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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 TINA LEE THOMAS
FOR JUDICIAL REVIEW

COGHLIN J

In this case the applicant, Tina Lee Thomas, seeks judicial review of a decision, made on 4 December 1997, by the Secretary of State for the Home Department ("Secretary of State") to deport the applicant from the United Kingdom.

The applicant is a national of the United States of America, having been born in Texas on 11 September 1965, and, in the course of an affidavit sworn on 12 February 1998, she furnished details of her childhood and adolescence. She stated that her parents divorced when she was very young and that she spent approximately two and a half years at an orphanage before going to live with her grandmother when she was four years of age. When the applicant reached the age of nine her grandmother died and the applicant spent the next eight years being, to use her own words, "farmed out" to various family friends and relatives. She has described her

adolescent life as being "extremely chaotic and unhappy" and, from time to time, she received counselling and therapy for depression. The applicant has stated that, upon one occasion, she attempted suicide. The applicant attended the University of Texas and, ultimately, successfully completed a degree in Art History. Thereafter she worked "from time to time" supporting herself with the assistance of a small inheritance.

Miss Burden, a Social Worker employed by the North and West Belfast Health and Social Services Trust ("the Trust") recorded in her report dated 27 October 1997 that:

> "During this period Ms Thomas' apparent self-destructive lifestyle and erratic employment history reflected significantly the lack of family stability she experienced in childhood and adolescence. As a consequence Ms Thomas stated she suffered from depression. Ms Thomas has also alluded to several episodes of therapy and one self-referral to hospital for mental health difficulties."

The applicant became pregnant at the age of fifteen and subsequently underwent an abortion and, after becoming pregnant for a second time, at the age of seventeen, she arranged for the child to be adopted. At all times she has been acutely aware of her lack of a stable family background and she has expressed herself as being deeply frustrated by American "values".

At paragraphs of her affidavit she stated that she decided to move to Ireland because she believed that she could find a "better, more nurturing, way of life" although she told Miss Burden that she had decided to come to Ireland "for a holiday". Miss Burden recorded that the plaintiff told her that:

> "She had recently converted to Catholicism and states that she had a great grandfather from Donegal. As an isolated and rootless adult who seemed to feel keenly a sense of

> isolation in the USA she had a, perhaps, romanticised notion of gaining a sense of belonging and connecting this in a small Irish community, also states she has an interest in Irish history and politics and this brought her to Belfast."

The applicant left America and arrived at Shannon Airport on 12 August 1996. At the airport her passport was stamped with a three-month entry permit although it seems that she subsequently lost her passport. On 15 August 1996 the applicant travelled from the Republic of Ireland into Northern Ireland thereby acquiring leave to enter the United Kingdom for three months in accordance with the Immigration (Control of Entry through Republic of Ireland) Order 1972. Her three months leave expired on 15 November 1996 and thereafter she has remained unlawfully within the United Kingdom.

It appears that the applicant became pregnant within a fairly short time of her arrival in Northern Ireland since, on 6 July 1997, she gave birth to a female child named Aoife Frances Thomas at the Royal Maternity Hospital in Belfast. The applicant had booked in for ante-natal care at the Royal Maternity Hospital in January 1997 and it appears that she was hospitalised on three occasions during her pregnancy.

During the course of compiling the report for the Trust the applicant told Miss Burden that in March 1997 she had contacted the Catholic Welfare Care Association Adoption Agency stating that, in the event of being deported, it would be preferable for her to arrange to have her baby adopted in Ireland and that she would then commit suicide.

During the course of the hospital admissions she was assessed by a Psychiatrist as being in need of emotional support and, on 25 April 1997, she presented to

Night Staff at the Royal as very distressed and expressing suicidal thoughts. She was then assessed by a Clinical Psychologist who recommended referral to the Community Psychiatric Service. After the birth of Aoife, staff on the ward requested a further psychiatric assessment after becoming increasingly concerned at the applicant's level of distress.

The applicant has stated in her affidavit that she has been in contact with the father of her child who is "an Irish/British citizen", but it seems that he has at all times refused to acknowledge paternity.

