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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY KEVIN PHILLIPS A MINOR FOR JUDICIAL REVIEW

CARSWELL LCJ

Introduction

In this application the applicant, who is now aged 16 years, seeks judicial review of a decision by the Secretary of State to place him in Lisnevin Juvenile Justice Centre, a secure centre located near Millisle, Co Down. He was in fact released from detention in that centre a fairly short time after the decision in question, but the parties nevertheless asked the court to consider the issues involved in the application and make any necessary declaration, on the ground that it would clarify the law and would be likely to settle the issue in respect of future cases. Acting upon the principles set out by Lord Slynn of Hadley in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 at 456-7, I agreed to take this course.

The Factual Background

On 20 October 1999 the applicant appeared before Belfast Youth Court, charged with burglary, driving a motor vehicle while disqualified, using a motor

vehicle without insurance and three counts of taking a motor vehicle without consent. He was legally represented and pleaded guilty to the charges. The court remanded him in custody for a week under the power contained in Article 13 of the Criminal Justice (Children) (Northern Ireland) Order 1998 (the 1998 Order), being satisfied under Article 12 that it was necessary to do so to protect the public and that the requisite conditions were fulfilled. He was placed in Lisnevin, which is the only secure juvenile justice centre in Northern Ireland.

It then became the duty of the Secretary of State under paragraph 1(1) of Schedule 2 to the 1998 Order to determine in which centre the applicant was to be detained. The Secretary of State follows a policy whereby, as a general rule, male children remanded in custody by a court under Article 13 of the 1998 Order will be detained in Lisnevin. He has power, however, to have a child transferred from one juvenile justice centre to another, and accordingly he sought advice from the non-statutory group constituted by him to consider such matters in order to determine whether the applicant should be transferred from Lisnevin. This group is comprised of representatives from the Juvenile Justice Branch of the Northern Ireland Office, from each of the three juvenile justice centres in which male children may be accommodated, members of the Social Services Inspectorate and a psychologist employed by the Juvenile Justice Board who specialises in the treatment of children in custody. The function and method of operation of the group are set out in paragraphs 12 to 14 of the affidavit sworn by Mr John McCartney, head of the Juvenile Justice Branch in the Criminal Justice Services Division of the Northern Ireland Office:

> "12. The function of this non-statutory group is to advise the Secretary of State and his officials. In doing so, the group takes into account such information as is available relating to the alleged criminal conduct of the detained person; any criminal record, the conduct of the detained person during previous periods of remand or sentenced custody; and any other information of relevance to the risk of the detained person absconding and/or re-offending if accommodated in either of the two non-secure Juvenile Justice Centres.
>
> 13. Advice from the non-statutory group, by virtue of its collective experience and expertise and the nature of the information which it considers, is influential in decisions made on behalf of the Secretary of State under paragraph 1 of Schedule 2 to the 1998 Order. The advice of the group is accepted in a large percentage of cases.
>
> 14. Children detained in Lisnevin and those representing them are at liberty to make representations and to furnish reports or other information to the Secretary of State's officials during the decision-making processes described in the preceding paragraphs hereof. Any such representations, reports or other information will in all cases be considered by the Secretary of State's officials in making decisions under paragraph 1 of Schedule 2."

The group considered the applicant's case on 26 October 1999. The members had before them the warrant of commitment, which detailed his offences, and an initial assessment completed by the worker assigned to the applicant by Lisnevin management. The group recommended that he should continue to be accommodated in Lisnevin. The Secretary of State accepted this recommendation.

When the applicant appeared again before Belfast Youth Court on 27 October 1999, it remanded him in custody for a further period of 28 days. In accordance with the Secretary of State's decision concerning his accommodation, he continued to be detained in Lisnevin. When he appeared on 24 November 1999

before Belfast Youth Court, the court on this occasion granted him bail and he was released.

