Neutral Citation no. [2007] NIQB 14 | *Ref:* **GILF5735**

Judgment: approved by the Court for handing down | *Delivered:* **26/02/07**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY TENDAI CINDY ZWOUSHE ZHANJE FOR JUDICIAL REVIEW

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GILLEN J

The application

[1] The applicant is a Zimbabwean national now resident in the Republic of Ireland having been removed from Northern Ireland on 22 November 2005 ("the removal"). She currently has an ongoing asylum application in the Republic of Ireland which is the subject of an appeal. In this matter she seeks judicial review of a number of issues:

(a) The quashing of the decision by the Secretary of State for the Home Department ("the respondent") to remove her to the Republic of Ireland.

(b) An order of mandamus requiring the respondent to accept the applicant back into the UK from the Republic of Ireland and accept responsibility for her asylum claim.

(c) An order to quash the decision of the respondent to certify the human rights claim of the applicant as "clearly unfounded" and to declare that the decision was unlawful, ultra vires, contrary to her Article 5 and 8 rights under the European Convention of Human Rights and Fundamental Freedoms ("ECHR") and of no force or effect.

(d) A declaration that her removal offended against her legitimate expectation that she would be informed of any decision to transfer her to the Republic of Ireland and be given an opportunity to make representations before any such application was made or a decision to transfer effected.

(e) A declaration that her removal was contrary to the terms of the Dublin II Regulations.

(f) A declaration that the removal of the applicant to the Republic of Ireland was not preceded by the required issuing of removal directions and that these were not served on her.

The background facts

[2](i) The applicant makes a case that she had originally travelled to the UK from Zimbabwe via South Africa and the Republic of Ireland. She had arrived in the Republic of Ireland using a visa that was issued to her from the Irish Embassy in South Africa. She was only in Dublin for a very short time when she moved to Northern Ireland. She claimed she was travelling north to her family and to claim asylum in the UK.

(ii) She applied for asylum in the UK on 9 February 2004. She was not afforded a substantive interview in relation to the claim although she did attend a screening interview at Belfast International Airport on 24 February 2004. At that interview she was told that the UK might not be the country responsible for hearing her asylum but that if transfer was to be made she would be advised of this.

(iii) She was then in possession of a visitor's visa in the Republic of Ireland until 12 March 2004. That visa had been granted in the Irish Embassy in South Africa.

(iv) The applicant asserts that she had two younger siblings who had arrived in Northern Ireland on 12 August 2005 and they had all resided together as a family with her mother between that date and the date of her removal.

(v) Unknown to her, an application was made by the United Kingdom (UK) to the Republic of Ireland (ROI) to the effect that the latter was the country responsible for hearing the applicant's asylum claim.

(vi) The ROI accepted this on 28 May 2004 under the terms of EC Council Regulation 2003/343/EC of 18 February 2003 (hereinafter referred to as "Dublin II" and referred to in detail subsequently in this judgment). This Regulation came into force on 1 September 2003 and applies to requests made by Member States in respect of asylum seekers from that date. The ROI accepted the responsibility under Dublin II because the applicant had first arrived the territory of the EU by entering through the ROI on a visa issued by that country in South Africa and then travelled north to Northern Ireland. It is conceded by the respondent that the applicant was not notified of the UK's decision not to examine her application for asylum and of the decision

to transfer the applicant to the Republic of Ireland. Moreover she was not notified of the certification of her asylum application on third party grounds on 2 June 2004.

(vii) It is the respondent's case that it was the intention to serve the applicant with removal directions and detain her prior to her removal from the United Kingdom on 26 October 2004 when she was due to report under the terms of her temporary admission to the United Kingdom to Strandtown PSNI Station in Belfast. There is a dispute between the parties as to what happened on that occasion. It is the respondent's case that the applicant absconded upon being informed that a member of the Immigration Service was to attend to speak with her at Strandtown Station. I shall return to that issue later in this judgment as it has a direct relevance to the time limits for actions taken by the respondent to remove the applicant in this case.

(viii) On 22 November 2005 the applicant was detained by the immigration authorities. Her solicitor avers that before she was removed he contacted the respondent by letter/fax and by telephone. One of his letters sent on 22 November 2005 lodged an appeal against the removal directions citing Article 5 and Article 8 of the ECHR. The respondent accepts that there was a failure to provide her with Removal Directions under Rule 5 of the Immigration (Notices) Regulations 2003. Under Article 5(4) of the Schedule 3 to the Asylum and Immigration (Treatment of Claimant, etc) Act 2004, the Secretary of State certified that the human rights claim was clearly unfounded unless satisfied that it is not clearly unfounded("the certification"). It is conceded by Mr McGleenan, who appeared on behalf of the respondent, that this certificate was not issued prior to the applicant's removal on 22 November 2005. He accepts that the certificate came into being some time between 22 November 2005 (the date recorded on the certificate) and its receipt by the solicitor on behalf of the applicant on 7 December 2005. Notwithstanding these matters, the removal proceeded.

The applicant was removed to the Republic of Ireland where she has processed an asylum claim (which was refused) and subsequent appeal which is currently outstanding.

(xi) The present application for a judicial review was not lodged until 24 June 2006 ie seven months after the removal. The applicant asserts that she has good reason for this delay.

