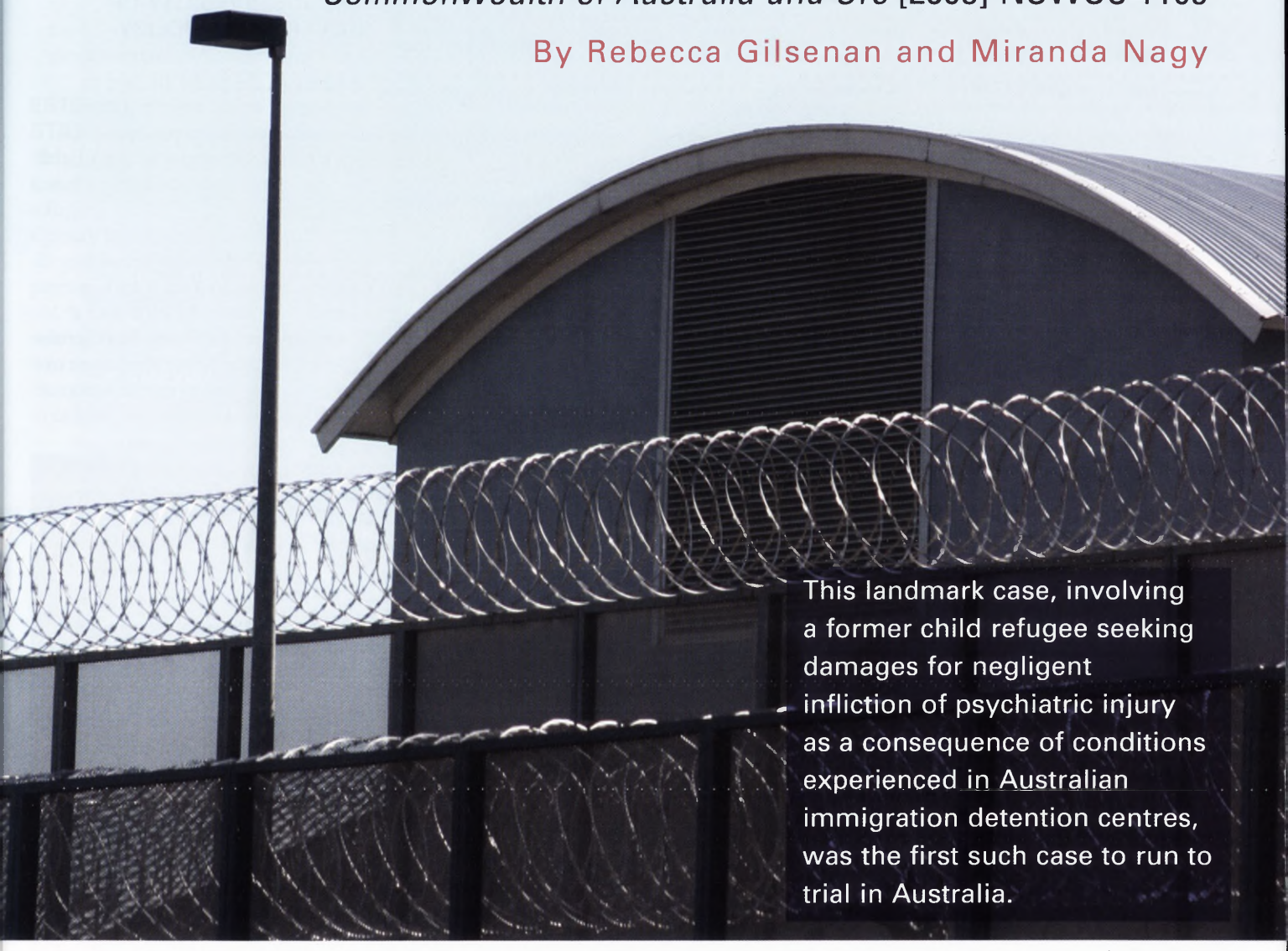
Immigration detention and child psychiatric injury:

Shayan Badraie (by his tutor Mohammad Saeed Badraie) v Commonwealth of Australia and Ors [2005] NSWSC 1195

By Rebecca Gilsenan and Miranda Nagy



This landmark case, involving a former child refugee seeking damages for negligent infliction of psychiatric injury as a consequence of conditions experienced in Australian immigration detention centres, was the first such case to run to trial in Australia.

Photo: Bill Madden

The case settled on 3 March 2006 after a 64-day hearing before his Honour Justice Johnson in the Supreme Court of NSW. The plaintiff, an 11-year-old child, obtained judgment in the sum of $400,000 plus costs and a verdict against the Commonwealth of Australia. The plaintiff discontinued proceedings against the second and third defendants, Australasian Correctional Services Pty Ltd (ACS) and Australasian Correctional Management Pty Ltd (ACM), related companies which formerly managed the detention centres at Woomera and Villawood, where the plaintiff had been detained in 2000 and 2001.