The applicant's solicitors wrote to the Juvenile Justice Branch on 1 November 1999 asking for information on a number of matters, including reasons why he had been remanded to Lisnevin instead of St Patrick's or Rathgael. The Northern Ireland Office replied by letter dated 9 November 1999 as follows:

> "Thank you for your letter dated 1/11/99 concerning your client Kevin Phillips who was remanded in custody by the Magistrates' Court. The sole option in such cases is a remand in custody to Lisnevin Juvenile Justice Centre.
>
> Under the new legislation, (The Criminal Justice (Children) (Northern Ireland) Order 1998), there is an underlying presumption of bail and the general thrust of the legislation is to restrict the use of custody for those deemed by the courts to be serious or persistent offenders.
>
> When a child is remanded into custody it is for the Secretary of State for Northern Ireland to determine where each child should be placed within the juvenile justice system. However, the Secretary of State is informed by recommendations from a Placement Panel (comprising, amongst others, representatives from each of the juvenile justice centres,) but the final decision concerning placement in each case rests with the Secretary of State alone.
>
> In your client's case the decision to remand in custody was taken by Belfast Youth Court on 19th October 1999. His case was considered by the Placement Panel on 26th October, but in view of his previous behaviour while in the care of the social services and the serious charges he faces now it was unanimously concluded that he should remain in custody in Lisnevin Juvenile Justice Centre. That recommendation was endorsed by the Department."

The Issues

The grounds put forward by Mr Larkin on behalf of the applicant were the following:

(i) The Northern Ireland Office had failed to comply with the requirement of procedural fairness that an opportunity be given for representations to be made on his behalf in respect of the centre in which he was to be placed, and that sufficient information be furnished to enable proper representations to be made.

(ii) The reasons given by the Northern Ireland Office for the decision to place the applicant in Lisnevin were insufficient.

(iii) The Secretary of State failed to take into account the provisions of the United Nations Convention on the Rights of the Child.

(iv) The applicant had a legitimate expectation that the Secretary of State would act in accordance with that Convention.

Opportunity for Representations

In support of his major argument that the respondent was obliged to give an opportunity to make representations Mr Larkin relied upon the general duty of fairness imposed upon a person or body making an administrative decision. He did not attempt to argue that the applicant had a specific legitimate expectation of consultation. In this I think that he was correct, for there is nothing in the facts which might be regarded as a representation or conduct giving rise to any such expectation.

The principles to be applied in determining the content of fairness in the exercise of a statutory power were set out by Lord Mustill in *R v Secretary of State for*

the Home Department, ex parte Doody [1994] 1 AC 531 at 560, in a passage which has been cited and followed in many subsequent cases, but which still bears repetition:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

It appears from a number of decisions in which these principles have been worked out in the field of prison administration that several factors have to be taken into consideration in determining whether a duty to consult will arise at any stage:

(i) There must a sufficiently substantial interest to require such protection.

(ii) It is necessary to have regard to the practical difficulties which would be involved in carrying out consultation.

(iii) Where there is a procedure which involves two or more stages the court looks to see whether overall fairness is shown to be established.

(iv) In some circumstances a later procedural stage may cure a defect in an earlier one.

The first of these factors is founded upon the same principle as that expressed by Megaw LJ in *R v Hull Prison Board of Visitors, ex parte St Germain* [1979] QB 425 at 450-1, that the courts would interfere in the case of a breach of a procedural rule by a board of visitors only if –

> "there were some failure to act fairly, having regard to all relevant circumstances, and such unfairness could reasonably be regarded as having caused a substantial, as distinct from a trivial or merely technical, injustice which was capable of remedy."

