HIGH COURT OF AUSTRALIA

CRENNAN J

Matter No M168/2010

PLAINTIFF M168/10, A MINOR, BY HIS LITIGATION GUARDIAN SISTER BRIGID (MARIE) ARTHUR — PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA & ANOR — DEFENDANTS

Matter No M169/2010

PLAINTIFF M169/10, BY HIS LITIGATION GUARDIAN SISTER BRIGID (MARIE) ARTHUR — PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR — DEFENDANTS

Matter No M170/2010

PLAINTIFF M170/10, A MINOR, BY HIS LITIGATION GUARDIAN SISTER BRIGID (MARIE) ARTHUR — PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA & ANOR — DEFENDANTS

Matter No M171/2010

PLAINTIFF M171/10, BY HIS LITIGATION GUARDIAN SISTER BRIGID (MARIE) ARTHUR — PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR — DEFENDANTS

Matter No M172/2010

PLAINTIFF M172/10, BY HIS LITIGATION GUARDIAN SISTER BRIGID (MARIE) ARTHUR — PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA & ANOR — DEFENDANTS

Matter No M173/2010

PLAINTIFF M173/10, BY HIS LITIGATION GUARDIAN SISTER BRIGID (MARIE) ARTHUR — PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR — DEFENDANTS

Matter No M174/2010

PLAINTIFF M174/10, A MINOR, BY HIS LITIGATION GUARDIAN SISTER BRIGID (MARIE) ARTHUR — PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA & ANOR — DEFENDANTS

Matter No M175/2010

PLAINTIFF M175/10, BY HIS LITIGATION GUARDIAN SISTER BRIGID (MARIE) ARTHUR — PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR — DEFENDANTS

Plaintiff M168/10 v The Commonwealth
Plaintiff M169/10 v Minister for Immigration and Citizenship
Plaintiff M170/10 v The Commonwealth
Plaintiff M171/10 v Minister for Immigration and Citizenship
Plaintiff M172/10 v The Commonwealth
Plaintiff M173/10 v Minister for Immigration and Citizenship
Plaintiff M174/10 v The Commonwealth
Plaintiff M175/10 v Minister for Immigration and Citizenship
[2011] HCA 25

19 January 2011
M168/2010, M169/2010, M170/2010, M171/2010, M172/2010, M173/2010, M174/2010 & M175/2010

ORDER

In matters M168/2010, M170/2010, M172/2010 and M174/2010:

1. *The application made by summons dated 23 December 2010 for an interlocutory injunction restraining the defendants or any officer, servant or agent of the defendants from detaining the plaintiff and/or for an order that the plaintiff be released from detention until the hearing and determination of these proceedings is dismissed.*

2. *The proceedings be stood out of the list to await the hearing and determination of related proceedings.*

3. *Liberty to apply.*

In matters M169/2010, M171/2010, M173/2010 and M175/2010:

1. *Pursuant to s 486A(2) of the* Migration Act *1958 (Cth), the time within which an application may be made for a remedy in relation to the decision made on or about 16 February 2010 to detain the plaintiff on Christmas Island ("the detention decision") be extended to 17 December 2010.*

2. *To the extent that it is necessary to do so, pursuant to r 25.06.1 of the High Court Rules 2004, the time to apply for an order to show cause why a writ of certiorari should not issue to remove the detention decision for the purpose of its being quashed be enlarged to 17 December 2010.*

3. *The application made by summons dated 23 December 2010 for an interlocutory injunction restraining the defendants or any officer, servant or agent of the defendants from detaining the plaintiff and/or for an order that the plaintiff be released from detention until the hearing of these proceedings is dismissed.*

4. *On or before 18 February 2011, the defendants file and serve any evidence on which they propose to rely.*

5. *On or before 25 February 2011, the plaintiff file and serve:*

    (a) any further evidence on which he proposes to rely; and

(b) any proposed amendment to the application for relief.