Although the case was arguably a logical result of the policy of mandatory detention, the plaintiff did not challenge the lawfulness of his detention. Rather, the plaintiff claimed that the Commonwealth and detention centre providers, ACS and >>

Twenty minutes after the plaintiff's father settled the claim, he was advised by telephone that the family had been granted permanent protection visas and a permanent right of residence in Australia.

Photo: Jeremy Scheerlinck

ACM, had acted negligently in failing to detain him in a safe environment or provide him with adequate educational, recreational, medical and psychological services. The plaintiff alleged, in particular, that he had witnessed numerous acts of violence and self-harm while in detention, including mass hunger strikes, riots and suicide attempts. The defendants conceded virtually none of the plaintiff's factual allegations in the statement of claim. The existence of the duty of care, causation, damage and quantum were all the subject of robust dispute between the parties.

While there was no final judgment, numerous interlocutory decisions were made by Johnson J on various evidentiary and legal issues. Some of these were subject to non-publication orders and remain suppressed on the basis of possible repercussions for the plaintiff's relatives in Iran.

THE NON-DELEGABLE DUTY OF CARE

There was no precedent articulating the content of the duty of care owed by the Commonwealth to persons detained pursuant to policy and legislation mandating 'administrative' detention. The plaintiff asserted, and the Commonwealth originally denied, that the Commonwealth owed a duty of care that could not be delegated to the detention centre operators. This issue had been previously raised in injunction proceedings brought in the Federal Court by an asylum-seeker in detention: *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*.[1] In that case, the Commonwealth conceded that it owed a non-delegable duty of care. The Commonwealth conceded the existence of the duty of care at the end of the first week of hearing *Shayan Badraie by his tutor Mohammad Saeed Badraie v Commonwealth of Australia and Ors*,[2] but disputed that the duty had been breached. In addition, the plaintiff contended that ACM and ACS also owed him a separate duty of care.

THE JUSTICIABILITY OF GOVERNMENT POLICY

The Commonwealth contended at trial that the plaintiff's case in negligence would require judicial consideration of the policy / operational dichotomy as articulated by Mason J in *Sutherland Shire Council v Heyman*:[3]

> "[B]udgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction … or general standards of reasonableness."

The Commonwealth indicated that it would assert that the principle in *Crimmins v Stevedoring Industry Finance Committee*[4] and *Graham Barclay Oysters Pty Ltd v Ryan*[5] would prevent the court from deciding whether it had breached its duty of care by failing to detain the plaintiff in a place other than a detention centre. In support of this, the Commonwealth led evidence from a senior departmental officer as to the exigencies surrounding the establishment of Woomera as a detention centre in late 1999; in particular, resource constraints and disorganisation in the context of an unanticipated influx of boat arrivals. It also led evidence of the direct personal involvement of the then Minister for Immigration and Multicultural Affairs, Mr Ruddock, in managing the plaintiff in immigration detention (in particular, the then Minister's explicit refusal, for a considerable period after the plaintiff had been diagnosed with post-traumatic stress disorder, to allow the plaintiff to be detained anywhere other than a detention facility or in hospital for emergency treatment).

DETENTION 'PER SE'

During cross-examination of the plaintiff's treating doctors and expert witnesses, the Commonwealth raised the issue of the effects of detention 'per se' upon the plaintiff. It became clear, following this exchange on day 59 of the trial, that the Commonwealth was seeking to argue that the deprivation of liberty in itself was sufficient to cause mental illness, presumably as a proposition related to the non-justiciability of government policy – in particular, mandatory detention of asylum-seekers.

His Honour:

"Detention per se is a concept which is a starting point. There are incidents of detention which include where they're held, who they're held with, how they're fed, how they are treated, how their medical conditions are treated, all of which are part of detention per se are they not? Otherwise it's a meaningless concept isn't it?"

Counsel for the Commonwealth:

"Deprivation of liberty is not a meaningless concept. … That's the proposition that we advance. That the deprivation of liberty and uncertainty about outcome are the two things which… founds their findings on a progressive deterioration of mental state."[6]

ESTOPPEL – PRIOR DETERMINATION OF REFUGEE STATUS

Although the matter was not an immigration law case and the plaintiff and his family had been recognised as refugees requiring protection by Australia in 2001, the Commonwealth at trial sought to amend its defence to allege as a complete defence that the plaintiff and his parents had obtained their visas fraudulently as they were not members of a minority religion as they had claimed.