In *Ex parte Doody* the procedure for fixing the tariff in mandatory life sentences was clearly regarded as sufficiently important to the applicant to give him an interest requiring protection. Similarly, the consequences to the applicant of a decision whether he should be transferred from category A to a lower category were such that he had such an interest: *R v Secretary of State for the Home Department, ex parte Duggan* [1994] 3 All ER 277. Conversely, in *R v Secretary of State for the Home Department, ex parte Shaw* (The Times, 10 February 2000) Richards J held a decision not to place the applicant on a Sex Offender Treatment Programme was not such that the applicant had to have the opportunity to make representations. An intermediate stage may perhaps be seen in *R v Secretary of State for the Home Department, ex parte Allen* (The Times, 21 March 2000), where the decision was whether the applicant should be given early release on Home Detention Curfew (the

"electronic tagging" scheme). The Court of Appeal held that although this involved significant consequences for the applicant, it did not require that he be afforded the right to make representations at the assessment stage, so long as he had the opportunity at some point in the process. The court would look at the procedure as it operated at its various stages to see whether overall fairness was shown to have been established. In doing so it would have regard to the practicalities of the case, as Lord Woolf MR observed in *R v Secretary of State for the Home Department, ex parte McAvoy* [1998] 1 WLR 790 at 798-9:

> "For my part, I accept that it is desirable, when something has the impact which being placed in category A has on a prisoner, that the approach should be to ensure, so far as practical, that fairness is achieved. However, in considering whether in any particular situation the procedure which is adopted is fair or unfair, one has to reach a decision not only in the light of the situation of the prisoner, but also in the light of the practical considerations which must apply to the proper running of a prison."

The applicant's solicitors did not advance in correspondence any ground on which the applicant suffered any disadvantage from being placed in Lisnevin rather than in St Patrick's Juvenile Justice Centre, nor was any evidence put before the court which tended to establish that such disadvantage might exist. The applicant put in evidence an inspection report in which the Social Services Inspectorate made a number of criticisms of the physical facilities and the management of Lisnevin. I have considered the content of these criticisms, and no doubt improvements were required – Mr McCartney states in paragraph 18 that some physical improvements have been made since the Inspectorate produced their report. The faults which they found with Lisnevin, however, even if many are still uncorrected, are not in my

judgment sufficient to found the argument that the applicant was substantially worse off by being placed there than if he were accommodated in St Patrick's. In the course of argument Mr Larkin suggested that because of the greater distance of Lisnevin from his home as against St Patrick's his family could not visit him so frequently. This was not established by means of any evidence, and I should be slow to accept that it was a factor of great consequence, bearing in mind the location of each institution.

In the circumstances of this case I consider that consultation was not required at all, because of the relatively slight impact that the decision regarding his placement had upon the applicant's interests. If, contrary to my opinion, it was necessary to afford the opportunity to make representations in some fashion in order to comply with the requirements of fairness, I am satisfied that it was made sufficiently available to the applicant and his family and solicitors, as Mr McCartney sets out in his affidavit. There would have been considerable practical difficulties in consulting them before the initial consideration of the applicant's placement by the non-statutory group and the Secretary of State. Representations could have been made at any stage, and the Secretary of State could have altered his decision on placement at any time and transferred the applicant to another centre.

Reasons for the Decision

The second limb of the applicant's first argument seems to me more apposite than his second argument. Applying the principles laid down in *Ex parte Doody* and usefully discussed in de Smith, Woolf & Jowell, *Principles of Judicial Review*, paras 8-047 and 8-048, I should not regard it as necessary in the first instance for the

Secretary of State to furnish reasons to the applicant for his decision regarding his placement. When his solicitors questioned the decision, however, I consider that some obligation arose to give an explanation for the decision, in order to allow them to put forward effective representations if they so wished: cf the discussion of the content of the common law obligation to furnish reasons for a decision contained in pages 8 to 9 of my judgment in *Re Ferris' Application* (2000, unreported). That was done in the letter of 9 November 1999 from the Northern Ireland Office to the solicitors, in which reference was made to the applicant's "previous behaviour while in the care of the social services and the serious charges he faces now". These matters would have been within the knowledge of the applicant and his family, and I do not consider that it was required that they should be spelt out with any greater particularity at that stage, though such a requirement might have arisen if the correctness of the matters relied upon by the NIO had been challenged. I accordingly do not consider that the applicant can rely successfully on either of the first two grounds advanced on his behalf.

The UN Convention

The applicant relied on Articles 3, 12 and 27 of the United Nations Convention on the Rights of the child, which provide as follows:

> "**Article 3**
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-

being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

…

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

…

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need

> provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
>
> 4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements."