Legislation

[3] The Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Community ("the Dublin Convention 1990 or Dublin I") and Dublin II lie at

the heart of this matter. The Dublin Convention was one of the first multi-lateral agreements between States to delineate responsibility for examining asylum applications. Its main purposes were to prevent multiple claims and "forum shopping" by asylum seekers and also to prevent the situation of refugees "in orbit" passing between States with no one State having responsibility for examining the asylum application, by guaranteeing a determination of the asylum claim in one country. Dublin II applies to requests made by Member States in respect of asylum seekers from that date. The obligation to examine an asylum application made by any third country national at the border or in the territory of a Member State belongs to a single Member State which is to be identified by reference to the hierarchy of criteria set out in Chapter III of Dublin II, although Member States are free to examine any application, even if examination is not its responsibility. Member States have the right to send an asylum seeker to a third country. The criteria for determining which Member State is responsible for examining an asylum application are set out in Articles 5-14 (Chapter III) of Dublin II.

[4] Chapter V of the Dublin II lays down detailed procedures to be applied between Member States dealing with the "taking charge and taking back" of asylum seekers. A number of Articles in Chapter V are relevant to this application and I shall set them out for ease of reference at this stage:

> "Article 19
>
> (1) Where the requested Member State accepts that it should take charge of an applicant, that Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.
>
> (2) The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. The decision may be subject to an appeal or a review. Appeal or review concerning the decisions shall not suspend the implementation of the transfer unless the courts or competent so decide on a case by case basis if national legislation allows for this.
> ……

(4) Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

Article 20

(1) An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows:

(a) The request for the applicant to be taken back must contain information enabling the requested Member State to check that it is responsible.

(b) The Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system this time limit is reduced to two weeks.

(c) Where the requested Member State does not communicate its decision within one period or the two weeks period mentioned in sub-paragraph (b), it shall be considered to have agreed to take the asylum.

(d) A Member State which agrees to take back an asylum seeker shall be obliged to re-admit that person to its territory. The transfer shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practicably possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect.

(e) The requesting Member State shall notify the asylum seeker of the decision concerning his being

> taken back by the Member State responsible. The Decision shall set out the grounds on which it is based. It shall contain details of the time limit on carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case by case basis if the national legislation allows for this.
>
> …
>
> (2) Where the transfer does not take place within the six months time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer or the examination of the application could not be carried out due to the imprisonment of the asylum seeker or up to a maximum of 18 months if the asylum seeker absconds."

The applicant's case

[5] Mr McTaggart appeared on behalf of the applicant. In the course of a clear and skilfully presented skeleton argument well augmented by oral submissions before me, he made the follow points:

(i) The removal of the applicant on 22 November 2005 was unlawful in light of the several failures on the part of the respondent to comply with the provisions of Dublin II. Whilst acknowledging that the breaches of Articles 19(1) and 19(2) were procedural, he argued that the failure to comply with the time limit of six months imposed in Article 19(4) was a substantive breach and should trigger the respondent now accepting responsibility for the applicant's asylum claim.

(ii) Counsel recognised that the alleged breach of the time limit of six months is obviated if, as suggested by the respondent, the applicant was an absconder. He challenged that finding by the respondent, asserting that the applicant had not absconded from Strandtown Police Station and that

contrary to assertions by the immigration officials, her address was known. Consequently the time extension referred to in Article 19(4) did not obtain.

(iii) The applicant's removal whilst a human rights claim had been lodged was a breach of the Nationality Immigration and Asylum Act 2002. He submitted that the only ground on which an applicant would not have been able to so appeal whilst in the country was if a third country certificate had been served on her and it is accepted that this had not been done albeit it had been prepared on 2 June 2004. There was also a concession by the respondent that the certification of the human rights claim as "clearly unfounded" had not been drawn up at the time of her removal.

(iv) Counsel asserted in any event that the actual certification of the human rights claim as "clearly unfounded" was untenable given the nature of family life and private life rights which the applicant enjoyed. He drew attention to an error of fact on the part of the decision makers who had concluded that the siblings did not have leave to remain whereas one, Vincent, had permission to remain until he was 18 and the other, Couzie, had a similar discretion bestowed upon her.

(v) Mr McTaggart resisted the suggestion that the case itself should be dismissed on the grounds of delay because, whilst he conceded that the time limit for the lodging of the judicial application was spent, he submitted that there was good reason for the delay. This included a desire to exhaust alternative remedies (application before the Appeal Immigration Tribunal), delay in papers being furnished to his solicitor Mr Hollywood from his former solicitors Madden and Finucane, delay in obtaining legal aid and the presence of the applicant outside the jurisdiction.

(vi) In essence Ms McTaggart submitted that the applicant had been subjected to a succession of unlawful acts on the part of the respondent and that she should now be allowed to return to the UK and have her asylum claim heard in the UK de novo.

<u>The respondent's case</u>

[6] Mr McGleenan, on behalf of the respondent, in an equally persuasive and skilful skeleton argument together with cogent oral submissions, submitted the following matters:

(i) Whilst he conceded that there had been a number of failures to comply with the requirements of Dublin II, he invited the court to exercise its discretion not to grant relief to the applicant.