6. Reserve liberty to apply, on the giving of two days' notice to opposite parties.

7. The directions hearing be adjourned to 9:30 am on 28 February 2011.

8. Costs reserved.

Representation

C J Horan with K E Foley for the plaintiffs in all matters (instructed by Victoria Legal Aid (Civil Law Section))

S P Donaghue with R J Sharp for the defendants in all matters (instructed by Australian Government Solicitor)

CATCHWORDS

Plaintiff M168/10 v The Commonwealth
Plaintiff M169/10 v Minister for Immigration and Citizenship
Plaintiff M170/10 v The Commonwealth
Plaintiff M171/10 v Minister for Immigration and Citizenship
Plaintiff M172/10 v The Commonwealth
Plaintiff M173/10 v Minister for Immigration and Citizenship
Plaintiff M174/10 v The Commonwealth
Plaintiff M175/10 v Minister for Immigration and Citizenship

Injunctions – Interlocutory injunctions – Migration – Detention under *Migration Act* 1958 (Cth) ("Act") – Plaintiffs arrived in Australian waters by boat and treated as unlawful non-citizens under Act – Plaintiffs detained on Christmas Island and transported to mainland to be placed in immigration detention – Plaintiffs sought interlocutory injunctions restraining detention or effecting release, claiming that detention on Christmas Island and subsequent detention on mainland unlawful – Whether prima facie case that continuing detention of plaintiffs on mainland unlawful.

Words and phrases – "prima facie case".

Migration Act 1958 (Cth), ss 189(1), 189(3).

1 CRENNAN J. Orders are sought today in respect of four sets of proceedings concerning four plaintiffs, three of whom are minors and all of whom are of Afghan nationality. They are aged 16, 17, 17 and 18. The third plaintiff will turn 18 next Sunday. The plaintiffs have been treated as unlawful non-citizens within the meaning of s 14 of the *Migration Act* 1958 (Cth) ("the Act") and they are in immigration detention in the Melbourne Immigration Transit Accommodation pending the final determination of their applications for visas.

2 The plaintiffs all travelled to Australia from Afghanistan, through Indonesia, arriving in Australian waters by boat. At the time of arrival they were all unaccompanied minors. The plaintiffs are not citizens of Australia and they do not hold any visa. By decisions made on 11 February (in respect of the plaintiff in M173) and on 16 February 2010 (in respect of the plaintiffs in M169, M171 and M175) the plaintiffs were detained on Christmas Island ("the Christmas Island detention decisions").

3 In late March 2010 the plaintiffs were transported to the mainland and placed in immigration detention.

4 Each of the plaintiffs (by a litigation guardian) has brought two proceedings against the Minister and the Commonwealth of Australia. It is convenient to describe one set of proceedings. Proceeding M168 of 2010, commenced by writ and statement of claim, is an application in the original jurisdiction of the Court under s 75(iii) of the Constitution, being a matter in which the Commonwealth is a party. The plaintiff seeks declarations that the detention of the plaintiff on Christmas Island and on the mainland was and is unlawful and constitutes a false imprisonment, together with a declaration that by the continuing detention of the plaintiff the Minister is in breach of statutory duties as guardian under s 6 of the *Immigration (Guardianship of Children) Act* 1946 (Cth) ("the Guardianship Act"). Damages are sought in respect of negligence, breach of guardianship duty and false imprisonment. An interlocutory mandatory injunction is sought, directed to the Minister, to release the plaintiff from detention into appropriate residential arrangements within the community.

5 Proceeding M169 of 2010 is an application for an order to show cause why a writ of certiorari should not issue within the original jurisdiction of the Court, under s 75(iii) and (v) of the Constitution, in which the plaintiff (who is the same person as the plaintiff in M168 of 2010) seeks certiorari and prohibition or injunctive relief in respect of the Christmas Island detention decision and habeas corpus or an order requiring release of the plaintiff from detention. A declaration is sought that the Christmas Island detention and the detention on the mainland are unlawful. The plaintiff also seeks a declaration in respect of an alleged failure by the Minister to take steps as permitted under either ss 195A or 197AB of the Act and a declaration that the Minister is in breach of his guardianship duties under s 6 of the Guardianship Act. An interlocutory

injunction is sought restraining the defendants from detaining the plaintiff or, alternatively, ordering that the plaintiff be released from detention pending the determination of the proceedings or further order.

6 Proceedings M170 to M175 of 2010 are three sets of proceedings substantially identical to the set of proceedings M168 and M169 of 2010, which I have just described.

7 A summons dated 23 December 2010 and returnable today has been filed in each proceeding seeking:

1. An interlocutory injunction restraining the defendants or any officer, servant or agent of the defendants from detaining the plaintiff and/or an order that the plaintiff be released from detention until the hearing and determination of these proceedings or further order;

2. An enlargement of time pursuant to r 25.06.1 of the High Court Rules 2004 to apply for an order to show cause why a writ of certiorari should not issue to remove the Christmas Island detention decision for the purpose of its being quashed;

3. Directions for the further conduct of the proceedings.

Extensions of time

8 Rule 25.06.1 of the High Court Rules provides for a six months time limit in respect of an order to show cause why a writ of certiorari should not issue. Further, s 486A of the Act provides a time limit of 35 days for applications to the High Court seeking a remedy in respect of a migration decision.