Mr Larkin argued that the decision of the Secretary of State relating to the placing of the applicant in Lisnevin was in breach of these provisions. He submitted that the Secretary of State was obliged to have regard to the provisions, and in the alternative, that the applicant had a legitimate expectation that he would observe them in reaching his decision.

In my judgment it cannot be said that the Secretary of State acted in breach of any of these provisions. The court took the view that it was necessary for the applicant's well-being to prevent him from absconding and committing more offences, which would have further imperilled his future. In order to comply with its ruling, it was proper for the Secretary of State to direct that he be placed in Lisnevin. That decision could be contrary to his well-being only if the conditions at Lisnevin were such as to be positively detrimental to him. Criticism may have been directed at the conditions and regimen at Lisnevin, but even if these had been uncorrected they were far from being such as to constitute a breach of Article 3. Similarly, it cannot in my view be said that the applicant was deprived of a standard

of living adequate for his physical, mental, spiritual, moral and social development to a degree which would constitute a breach of Article 27.

The argument for the applicant under the UN Convention was based mainly on Article 12, which assures to children the right to express their views freely in all matters affecting it and an opportunity to be heard in any judicial and administrative proceedings affecting them. The object of this provision appears to be to ensure that children do not have to remain unrepresented or without a voice when their interests are affected by judicial or administrative decisions being taken. It is clearly important that if their interests may diverge from those of their parents, family members or guardians the children themselves must be given the chance to express a separate view. Even if there is not a material divergence of interests, the provisions of Article 12 appear to require that children be given an opportunity to express their own views and parents or family members cannot have the exclusive right to speak on their behalf. The focus of Article 12 is accordingly on the right to separate representation and expression of views, and it does not confer any greater entitlement to be consulted or to make representations than exists under the general law. For the reasons which I have given I consider that sufficient opportunity was given under the general law to the applicant to make representations about the institution in which he was placed. The solicitors who communicated with the Northern Ireland Office were instructed on his behalf, and the present application has been brought in his name. I therefore consider that the provisions of the UN Convention have all been observed.

Legitimate Expectation

This conclusion is sufficient to dispose of the application, but since the issues of the extent to which the Secretary of State was bound to have regard to the UN Convention and of the applicant's legitimate expectation were fully argued before me, I shall express my opinion upon them. Mr Larkin argued that the decision of the Secretary of State relating to the placing of the applicant in Lisnevin was in breach of the provisions of the UN Convention which I have quoted. He submitted that the Secretary of State was obliged to have regard to these provisions, and in the alternative, that the applicant had a legitimate expectation that he would observe them in reaching his decision.

The first of these arguments is not in my opinion sustainable. The juridical status of international conventions in domestic law was reaffirmed by the Privy Council in *Thomas v Baptiste* [2000] 2 AC 1, where Lord Millett said at page 23, in the course of giving the majority judgment:

> "Their Lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a treaty, in Trinidad and Tobago as in England, is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the courts give effect to the domestic legislation, not to the terms of the treaty. The many authoritative statements to this effect are too well known to need citation. It is sometimes argued that human rights treaties form an exception to this principle. It is also sometimes argued that a principle which is intended to afford the subject constitutional protection against the exercise of executive power cannot be invoked by the executive itself to escape from obligations which it has entered into for his protection. Their

> Lordships mention these arguments for completeness. They do not find it necessary to examine them further in the present case."

The issue in that case was decided by the conclusion that by ratifying the American Convention on Human Rights and making provision for individual access to an international body the government of Trinidad and Tobago had made the process part of domestic law. The judgments did, however, contain some discussion of the topic of legitimate expectation, to which I shall return in a moment.

It follows from the basic proposition set out by Lord Millett that if the Secretary of State did not have regard to the UN Convention or take into account its provisions, that is not in itself a valid ground of attack on his decision. As Sir Thomas Bingham MR observed in *R v Ministry of Defence ex parte Smith* [1996] QB 517 at 558:

> "The fact that a decision maker failed to take account of Convention obligations when exercising an administrative discretion is not of itself a ground for impugning that exercise of discretion."