(ii) He submitted that there had been unconscionable delay on the part of the applicant in bringing the judicial review proceedings. The applicant was removed to the Republic of Ireland on 22 November 2005 and notwithstanding the benefit of legal representation in this jurisdiction since that date, the judicial review proceedings were not lodged until 24 June 2006. He submitted that the lapse of time had brought about an adverse impact on the utility of these proceedings insofar the applicant is and remains fully engaged with the asylum procedures in the Republic of Ireland. I observe here that the applicant had lodged an asylum claim in the Republic of Ireland shortly after her removal to that jurisdiction. She had been invited to a screening (which she had attended) and to a further substantive interview. The applicant had claimed that she had not received notice of this latter interview and accordingly her application was refused on the grounds of non-compliance. She is now processing an appeal against that decision which was lodged according to Mr McTaggart some time in early 2006.

(iii) Mr McGleenan argued that the transfer had taken place within the extended time limit afforded by Article 19(4) of Dublin II due to the applicant absconding. He submitted that it was a perfectly proper conclusion by the immigration authorities that the applicant had absconded given the facts that appeared on the papers before the court.

(iv) In any event counsel asserted that the procedural breaches of Dublin II Regulation do not confer freestanding rights upon individual applicants and a breach of the Regulations cannot result in the determination of an asylum application by a State other than the State which has accepted the transfer pursuant to Article 9. In terms Mr McGleenan argued that Dublin II is primarily aimed at the determination of responsibility between Member States rather than conferring rights on individuals. The purpose of Part V of the Regulation is to ensure prompt determination of the country in which the asylum claim should be processed. He placed reliance on a number of authorities which he claimed were to that effect and to which I shall turn shortly in my conclusions. In essence it was Mr McGleenan's submission that the only actionable right that the applicant derives from the Dublin II Regulations is that her asylum application should be promptly transferred to the Republic of Ireland and there addressed.

Discussion of the issues for determination

[7] A. Delay

(i) An application for permission to apply for judicial review must be made promptly and in any event within three months from the date when the grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be

made pursuant to Order 53 rule 4. It is for the applicant to establish that there is good reason to extend time (see R v Warwickshire County Council ex p Collymore (1995) ELR 217 at 228F-g).

(ii) For the removal of doubt, I make it clear that an application for permission to apply for judicial review must not only be made promptly, but even where an application is made within three months it may still be rejected where, for example, finality is important (see R v Bath Council ex p Crombie (1995) COD 283).

(iii) In approaching this matter I regard a good overview of the principles to be applied is found in R v Secretary of State for Trade and Industry, ex parte Greenpeace Limited (2000) ENV LR 221 where Kay J posed three criteria:

> "(1) Is there reasonable objective excuse for applying late?
>
> (2) What, if any, is the damage in terms of hardship or prejudice to third party rights and detriment to good administration, which would be occasioned if permission were now granted?
>
> (3) In any event, does the public interest require that the application should be permitted to proceed?"

(iv) I have come to the conclusion that there is good reason and reasonable objective excuse in this matter to allow the case to proceed for the following reasons:

(a) Several weeks in the initial period were taken up by the applicant pursuing an alternative remedy with the Appeal Immigration Tribunal. Pursuit of alternative solutions or of other avenues is always acceptable in a jurisdiction where judicial review should be a remedy of last resort. Although this Tribunal eventually found it had no jurisdiction, I believe this to have been a reasonable preliminary step by the applicant.

(b) Further delay was engendered by the exchange of papers in this matter between the applicant's solicitor Stephen Hollywood and his former firm Madden & Finucane. Whilst tardiness or incompetence of legal or other advisors is normally not a good ground, the remedy of the client being to sue those advisors, (see R v Secretary of State for Health ex p Furneaux (1994) 2 AER 652), I think that neither criticism can be visited on the solicitors involved in this case and the delay may well have simply been an example of understandable administrative difficulties in the exchange of papers. Not only does the applicant bear no blame for this, but Mr Hollywood, her

current representative , has been assiduous throughout this case in the pursuit of his client's interests.

(c) Several weeks delay was encountered as a result of processing the claim for public funding. In this corner of the law, the results of decided cases are very fact sensitive. Mr McTaggart relied on R v Stratford on Avon District Council, ex p Jackson (1985) 1 WLR 1319 where at p. 1324A Ackner LJ said:

> "It is a perfectly legitimate excuse for delay to be able to say that the delay is entirely due to the fact that it takes a certain time for a certificate to be obtained from the legal aid authorities and that, despite all proper endeavours by a claimant, and those advising her, to obtain a legal aid certificate with the utmost urgency, there has been some difficulty about obtaining it through no fault of the claimant."

There are a number of authorities pointing in the other direction. In my view however legal aid delay will not be treated as a sufficient reason to extend time in cases where speed and the need for early warning is important. That does not apply with such force in this instance. Given that the claimant was once again blameless in this search for legal aid funding, I consider that it amounts to a good reason for that measure of delay. An important factor in the exercise of my discretion in this regard is the fact that once legal aid was obtained, the solicitor for the applicant acted with exemplary expedition.

(d) I see no prejudice accruing to the respondent in this case because of the delay.