The applicant first came to the attention of Social Services in January 1997 when she applied for financial assistance and, at a case conference prior to the birth of the child, the Trust decided that, in view of the applicant's history of mental health problems, suicidal thoughts and history of disruption, the baby's name should be placed on the Child Protection Register and the applicant should be asked to consider a placement in a hostel for assessment of her parenting skills. The applicant consented and, in due course, arrangements were made for her admission to Thorndale. The outcome of this assessment was very positive and Miss Burden noted that a strong bond existed between mother and daughter with the mother displaying good management skills and insight into the needs of the child. The child's name was subsequently removed from the Child Protection Register.

In May 1997 the applicant wrote to the Immigration Office informing them of her continued presence in Northern Ireland and she subsequently consulted the Law Centre to pursue an application for leave to remain in the United Kingdom. On 24 July 1997 the Irish authorities confirmed that the applicant's Declaration of Irish

Citizenship on behalf of her daughter had been noted in the records of the department. On 4 December 1997 the applicant was interviewed by Bernard Langan at the Immigration Office in Belfast and a decision was made that she should be deported from the United Kingdom in accordance with Section 3(5) of the Immigration Act 1971. The circumstances under which that decision came to be taken have been set out in detail by John Hill Waddell of the Home Office Immigration and Nationality Directorate in his affidavit of 7 April 1998.

On 8 December 1997 the applicant lodged an appeal under Section 15(1) of the 1971 Act. As a matter of course, this appeal prompted a reconsideration of the decision of 4 December 1997, but the conclusion reached was that the determination had been properly made. The Order 53 statement in support of the application for judicial review was lodged on 13 February 1998 and, in the light of that application, the impugned determination was reviewed for a second time on behalf of the Secretary of State. The matter was reconsidered generally by Mr Stephen Still of the Home Department Immigration and Nationality Directorate and this included an assessment of the applicant's grounds for judicial review together with the affidavits and exhibits thereto. The circumstances of this further review of the applicant's case have been set out in detail by Mr Still in his affidavit of 14 April 1998.

On 17 July 1998 Dr Philip McGarry, Consultant Psychiatrist, lodged an affidavit on behalf of the applicant to which he exhibited a report on the applicant dated 9 July 1998. On 6 August 1998 Miss Burden, Social Worker, lodged a brief affidavit to which she exhibited an up-to-date report from the Trust relating to the applicant. On 27 August 1998 Miss Ann Grimes from the Law Centre lodged an affidavit exhibiting a

report from "Legal Aid of Central Texas" relating to financial and psychological support that would be available for the applicant and her child in Austin, Texas.

These materials were all considered by Mr Still who lodged a further affidavit on 30 September 1998 indicating that these up-to-date developments had been taken into account and that, having done so, the original decision had been confirmed.

The relevant domestic legislation

Part 1 of the Immigration Act 1971 ("the 1971 Act") created the concept of "the right of abode in the United Kingdom" and, as a general rule, those possessing this right are:

(i) British citizens

(*ii*) Commonwealth citizens.

The applicant has not possessed the statutory right of abode in the United Kingdom at any material time. Section 3(1) of the 1971 Act created the concept of "leave to enter" the United Kingdom. By virtue of Article 4(1) of the Immigration (Control of Entry through Republic of Ireland) Order 1972 ("the 1972 Order") the applicant acquired leave to enter the United Kingdom by operation of law. The effect of Article 4(4)(*a*) of the 1972 Order is that such leave was limited to a period of three months. Thus, from 16 November 1996 the applicant's status has been that of an illegal entrant. Section 3(5) of the 1971 Act, inter alia, provides that:

> "A person who is not a British citizen shall be liable to deportation from the United Kingdom –
>
> (*a*) if, only having a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave …"

The Immigration Rules made by the Secretary of State in accordance with the provisions of Section 3(2) of the 1971 Act set out:

> "… the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances … ."

Part 13 of the Immigration Rules deals with Deportation. Paragraph 364 provides as follows:

> "In considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case. While each case will be considered in the light of the particular circumstances, the aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. Deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority. Before a decision to deport is reached the Secretary of State will take into account all relevant factors known to him including:
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> (*i*) age;
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> (*ii*) length of residence in the United Kingdom;
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> (*iii*) strength of connections with the United Kingdom;
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> (*iv*) personal history, including character, conduct and employment record;
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> (*v*) domestic circumstances;
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> (*vi*) previous criminal record and the nature of any offence of which the person had been convicted;
>
> (*vii*) compassionate circumstances;
>
> (*viii*) any representations received on the person's behalf."