Were the law otherwise, the consequence would be, as Lord Ackner pointed out in *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 at 761-2, that such conventions would be incorporated into domestic law by the back door. The European Convention on Human Rights may now have been admitted by the front door through the enactment of the Human Rights Act 1998, but the UN Convention with which we are concerned has not been incorporated into domestic law and cannot therefore be a source of rights and obligations.

Mr Larkin's alternative argument was that since the government has adhered to the UN Convention, an international treaty, persons in the position of the

applicant must have a legitimate expectation that the Secretary of State would observe its terms. It does not follow, if this argument is correct, that failure to do so *ipso facto* invalidates his decisions, for provision may be made for a procedure which does not comply with the terms of the convention, which will be valid so long as the decision maker acts fairly: see *Thomas v Baptiste* [2000] 2 AC 1 at 25, per Lord Millett and cf de Smith, Woolf & Jowell, *Principles of Judicial Review*, para 7-019. Mr Larkin did not spell out the nature and extent of the expectation to which the applicant was entitled, but his argument was directed mainly to the provisions of Article 12 of the UN Convention. The nature of these provisions is such that any expectation may properly be described as one of procedural rather than substantive benefit – ie a claim to be entitled to the benefit of a specified procedure rather than to have the decision maker reach a specified conclusion – but the arguments advanced by counsel were addressed to legitimate expectations of both kinds. For convenience and economy of language I shall refer to the latter kind as substantive legitimate expectations.

Three questions arise for consideration:

1. Can the government's adherence to the UN Convention give rise to a legitimate expectation of procedural protection?
2. Can that adherence give rise to a substantive legitimate expectation?
3. Can a substantive legitimate expectation exist at all?

In *R v Secretary of State for the Home Department, ex parte Ahmed* [1999] Imm AR 22 Lord Woolf MR was prepared to answer the first two questions in the affirmative. The applications failed because the Home Secretary had validly adopted certain

policies that were in conflict with the legitimate expectations which the Court of Appeal held could arise from adherence to the European Convention on Human Rights (not then part of domestic law). But in the course of his judgment Lord Woolf MR accepted that both a procedural and a substantive legitimate expectation might arise:

> "I will accept that the entering into a treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general are entitled to rely. Subject to any indication to the contrary, it could be a representation that the Secretary of State would act in accordance with any obligations which he accepted under the Treaty. This legitimate expectation could give rise to a right to relief, as well as additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations which this country had undertaken."

In reaching this conclusion Lord Woolf expressed agreement with the judgments of Mason CJ and Deane J in the Australian case of *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291:

> "Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act 45, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention 46 and treat the best interests of the children as 'a primary consideration'. It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should

> personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it …
>
> The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door."

In *Thomas v Baptiste* [2000] 2 AC 1 Lord Millett was rather more circumspect, when he stated at page 25:

> "Even if a legitimate expectation founded on the provisions of an unincorporated treaty may give procedural protection, it cannot by itself, that is to say unsupported by other constitutional safeguards, give substantive protection, for this would be tantamount to the indirect enforcement of the treaty: see *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R 273. In this sense legitimate expectations do not create binding rules of law: see *Fisher v. Minister of Public Safety and Immigration (No. 2)* [2000] 1 A.C. 434 446G-447A. The result is that a decision-maker is free to act inconsistently with the expectation in any particular case provided that he acts fairly towards those likely to be affected."