(e) Even if the applicant can make out a good reason for obtaining permission to extend time, the court retains an overriding or residual discretion and may still refuse permission for example where the public interest does not require the application to proceed. Moreover if the substantive merits are poor the applicant may be refused at the initial stage or later. A further reason for exercising discretion against an applicant may be where the re-opening of the matter could have a stultifying effect upon a department or have an adverse effect on good administration. In this regard I have considered the submission by Mr McGleenan that the exercise of the applicant's rights to pursue her asylum claim in the Republic of Ireland have been ongoing for several months now and that the whole process should not be further elongated by having parallel proceedings here in Northern Ireland. I remain unconvinced by this argument. In the first place, I am conscious of what Lord Wolff MR said in Ahmad and Simba v Secretary of State for the Home Department (1999) Imm AR 356 at 357:

> "Normally, in the case of asylum seekers, this court will be circumspect about being too rigorous in applying the normal principles of judicial review in relation to delay because the court appreciates that to refuse an application for (permission) to apply for judicial review solely on the grounds of delay may have very grave consequences for the asylum seeker."

In addition I consider that the merits of this case and in particular the procedural failures on the part of the respondent are such that the matter does merit scrutiny . It would not be in the public interest to refuse a late challenge in circumstances where there is prima facie evidence of the respondent having acted unlawfully.

B. Absconder notification

[8] A key component in the applicant's case was that the respondent was in breach of the obligation under Article 19(4) of Dublin II to ensure that the transfer to the Republic of Ireland was carried out within a six months' time limit. There was no dispute that this time limit had not been adhered to. However the respondent's case was that it could avail of the extension of time under Article 19(4) i.e. "up to a maximum of 18 months if the asylum seeker absconds". The respondent had issued an absconder notification dated 30 October 2004. In the event of this notification being valid, the respondent had complied with the relevant 18 month time limit. Much of this case was taken up with argument as to whether a breach of Article 19(4) by the respondent conferred a freestanding right upon an individual applicant or whether the regulations primarily aimed at the determination of responsibility between Member States for dealing with asylum seekers. Whilst I shall return to this general issue later in this judgment, the first matter that I must consider is whether or not the applicant has sustained her argument that the decision taken to issue the absconder certification was based on flawed facts and poor record keeping. In terms was the decision to issue the certificate made with a disregard of relevancies, a consideration of irrelevancies and overall patently unreasonable? I am unpersuaded on the facts that this was the case and I have therefore rejected this aspect of the applicant's submission on a factual basis. I have come to this conclusion for the following reasons:

(i) The reasons set out in the notification for the conclusion are as follows:

> "Absconded from PSNI before IO(*Immigration Officer*) got there. UKIS Belfast intended to detain at police station, but subject absconded and has not lived at the address for two months. Police attempts to capture her failed."

I had before me the statements of Police Constable McGibbon of Strandtown Police Station and Sarah Lyons of the Immigration Service, Belfast Ports, Belfast International Airport. The former described how the applicant had attended the enquiry office on 26 October 2004 at Strandtown Police Station at approximately 8.45 am. He dealt with her. When she had signed her bail (she was to appear monthly), he observed a note pinned on the immigration sheet which requested the officer on duty to request the applicant to wait in the enquiry office because a member of the Immigration Service was to attend to speak with her. He asked her to wait and advised her that the officer was to attend to speak with her at approximately 10.00 am in the morning. She initially waited but according to him she then ran from the room. Because he was on duty he requested one of his colleagues, Police Constable Cooke, to chase after the applicant and to bring her back to await the immigration officer. Ms Lyons made an affidavit to the effect that she had telephoned the enquiry office at the police station at 9.00 am.She spoke to PC Cooke who told her the applicant had run from the enquiry office and was chased by another officer but she could not be found. During the day Ms Lyons received several telephone calls from PC Cooke to say that police had been to the address that had been provided for the applicant and there had been no one at the property. At 17.30 hrs that day Ms Lyons received a final call from PC Cooke who stated that she had been to the applicant's address and a white female had answered the door. That female said she had lived there for two months and claimed not to know the applicant.

(ii) Mr McTaggart closely analysed the affidavits and drew my attention to certain inconsistencies that appeared on the face of the affidavits. I found these inconsistencies inconsequential. The applicant's assertion was that she had not fled from the building at all and had no recollection of this incident. Mr McTaggart argued that no power of arrest had been exercised in any event.

It has often been observed that judicial review is unsuitable for resolving disputes of fact. Although it may well be appropriate in certain instances, in essence judicial review is not a fact finding exercise.It is an extremely unsatisfactory tool by which to determine matters of dispute such as have arisen in this instance. (See R v Chief Constable of Warwickshire Constabulary, ex p Fitzpatrick (1999) 1 WLR 564 at 579D).

(iii) In so far as the immigration officer was clearly informed that the applicant had run from the police station (and there is a contemporaneous document in the possession of the PSNI recording this) she was entitled to conclude that the applicant had taken to flight. Further, in two letters, namely 19 May 2004 and 15 July 2004 – both emanating from Mr Hollywood the representative acting on behalf of the applicant - it was asserted that she was currently residing at 97 Greenore Street, Belfast. This was the address to

which the police had called and the evidence they received was that the applicant was not living there. Mr McTaggart countered this by drawing my attention to the fact that on 15 November 2004 an enforcement visit was undertaken to the applicant's address at 1 Ashmount Park, Belfast.This occurred again on 22 August 2005 but on neither occasion was she there. He therefore submitted that the police had gone to the wrong address on 26 October 2004. On the facts before me the address notified to the authorities by the applicant's representative was that to which the police understandably went in order to ascertain the whereabouts of this woman, namely Greenore Street, Belfast. In those circumstances I have absolutely no doubt that it was a perfectly reasonable conclusion for the immigration officer to come to that this applicant had absconded.