The respondent's consideration and application of Rule 364 has been set out at paragraphs 5-8 of Mr Waddell's affidavit, paragraphs 5-7 of Mr Still's first affidavit and paragraphs 2-7 of Mr Still's second affidavit.

The applicant was represented by Mr John Larkin while Mr Bernard McCloskey appeared on behalf of the respondent. I am indebted to both counsel for the extent of their research and the degree of care and clarity with which they formulated their respective submissions.

Mr Larkin developed five main arguments in support of the application.

Irrationality and Article 8 ECHR

While he accepted that, apart from a small number of exceptions, the provisions of the Human Rights Act 1998 are not due to come into force until October 2000, Mr Larkin relied upon the provisions of Section 22(4) of that Act in support of a submission that it would be "irrational" in the Wednesbury sense to merely "have regard" rather than to apply Article 8 of the European Convention on Human Rights ("the ECHR").

Article 7(1)(*b*) of the Human Rights Act provides that a person who claims that a public authority has acted in a way which is made unlawful by Section 6(1) of the Act may rely on a Convention right or rights in any legal proceedings. Section 22(4) applies this provision to proceedings brought by or at the instigation of a public authority "whenever the act in question took place". Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

While accepting that in R v DPP ex parte Kebilene and others [1999] 3 WLR 972, the House of Lords rejected an argument in favour of a legitimate expectation as inconsistent with a clear statutory intent to postpone the coming into effect of the central provisions of the Human Rights Act – see the remarks of Lord Steyn at page 982 - Mr Larkin nevertheless sought to argue that it would be irrational not to apply Article 8 in these proceedings having regard to their likely duration, including the possibility of appeals and/or a reference to the Court of First Instance of the European Court of Justice.

I do not accept this argument. It does not seem to me that the decision in R v Kebilene has significantly altered the status of the Convention in domestic law which, in my view, at present, remains as set out by Sir Thomas Bingham MR, as he then was, in ex parte Smyth [1996] QB 517 at page 558E when he said:

> "It is, inevitably, common ground that the United Kingdom's obligation, binding in international law to respect and secure compliance with (Article 8) is not one that is enforceable by domestic courts. The relevance of the Convention in the present context is as background to the complaint of irrationality. 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."

It seems to me that to hold that it was irrational only to "have regard" to Article 8 would be tantamount to holding that rationality required the decision-maker to treat Article 8 as being currently in force which would result in the incorporation of the Convention into domestic law by the "back door" – see Lord Ackner in Brind v Secretary of State for the Home Department [1991] 1 AC 696 at 761H-762A. Furthermore, such an approach would be contrary to the intention of Parliament which is clearly not to bring into force the substantive provisions of the Human Rights Act 1998 giving effect to Convention rights in domestic law until 2 October 2000.

At paragraph 7 of his affidavit of 14 April 1998, Mr Still confirmed that he did have regard to Article 8 and to the jurisprudence of the European Court of Human Rights in the context of immigration cases and I would not be prepared to condemn his approach as Wednesbury irrational.

However, even if Mr Larkin was correct in his submission that the decision-maker ought to have applied Article 8 of the Convention rather than merely "having regard" to it, I remain far from satisfied that any breach of Article 8 has in fact been established in the course of this application. The approach of Mr Waddell, HM Inspector of Immigration for Scotland and Northern Ireland, is set out at paragraphs 4-8 of his affidavit of 7 April 1998 and, as I have already noted above, at paragraph 7 of his affidavit of 14 April 1998, Mr Still averred that he did have regard to Article 8 of the Convention and to the jurisprudence of the European Court of Human Rights in the context of immigration cases. In particular he referred to the decision in Sorabjee v United Kingdom [23 October 1995 – Application No 23938/94].

