside the Court's power.[30]

212. Why is this? In Australian law, I think it is because such an application would not as a matter of interpretation fall within the relevant provisions of the Family Law Act 1975. Section 67ZC gives the Court jurisdiction "to make orders relating to the welfare of children". It is obviously necessary to read that down by reference to the context. It is not appropriate here to attempt any elaborate definition. However in the example, the reason the parent is in prison is to implement the purposes of the criminal law: to deter the parent and others from committing offences, to punish the parents, and so on. Those purposes are different from the purpose of promoting the welfare of the prisoner's child. Within the criminal law system, when considering the sentence, the Court may well take into account the offender's family situation as a mitigating factor; but it may nevertheless decide that the purposes of the criminal law require the parent to be imprisoned. It therefore makes no sense for a Court exercising welfare jurisdiction under the Family Law Act to have power to release the parent merely because doing so would benefit the child (ie treating the child's best interests as paramount). Such a power could undermine the functioning of the criminal law system.

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30 As recognised in *B and B* at [154].

213. A similar analysis would apply if the application were based on the power to make parenting orders, or injunctions for the welfare of the child. When read in context, the words of those sections should not be taken to authorise such orders. The applications could therefore not be characterised as being for orders relating to the child's residence or contact, or about parental responsibility. Nor could they be characterised as applications for injunctions under section 68B, despite the fact that the application might fall within the words of that section, taken out of context.

214. Another way of considering this is to look at the Constitutional basis of the relevant provisions of the Family Law Act. They depend essentially on Constitutional powers relating to marriage, and the reference of powers from the states to do with guardianship and custody of children. Without going into detail – these matters were not argued before me, and are discussed in *B and B* – all such sources of legislative power have to do with the parenting of children and the powers and responsibilities of parents. They do not have to do with releasing people from prison. Even to the extent that the Family Law Act may be based on the *Convention on the Rights of the Child* (via the external affairs power), a matter considered in *B and B*,[31] it is not plausible to interpret the provisions of the Family Law Act 1975 as referring to an application to release a parent from lawful imprisonment. The applications do not have the necessary connection with the heads of constitutional power. It is orthodox to read down the provisions so that they do have such a connection.

215. In reply to this it might be said that the same argument could be put in relation to *Re X*. It could be argued that if the analysis just advanced were correct, the application in *Re X* also could not have been characterised as one that fell within the welfare powers. Thus the analysis is inconsistent with *Re X*.

216. I do not think that argument is persuasive. The English cases, including *Re X*, do two things. They do indicate that the Court's powers extend to such matters; but then they say that the competing policy matters – freedom of speech in *Re X*, immigration

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[31] *B and B*, paragraphs 248 – 288.

policies in other cases[32] – effectively over-ride the child's interests. Thus in one case Lord Scarman said:[33]

> *"The High Court cannot exercise its powers, however wide they may be, so as to interfere on the merits in an area for concern entrusted by Parliament to another public authority."*

217. Thus in the prison example, as I understand it the English authorities might say that in theory that power exists but as a matter of exercise of discretion it will not or cannot be exercised. The resulting situation, that the Courts will not or cannot make the orders, is similar in practice to what would have been the outcome of saying the Court lacked jurisdiction. I can see why the Full Court did not follow these cases, however. This approach, I think, is impossible to reconcile with the principle that the child's best interests must be treated as paramount.

218. I conclude, therefore, that it would be wrong to follow the English authorities on the question of jurisdiction, but then give full effect to treating the child's best interests as paramount. Such an approach would logically mean that the court would order the parent's release from prison, which, everyone seems to agree could not be right. I am not persuaded, therefore, by the argument based on *Re X*.

219. There may well be a contrast here with the line of cases of which *Johnson* is an example.[34] In those cases, one might say generally that the issues relate to the respective roles of the relevant court and government welfare agency. But broadly speaking, the purpose of both the relevant government department and of the court is the parenting of the children, and their welfare. It may well be right to say that the relevant legislation should be interpreted so that a court that has the child's welfare as paramount may make orders about children in the care of a government department that has much the same objective. But it might be quite implausible to say that the

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32 Eg *Re Mohamed Arif (An Infant)* [1968] Ch 643; *In Re A (A Minor) (Wardship: Immigration)* [1992] 1 FLR 427; see the discussion in *B and B* at [157] – [162].

33 *Re W (A Minor) (Wardship Jurisdiction)* [1985] AC 791, sub nom *Re W (A Minor) (Care Proceedings: Wardship)* [1985] FLR 879, at 797C and 882 respectively, cited in *B and B* at [158]

34 *Johnson v Director General of Social Welfare (Vict)* (1976) 135 CLR 92, discussed in *B and B*, paragraphs 146-149

legislature intended such a court to be able to make orders that interfere with the operation of a department or body that has a completely different purpose.

220. Having regard to this, I return to the present question. In my view the detention of this family in immigration detention has purposes other than the welfare of the children, just as the detention of family members in prison has purposes other than the welfare of children. There was no relevant evidence or submissions, but I take those purposes to be related to regulating who comes to Australia, and whether they stay. The Minister needs to consider, I assume, whether carrying out the purposes requires illegal non-citizens such as asylum-seekers to be detained, and in what circumstances. Again, the question what Commonwealth resources should be used for these people, and how, is very much a question to be determined by the Minister, and has to do with matters other than the interests of the children involved.