(iv) Mr Taggart, leaving no stone unturned, raised the question of the definition of "absconder". It is common case that there is no definition set out in any regulation or guidance at the time that the alleged event occurred. He drew my attention to an asylum process notice ("APN") issued subsequent to notification in this case in April 2005. That APN records:

> "Only UKIS can identify a claimant as an absconder. Once they have done so they will prepare an IS159 (enforcement case) for such claimants. …. UKIS will only prepare and issue an absconder notification when it has been established beyond reasonable doubt that the claimant is no longer in residence at the address given on file."

The first point to be made is that this was not in force at the time of the notification. Mr McGleenan submits that the dictionary definition – "To go away furtively, especially after wrongdoing" - is the most that could have guided the immigration officer. I am satisfied that the facts as related by the police to the immigration officer were sufficient for the conclusion that this applicant was absconding. Indeed even if the definition referred to in the APN of 11 April 2005 had been in force, I consider that it would have been perfectly reasonable for an immigration office to have formed the conclusion beyond reasonable doubt that the claimant was no longer in residence at the address given on file on the basis of the facts which were related to her on that occasion.

I have therefore concluded that the respondent was not in breach of any time limit for the removal of this applicant and that it was entitled to avail of the extension contained in Article 19(4) of Dublin II.

C. <u>Other breaches of Article 19 of Dublin II</u>

[9](i) It was common case that the respondent had failed to comply with Articles 19(1) and (2) of Dublin II. When the Republic of Ireland had accepted that it should take charge of the applicant, the respondent had failed to notify the applicant of the decision not to examine her application and of the obligation to transfer her to the Republic of Ireland. Moreover it had failed to set out the grounds on which the decision was based or the details of the time limit for carrying out the transfer or information of the place and date of which the applicant should appear.

(ii) The issue took up most of the hearing before me and centred around the question of whether Dublin II had direct effect conferring on the applicant freestanding rights. The respondent's submission was that the regulation was primarily aimed at the determination of responsibility between Member States rather than conferring rights on individuals. Both sides made generous reference to authorities which have helped me to come to the following conclusions:

(a) Dublin I has a composite purpose. It was intended to effect a clear assignment of responsibility for dealing with asylum claims between Member States and to do so as speedily as possible. It was a treaty or Convention and thus as a matter of English law only had effect on the international plane. Dublin II is by contrast a Council Regulation and is directly applicable in the legal systems of the Member States. The Dublin II Regulation therefore has direct effect. I respectfully adopt the summary of both the Convention and the Regulation set out by Sir Swinton Thomas in Omar (Mohamed) Abdi v Secretary of State for the Home Department (2005) EWCA 285 at para. 22 when he said:

> "Both the Convention and the Regulation draw a clear distinction between criteria and mechanisms, and both provide for the circumstances, in which consequences follow a breach. The distinction between criteria and mechanisms is drawn in the pre-amble. Article 2(3) defines the criteria as those set out in Articles 4-8. Article 8 refers to the criteria that precede that Article. Article 13 of the Regulations similarly refers to the criteria which precede that Article and then in subsequent chapters provision is made for the carrying into effect of the Regulation (the equivalent of the mechanisms) with consequences to follow where consequences are intended to follow. There is a stark contrast between the transfer provisions in the Convention and in the Regulation concerning transfer from the requesting State to the requested State, the Convention not providing for consequences to follow a breach,

> whereas the latter does provide for consequences, but with quite different time limits."

Thus Article 19 lays down various requirements placed on both the requested Member State and the requesting Member State, such as notification to the applicant of the decision, setting out grounds upon which the decision is based, details of time limits for carrying out the transfer, and means of travel. Article 19(2) provides that the decision may be subject to an appeal or review. Article 19(3) provides that the transfer of the applicant from one State to the other shall be carried out "as soon as practicably possible and at the latest within six months of acceptance of the request that charge be taken or of the decision on an appeal or review where there is a suspensive effect." 19(4) is as I have already outlined. 19(4) thus makes provision for consequences to follow in those circumstances. The Regulation however is clearly primarily aimed at determining responsibility between Member States, rather than conferring rights on individuals (see Macdonald's Immigration Law and Practice 6th Edition at para. 12.155). Mr McGleenan helpfully took me on an odyssey through each of the chapters illustrating that the express wording of the Regulation again and again refers to the aim of determining responsibility between Member States. In most instances eg. 19(1), 19(2) no consequence is expressed for a failure to adhere to provisions. Whether this gives even Member States rights to enforce these Articles against each other may be a moot point, but certainly there is no indication whatsoever in these Articles that they give rise to a freestanding right to individuals outside the Member State.

(b) It has proved unnecessary for me to make a determination whether the direct effect of 19(4) would have provided a freestanding right for the applicant in the event of me determining that the respondent had acted outside the time limits but I venture to suggest that the clear references in 19(4) to the Member States are indicative that this Article is aimed at determining responsibility between the Member States rather than conferring any right on an individual.