In Sorabjee the European Commission of Human Rights ("the Commission") considered the application of a three year old British citizen whose mother, a Kenyan Asian, the Government were seeking to remove from the United Kingdom as an illegal entrant. Inter alia, the applicant relied upon Article 8 of the Convention. The applicant relied upon evidence that, if they were returned to Kenya, she and her mother would be marginalized in Kenyan society, they would be excluded from the Hindu-Asian socio-religious group because of the circumstances of her mother's marriage, there were no members of their immediate family in Kenya and her mother would no longer benefit from the healthcare available in the United Kingdom which she required in respect of her epilepsy and "bilateral trigger thumb condition". In particular, it was argued that her mother's inability to afford the necessary surgery for the latter condition could lead to irreparable damage to development of her manual and co-ordination skills. The Commission referred to its established case law holding that Article 8, in itself, did not guarantee a right to enter or remain in a particular country nor did it impose a general obligation on States to respect the choice of residence where members of a family were non-nationals. The Commission observed that establishing a breach of Article 8 in such a context would depend upon a number of factors including the extent to which family life was effectively ruptured, whether there were insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there were factors of immigration control or public order weighing in favour of exclusion.

In relation to the applicant's circumstance the Commission noted, at page 8:

> "In the present case, the applicant, 3 years old, is likely to follow her mother on removal. As a result she may have to leave the society where she was born and face the hardship of living in a society where, due to family, socio-religious factors her mother risks having difficulties in integrating into any community there. The Commission recalls however that the mother was an illegal immigrant who had lived previously in Kenya. It finds that the applicant is of an age at which it can be expected that she can adapt to the change in environment. With reference to the applicant's links with her father, it does not appear from the material before the Commission that the removal would disrupt the relationship, there being no apparent established bond between them."

The Commission specifically expressed the view that the possible shortcomings in healthcare in Kenya were not of such a nature or a degree to impinge on respect for family or private life and went on to hold that there were "… no elements concerning respect for family or private life which in this case outweighed the valid considerations relating to the proper enforcement of immigration controls." In the circumstances, the Commission rejected the application as "manifestly ill-founded" within the meaning of Article 27 paragraph 2 of the Convention.

I also note the views of the learned authors of Harris and others "Law of the European Convention on Human Rights" expressed at page 332:

> "The strongest cases are where the Convention State members of the family have no right in the law of the alien member State to join him there. Equally, where the alien Member is not able to return to his own State because he is a refugee, there is a good reason why Article 8(1) should be interpreted to require the Convention State to allow him to join the other members of the family, whether it is formally bound to do so under refugee law or not. Otherwise the obstacles to the family members joining the other outside the Convention State will have to be substantial – economic or cultural advantage will generally be insufficient."

The one factor which might be argued to be of particular significance in this case in relation to a potential breach of Article 8 is the potential for the applicant to commit suicide and I propose to consider this aspect of the case in further detail later in the judgment.

Article 8(*a*) of the Treaty on European Union

Article 8(*a*), paragraph 1 of the Treaty on European Union as amended provides that:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."

Mr Larkin submitted that Article 8(*a*) created an autonomous substantive right to move and reside freely in community territory and that the impugned decision to remove the applicant would have the inevitable consequence of precluding her child, Aoife, from freely exercising her rights in accordance with Article 8(*a*). In support of this submission Mr Larkin relied upon the opinions of the Advocates General in Maria Martines Sala v Freistaat Bayern (ECJ 12 May 1998 Case No C-85/96) and Wijsenbeek v Netherlands (ECJ 12 October 1999 Case No C-378/97).

By way of response Mr McCloskey submitted that Article 8(*a*) did not have direct effect and was, at most, merely declaratory of existing European rights and that, in any event, on the facts of this case, there had not been any infringement of Article 8(*a*).