9 Section 486A(2)(a) of the Act relevantly provides:

"The High Court may, by order, extend that 35 day period as the High Court considers appropriate if:

(a) an application for that order has been made in writing to the High Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order …"

10 The applications for extensions of time are opposed. Reliance is placed by the defendants on both r 25.06.1 of the High Court Rules and s 486A(2)(a) of the Act, to which I have just referred. It is submitted that, absent exceptional

circumstances, the extensions of time should not be granted[1]. The defendants point out that the plaintiffs have engaged in other litigation during the period of delay. Further, the defendants contend they would be prejudiced by extensions of time facilitating the late commencement of proceedings because the defendants have been administering the Act on a basis now said to be unlawful and any liability of the defendants in that respect has been increased by the delay.

11 The response on behalf of the plaintiffs to the opposition to the grant of the extensions of time can essentially be described as a submission that extensions of time are necessary to do justice between the parties. The substantive case which the plaintiffs wish to pursue is that the Christmas Island detention decision in each of the four cases was unlawful because s 189(3) of the Act provides for a discretionary decision to be made whether to detain, which, on the evidence so far, appears not to have been made. The fact that the Minister accepts, for the purpose of the hearing concerning the interlocutory injunctions, that there is a serious question to be tried in relation to the validity of the Christmas Island detention decisions is also relied upon by the plaintiffs in the context of their applications for extensions of time.

12 In terms of the history of these matters and the conduct of the plaintiffs, it is submitted that at the time of the decisions complained about all of the plaintiffs were minors (their guardian being the Minister), they were without resources, English is not their first language and they have necessarily relied upon publicly aided legal assistance (which I have been informed was first sought in October last year) all of which circumstances taken together help to explain the delay in issuing proceedings. Further, the question to be determined in the substantive proceedings is likely to affect the detention of all offshore entry persons on Christmas Island, which adds a public interest dimension to the applications for extensions of time.

13 In all the circumstances, and having weighed all the arguments, I am satisfied that the delay in issuing proceedings is not so substantial as to justify refusing to extend time as required. Secondly, I am satisfied that it is in the interests of justice to grant the extensions of time requested.

Interlocutory injunctions

Power

14 There is no dispute between the parties as to the Court's power to make an interlocutory order effecting the release of a person from detention where there is

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1 *Re Commonwealth; Ex parte Marks* (2000) 75 ALJR 470 at 474 [15]-[16] per McHugh J; 177 ALR 491 at 495-496; [2000] HCA 67.

a serious question to be tried about whether the detention of the person is lawful. In the context of these applications brought pursuant to s 75 of the Constitution, this Court has an incidental power to do all that is necessary to effectuate the grant of jurisdiction conferred by s 75[2].

Applicable principles

15 In *Australian Broadcasting Corporation v O'Neill*[3], in a joint judgment, Gummow and Hayne JJ (with whom Gleeson CJ and Crennan J agreed on the point) restated that the applicable principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*[4]. There, this Court (Kitto, Taylor, Menzies and Owen JJ) said that there are two main inquiries to be undertaken. The first inquiry, which is particularly relevant to these cases, is described thus[5]:

> "The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief."

The Court continued:

> "How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order [the plaintiff] seeks."

16 In *Australian Broadcasting Corporation v O'Neill*, Gummow and Hayne JJ spoke of the relationship between *Beecham* and the subsequent decision *American Cyanamid Co v Ethicon Ltd*[6], which is the source of the phrase "a serious question to be tried". Their Honours said[7]:

> "There is then no objection to the use of the phrase 'serious question' if it is understood as conveying the notion that the seriousness of the question,

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2 *United Mexican States v Cabal* (2001) 209 CLR 165 at 180 [37]; [2001] HCA 60; see also *Tait v The Queen* (1962) 108 CLR 620 at 624; [1962] HCA 57.

3 (2006) 227 CLR 57 at 81-84 [65]-[72]; [2006] HCA 46.

4 (1968) 118 CLR 618; [1968] HCA 1.