Debate has continued for some time on the question whether there can be a legitimate expectation, whose fulfilment will be enforced by judicial review, that a substantive right will be upheld. The scale has been tipped towards recognition of substantive legitimate expectation by the decision of the Court of Appeal in *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850, in which the court declared unlawful a decision to close a nursing home in which the applicant was a resident, contrary to a firm promise given to her that it would be her

home for life. It held on the facts that Miss Coughlan had a legitimate expectation of continued residence there, frustration of which would be so unfair as to amount to an abuse of power. The authority's decision to close the home and transfer the applicant could only be justified if there was an overriding public interest, which had not been established. In the course of his judgment Lord Woolf MR set out the limits of the application of the doctrine of substantive legitimate expectation at pages 871-2:

> "Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

At page 878 Lord Woolf MR defined more closely the circumstances which will make it a proper case for the court to declare a decision unlawful on this ground. Referring to *R v Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 All ER 397, in which Hirst LJ had condemned the doctrine of substantive legitimate expectation as a heresy, he stated:

> "76. *Ex p Hargreaves* can, in any event, be distinguished from the present case. Mr Gordon has sought to distinguish it on the ground that the present case involves an abuse of power. On one view all cases where proper effect is not given to a legitimate expectation involve an abuse of power. Abuse of power can be said to be but another name for acting contrary to law. But the real distinction between *Ex p Hargreaves* and this case is that in this case it is contended that fairness in the statutory context required more of the decision-maker than in *Ex p Hargreaves* where the sole legitimate

> expectation possessed by the prisoners had been met. It required the health authority, as a matter of fairness, not to resile from their promise unless there was an overriding justification for doing so. Another way of expressing the same thing is to talk of the unwarranted frustration of a legitimate expectation and thus an abuse of power or a failure of substantive fairness. Again the labels are not important except that they all distinguish the issue here from that in *Ex p Hargreaves*. They identify a different task for the court from that where what is in issue is a conventional application of policy or exercise of discretion. Here the decision can only be justified if there is an overriding public interest. Whether there is an overriding public interest is a question for the court."

In *R v Secretary of State for the Home Department, ex parte Begbie* [2000] 1 WLR 1115 Laws LJ sought to define with more particularity the circumstances in which the court would intervene on the ground of an abuse of power. At pages 1130-1 he expressed the view:

> "As it seems to me the first and third categories explained in the *Coughlan* case [2000] 2 W.L.R. 622 are not hermetically sealed. The facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear. The local government finance cases, such as *Reg. v. Secretary of State for the Environment, Ex parte Hammersmith and Fulham London Borough Council* [1991] 1 A.C. 521, exemplify this. As Wade and Forsyth observe (*Administrative Law,* 7th ed. (1994), p. 404):
>
> > 'Ministers' decisions on important matters of policy are not on that account sacrosanct against the unreasonableness doctrine, though the court must take special care, for

> constitutional reasons, not to pass judgment on action which is essentially political.'
>
> In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players. Here, with respect, lies the importance of the fact in the *Coughlan* case [2000] 2 W.L.R. 622 that few individuals were affected by the promise in question. The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, falling to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.
>
> There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy."

I would refer also to the useful discussion of the topic in Kerr J's judgment in *Re Treacy's Application* [2000] NI 330 at 360-4.

No doubt the debate will continue and the law will be further developed as cases come before the courts for decision, but for the moment at least it would seem that the doctrine of substantive legitimate expectation has been accepted in England as a ground for invalidating an administrative decision in circumstances where it amounts to an abuse of power for which there is no

justification based on overriding public interest. There has been criticism of the decision in *Ex parte Coughlan*, notably in the March 2000 issue of *JR*, but it represents binding authority in England and was accepted as such in *Ex parte Begbie*. In these circumstances I would, if it fell to be decided in the present application, accept when sitting at first instance that that view of the law ought to be adopted, and regard the dispute to which I referred in *Re Croft's Application* [1997] NI 1 at 18-19 as having been resolved in this manner. I would also hold, if this issue had not been determined by my conclusion that the actions of the Secretary of State were not in breach of the UN Convention, that in the circumstances of the present case there was no abuse of power on his part.

The applicant has accordingly failed to make out a case for a declaration on any of the grounds on which he relied, and the application must be dismissed.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

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IN THE MATTER OF AN APPLICATION BY KEVIN PHILLIPS A MINOR FOR JUDICIAL REVIEW

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JUDGMENT

OF

CARSWELL LCJ

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