The significance of Articles 8 and 8(*a*) of the Treaty, as amended, was considered by the Court of Appeal in Phull v Secretary of State for the Home Department [1996]

IMM AR 72. In that case the respondent sought to deport an Indian national who had married a British citizen. It was argued on behalf of the applicant that the right of residence in the Member State, enjoyed by the applicant's British husband, carried with it a right to family reunion in that State. In giving the judgment of the Court of Appeal, Leggatt LJ expressed the view that the language of the Article did not support the argument that Article 8(*a*) had introduced a departure from the principle that the right to move freely and to reside with Member State was inapplicable in wholly internal situations and he noted that academic writers were virtually unanimous in the view that the new right created by Article 8(*a*) did not significantly extend the rights of free movement and residence enjoyed by nationals of Member States under the EC Treaty and Council Directives. He further pointed out, at page 77 of the judgment, that in all the cases cited before the Court of Appeal the right of a citizen to have his or her family residing with him or her was given not by an Article of the Treaty expressed in general terms, but by specific subordinate legislation such as Community Regulations or national legislation following a Directive. He went on to conclude that:

> "Even if , contrary to our view, Article 8(*a*) has the effect of creating a new right to reside in a person's own State coupled with a right of family reunion, in our judgment, until the requisite subordinate legislation has been passed, it will not be sufficiently precise or unconditional to have direct effect."

At page 78, in relation to a suggestion that the case should be referred to the European Court of Justice in accordance with Article 177 of the Treaty Leggatt LJ said:

> "That in this case after full argument we have come to the confident conclusion both that Article 8(*a*) is not intended to operate domestically, and also that in default of further measures it is not capable of having direct effect. On the

> grounds of community law relied on by the applicants we therefore do not entertain any such doubt as would warrant a reference to the European Court of Justice under Article 177 of the EC Treaty."

A similar view of Article 8(*a*) was taken by a differently constituted Court of Appeal in Vitale v Secretary of State for the Home Department [1996] IMM AR 275 and that court also rejected a request for a reference under Article 177 noting that the House of Lords had refused leave to appeal in Phull's case without making any reference under Article 177. Mr McCloskey also referred me to page 659 of Wyatt and Dashwood "European Community Law" (3rd Edition 1993) where, in relation to Article 8(*a*), the learned authors observed:

> "According to Article 8(*a*) of the EC Treaty, as amended by the T.E.U., every Union citizen is to have the right to move and reside freely within the territories of the Member States, subject to the limitations and conditions laid down by the Treaty and by legislation adopted under it. The new rights thus created will not significantly extend the rights of free movement and residence already accorded to nationals of Member States under the EC Treaty or pursuant to Council Directives."

At paragraph 18 of his opinion in Maria Martines Sala v Freistaat Bayern Advocate General La Pergola said:

> "Now, however, we have Article 8(*a*) of the Treaty. The right to move and reside freely throughout the whole of the Union is enshrined in an act of primary law and does not exist or cease to exist depending on whether or not it has been made subject to limitations under other provisions of Community law, including secondary legislation. The limitations provided for in Article 8(*a*) itself concern the actual exercise but not the existence of the right."

Again, when dealing with the prohibition of discrimination on grounds of nationality he went on to say, at paragraph 20:

> "The creation of Union citizenship unquestionably effects the scope of the Treaty, and it does so in two ways. First of all, a new *status* has been conferred on the individual, a new *individual legal standing* in addition to that already provided for, so that nationality as a discriminatory factor ceases to be relevant or, more accurately, is prohibited. Secondly, Article 8(*a*) of the Treaty attaches to the legal status of Union citizen the right to move and reside in any Member State."

However, in the course of giving judgment, the court itself did not deal with the submissions of the Advocate General relating to Article 8(*a*) observing, at paragraph 60 of the judgment:

> "It should, however, be pointed out that, in a case such as the present, it is not necessary to examine whether the person concerned can rely on Article 8(*a*) of the Treaty in order to obtain recognition of a new right to reside in the territory of the Member State concerned, since it is common ground that she has already been authorised to reside there, although she has been refused issue of a residence permit."