5 (1968) 118 CLR 618 at 622 (citations omitted).

6 [1975] AC 396.

7 (2006) 227 CLR 57 at 83 [70].

like the strength of the probability referred to in *Beecham*, depends on the considerations emphasised in *Beecham*."

17 Their Honours then explained that Lord Diplock's observation in *American Cyanamid*[8] that, provided the court is satisfied that the plaintiff's claim is not frivolous or vexatious, then there will be a serious question to be tried does not accord with the *Beecham* doctrine and should not be followed[9].

18 For the purposes of these applications for interlocutory injunctions today I have applied the doctrine established in *Beecham*, explicated in *Australian Broadcasting Corporation v O'Neill.*

19 It may be as well to mention that the second inquiry to be made in respect of an application for an interlocutory injunction is an inquiry into what is commonly encompassed by the expression "the balance of convenience", about which the parties in these cases are not in dispute. The plaintiffs made reference to *Bullock v Federated Furnishing Trades Society of Australasia (No 1)*[10], where a Full Court of the Federal Court noted that the two inquiries in *Beecham* need not be considered in isolation from each other and a marked balance of convenience may be an important consideration.

Submissions

20 As already mentioned, the first inquiry to be made in respect of an application for an interlocutory injunction is whether the plaintiff has established a prima facie case for the relief sought. The relevant relief for the purposes of these applications for interlocutory injunctions is relief in respect of an allegation that the present detention of the plaintiffs in Melbourne is unlawful. It is submitted for the plaintiffs that the plaintiffs' detention on Christmas Island was unlawful because s 189(3) of the Act confers a discretionary power, rather than a mandatory duty, to detain. It was argued next that the failure to apply s 189(3) properly renders unlawful the plaintiffs' detention on the mainland. There were two aspects of this argument. The first was that invalidity in relation to the decision to detain on Christmas Island continues to undermine any authority to detain to be found in s 189(1) of the Act. On this branch of the argument it was contended that s 189(3) contains merely an arrest power which does not authorise continued detention. Cases relied upon by the plaintiffs in this context included

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8 [1975] AC 396 at 407.

9 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 83-84 [71].

10 (1985) 5 FCR 464 at 472.

Minister for Immigration and Multicultural and Indigenous Affairs v VFAD[11] and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*[12].

21 The second aspect of this argument was that s 189(1) has no application to the plaintiffs because they originally arrived in an excised offshore place, therefore s 189(3) has a continuing application in respect of their present detention in Melbourne and that s 189(1) could never apply to the plaintiffs because ss 189(1) and 189(3) are directed to different regimes. Reduced to essentials, the plaintiffs' case was that there was a prima facie case established that s 189(1) of the Act does not apply to the plaintiffs and, in particular, that as a matter of law the plaintiffs have never been detained under s 189(1).

22 It has also been mentioned in the plaintiffs' submissions that the Minister has powers under s 195A of the Act to grant a visa or under s 197AB of the Act to make a "residence determination", neither of which has been done to date, and a suggestion was made that the Minister has been and continues to be in breach of his duties under the Guardianship Act because there are government policies in respect of the detention of minors (including in relation to the granting of bridging visas). Section 4AA of the Act covers detention of minors and sub-s (1) contains an affirmation by Parliament of the principle "that a minor shall only be detained as a measure of last resort". That legislative policy is to be applied within the framework of the Act.

23 As to the second inquiry in respect of the grant of an interlocutory injunction, that is in relation to the "balance of convenience", the plaintiffs rely on a body of evidence, including evidence of medical experts which deals with current symptoms of the plaintiffs in respect of severe and deteriorating mental health. I do not set out this evidence in any detail for the reason that the defendants accept that the balance of convenience would favour the grant of the relief sought.

24 The defendants have made a number of concessions which narrow the ambit of dispute. As I have just mentioned, the defendants accept that the balance of convenience would favour the grant of relief. The defendants are also content for the applications for interlocutory injunctions to proceed on the basis that the Court may assume that the plaintiffs have established a prima facie case for relief in relation to the claim of invalidity of the Christmas Island detention decisions. The defendants' resistance to the grant of relief sought is based on the argument that the present detention is lawful.

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11 (2002) 125 FCR 249, especially at 276-277 [150]-[152].

12 (2003) 126 FCR 54 at 64-65 [30].

