FEDERAL COURT OF AUSTRALIA

Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour [2004] FCAFC 93

MIGRATION – conditions of detention – duty of care owed to detainee – whether duty owed by the Secretary of the Department of Immigration and Multicultural and Indigenous Affairs – nature and content of duty – absence of regulatory regime

PROCEDURE – appeal from interlocutory order to transfer detainee to alternative detention centre – whether serious question to be tried – terms of order akin to final order

Migration Regulations

Migration Act 1958 (Cth)

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, ATS 21, entered into force 7 September 1989)

Howard v Jarvis (1958) 98 CLR 177
Minister for Immigration and Multicultural Affairs v Al Masri (2003) 197 ALR 241
Alsalih v Manager Baxter Immigration Detention Facility [2004] FCA 352
The Council of the Shire of Sutherland v Heyman (1985) 157 CLR 424
Sullivan v Moody (2001) 207 CLR 562
Sanders v Snell (1998) 196 CLR 329
Question of Law Reserved (No 2 of 1996) (1996) 67 SASR 63

SECRETARY, DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v MOHAMMED AMIN MASTIPOUR and AUSTRALASIAN CORRECTIONAL MANAGEMENT PTY LTD

S 799 OF 2003

FINN, SELWAY and LANDER JJ
29 APRIL 2004
ADELAIDE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY **S 799 OF 2003**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**SECRETARY, DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **APPELLANT**
AND:	**MOHAMMED AMIN MASTIPOUR** **FIRST RESPONDENT**
	AUSTRALASIAN CORRECTIONAL MANAGEMENT PTY LTD **SECOND RESPONDENT**
JUDGES:	**FINN, SELWAY and LANDER JJ**
DATE OF ORDER:	**29 APRIL 2004**
WHERE MADE:	**ADELAIDE**

THE COURT ORDERS THAT:

1. Appeal allowed.
2. Paragraph 1 of the orders made by Mansfield J on 9 September 2003 is set aside.
3. In lieu thereof, there be an order:

   Until the trial of this action or until further order, whichever first occurs, an injunction is hereby granted restraining the first respondent (the Secretary) from:

   (1) Detaining the applicant (Mr Mastipour) at the Baxter Reception and Processing Centre in Port Augusta, South Australia; or

   (2) Removing the applicant (Mr Mastipour) to the Port Hedland Reception and Processing Centre in Western Australia.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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AND:	**MOHAMMED AMIN MASTIPOUR** **FIRST RESPONDENT**
	AUSTRALASIAN CORRECTIONAL MANAGEMENT PTY LTD **SECOND RESPONDENT**
JUDGES:	**FINN, SELWAY and LANDER JJ**
DATE:	**29 APRIL 2004**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

FINN J:

1 I have had the advantage of reading in draft the reasons of Lander J. I agree with those reasons and with the orders proposed.

2 I wish to make only two additional comments. The first is to associate myself with the observations of Selway J concerning the absence of a statutory regime regulating the manner and conditions of immigration detention. The present legislative vacuum is, in my view, potentially unfair both to those involved in the conduct of detention centres and to the detainees. Selway J has illustrated why this is so. I need hardly add that this state of affairs is not conducive to ordered and principled public administration.

3 Secondly, I wish to emphasise that while injunctive relief has been granted which in substance affects the conditions of the first respondent's confinement, that relief has been granted on orthodox grounds in aid of private rights. It does not presage the covert

transplantation of a species of "structural injunction" from the United States into our own jurisprudence: see Gummow, "The Injunction in Aid of Legal Rights – An Australian Perspective" (1993) 56 Law & Contemp Problems 83 at 86; Easton, "The Dual Role of the Structural Injunction" (1990) 99 Yale LJ 1983; Dobbs, *Law of Remedies*, vol 2 §7.4(4) (2nd ed, 1993).

I certify that the preceding three (3) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated: 29 April 2004

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **S 799 OF 2003**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**SECRETARY, DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **APPELLANT**
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	AUSTRALASIAN CORRECTIONAL MANAGEMENT PTY LTD **SECOND RESPONDENT**
JUDGES:	**FINN, SELWAY and LANDER JJ**
DATE:	**29 APRIL 2004**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

SELWAY J:

4 I have had the opportunity to read in draft form the reasons of Lander J. I agree with the conclusion he reaches and with his reasons. I merely wish to make some further comments of my own. For this purpose I will describe the appellant as "the Secretary" and the respondent as "Mr Masitpour".

5 Both parties seemed to be in agreement that the power of detention of Mr Mastipour was to be found in s 189(1) of the Act. That sub section provides:

> *'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.'*

6 Current authority in this Court is that the continued power to hold a person in detention is contained in s 196(1) of the Act: see *Minister for Immigration and Multicultural Affairs v Al Masri* (2003) 197 ALR 241, 249 [30]. That subsection provides:

'(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

(a) removed from Australia under section 198 or 199; or

(b) deported under section 200; or

(c) granted a visa'

7 The difference between the two provisions may well be important in some contexts, particularly where the validity of the detention is in issue. However, this case does not concern the validity of the detention, but rather whether the Secretary owes a duty of care in negligence to Mr Mastipour in respect of various actions taken (or omissions made) by various persons in respect of the detention of Mr Mastipour. Subject to the question of who has custody of Mr Mastipour (which is mentioned below), it may be that the identification of the actual power is not critical in this case. What is important for present purposes is that there is an express power of detention.

8 What is surprising is that there are virtually no provisions, either in the Act or in the *Migration Regulations* which purport to regulate the manner and conditions of that detention. As I mentioned in my reasons for judgment in *Alsalih v Manager Baxter Immigration Detention Facility* [2004] FCA 352 at [47]-[48] it is usual when powers of detention are conferred for the Parliament to make provision for the manner of the exercise of those powers. There are at least two reasons for this. The first is to curtail the possible abuse of the powers. The second is to protect those who have to exercise them by providing some guidance as to what the powers are.

9 The Parliament has expressly made provision authorising regulations to be made for the operation and regulation of detention centres. Section 273 of the Act provides:

'(1) The Minister may, on behalf of the Commonwealth, cause detention centres to be established and maintained.

(2 The regulations may make provision in relation to the operation and regulation of detention centres.

(3) Without limiting the generality of subsection (2), regulations under that subsection may deal with the following matters:

(a) the conduct and supervision of detainees;

(b) the powers of persons performing functions in connection with the supervision of detainees.

(4) In this section:

detention centre *means a centre for the detention of persons whose detention is authorised under this Act.'*

It would not appear that any such regulations have been made.