In response, the plaintiff unsuccessfully argued that the doctrines of issue estoppel and *Anshun* estoppel barred the Commonwealth from raising this issue when it had failed to appeal the Refugee Review Tribunal decision in 2001 to grant refugee status to the plaintiff's family. Johnson J decided that the features of the RRT's decision-making processes and its status as a Commonwealth administrative tribunal meant its decision was incapable of constituting an estoppel.[7]

His Honour refused to allow the Commonwealth's proposed amendment on the basis that alleged fraud on the part of the plaintiff's parents could not function to defeat the plaintiff's own claim for damages or function as a basis to reduce an award of damages.[8]

The issue of the plaintiff's family's religion remained live, but only as an attack on the credit of the plaintiff's father and stepmother. This was particularly stressful for the plaintiff's family because at the time of the trial, the family's temporary protection visas had expired and they were awaiting the decision to their application for permanent protection visas.

CASE MANAGEMENT AND THE MODEL LITIGANT PRINCIPLES

The case had originally been set down for 20 days of hearing but only one of the plaintiff's witnesses finished her evidence in the first tranche, with the evidence of the plaintiff's father and tutor being commenced but not completed. Both these witnesses gave evidence through an interpreter and cross-examination was lengthy and vigorous. In addition, disputes over the plaintiff's tender of >>

documentary material discovered by the defendants required judicial determination as to whether such material (which included medical and immigration records relating to the plaintiff, as well as operational documents from Woomera and Villawood detention centres) were admissible as the defendants' business records.

The slow progress of the matter provoked the court to mention on a number of occasions the provisions of the new Uniform Civil Procedure Rules 2005 that relate to the just, quick and cheap disposal of the real issues in proceedings. The court also drew attention on various occasions to the fact that the slow progress of this case was having a detrimental effect on other litigants and the orderly conduct of civil proceedings in the court generally.

The court also gave consideration to the Commonwealth's obligations as a model litigant pursuant to the Attorney-General's Legal Services Directions, including the obligations to act fairly and with diligence in the conduct of litigation, and not to take advantage of a plaintiff who lacked resources. The tardy provision of a proof of evidence of a key proposed witness was a central issue in a reported decision in the litigation.[9] That proof of evidence, served on day 18 of the trial, asserted that the plaintiff was not a member of his minority religion and provoked the Commonwealth's unsuccessful attempt to amend its defence in that respect.

His Honour found that the Commonwealth had failed to exercise 'reasonable diligence' in locating the proposed witness and taking her statement. His Honour also found on the evidence that the Commonwealth had been aware of the whereabouts of the proposed witness since September 2001 and had, since that period, been in communication with her regularly, including by facilitating her application for legal aid to pursue a proposed Family Court application for custody of the plaintiff. In finding that the Commonwealth had not taken 'reasonable steps' to obtain the witness statement in a timely manner, his Honour rejected an argument put on the basis of the Court of Appeal's decision in *Commercial Union Assurance v Beard*[10] that the law required the relevant officers managing the *Badraie* litigation to have had actual knowledge of the proposed witness and that it was irrelevant that that knowledge was held by other officers of the Commonwealth.

His Honour determined that although the dictates of even-handed justice required that the Commonwealth not be shut out, on the basis of its absence of diligence, from calling the proposed witness, they required that further orders be made to give the plaintiff an opportunity to meet the anticipated evidence. Detailed orders, including in relation to costs, were foreshadowed by his Honour in a lengthy judgment but were never made because the Commonwealth shortly afterwards withdrew its application to rely on the proposed evidence.

The case then progressed in the absence of this proposed witness's evidence, although the Commonwealth passed her unsigned statement to the Department of Immigration case officer who was then in charge of assessing the plaintiff's family's application for a permanent protection visa. The plaintiff's family was required to provide material in rebuttal to the case officer. Twenty minutes after the plaintiff's father and tutor had accepted $400,000 in settlement of the plaintiff's claim for damages from the Commonwealth, he was advised by telephone that, in an unrelated decision by that case manager, the family had been granted permanent protection visas and had finally won a permanent right of residence in Australia. ■

Notes: **1** (2005) 216 ALR 252 at [195—203], [207—213]. **2** [2005] NSWSC 1195 at [28]. **3** (1985) 157 CLR 424 at 469. **4** (1999) 200 CLR 1. **5** (2002) 211 CLR 540. **6** Transcript, 24 February 2006, p3698. **7** *Shayan Badraie by his tutor Mohammad Saeed Badraie v Commonwealth of Australia and Ors* [2005] NSWSC 1195 at [83—87]. **8** *Shayan Badraie by his tutor Mohammad Saeed Badraie v Commonwealth of Australia and Ors* [2005] NSWSC 1195 at [102—103]. **9** *Shayan Badraie by his tutor Mohammad Saeed Badraie v Commonwealth of Australia and Ors* [2005] NSWSC 1195. **10** (1999) 47 NSWLR 735.

Miranda Nagy *is an associate at Maurice Blackburn Cashman.*
PHONE *(02) 8267 0907* **EMAIL** *MNagy@mbc.aus.net*

Rebecca Gilsenan *is a principal at Maurice Blackburn Cashman.*
PHONE *(02) 8267 0959* **EMAIL** *RGilsenan@mbc.aus.net*