25 The defendants rely on s 189(1) of the Act which authorises mandatory detention of unlawful non-citizens in the migration zone (other than an excised offshore place). The constitutional validity of the mandatory detention provided for under s 189(1) of the Act has been upheld by this Court[13], including in respect of unlawful non-citizens who are below the age of 18 years[14]. There are no issues here of the kind raised in *Al-Kateb v Godwin*[15].

26 The defendants contend that having been detained under s 189(1) on the mainland, the plaintiffs' detention must continue until the occurrence of one of the events specified in s 196(1) of the Act. That leads to the submission that no prima facie case has been made out for the relief sought in respect of the present detention.

27 In relation to the Minister's discretionary powers under ss 195A and 197AB, which would include the grant of a bridging visa or a determination that a person may be detained at a specified place rather than another specified place of detention, it is noted that the Minister has not exercised such powers to date. It is submitted by the defendants that the Court cannot compel the Minister to consider the exercise of those powers because the Act specifically provides that the Minister is not under any duty to consider whether to exercise those powers[16].

28 I turn to consider these competing submissions. There is no doubt that the right to liberty relied on by counsel for the plaintiffs is a most important right[17]. Mandatory detention was introduced in 1992. It was noted by Gleeson CJ in *Re Woolley; Ex parte Applicants M276/2003*[18] that the practical consequences of mandatory detention for children are "considered by some to be a reason to oppose the policy of the Act, but it is not for this Court to set out to frustrate the legislation on the basis of such opposition."

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13 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; [1992] HCA 64.

14 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1; [2004] HCA 49.

15 (2004) 219 CLR 562; [2004] HCA 37.

16 Sections 195A(4) and 197AE of the Act.

17 *Al-Kateb* (2004) 219 CLR 562 at 577 [19].

18 (2004) 225 CLR 1 at 9 [9].

29 In a similar vein in *Re Woolley*, Kirby J said[19]:

> "[The Act] is specific, particular and clear so far as its requirement for universal mandatory detention is concerned, including in relation to children. Such requirements prevail over any otherwise existing general powers enjoyed by federal courts, including this Court …
>
> Detention is the deliberate policy of the Australian Parliament, repeatedly affirmed. In default of a constitutional basis for invalidating it, it is the duty of this Court to give effect to the Act, whatever views might be urged about the wisdom, humanity and justice of that policy."

30 Also in *Re Woolley*[20] Hayne J (with whom Heydon J agreed) stated:

> "If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer *must* detain the person (s 189(1)) … Continued detention under s 196 is predicated upon the person being an unlawful non-citizen. It does not depend upon the formation of any opinion of the Executive ... about whether detention is necessary or desirable whether for purposes of investigation or any other purpose. That judgment has been made by the legislature." (emphasis in original)

31 There is evidence of the relevant suspicion, for the purposes of s 189(1) in these cases, at least since September 2010, and the plaintiffs do not deny that the plaintiffs' status is that of unlawful non-citizens.

32 I do not regard the authority of *Re Woolley* as inapplicable to the facts of these cases, as suggested by the plaintiffs, merely because the facts in *Re Woolley* did not require any explicit consideration of s 189(3). It was submitted for the plaintiffs that since the addition of s 189(3) to the Act, Parliament has provided that mandatory detention does not apply in all cases of unlawful non-citizens. That is true, but the Act makes a plain and unambiguous distinction between persons who are in an excised offshore place and persons who are not.

33 While, for the purpose of today's applications, I have assumed that the plaintiffs have established a prima facie case in respect of relief, in respect of the Christmas Island detention decisions based on s 189(3), as I was invited to do by the defendants, I do not accept that the plaintiffs have established a prima facie case that the present detention of the plaintiffs on the mainland is unlawful.

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19 (2004) 225 CLR 1 at 68 [193] and 70 [198] (footnotes omitted).

20 (2004) 225 CLR 1 at 76 [224].

Minister for Immigration and Multicultural and Indigenous Affairs v VFAD[21] is distinguishable because there the applicant for relief was contending he was a lawful non-citizen having been granted a visa.

34 It can also be noted that even when an applicant is ultimately found to be a lawful non-citizen, detention mandated by s 189(1) is not thereby rendered unlawful[22]. *Ruddock v Taylor*[23] supports the proposition that the power to detain under s 189(1), which includes the power to arrest, is to be read so as to include the power to continue to detain. See also the definition of "detain" in s 5(1) of the Act. It appears to me that the detention of the plaintiffs in Melbourne is detention which is authorised and mandated by s 189(1) because, as explained by Hayne J in *Re Woolley* in the passage to which I have referred, the legislature has made a judgment about the necessity and desirability of the detention of unlawful non-citizens in the migration zone (other than an excised offshore place).