10 It is true that the word "detain" is defined in s 5 of the Act to mean:

'(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.'

11 However, this provides little insight as to what is involved in the relevant "detention". It is also true that there are powers to conduct searches of detainees in certain circumstances: see ss 252AA, 252A, 252B, 252C, 252G of the Act. There is also power to administer medical treatment without consent: *Migration Regulations*, R 5.35. None of these assist in determining whether the detention regime operated at Baxter Detention Centre was within the statutory power.

12 The pleadings identify a number of issues which directly concern what powers relevant persons have in relation to detainees at detention centres. For example, it would seem that the following issues may well need to be addressed: whether there was an "administrative" power to detain Mr Mastipour in the Management unit; whether that power could be exercised without affording Mr Mastipour a right to be heard; whether there was an "administrative" power to separate Mr Mastipour from his daughter; whether that power could be exercised without affording Mr Mastipour a right to be heard; whether there was a power to send Mr Mastipour's daughter back to Iran without some judicial determination that Mr Mastipour did not have lawful custody of his child and whether that power could be exercised without affording Mr Mastipour a right to be heard. There may well be others.

13 These issues concern the powers of those having the right to detain Mr Mastipour. The mere fact that those powers exist (if they do) does not mean that the Secretary cannot be liable in negligence for the performance of them: see *The Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 at 457-458. Nevertheless in determining the extent of the duty of care (if any) owed by the Secretary to Mr Mastipour the statutory background may well be critical: see, for example *Sullivan v Moody* (2001) 207 CLR 562 at 582-583. For example, at least as a general proposition it is unlikely that a common law duty of care would or could be imposed which was contrary to a statutory duty or even a clear statutory power.

14 In this case there is no detailed regulatory regime against which to consider the duty of care owed by the Secretary to Mr Mastipour. In the absence of such a detailed regulatory regime there is no obvious reason for limiting the common law duty of care by reason of some inferred power or duty of the Secretary. The power and the duty of the Secretary is a power and duty to detain. In determining the extent of the powers inherent in, or necessarily implied by, the power to detain there are at least two issues that need to be considered and balanced:

(a) The power of detention is conferred for the purpose of preventing an unlawful non-citizen entering the Australian community before their entitlement to do so is established and, if it is not established, for the purpose of their removal if possible; and

(b) A detainee retains all of his or her civil rights other than those that are only available to a citizen, and other then those taken away by law, either expressly or by necessary implication.

15 Looked at in this way it is obvious that cases dealing with the powers of prison authorities, or the powers of those administering mental health institutions may not be analogous to the circumstances of detainees under the Act.

16 A submission was made to the primary Judge on behalf of the Secretary that "once a person is in lawful immigration detention, the form of that detention is entirely within the Minister's discretion so that a form of detention which is imposed for punitive purposes (even if unwarranted or capricious) is not subject to judicial review, although it may give rise to a

claim for damages". This submission was properly disowned by Mr Basten QC, who appeared for the Secretary before us. He was not the counsel who made that submission before the primary Judge. Of course, as a proposition of law that submission is entirely erroneous. The problem is that the counsel who put it may not be the only one who has that view. In particular it would be very troubling if any of those exercising the power to detain were of the view that their powers were so unqualified.

17 The failure to make regulations in relation to the operation and regulation of detention centres necessarily results in uncertainty as to what powers and obligations apply. That uncertainty involves risks not only to those detained in detention centres, but also to those employed there. In relation to those employed there they are subject not only to public law duties, but also to tortious and (perhaps) even criminal liabilities if they breach the duties imposed on them by law. See, for example, the reasons of the Justices of the High Court in *Sanders v Snell* (1998) 196 CLR 329 and of the South Australian Supreme Court in *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63.

18 One obvious example of the current regulatory vacuum in this case is the issue of who are the proper parties to these proceedings. Both parties seem content to accept that the Secretary of the Department is the person who is detaining Mr Mastipour. For present purposes it is sufficient to proceed on that basis. Although it is ultimately a matter of fact it is unlikely that it is the Secretary that is physically detaining Mr Mastipour. Given the potential personal liabilities involved, the question of who is detaining Mr Mastipour and what their powers and duties are in that regard, cannot be treated merely as some procedural issue to be resolved by adopting what appears to be a convenient fiction.

19 I agree with the orders proposed by Lander J.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Selway.

Associate:

Dated: 29 April 2004

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY **S 799 OF 2003**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

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AND:	**MOHAMMED AMIN MASTIPOUR** **FIRST RESPONDENT**
	AUSTRALASIAN CORRECTIONAL MANAGEMENT PTY LTD **SECOND RESPONDENT**
JUDGES:	**FINN, SELWAY and LANDER JJ**
DATE:	**29 APRIL 2004**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

LANDER J:

20 This is an appeal from orders of a judge of this Court made on 9 September 2003.

21 On 18 August 2003 the first respondent, whom I shall call Mr Mastipour, brought proceedings in this Court seeking the following orders:

> *'A. A declaration that the Respondents, by holding the Applicant in solitary confinement, have acted beyond the power conferred by section 189 of the Migration Act.*
>
> *B. A declaration that the decisions of the first Respondent to permit the second Respondent:*
>
> *a. To place the Applicant in solitary confinement in the conditions described in the Statement of Claim;*
>
> *b. To continue to hold the Applicant in solitary confinement in the conditions described in the Statement of Claim;*

are beyond the power given to him under the Migration Act and are void.

C. An injunction restraining the Respondents from holding the Applicant in solitary confinement.

D. An injunction directing the Respondents to return the Applicant to the appropriate compound in Baxter Immigration Reception and Processing Centre.

E. Damages, including exemplary damages, for personal injuries.

F. An order that the Respondents pay the Applicant's costs.

G. Such other orders as the Court thinks fit.'

22 The application was accompanied by a statement of claim in which Mr Mastipour pleads that he is an Iranian citizen currently held in the Baxter Immigration Reception and Processing Centre in Port Augusta, South Australia (Baxter) pursuant to s 189 of the *Migration Act 1958* (Cth) ('the Act') and has been in immigration detention since early 2001.

23 He pleads that on 14 July 2003 employees of the second respondent, Australasian Correctional Management Pty Ltd ('ACM'), entered his living area and searched it; beat him on his head, right knee and chest; ordered him to take off his clothes in front of his seven year old daughter; handcuffed him when he refused to take off his clothes in front of his daughter; and placed Mr Mastipour in the Management Unit in Baxter. He has been held in that Management Unit in solitary confinement since that day.