(c) My conclusion that Article 19 of Dublin II does not confer any freestanding right on the applicant does not necessarily dilute Mr McTaggart's submission to me that, as directly applicable measures, regulations can apply horizontally between private parties as well as vertically against public bodies. He relied on an extract from Antonio Munoz Cia Sa v Frumar Limited (case C-253/00), quoted in Steiner and Woods text book on EC Law 8th Edition at page 93 which states:

> "In terms of enforcement, it also seems to suggest that it is not necessary that rights be conferred expressly on the claimant before that individual may rely on the sufficiently clear and unconditional provisions of a

> regulation. In this, there seems to be the beginning of a divergence between the jurisprudence and regulations and that on directives."

The flaw in his argument however is that much will depend upon the precise provisions in the Regulations. In my view the wording and purport of Regulation 19 is very clear This Regulation is clearly aimed at determining responsibility between Member States and does not confer rights on individuals certainly. The wording of other articles in this or other Regulations may lead to different conclusions. Accordingly I refuse the relief sought and referred to in paragraphs 1(d),(e)and (f) of this judgment.

D. The Removal

[10](a) When the applicant was detained on 22 November 2005, and before she was removed to the Republic of Ireland, her legal representative Stephen Hollywood had contacted the respondent by letter/fax and also by telephone call. One of the letters sent on 22 November 2005 endeavoured to lodge an appeal against any removal directions under Section 82 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"). Inter alia, the letter stated:

> "We advise we have this afternoon been informed that our client has been detained under the Immigration Legislation pending removal to the Republic of Ireland.
>
> We would submit that this would amount to a clear breach of our client's rights under articles 5 and 8 of the European Convention on Human Rights. Furthermore we would advise that our client initially made her application for asylum on 9th February 2004 and that to date we have not received clarification of the outcome of this application despite numerous written requests. It is our submission that our client has not been afforded any degree of procedural fairness.
>
> We advise that we hereby lodge appeal against any removal directions under Section 82 of the Nationality Immigration and Asylum Act 2002. We would advise that this appeal is suspensive. In light of the above we would submit that to remove our client would be unlawful. We would advise also that we intend to lodge High Court proceedings without further notice

> if continued attempts are made to remove our client from this jurisdiction.
>
> Please confirm by return that our client will not be removed from Northern Ireland until such time as the above issues have been properly addressed".

(b) Section 82 of the 2002 Act provides a right of appeal, inter alia, against a decision that a person is to be removed from the United Kingdom by way of directions under Section 10(1)(a), (b) or (c) of the Immigration and Asylum Act 1999 and also against the decision that an illegal immigrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 of the Immigration Act 1971. A person may not appeal under Section 82(1) whilst he is in the United Kingdom if a certificate has been issued in relation to him under Section 11(2) or 12(2) of the Immigration and Asylum Act 1999 save if:-

> (a) The appellant has made a human rights claim, and
> (b) The Secretary of State has not certified that in his opinion the human rights claim is clearly unfounded.

(c) It was common case that human rights appeals are generally suspensive of removal (see s. 92(4)(a) of the 2002 Act). In that event the Secretary of State may certify a claim as "clearly unfounded" which will deprive the appeal of suspensive effect by virtue of paragraph 5(4) of Schedule 3 of the Asylum and Immigration (Treatment of Claimant's etc) Act 2004. It is equally clear that the respondent failed to implement that suspension and the applicant was removed on 22 November 2005. The affidavit of Lesley Elliott of the Immigration Service, UK Enforcement and Removals Directorate on 14 September 2006 is instructive as to the manner in which the statutory right of appeal and its suspensive effect were considered by the respondent:

> "6. On 22 November 2005, I was advised by the Immigration Service in Liverpool, who had responsibility for removals from Northern Ireland, of their intention to remove the Applicant to the Republic of Ireland later that day. By letter dated 22nd November 2005 the Applicant's solicitors made representations to the Home Office that removal of the Applicant to the Republic of Ireland would be in contravention of her ECHR rights. This letter was received during the afternoon of 22 November 2005, shortly after the applicant had been detained. I tried to contact the Immigration Service at Liverpool to

advise them that representations had been received, but they were unable to contact the officer dealing with the case in Belfast and the removal went ahead as planned.

7. During the afternoon of 22nd November 2005 I was in the process of considering these representations and received a number of telephone calls from the Applicant's solicitors regarding their client's removal. I spent a considerable amount of time that afternoon speaking to the solicitors and was still in communication with them by telephone at 6.00 pm. During the telephone conversation the solicitors mentioned that they were going to make further representations in addition to those which I had already received. I asked them to put the further representations in writing and said that I would respond to them as possible. I duly noted the applicant's Home Office file to this effect. By the time I had finished speaking to the solicitors, the applicant had already been removed to Ireland.

8. No further representations were received and I considered those made in the letter of 22 November 2005 taking into account the information available. Due to the amount of time which has elapsed, I cannot recall the exact date on which I responded and unfortunately I did not note on the file on which date I sent the response to the solicitors. Neither is there a copy of the faxed confirmation.

9. It is of note that the letter to the Applicant's solicitors is still dated 22 November 2005. This is an oversight on my part as I had begun my draft on 22 November 2005. There was never any intention to indicate that I had responded to the solicitors representations on 22 November 2005. My intentions are clearly noted on the Home Office file and I had informed the Applicant's solicitor that I would not be responding to their representations on 22 November 2005, but would wait for their further representations and answer the letters together".