35 On the evidence before me, I do not accept the plaintiffs' contention that the invalidity of the Christmas Island detention decisions "infects" or undermines their detention on the mainland. Nor do I accept that s 189(3) has continuing application to the plaintiffs on the mainland. I do accept that there are different regimes in respect of visa applications depending on where applicants arrive. However, read together, ss 189(1) and 189(3) are provisions governing the detention of unlawful non-citizens in two distinct areas. It is plain that s 189(1) applies except when an unlawful non-citizen is in an excised offshore place and that s 189(3) applies when an unlawful non-citizen is in an excised offshore place. Accordingly, s 189(1) applies to the present detention of the plaintiffs in Melbourne. Having been detained under s 189(1), the detention of the plaintiffs continues until the occurrence of one of the events specified in s 196(1) of the Act, namely, removal, deportation or the grant of a visa. Section 196(3) provides:

> "To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa."

36 In the context of an argument that the transfer of the plaintiffs to the mainland was unlawful, it can be noted that whilst all the plaintiffs were minors when they arrived on Christmas Island unaccompanied, they are at an age where they may well have had the capacity to request removal. However, this is not an issue on these applications.

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21 (2002) 125 FCR 249.

22 *Ruddock v Taylor* (2005) 222 CLR 612; [2005] HCA 48.

23 (2005) 222 CLR 612.

37 As to other submissions of the plaintiffs which touch on various matters, including the fact that to date the Minister has not exercised his powers under either s 195A or s 197AB, the plaintiffs' counsel acknowledged that both sections include statements in terms that the Minister is under no duty to exercise either of those powers. Reference has already been made to those provisions (ss 195A(4) and 197AE). As was pointed out in *Plaintiff M61/2010E v Commonwealth*[24], in such circumstances "mandamus will not issue to compel the Minister to consider or reconsider exercising" such powers. Similarly, the Court would lack the power to issue interlocutory mandatory injunctions compelling the Minister to consider exercising those powers. In any event, that is not the relief sought. It can be noted that Kirby J in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*[25] noted that even assuming the Minister has general guardianship obligations to persons in the position of the minors among the plaintiffs, those guardianship obligations have to be read subject to the specific obligations under the Act.

38 Something should be said about the balance of convenience issues in these cases which rest on strong and uncontested evidence. The plaintiffs assert this establishes that:

> "the continued detention of the [p]laintiffs involves a serious risk of psychological and other harm … [and] there are available arrangements for the accommodation and supervision of the [p]laintiffs in the event that they are released from detention."

39 Sister Brigid (Marie) Arthur gave evidence that the Brigidine Congregation has premises which are suitable for the accommodation of the plaintiffs. Such premises have apparently been used in the past for accommodating asylum seekers on bridging visas. As already mentioned, the defendants accept that these considerations would support the grant of the relief sought. As I understand the mechanisms available to the Minister, since 1994 the Minister has the power to declare premises such as those proffered in these cases by the Brigidine Congregation, a place of detention under the extended definition of "immigration detention" in par (b)(v) of s 5(1) of the Act, or the premises may be deemed to be a place of detention under the provisions of s 197AB. It would appear that the legal analysis of what transpires in such circumstances is that persons are transferred from lawful detention in one place to lawful detention in another place. It is accepted by the parties that under the Act the Minister is the only person who can effect that outcome.

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24 (2010) 85 ALJR 133 at 151 [99]; 272 ALR 14 at 37; [2010] HCA 41.

25 (2004) 79 ALJR 94 at 114 [106]; 210 ALR 190 at 217; [2004] HCA 50.

40 The Minister does not contest the points that the continued detention of the plaintiffs in detention centres involves a serious risk of psychological or other harm to the plaintiffs and that detention and supervision of the plaintiffs otherwise than in their present place of detention is available. I was informed during the hearing that the processing of applications under s 197AB is under way in respect of all four plaintiffs. Apparently there is a technical difficulty in respect of one of the four plaintiffs, but it is anticipated that can be overcome.

41 For the reasons set out, I decline to grant the interlocutory injunctions in the form sought because I am not persuaded that the plaintiffs have established a prima facie case that their present detention in Melbourne is unlawful.