24 He claims that the conditions in which he is held amount to 'torture', as defined by Article 1(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (opened for signature 10 December 1984, ATS 21, entered into force 7 September 1989), and constitute punishment of Mr Mastipour and conditions of detention not authorised by the Act.

25 The conditions of which he complains are:

'6. The cell in which the Applicant is held:

a. is approximately 3 metres square;

b. contains a mattress and no other furniture;

c. has bare walls;

d. has an open doorway leading to a small bathroom;

e. contains a closed circuit TV camera which observes and records the Applicant's movements at all times;

f. is always lit;

g. allows no view of anything outside the cell.

7. The Applicant is held in conditions which include the following features:

a. he is confined to the cell for more than 23 hours in each day;

b. he is not permitted to have any reading material;

c. he is not permitted to have any writing material;

d. he has no other person to talk to;

e. he is not permitted television;

f. he is not permitted radio;

g. he has no form of entertainment or diversion;

h. he cannot see anything outside the cell;

i. he is permitted to spend less than one hour in each 24 hours in the open air;

j. he is under continuous video surveillance;

k. the cell is never dark.'

26 Next, he pleads that since 1998, pursuant to a divorce agreement, he has had custody of his daughter, Massoumeh. His daughter accompanied him to Australia and had been in detention with him since 2001.

27 On 23 July 2003, whilst Mr Mastipour was in the Management Unit, employees of the appellant ('the Secretary') removed Massoumeh from Australia and returned her to Iran.

28 He pleads that she was removed whilst her right to remain in Australia was the subject of an application in the High Court brought by Mr Mastipour on behalf of them both.

29 The circumstances of her removal are set out in the statement of claim:

> *'14. In removing Massoumeh from Australia, the Respondents:*
>
> *a. took steps to ensure that the Applicant did not know that she was being removed from Australia;*
>
> *b. took steps calculated to prevent him from attempting to stop her removal from Australia;*
>
> *c. took steps calculated to prevent him from seeing her or saying goodbye to her before she was removed from Australia.*
>
> ***PARTICULARS***
>
> *By holding the Applicant in the conditions described above and by failing to tell him of the plan to remove Massoumeh from Australia the Respondents ensured that the Applicant could not seek to prevent the removal and prevented him from saying goodbye to her.*
>
> *On 23 July when the Applicant asked to be allowed to see Massoumeh, an employee of ACM falsely told the Applicant that Massoumeh had been taken shopping, whereas she was then in the process of being returned to Iran.*
>
> *The purpose of the Respondents is to be inferred from the circumstances of the case and from the obvious wish of a custodial parent to prevent the removal of his daughter in the circumstances, or (if it could not be prevented) to say goodbye to her.'*

30 He claims that he was not informed of her removal until she had been returned to Iran.

31 He complains that she was removed, in the circumstances described, to place pressure on him to abandon his attempt to get a protection visa and to pressure him to return to Iran voluntarily.

32 Importantly, at least for the purpose of this appeal, Mr Mastipour pleads:

> *'19. At the time Massoumeh was removed from Australia it was reasonably foreseeable that her removal, in the circumstances that prevented the Applicant from seeking to prevent her removal or from saying goodbye to her, would cause the Applicant emotional shock and psychiatric injury.*
>
> *20. In the circumstances, the Respondents owe the Applicant a duty to take care to avoid exposing him to circumstances which were likely to cause him emotional shock and psychiatric injury.*

> *21. As a result of the matters alleged, the Applicant has suffered severe emotional shock and psychiatric injury.*
>
> *22. In the circumstances, the Applicant is entitled to exemplary damages.'*

That part of Mr Mastipour's claim is in tort. It is simply a claim of a breach of a duty of care.

33 The cause of action is, with respect, not well pleaded. The facts and circumstances giving rise to the duty of care are not identified. It may be assumed that the duty of care arises because Mr Mastipour is detained and those responsible for his detention thereby have a duty of care of some kind to him. Whether that duty arises out of that mere relationship or whether it arises because of the relationship and any statutory or regulatory obligations is not addressed. The duty itself is rather imprecisely articulated. The duty is pleaded as a positive duty 'to avoid exposing him to circumstances which were likely to cause him emotional shock and psychiatric injury'. On this appeal, Mr Basten QC, who appeared for the Secretary, conceded that Mr Mastipour is owed a duty of care. The duty is 'to take reasonable care of [Mr Mastipour] in relation to his safety whilst in detention'.

34 Mr Basten also accepted that the duty was owed by the Secretary.

35 I have no doubt that because Mr Mastipour is in detention that a duty of some kind is owed to him by those who have the responsibility for his detention: *Howard v Jarvis* (1958) 98 CLR 177. However, I have some doubt that the Secretary of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) is the person detaining Mr Mastipour and therefore some doubt that the Secretary owes a duty to him.

36 I am prepared to accept, for the purpose of this appeal, as the Secretary did, that the Secretary owed the duty.

37 I think that the duty pleaded by Mr Mastipour may be too wide. I think the duty articulated by the Secretary is more likely to be the duty found to be owing to Mr Mastipour when all the facts and circumstances surrounding the relationship between Mr Mastipour and the Secretary and ACM are examined. This Court should proceed on the basis that the duty is owed to Mr Mastipour.

38 Mr Mastipour has not pleaded the breach. The plea in paragraph 21 of the statement of claim is clearly unsatisfactory.

39 In due course, the Secretary and ACM are entitled to better particulars of the breach.

40 On the pleading before the primary judge, it may be inferred that the Secretary failed to take reasonable care for Mr Mastipour's safety in the actions by DIMIA or ACM on 14 July 2003 which led to him being placed in the Management Unit; confining him in the Management Unit with the deprivations pleaded in paragraphs 6 and 7; removing Mr Mastipour's daughter from Australia to Iran without notice being given to him; effecting the removal under cover of a lie; and keeping Mr Mastipour in Baxter knowing that to do so might cause him mental injury.

41 I should observe that Mr Mastipour has, since the hearing before the primary judge, filed a further statement of claim which still does not address what I believe are serious shortcomings in the statement of claim. This Court was told on appeal that yet another statement of claim would be filed.

42 Mr Mastipour also filed a number of affidavits including two of his own in support of the interlocutory injunction sought in the application. I shall return to those affidavits.

43 The matter first came before the primary judge on 26 August 2003 when the Secretary advised the Court that, although the Secretary did not acknowledge that the Court had power to make the order sought, the Secretary would arrange as soon as practicable to transfer Mr Mastipour to the Glenside Psychiatric Hospital for assessment and notify his solicitors of the outcome of that assessment.