221. I am not suggesting, of course, that the children's interests should be or could be *ignored*: only that what happens to asylum seekers is a matter that may be determined by the Minister having regard, at least in part, to matters other than the interests of the children involved.

222. For that reason, there seems to be a close similarity between the prison example and the present case. Of course *B and B* holds that the Court has power to make orders relating to the *children*, to the extent I have described. And I have taken into account the numerous authorities cited by Mr McQuade. However in the end I have come to the conclusion that the orders sought in this application, which would in effect require the Minister to make particular arrangements for the detention not only of the children but also adult members of the family, do not fall within the jurisdiction, or powers, granted to the Court by the Family Law Act 1975.

OTHER ISSUES ABOUT THE ORDERS SOUGHT

Orders 1 and 2, and the appointment of Ms H. as "officer"

223. Having regard to the conclusions I have reached, it is not necessary to deal in detail with Mr Basten's more specific objections to the orders sought by the applicants.

224. Mr Basten pointed out a number of difficulties with the appointment of Ms H. as an officer. By reason of section 198(6), Mr Basten submitted that she would be under a statutory obligation to "remove as soon as reasonably practicable" all members of the family. He said in effect that there was no evidence that she would have the ability to do this or would be willing to do so. In my view Mr Basten's submission is correct on this point, in that the provisions of that subsection to apply in this case. I note in that connection that the grant of the relevant visa has been refused and the application has been "finally determined" as that term is defined in the Act. Mr Basten also pointed out that as an "officer", by section 189 Ms H.would come under an obligation to detain certain other unlawful non-citizens. He suggested that this, too, would be an inappropriate obligation for her to have.

225. Difficulties could arise, I think, even under the final form of the orders, which uses the words *"to be held by T.H. as an officer or on behalf of an officer"*. This wording would leave it open to the Minister to appoint someone else as an officer and Ms H.would be obliged to hold the family on that officer's behalf; in that event, though, the nature of the proposed relationship between the officer and Ms H.is not entirely clear.

226. It is enough to say that having regard to the provisions of the Act, and to the whole notion of the officer having an obligation to "hold" members of the family in detention, even if there had been no other obstacles these matters would have given me real concerns about making orders in the form sought by the applicants.

The third order

227. The third order sought by the applicants requires the Minister to provide whatever services the medical advisers and others referred to in the order may from time to time recommend. This order faces all the problems previously indicated, and I do not think I have jurisdiction or power to make it.

228. There are some additional reasons, too, why this order should not be made. Firstly, as the order is drafted the obligation is absolute, regardless of whether the recommendations are reasonable or not, and whether they Minister is able to provide the medical or other services. A more fundamental problem is that it is not clear from

the evidence what medical needs the family has that are not currently being met. There is some evidence of the current provision of medical services and these were not criticised. And as Mr Basten points out, there is nothing in the father's affidavit to indicate any problem at the present time in the provision of medical services. Nor is there any other evidence from which I can say that at the present time the medical services provided by the Minister fall short of what the family needs.

229. For these reasons I do not think that a case has been made for making order number 3.

4. CONCLUSIONS

230. For the reasons given, I have come to the conclusion that I do not have power or jurisdiction to make the orders sought by the applicants. It follows that the application for interim orders must be dismissed.

231. Nevertheless, I hope that now that all the evidence is available, the Minister might give further consideration to whether some alternative arrangements might be made that would help these unfortunate children and yet not compromise the carrying out of his obligations under the Migration Act. It was obvious from Mr Basten's moderate and sensitive conduct of the case that the Minister is not indifferent to the great suffering and distress the family has experienced. Mr Basten readily acknowledged this suffering. Anyone seeing the evidence must, whatever might be thought about ultimate responsibility for what has happened, and whatever differences there might be about the difficult legal questions that have arisen in this case.

232. The evidence, although untested, strongly suggests that these children have had highly damaging experiences in their time in Australia. The experts have consistently called for them to be released from detention centres. To some extent this has happened: the mother and children went to a Housing Project in, or soon after, July 2002. But this has meant that the family has been separated: the father is still in Baxter.

233. The evidence indicates that a considerable number of generous and in many cases highly qualified people are willing to provide this family with money, a house, education for the children, and a range of supportive services. Whatever might be the ultimate fate of the family – for example, if they have to return to Iran – in these

proceedings they have asked that some arrangements be made so that they can take advantage of these resources and spend some time living in the community, once again together as a family. On the evidence before me, that would help the children, as well as the parents, to make some recovery from the ordeals they have faced, and that have so damaged them.

234. It is within the Minister's legal powers to arrange for this. While for the reasons given in this judgment I have concluded that this is ultimately a matter for the Minister to determine, I express the hope that he will give careful and compassionate consideration to the urgent needs of this unfortunate family.

I certify that the preceding 234 paragraphs are a true copy of the reason for judgment herein of the Honourable Justice Chisholm

Associate