The European Court of Justice has demonstrated little enthusiasm for providing a definitive analysis of the "citizenship" provisions contained in Article 8(*a*) to (*e*). In Skanavi [1996] ECR 1-929 the court expressed the view that Article 8(*a*) was a general expression of the rights provided under Article 52 (now Article 43 governing the freedom of establishment), and therefore secondary in importance to specific free movement provisions and the court noted that, as a consequence, "it is not necessary to rule on the interpretation of Article (*a*)". In Poukhalfa [1996] ECR 1-2253 Advocate General Léger described Article 8 as being of "considerable symbolic value"

and suggested that it was the responsibility of the court to take citizenship from the constitutional twilight zone noting that "it is for the court to ensure that its full scope is attained" (page 2271 para 63 of the Advocate General's Opinion). In the course of giving judgment the court made no reference either to Article 8 or to the Advocate General's arguments. Advocate General Pergola's Opinion in the Sala case was delivered on 1 July 1997 and I was helpfully furnished with a copy by the parties to these proceedings. There is no doubt that Advocate General Pergola considered that Article 8(*a*) was of considerable importance and, I have already referred to his remarks at paragraph 20 of the opinion. At paragraph 23 the Advocate General went on to say:

> "What justifies the application of the general prohibition of discrimination in this case is not, as the Commission argues, the fact that the plaintiff has a right of residence which derives from the Treaty and which remains fully intact until the host State avails itself of the possibility of limiting the exercise of that right under the directive: justification for equality of treatment lies rather, as I have explained, in the legal status of a citizen of the Union, in the guarantee afforded by the status of the individual, as it is now governed by Article 8 of the Treaty, which is enjoyed by a national of *any Member State* and in *any Member State*. In other words, the Union, as conceived in the Maastricht Treaty, requires that the principle of prohibiting discrimination should embrace the domain of the new legal status of common citizenship. This case is therefore a test case where a range of problems which could be referred to the court in future."

However, as I have already noted above, ultimately, the court steadfastly declined this invitation. I was also provided with a copy of The Times report of the decision of the European Court of Justice in Wijsenbeek – case C-378/97 in which Article 8(*a*) was referred to by the court, but only upon a hypothetical basis.

In the circumstances I am clearly bound by the authority of the Court of Appeal decisions and, accordingly, I reject Mr Larkin's submissions in relation to Article 8(*a*). Despite the valiant efforts of the Advocates General, there is nothing in the European jurisprudence to which I have been referred that suggest to me that the decisions of Phull and Vitale should be reconsidered and, accordingly, bearing in mind the guidance afforded by R v International Stock Exchange of the UK ex parte Else [1993] QB 534, I do not consider that this is an appropriate case for an Article 234(177) Reference.

Legitimate expectation

During the course of his helpful submissions Mr Larkin advanced the proposition that accession by a national State to an international agreement or treaty gives rise to a substantive legitimate expectation that the State will honour the terms of that agreement or treaty. In this context Mr Larkin referred to Article 3(1) of the United Nations Convention on the Rights of the Child (1989) ("the 1989 Convention"). Article 31 of the 1989 Convention provides:

> "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."

Mr Larkin also referred to Articles 3(2), 5, 6(2), 7 and 9 of the 1989 Convention. In the course of developing this argument, Mr Larkin drew my attention to the recent Court of Appeal decision in R v North and East Devon Health Authority ex parte Coughlan [2000] 2 WLR 622: [2000] 3 All ER 850 upon which he relied as confirming the existence of the concept of substantive legitimate expectation and he referred to

R v Secretary of State for the Home Department ex parte Ahmed and Patel [1999] IMM AR 22 and to R v Uxbridge Magistrates' Court ex parte Adimi [1999] 4 All ER 520 as authority for the proposition that such a substantive legitimate expectation could be founded upon the provisions of an international Convention or treaty.

Mr Larkin accepted that a clear statutory intent to postpone the coming into effect of legislation seeking to apply the terms of such a treaty or Convention would prevent such a legitimate expectation from coming into existence noting the remarks of Lord Steyn in R v DPP ex parte Kebeline [1999] 4 All ER 801 at 833. However, he submitted that neither the Court of Appeal nor the House of Lords in Kebeline had rejected the proposition that a substantive legitimate expectation could be founded upon an international treaty or convention out of hand or condemned it as fundamentally flawed.