44 On that occasion, the primary judge gave leave to Mr Mastipour to file and serve an amended statement of claim and made other directions.

45 On 28 August 2003 Mr Mastipour filed and served an amended statement of claim giving some particularity to the claim that he had been held in solitary confinement in the Management Unit and of his claim that the conditions in that unit were punitive. The

amended statement also claimed that Mr Mastipour had suffered emotional shock and psychiatric injury by reason of his confinement.

46 The primary judge made further directions on 4 September and 5 September 2003 and the matter was listed for hearing before him.

47 On 9 September 2003 the primary judge made the following order, which is the subject of this appeal:

> *'1. The first respondent do transfer the applicant as soon as reasonably practicable to either the Villawood Immigration Reception Processing Centre or to the Maribyrnong Immigration Reception Processing Centre as the first respondent may determine.'*

48 Neither the Secretary nor ACM had filed a defence before 9 September 2003.

49 It can be noticed at once that the order made by the primary judge bore no relationship to the orders sought in the application. Mr Mastipour's claims and the orders which he sought changed between the date of the issue of the application and its determination on 9 September 2003. That was, in part, due to a change in his circumstances and especially his daughter's return to Iran. The order made by the primary judge was the order sought by Mr Mastipour at that final hearing.

50 Before identifying the grounds of appeal, it is necessary to identify the facts which were before the primary judge and to that end to have regard to the affidavit evidence.

51 Mr Mastipour read two affidavits of his own, both sworn on 22 August 2003.

52 Mr Mastipour married his former wife in 1993 and their daughter Massoumeh was born on 18 June 1996. His wife filed for divorce in late 1997. He said that a judge ordered that they be divorced and that he was to have the full-time care of Massoumeh and his former wife was to have her one day a week. His former wife remarried five or six months after the divorce and 'began to seek custody of Massoumeh'.

53 Mr Mastipour deposed that he left Iran in November 2000, with his daughter, without telling his wife or anyone else. He said that he left because he feared persecution and took

Massoumeh because he had care of her since she was two years old. His former wife was upset that he had left without telling her.

54 He said he had not been served with or received any documents from his wife relating to his daughter's removal to Australia.

55 In or around February 2003, child abuse allegations were made against Mr Mastipour in relation to his daughter. As a result of those allegations, his daughter was taken out of Baxter for around two weeks by the Department of Family and Youth Services.

56 Eventually, she was returned to him with an acknowledgement by the Department that they had not found that Massoumeh had experienced any sexual abuse.

57 Becuse of pressure in the compound arising from the sexual abuse allegations, Mr Mastipour wanted to be transferred with his daughter from Baxter to another Detention Centre.

58 He said that nothing happened and, as a result, on 8 July 2003 he began a hunger strike.

59 Six days later, on 14 July 2003, he said that five officers of ACM came to his room asking to search it. They looked around the room for about a minute and then one of them said to him: 'Take off your cloths [sic] we are going to strip search you'.

60 Mr Mastipour said that he protested about being strip searched in front of his daughter, as a result of which he was handcuffed. He was then taken to the Management Unit at Baxter. His evidence in his affidavit of 22 August 2003 was that the cell was of the kind pleaded in the statement of claim and that he was subject to the regime also pleaded in the statement of claim.

61 He said that after he was removed to the Management Unit on each day at around 5.00 pm he was taken to the visiting area to visit his daughter. Although he was supposed to see her for 90 minutes, the visit usually lasted no more than 40 or 45 minutes. On occasions, the visits were quite short.

62 He said that he was pressured by officers, I think of the Secretary and ACM, to sign an acknowledgement that he had beaten officers. He was told that if he did not sign those papers, including the confession, he would not be able to visit his daughter. He was also told by Ms Terrina Wallis that if he signed the paper she would give him recent photographs of his daughter.

63 On Wednesday, 23 July 2003, at around 5.00 pm, he was told by a Detainee Manager that his daughter had been taken shopping by Terrina and Greg Wallis, and that he would be able to visit his daughter later. At about 7.30 pm he said he was told by the same lady that no visit could take place that day because Terrina and Greg Wallis had taken his daughter to their house.

64 Mr Mastipour said that he became upset and asked to speak to his daughter on the telephone, but was told that he could not speak to her because he had not signed the paper.

65 The next day, at about 5.00 pm or 5.30 pm, he said that Mr Greg Wallis came to see him and said words to the effect of: 'I have sent Massoumeh back to Iran'.

66 Mr Mastipour said that he did not believe Mr Wallis. However, Mr Wallis said: 'You can call her if you like', meaning that he could call her in Iran.

67 At about 7.30 pm Mr Mastipour spoke to his daughter who was then in Iran. She asked him: 'When are you coming', meaning returning to Iran.

68 Mr Mastipour's case was that he had been subjected, for no apparent reason, to the humiliation of being warned that he would be strip searched in the presence of his daughter; handcuffed in her presence; removed to the Management Unit against his wishes; threatened with the loss of visitation rights to his daughter unless he signed a false confession; and deprived of his daughter under the cover of a lie; all because he had asked to be removed with his daughter from Baxter to another Immigration Centre because of his concerns about false allegations regarding sexual abuse of his daughter.

69 The two persons to whom Mr Mastipour referred are officers at Baxter. Gregory Wallis is an officer of DIMIA and the DIMIA Manager of Baxter. His wife, Terrina Jane Wallis, is also an officer of DIMIA and the Deputy Manager at Baxter.

70 The Secretary read an affidavit of Gregory Wallis and an affidavit of Terrina Wallis.

71 Neither of those deponents denied the allegations made by Mr Mastipour. Neither denied that Mr Mastipour had been placed in the Management Unit in the circumstances deposed to by him. Other deponents exhibited records which claimed that Mr Mastipour was:

> *'… placed in the management unit on Monday the 14th July '03 at 1700 hours for the safety and security of the centre after an incident in Blue 1. During a routine room search Mr Mastipour became aggressive towards the officers and assaulted two of them'.*

72 However, no evidence was adduced by the Secretary from the officers who were said to have been assaulted. Mr Mastipour's assertions in relation to the circumstances giving rise to his removal to the Management Unit were thereby largely uncontradicted. Neither Mr nor Mrs Wallis contradicted Mr Mastipour's claims in relation to his detention in the Management Unit and his claims of deprivation. Even more importantly, neither denied that Mr Mastipour's daughter was removed from Australia in the circumstances deposed to by him and, in particular, as Mr Burnside QC put it 'under the cover of a lie'. Indeed, neither of them addressed those allegations at all.