(d) It is clear therefore that not only had the respondents recognised that the effect of the Hollywood letter of 22 November 2005 was suspensive in effect in terms of the removal, but that the only reason that the removal took place on

that date was because Ms Lyons had been unable to make contact with the relevant officer to prevent the removal. I have no doubt that had contact been made, this removal would never have occurred on 22nd November 2005 and the normal suspension would have operated. Self evidently, the decision to certify that the applicant's human rights claim was clearly unfounded occurred some time between 22 November 2005 ("the certification") and 7 December 2005 when it is agreed the letter was provided to Mr Hollywood. The precise date when that certification was arrived at is therefore still unknown save that it occurred after the applicant had been removed.

(e)I consider that this removal was therefore unlawful and in breach of the applicant's rights under the 2002 Act. Moreover it occurred against a background where it is accepted by the respondent that the applicant had not been advised that a request for a "third country" transfer was being made to the Republic of Ireland pursuant to Article 9(2) of the Dublin II Regulation, that she was not informed of the acceptance of the transfer request by the Republic of Ireland on 28 May 2004, that she was not informed of the certification of her asylum application on third party grounds on 2 June 2004 and she was removed from the jurisdiction without the relevant removal directions having being prepared or served upon her. In addition Mr McTaggart drew my attention to Home Office guidelines referred to by Ms Barton-Hanson of the Third Country Unit in a memorandum dated 2 June 2004 as follows:-

> "NB: If an Applicant or their representatives express an intention to seek judicial review, they should be given three clear working days in detained cases from the date that the third country decision is served to obtain an administrative office reference number. This is extended to five days for applicant's (sic) that are not in detention. If an administrative office reference number is not obtained by the end of the third/five day period removal redirections should only be deferred if an injunction is obtained – for more information see IL Ten 1/99".

(f)Mr McTaggart argued that self evidently the need to give three clear working days to obtain the administrative office reference number was ignored in this instance by virtue of the removal on 22 November 2005 despite the indication that an application for judicial review was to be taken up by the applicant.

(g) Mr McGleenan candidly did not seek to justify any of these failures to comply with procedure and in particular the failure to operate the suspensive effect of the human rights based appeal. He readily conceded that the removal ought to have been suspended.

(h) Counsel for the respondent focused his submission however on the consequences of these breaches and the unlawful removal. He argued that the applicant has now readily engaged in the review in the Republic of Ireland to process her application there for asylum and that she is not precluded from making any of the points that have arisen before me in that jurisdiction. He urged the court to recognise that the more direct route for a remedy for the applicant is in the Republic of Ireland rather than the circuitous route of judicial review in this jurisdiction. It was his submission that if this court were to interfere in the processing of her claim for asylum in the Republic of Ireland it would be to step into the international plane in an unjustified manner. Both member states have agreed that the asylum issue will be determined in the Republic of Ireland within the boundaries of Dublin II and that remedies are to be found in the receiving state. Whilst not conceding the point, he urged that the most that this court should do was to make declarations of the unlawful nature of the applicant's removal as constituting a suitable remedy in this jurisdiction which the applicant could then borrow and usefully employ in her claim in the Republic of Ireland. In essence therefore he urged the court to confine any declaration solely to the points conceded by the Crown.

Conclusions on the removal issue

[11] I am satisfied that the removal of the applicant whilst she had a pending human rights claim was unlawful on 22 November 2005 in the absence of a certification by the Secretary of State that in his opinion the human rights claim was clearly unfounded. This applicant was removed on 22 November 2005 with indecent haste and that the failure to comply with a number of procedural notifications which have been conceded by the Crown form part of an unfolding pattern of procedural denial which culminated in the failure to suspend her removal on November 2005 without adequate justification. This latter matter was a clear breach of a remedy open to her under domestic legislation and has frustrated the policy of the statute.

[12] I recognise that in exceptional circumstances the court may refuse a remedy if it is established that an irregularity makes no difference to the outcome of the process. In the matter of an application by Upenyu Hove and Another for Judicial Review Weatherup J, confronting the same issue, adopted the approach of Bingham LJ in R v. Chief Constable of Thames Valley Police ex parte Cotton (1990) IRLR 64 where he set out six reasons why such a holding should be a rare event. At paragraph 22 Weatherup J said -

> "The six reasons were set out again in Bingham LJ's article "Should Public Law Remedies Be Discretionary" (1991 PL 64 at 72 –
>
> (1) Unless the subject of the decision has had an opportunity to put his case, it may not be easy

to know what case he could of or would have put if he had had the chance.

(2) As memorably pointed out by Megarry J in John v. Ross (1970) CH 345.402, experience shows that that which is confidently expected is by no means always that which happens.

(3) It is generally desirable that decision makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision maker's mind became more closed.

(4) In considering whether the complainant's representations would have made any difference to the outcome, if the court may unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision.

(5) This is a field in which appearances are generally thought to matter.

(6) Where a decision maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied".