73 At the hearing before the primary judge Mr Mastipour's claims, except in one respect, remained unanswered. Mr and Mrs Wallis and other officers did purport to address the claim that Mr Mastipour was being held in Baxter by the Secretary with knowledge that to do so would cause him mental injury.

74 Mr Mastipour also read an affidavit of Shakeh Momartin, a psychologist with the Psychiatric Research and Teaching Unit at the School of Psychiatry at the University of New South Wales. He carried out a psychological examination in association with Mr Zachary Steel and provided a psychological report dated 7 March 2003. Mr Steel's affidavit was also read.

75 The assessment was conducted by telephone on 5 September 2002, some 10 months before the events which led to Mr Mastipour being moved into the Management Unit. The authors stated that it was possible, even though no direct observations of his behaviour were made, to make clinical observations of his presentation. They also carried out a psychological assessment of Mr Mastipour's daughter on the same day.

76 They said of Mr Mastipour:

> *'Psychiatric diagnostic assessment indicated that Mr Mastipour was at the time of interview suffering from a severe major depressive disorder with comorbid chronic posttraumatic stress disorder. Mr Mastipour displayed extreme hopelessness about his circumstances and said that he "doesn't care anymore about himself". He also described recurrent suicidal thoughts although the presence of his daughter prevents him from acting on his thoughts. His clinical presentation during the interview was consistent with his reported symptoms of depression. His current symptoms of posttraumatic stress disorder, including the content of nightmares, flashbacks and intrusive thoughts, were primarily related to the incidents that have occurred in the detention environment and he experiences extreme feelings of anger at the injustices he believes has happened to him while in detention.*
>
> *It is clear from the current assessment that while Mr Mastipour has experienced symptoms of posttraumatic stress disorder and depression prior to arriving in Australia, his current clinical presentation is a direct result of his experiences in detention and his clinical condition will be exacerbated by continued detention.'*

77 They offered the following opinion in relation to Mr Mastipour's daughter:

> *'Psychiatric assessment of Massoumeh's mental state by interview with Massoumeh and her father indicated that she was at the time of interview suffering from multiple comorbid psychiatric conditions including major depressive disorder, posttraumatic stress disorder, separation anxiety disorder, enuresis, an oppositional defiant disorder. None of these conditions were present prior to Massoumeh's arrival in Australia and are directly attributable to her experiences in detention.'*

78 After dealing with some physical manifestations of what they thought to be her psychiatric condition, they said:

> *'It is highly recommended that Massoumeh be managed outside the detention centre environment as continued exposure to the conditions of detention would be expected to lead to a continued deterioration in her mental state, or at the very least, a maintenance of her mental state at the current level of psychological distress that is completely unacceptable.'*

79 There is no evidence that Dr Momartin's and Mr Steel's opinions were brought to the attention of the Secretary or ACM prior to July 2003. Mr and Mrs Wallis do not say in their affidavits that they had seen those opinions. There is, therefore, no evidence that those parties knew that Mr Mastipour might have had a propensity to mental harm.

80 Both psychologists carried out a further assessment on 20 August 2003. After referring to their previous report, they wrote:

> *'The current assessment found a significant deterioration in his already fragile mental state. His depressive illness has markedly deteriorated and is now associated with profound impairment. Mr Mastipour spends the majority of his time sobbing, lying listlessly in his cell with no energy to attend to even basic daily activities such as washing himself. It is our clinical opinion that such a severe depressive illness requires treatment in an acute psychiatric setting.*
>
> *The forced removal of Mr Mastipour's daughter from Australia has been a major life catastrophe for him. In response to this major traumatic experience, Mr Mastipour appears to have created a make-believe world for himself where he continues to have an ongoing relationship with Massoumeh and engages in conversations with her. He gains emotional relief from speaking to his daughter in this way and describes intentionally producing the circumstances that lead him to hear her voice by staring at her photo or paintings. This pattern of behaviour appears to be part of an extreme grief response to his traumatic separation from Massoumeh.'*

81 They conclude their report by saying:

> *'Mr Mastipour is one of the most distressed individuals that either assessor has encountered in our clinical careers. We are of the opinion that the severity of his depressive illness necessitates that Mr Mastipour receive treatment in an acute psychiatric setting. We are also of the opinion that Mr Mastipour's mental state is highly reactive to the detention environment and that he is unable to be cared for in the foreseeable future in such a setting without placing his mental health in serious jeopardy.'*

82 Mr Mastipour read an affidavit exhibiting a report, dated 29 August 2003, by Dr Fiona Hawker, consultant psychiatrist, and Associate Professor Norman James, Clinical Director of the Royal Adelaide Hospital Glenside Campus. They interviewed Mr Mastipour with the aid of a Farsi interpreter. Because of the urgency, the interview took place by video conference.

83 Those two psychiatrists did not agree with the psychologists' opinion. It was their opinion that Mr Mastipour was not suffering a psychotic or a major depressive illness. They

agreed with the opinion of the visiting psychiatrist at Baxter, Dr Howard Gorton, and the opinion of a registered psychiatric nurse, Mr Roberts. I will refer to Dr Gorton's opinion later. Notwithstanding their findings as to the absence of those illnesses, they said Mr Mastipour was clearly and understandably distraught at times 'and is likely to be suffering with some features of PTSD [post traumatic stress disorder], together with an acute grief reaction which is exacerbated by his present extremely difficult social and legal situations'.

84 They did not think that Mr Mastipour would benefit from psychiatric in-patient treatment. Indeed, it was their opinion that there was a risk associated with in-patient psychiatric care in that his current emotional difficulties might be complicated.

85 They concluded their report:

> *'Our recommendations are that he remain on his current management regime, as determined by Dr Howard Gorton and that he be transferred to another venue where he may receive continuing expert attention to his mental health needs, given the ongoing extreme stressors. To our knowledge, this would not be available outside a capital city.'*

86 That report was provided by Mr Mastipour's solicitors to the Secretary's solicitor on 1 September 2003. Thus, the Secretary was on notice from the time of receipt of that report that Dr Hawker and Associate Professor James were of the opinion that Mr Mastipour 'be transferred to another venue where he may receive continuing expert attention to his mental health needs, given the ongoing extreme stressors'.

87 On 1 September 2003 Mr Mastipour's advisers (Refugee Advocacy Service of South Australia Inc) wrote to the Secretary's solicitors seeking an undertaking, within 12 hours, that Mr Mastipour would be removed from Baxter to Villawood or Maribyrnong. No undertaking was given but an explanation was sought of the expression 'continuing expert attention' in the report of Dr Hawker and Associate Professor James. On 4 September 2003 Dr Hawker and Associate Professor James responded:

> *'In reference to your letter of 3.9.03, our explanation for the recommendation of "continuing expert attention to his mental health needs" is as follows:-*
>
> *1. Mr Mastipour will remain in a highly vulnerable emotional condition because of:*
>
> *a) The recent loss of the care of his daughter.*

b) His ongoing concerns regarding her welfare in the care of his ex wife.

c) The continuing discrimination and harassment by detainees who are responding to the unproven allegations of sexual abuse of his daughter. His views on this extend to other detainees from Curtin, now placed in both Port Headland and Baxter.

d) His profound fear of forced deportation and the likely consequences to him in the hands of the Iranian authorities.

2. This ongoing and significant vulnerability is likely to lead to a deterioration in his mental health. In our opinion this likelihood would be greatly lessened if he is placed in a centre where:-

a) Other detainees are likely to be unaware of the sexual allegations against him.

b) He has fewer reminders of his caring relationship with his daughter, in order to ameliorate his grief.

c) He has ready access to urgent psychiatric review, as required.

d) Continuing counselling and support from mental health nurses is readily available.

e) Counselling from culturally sensitive mental health workers, eg those who are appropriately trained to deal with patients dealing with trauma and grief; can be easily obtained.'

88 The Secretary tendered psychiatric evidence from Dr Howard Gorton. Dr Gorton visits Baxter. He is retained by DIMIA to provide psychiatric assessments of detainees. Dr Hawker and Professor James' report suggests that Dr Gorton also had the responsibility for Mr Mastipour's current management regime.

89 Dr Gorton has provided two reports, the first dated 28 July 2003 and the second dated 19 August 2003. In neither report does he say that he is Mr Mastipour's treating psychiatrist.

90 In his first report, Dr Gorton refers to a consultation he had with Mr Mastipour on 24 July 2003. Dr Gorton noted that Mr Mastipour was:

'[O]n a starvation diet as he sincerely desires to be moved to another detention centre because he is not getting on well with the other detainees. They had been harassing him because there was an allegation that he was behaving sexually inappropriately towards his 7 year old daughter. …'

He also recorded:

'… but he remains hostile to the other people living in his compound whom he thinks made the initial complaint and he also spoke of how he feels he is being made crazy by the continuing accusations.'

91 At that stage, Dr Gorton formed the opinion that Mr Mastipour was rational, lucid and able to give a good, straightforward account of himself. Dr Gorton also offered the opinion:

> *'[I]t is considered that his request for transfer is a reasonable one, and if such a transfer is possible such is recommended and supported on psychiatric grounds.'*

92 In that same report, Dr Gorton says:

> *'Unfortunately I was advised not to tell him that his daughter had, on the day he was seen, been taken from the detention centre and that he would be advised of this news later that day. It is considered that he will deteriorate further on hearing this news, and in view of that it is important that he remains in the Management Unit until this issue has been dealt with.'*

93 Dr Gorton's report supports Mr Mastipour's claim that he was actively deceived by one or other or both the Secretary and ACM in relation to the return of his daughter to Iran. It is unfortunate that Dr Gorton became embroiled in the deceit which was practised upon Mr Mastipour.

94 Moreover, the report establishes that it was either Dr Gorton or the Secretary's officers' opinion that Mr Mastipour would 'deteriorate further on hearing this news'. It would appear that Mr Mastipour's daughter was removed from Baxter knowing that would cause Mr Mastipour to deteriorate further.

95 Dr Gorton reported again on 19 August 2003, following on a further consultation on 15 August 2003. He wrote:

> *'At the end of the formal part of the interview he was seen in his room, which is a small one bedded room with shower and toilet facilities. He showed with pride samples of his daughter's writing, and drawings, some of her school test results and he indicated that he himself was endeavouring to learn English with the assistance of a Farsi-English dictionary but the study facilities were minimal, the Management Unit being designed for maximum security, there being no table, chair or anything else that would help him study. The fact that he prefers to remain in the Management Unit reflects the depths of his feeling and the very real problems he faces in leaving the Management Unit if he were not to be transferred to another detention centre.*
>
> *In view of this assessment it is strongly recommended that favourable consideration be given for his application for transfer as he has experienced significant hardship to date, with him being particularly distressed by having, from his point of view, his daughter taken away without even the chance to say goodbye. Fortunately they have re-established contact and this has helped him at least to begin eating and drinking again.'*

96 The psychologists' evidence was that Mr Mastipour was suffering from a depressive illness and that he needed acute psychiatric treatment.

97 The psychiatrists' evidence was all to the same effect: Mr Mastipour does not suffer from a major psychiatric illness, but he does have symptoms of post-traumatic stress disorder.

98 I think, at least on this interlocutory application, that the psychiatrists' evidence is to be preferred to the psychologists' evidence for two reasons. First, Dr Gorton has had closer contact, including physical contact, with Mr Mastipour than any other expert. Secondly, the psychiatrists themselves agree. Significantly, all three psychiatrists agreed that Mr Mastipour's health would be better served if he were transferred to another venue other than Baxter.

99 The Secretary read other affidavits. Stuart Wallace is the Deputy Manager at Baxter and responsible for Mr Greg Wallis' duties in his absence. Shirley Ellison is the Case Manager at Baxter and has responsibility to ensure all individual management plans of detainees are kept up to date.

100 Each of those two officers exhibited the minutes of the Management Unit Review Team to their affidavit. The Management Unit Review Team comprises Mr Stuart Wallace, Ms Ellison and other officers.

101 The minutes cover the period 15 July 2003 until and including 8 September 2003. There is no suggestion that the minutes are inaccurate and I think it safe to assume, for the purpose of this appeal, that they are accurate.

102 During the whole of the period over which the minutes refer, Mr Mastipour was in the Management Unit.

103 On 17 July 2003 he was presented with a behaviour plan which provided 'special conditions [as] regards visits with his daughter Massoumeh'.

104 He had still not signed that behaviour plan by 23 July. The minutes record:

'Mr Masstipour ask to speak to the MURT team regards the visits with his daughter as he was not having the full 90mins so he asked if he could be arranged so he did because he felt it was unfair to his daughter. He was assured by the CSM that he would have his visits as close to the times as possible (1730-1900) but if they start late then they will be extended at the end to cover the time.'