[13] I consider that the right of this applicant not to be removed from the United Kingdom until her human rights complaints had been considered is a matter that cannot be dismissed lightly. I have no doubt whatsoever that had notice been given of the intention to remove her without considering those rights, this court would have been asked to intervene in order to prevent it occurring. This court cannot be seen to fuel a paradox of illegality whereby the more flagrant the breach the weaker the remedy. To deny her the right to have the human rights claim determined whilst she remains in the United Kingdom simply because there has been a manifest denial of that right by virtue of an illegal removal is in my view an unacceptable outcome and an appearance that matters. One set of rules must be seen to be applied consistently to everyone. Once the fabric of justice is torn, steps must be taken to repair it. Good administration cannot be invoked to bury manifest injustice. It might well be that the eventual outcome will be no different and that permission for her to return to the UK in order to process the position as if she had not been

removed will again result in a certification from the Secretary of State that in his opinion the human rights claim is clearly unfounded. Mr McTaggart had submitted to me that the certificate that was issued was in itself unlawful. I am not prepared to make that determination at this stage. [14]In my view the respondent must follow the appropriate procedure under the 2002 Act, allow the applicant to remain in the United Kingdom whilst a determination is made and permit the applicant to make further representations on the human rights claim. I am unmoved by the suggestion of Ms Elliott that she had invited further representations and in the absence of them had concluded none had been made. In circumstances where the applicant had been removed from the United Kingdom unlawfully, it might be that Mr Holywood was deflected from making such representations as a waste of time. In any event Ms Elliott gave no time scale in which such representations were to be made before the certification was made. Ms Elliott is unaware when that decision was made and therefore I have no information as to whether or not sufficient time was permitted to Mr Hollywood to make further representations even if he was so requested. Moreover it is a matter of profound concern to me that the decision maker appears to have made the determination knowing that the applicant had already been removed. Could this fact have had even an unconscious influence on her decision ? I am not satisfied that a full opportunity has been given to the applicant to make her human rights claim. In all the circumstances therefore I have come to the conclusion that this is not one of those exceptional circumstances where the court will exercise its discretion not to quash a decision which has been found to be unlawful (see Barkley v. Secretary of State for the Environment (2001) 2AC 603 at 616f).

[15] I have determined therefore that I should make an Order of Mandamus requiring the respondent to accept the applicant back into the UK from the Republic of Ireland for the purpose of her processing her human rights claim if she still wishes to do so. That obligation cannot remain open ended and the applicant cannot have an indefinite period to pursue this appeal. I therefore invite the comments of counsel on the appropriate time limits within which the applicant may apply to return for the sole purpose of having her human rights claim reconsidered and within which the respondent will accede to such an application to return together with the terms of such an order.

[16] I am not prepared however to quash the decision of the respondent to certify the human rights claim of the applicant as "clearly unfounded". Such a decision at this stage might impact unnecessarily on the capacity of the respondent to implement the terms and obligation of Dublin II to and might unnecessarily interfere with the good administration of the process of asylum which is currently being pursued by the applicant in the Republic of Ireland. I intend to adopt the approach adopted by Weatherup J in Re Hove and Another and invoke Section 21 of the Judicature (Northern Ireland) Act 1978. This Section provides that -

". . . Where on an application for judicial review –

(a) The relief sought is in order of certiorari; and
(b) The High Court is satisfied that there are grounds for quashing the decision in issue, the court may, instead of quashing the decision, remit the matter to the lower deciding authority concerned, with a direction to reconsider it and reach a decision in accordance with the ruling of the court or may reverse or vary the decision of the lower deciding authority".

[17]I have decided therefore that in addition to ordering that the respondent is to accept the applicant back into the United Kingdom from the Republic of Ireland within a specified period for the purpose of processing her human rights claim under the 2002 Act, the certification matter will be remitted to the respondent under Section 21 of the 1978 Act with a direction to reconsider the certification in light of the current and any further representations to be made by the applicant within a specified time .Thereafter the respondent will reconsider whether to proceed with the Order for the removal of the applicant. Once again I consider there should be time limits fixed for the processing of this matter and I invite the comments of counsel before finalising the order.

[18]I recognise in making these Orders that it may well create logistical impediments to the smooth running of the Dublin II regulation and to the current application for asylum in the Republic of Ireland. This difficulty is entirely the making of the respondent by virtue of the procedural and legislative improprieties to which I have referred and outlined in this judgment. It is therefore for the respondent to unravel the tangle which these actions have created. I make it clear that my Order does not order the respondent to accept responsibility for the applicant's asylum claim. That will depend upon the outcome of the reconsideration of the human rights claim to which I have already adverted.

[19]In all the circumstances therefore I make the following orders:-

(1) I extend the time for the lodgement of this application.

(2) An order of certiorari quashing the decision of the respondent to remove the applicant to the Republic of Ireland before considering her human rights claim .

(3) An order of mandamus requiring the respondent to take such steps as are necessary to permit the applicant to come back into the United Kingdom from the Republic of Ireland if she so requests admission in order to process her

human rights claim in accordance with the time limits to be further considered by this court.

(4) I dismiss the application in relation to the certification of the human rights claim of the applicant as clearly unfounded as set out in paragraphs 3, 4 and 5 of the summons before me save that I remit the certification back to the respondent for reconsideration in light of such further representation as may be made by the applicant in accordance with the time limits to be further considered by the court.

(5) I award costs of the application to the applicant .