105 More importantly, the minutes of 24 July 2003 record:

'The MURT team were told that Mr Greg Wallis from DIMIA was coming to see Mr Masstipour regards his daughter and he wanted to speak to the MURT team also.

Mr Wallis told the MURT team that Mr Masstipour's daughter had been returned to her mother in Iran, this had been requested by Interpol for many years. Mr Wallis stated that Miss Masstipour had been taken by her father from Iran 3 years ago when he did not have any legal right to do so. He added that there had been a legal battle going on for many years over who should have the custody of the child. The Islamic Shariate law is that a girl should live with her father when she is 7 years old and at the age of 9 she can decide where she wants to live but the court has changed this because of the child being taken away from her mother they have said that she can live with her mother until she is old enough to make up her own mind. It was expected that Mr Masstipour would not be happy with this news.
Mr Masstipour was given the news by Mr Wallis and his reaction was one of quite [sic] contemplation, he did not make any fuss he seemed quiet [sic] accepting.
Mr Masstipour is still not eating or drinking.'

106 On 25 July 2003 the minutes record that Mr Mastipour told the Case Manager that 'he had no reason to live as his little girl had gone'.

107 On 28 July 2003, Dr Gorton reported in the terms which I have already referred. There is no note that Dr Gorton's report was brought to the attention of the Management Unit Review Team and/or the Case Manager.

108 The minutes rather suggest that Mr Mastipour was eating and drinking rather erratically. However, by 15 August 2003, it is recorded:

'The MURT team discussed at length what would be the next move for Mr Masstipour given his situation. It was felt that the MU was not the correct place for him to stay but it was also felt that he should eat for the at least another 2 or 3 days before he is moved. It would appear that the only compound that could be offered to him at this present time is B3.'

109 On 18 August 2003 the minutes record that Mr Mastipour refused to be moved out of the Management Unit stating that 'there was no compound within Baxter that he could live in that would be safe for him'.

110 On 19 August 2003 Mr Mastipour refused to sign a letter acknowledging that he wished to stay in the Management Unit because he was waiting for DIMIA to move him into another centre.

111 On 20 August 2003 he reiterated his wish to be moved to another centre.

112 Dr Gorton's second report was written on 19 August 2003. There is no record in the minutes that that report was brought to the Management Unit Review Team's attention.

113 There is a consistent theme running through the minutes. At all times, Mr Mastipour was requesting that the Secretary and ACM move him from Baxter to another Detention Centre and he wished to remain within the Management Unit until such time as this occurred.

114 The minutes record that on 3 September 2003:

> *'The DIMIA rep had told the MURT that DIMIA was prepared to offer Mr Masstipour a move to Port Headland. This offer was pervade [sic] to Masstipour. He stated that he can only go where we send him and that it is not up to him but if we send him to Port Headland then there will be problems. He continued to state that there are many people in Port Headland that knows him from Curtin and that they would cause trouble. He listed several families that he believes are still in Port Headland that knew him. The DIMIA rep stated that the DIMIA Manager Mr Greg Wallis would come and see him this afternoon or tomorrow. With this Mr Masstipour became very agitated and raised his voice. He stated that if Mr Greg Wallace [sic] came to this place then I will kill him and that would be good for me, I will be in the Newspaper. When asked what will we do with you because it is not good for you to be in here (MU). Mr Masstipour stated that he did not care where we put him as he can only go where we send him. He did however go on to say as long as he was in a compound by himself he would be alright. He suggested that we open a compound just for him and he said that he thought that was a good idea, stating one compound with one office, would be OK.'*

115 On 4 September 2003 the minutes record that Mr Mastipour was still thinking about a move to Port Hedland.

116 There is nothing in the minutes which suggest that, at any time, the psychiatric or psychologists' reports were brought to the attention of the Management Unit Review Team.

117 It might be thought that they were relevant in assessing how Mr Mastipour should be managed. As I have already noted, all three psychiatrists agreed that Mr Mastipour should be moved from Baxter to another Detention Centre. Moreover, the psychologists would not have disagreed with that opinion.

118 An affidavit of Manuel Marcelo Hernandez was read. Relevantly, Mr Hernandez deposed:

> *'At 3.00pm on 3 September 2003 I attended a MURT meeting with the applicant. During this meeting I said to Mr Mastipour words to the effect: "You have a choice of going back to one of the compounds in Baxter or a transfer to the Port Headland Immigration Detention Centre." Mr Mastipour said words to the effect: "I do not want to go to Port Headland because there are many people and families from Port Headland who know me from the Curtin Detention Centre and they would cause trouble for me". The case manager again offered Mr Mastipour the option to return to any compound but he declined and said words to the effect: "I go where you send me" and further said "DIMIA should open compound just for me. That is good idea, one compound with one officer for me would be okay.'*

119 Mrs Wallis said in her affidavit that she met with Mr Mastipour on 5 September 2003 and offered to move him out of the Management Unit into compound White 3 at Baxter or to the Port Hedland Detention Centre. She said that she considered White 3 compound would be a relaxed and appropriate environment for Mr Mastipour to reside in because it is a more family orientated environment, similar to what he had been in previously. She said: 'I have assessed it as very unlikely that anyone in the White 3 compound would harass the applicant [Mr Mastipour]'.

120 She deposed:

> *'I met with the applicant on 8 September 2003 to discuss the offer to move to White 3. The applicant refused to move to White 3 because he said that seeing families reminded him of his daughter. I also offered to move him to Port Hedland which he refused and said that the families there would be aware of the allegations made against him. I explained to the applicant that it would not matter were [sic] he was that if people wanted to find out information about him they would be able to because they would have contacts in other centres. He did not agree and said that they were all new at*

> *Villawood and would not know about him. I reiterated my previous comment that people could find out about him if they wanted to.'*

121 Mr Gregory Wallis said that he did not believe that Mr Mastipour had been harassed by other detainees prior to being placed in the Management Unit. He said that there were no complaints or incident reports on DIMIA's records to this effect.

122 I am not sure why the absence of a report would establish the absence of harassment. More relevantly, he said:

> *'7. Transferring the applicant to a facility located in Melbourne or Sydney is not a viable option. While there are no written Departmental policies on this issue, there are a whole list of issues that must be addressed before we would transfer a detainee to another facility. We do not just transfer people because they want to be transferred. In this case we know the applicant has concerns nor do we transfer people without taking into account all the relevant factors. In the case of Mr Mastipor [sic] we consider that we are able to address his concerns by placing him in a compound at Baxter where he will be protected and safe and his needs addressed. I am informed by Ms Terrina Wallis that on 5 September 2003, she spoke to the applicant, through the aid of an interpreter, and offered to move him to a number of places, including Compound, White 3. I believe that this is a viable option for the applicant subject to his agreement.*
>
> *8. We do not believe that there is significant justifications to transfer this detainee to another facility as his needs can be adequately met at the Baxter detention facility. We also believe that to transfer him would create a precedent which other detainees would want to pursue.'*

123 Mr Wallis does not give any reasons why it would not be viable to transfer Mr Mastipour to a facility located in Melbourne or Sydney. He said that a whole list of issues must be addressed before 'we would transfer a detainee to another facility'. He said '[w]e do not just transfer people because they want to be transferred'.

124 One gets the impression from Mr Wallis' affidavit that there is a resistance to moving Mr Mastipour because it is his wish that he be moved.

125 The most significant matter about the assertions made by each of the officers, all of whom are involved in management, is the absence of reference by those managers to the expert psychiatric reports.

126 Both Mr Wallis and Mrs Wallis assert that Mr Mastipour can be accommodated within Baxter. They do not address the uncontradicted psychiatric evidence, including the Secretary's own evidence, that it would be in Mr Mastipour's best interests to be accommodated at a Detention Centre apart from Baxter.

127 The primary judge found that there was a clearly arguable case that the Secretary owed Mr Mastipour a duty to take reasonable care for his safety whilst he was in immigration detention. He noted that the Secretary did not contend to the contrary. On this appeal, the Secretary has accepted that there is a duty of that kind imposed upon the Secretary.

128 The primary judge found that there was a serious question to be tried. He said: 'the present form of detention of the applicant, if it were to continue in the circumstances, may involve a breach of the duty to take reasonable care for the applicant's safety'.

129 It was because of the finding that there was a serious question to be tried in respect of that issue that the primary judge made the order which he did.

130 On this appeal, the Secretary argued that the primary judge's finding meant that the Court had intervened not in relation to the lawfulness of the immigration detention as such, but for the purpose of determining what precise place or circumstances of detention are lawful and what are unlawful.

131 In my opinion, that argument misconceives the primary judge's approach.

132 The primary judge, in my opinion, properly recognised that the application for an injunction was dependent upon Mr Mastipour establishing that there was a duty of care. Once he established that there was a duty of care which, as I say, is admitted, the question for the trial judge was whether there was a serious question to be tried in relation to the breach of that duty.

133 There can be no doubt that if there was a serious question to be tried in relation to the continuing breach of duty by the Secretary, the balance of convenience favoured Mr Mastipour, notwithstanding Mr Wallis' protestations that it would not be viable to move Mr Mastipour to another Detention Centre.

134 There was a further question being whether or not injunctive relief would go to restrain the continuing breach of a duty of care. That matter does not arise on this appeal because it was not argued that if there was a serious question to be tried and, if the balance of convenience favoured Mr Mastipour, an order in the nature of injunction could not be made.

135 The only real question before the primary judge, and it was a matter of fact, was whether there was a serious question to be tried in relation to a continuing breach of duty.

136 In my opinion, the evidence overwhelmingly supported the decision arrived at by the primary judge. There can be no doubt, in my opinion, that the evidence adduced, most of which was uncontradicted, supported the finding that there was a serious question to be tried.

137 In those circumstances, the primary judge was right to conclude that an injunction should issue.

138 In my opinion, however, the form of the order was, with respect, inappropriate. That is no criticism of the primary judge. Both counsel accepted on appeal that the question before the primary judge was whether or not Mr Mastipour should be transferred to Villawood Immigration Reception Processing Centre or to Maribyrnong Immigration Reception Processing Centre. That is why the order is framed in the terms that it is.

139 However, in my opinion, a mandatory injunction of the type made was inappropriate.

140 The terms of the order are such that the order is already spent. The order required the Secretary to transfer Mr Mastipour and no more. It was put to counsel, during argument, that the order in its literal terms would not prevent the Secretary returning Mr Mastipour to Baxter.

141 Both counsel, however, accepted that the spirit of the order was that Mr Mastipour be removed to one of those places and kept there. If that is the way in which the order should be read, it would mean that the Secretary could not move Mr Mastipour to a hospital or to some other Detention Centre. Again, if the order was understood in the way that counsel accepted, it might mean that the Secretary was not able to remove Mr Mastipour from Australia if the occasion arose for a power to be exercised under s 198 of the Act. The order sought was an

interlocutory order. The terms of the order made were more akin to a final order. For those reasons, the terms of the order were inappropriate.

142 Mr Mastipour was seeking to be removed from Baxter, but not to be removed to Port Hedland.

143 It would be appropriate to vary the primary judge's order and to make an order in the following terms:

> Until the trial of this action or until further order, whichever first occurs, an injunction is hereby granted restraining the first respondent (the Secretary) from:
>
> (1) Detaining the applicant (Mr Mastipour) at the Baxter Reception and Processing Centre in Port Augusta, South Australia; or
>
> (2) Removing the applicant (Mr Mastipour) to the Port Hedland Reception and Processing Centre in Western Australia.

144 That order will leave the Secretary free to detain Mr Mastipour at an appropriate place whilst he is subject to immigration detention. It will also give the Secretary the flexibility to move Mr Mastipour if that is required.

145 In my opinion, the appeal should be allowed, but only for the purpose of substituting the order referred to above for the order made by the primary judge.

146 Otherwise, the appeal should be dismissed. I would make the following orders:

1. Appeal allowed.
2. Paragraph 1 of the orders made by Mansfield J on 9 September 2003 is set aside.
3. In lieu thereof, there be an order:

   Until the trial of this action or until further order, whichever first occurs, an injunction is hereby granted restraining the first respondent (the Secretary) from:

(1) Detaining the applicant (Mr Mastipour) at the Baxter Reception and Processing Centre in Port Augusta, South Australia; or

(2) Removing the applicant (Mr Mastipour) to the Port Hedland Reception and Processing Centre in Western Australia.

I certify that the preceding one hundred and twenty seven (127) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lander.

Associate:

Dated: 29 April 2004

Counsel for the Appellant:	J Basten QC with M Roder
Solicitor for the Appellant:	Australian Government Solicitor
Counsel for the First Respondent:	J Burnside QC with G Harbord
Solicitor for the First Respondent:	Johnston Withers
Counsel for the Second Respondent:	K Thomas
Solicitor for the Second Respondent:	Fisher Jeffries
Date of Hearing:	5 March 2004
Date of Judgment:	29 April 2004