In the course of a carefully constructed submission advanced on behalf of the respondent in relation to this aspect of the case, Mr McCloskey urged upon the court the importance of returning to the historical origins of the doctrine of legitimate expectation and, in particular, the analyses contained in the judgments in Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374. Mr McCloskey also relied upon the detailed analysis of the doctrine of legitimate expectation contained in the judgment of Carswell J, as he then was, in Re Police Association for Northern Ireland's application [1990] NI Reports 258 at 271 to 274. At the conclusion of this review Carswell J, as he then was, expressed the view that the doctrine of legitimate expectation was part of the corpus of law concerned with the duty to act in accordance with the rules of natural justice and went on to observe, at page 274:

> "Given that the province of the doctrine of legitimate expectation is that of the manner or procedure of making decisions, it seems to me that to import the requirement of an overriding public interest is not appropriate. Such a concept relates to the merits of the decision to depart from the undertaking and to the strength of the case in favour of the departure. I do not consider that the court should be concerned with this. I think that it follows from the passage of Lord Roskill's speech in the GCHQ case which I have cited – a classic statement of the function of the court – that it should focus only on the manner in which the decisions are taken. Considerations of overriding public interest are not relevant to that, but pertain to the substance of the decisions."

Since the House of Lords decision in the GCHQ case the law relating to judicial review has undergone a period of widespread and rapid development and one of the recurring themes has been the debate as to whether the doctrine of legitimate expectation should be confined to the manner or procedure by which decisions are reached or whether it extends to securing a substantive benefit. Laws LJ has tended to espouse the former view eg R v Secretary of State for Transport ex parte Richmond LVC [1994] 1 All ER 577 – while the latter approach has been favoured by Sedley MJ eg R v Ministry of Agriculture, Fisheries and Food ex parte Hamble [1995] 2 All ER 714. In R v Secretary of State for the Home Department ex parte Hargreaves [1997] 1 All ER 397 the Court of Appeal in England rejected the concept of a substantive legitimate expectation. At page 4112 Hirst LJ said:

> "Mr Beloff characterised Sedley J's approach as heresy, and in my judgment he was right to do so. On matters of substance (as contrasted with procedure) Wednesbury provides the correct test. It follows that while Sedley J's actual decision in the Hamble case stands, his ratio in so far as he propounds a balancing exercise to be undertaken by the court should in my judgment be overruled."

At page 416 Pill LJ observed:

> "The claim to a broader power to judge the fairness of a decision of substance, which I understand Sedley J to be making in R v Ministry of Agriculture, Fisheries and Food ex parte Hamble (Onshore Fisheries Limited) [1995] 2 All ER 714, is in my view wrong in principle."

In the course of giving judgment at first instance Carswell LCJ in Re Croft's application [1997] NI Reports 1 referred to the depth of judicial and academic debate upon this topic and, after reviewing some of the more recent authorities and Articles, he held that if the doctrine of legitimate expectation extended to the upholding of substantive rights there would have to be a clear and unambiguous representation or statement of policy to give rise to an expectation. In his view there was nothing of that nature in Croft's case. By the time that Croft's application reached the Court of Appeal Hargreaves had been decided in England and the Northern Ireland Court of Appeal recognised the adverse impact of the latter decision upon the argument of those contending in favour of a substantive legitimate expectation. However, in the course of a lucid and careful analysis of the doctrine of legitimate expectation in Re Hampson's application [1998] NIJB 188 Girvan J with reference to the decision in Hargreaves observed, at page 193:

> "Whether this is the last word on the topic remains to be seen. The heresy of one age can on occasions become the orthodoxy of another."

It seems clear that in Kebeline the argument in favour of a substantive legitimate expectation was pursued more vigorously in the Court of Appeal than before the House of Lords. In the former both Lord Bingham CJ and Laws LJ referred to the argument in favour of legitimate expectation of substance based on the decision in R v

Secretary of State for the Home Department ex parte Ahmed and Patel in which Lord Woolf MR had cited with approval the reasoning of the High Court of Australia in Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353 at 385. In Ahmed and Patel Lord Woolf MR said, at page 583-584:

> "I will accept that entering into a treaty by the Secretary of State should give rise to a legitimate expectation 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 this 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 has undertaken. This is very much the approach adopted by the High Court of Australia … ."

It is to be noted that Lord Woolf's remarks expressed possibilities and that on the following page at 584F he found that there was no basis in fact, in the context of the relevant policies, for the legitimate expectation sought to be established on the part of the applicants. No doubt this was the reason while Laws LJ referred to Lord Woolf's observations as obiter in Kebeline – see page 825 of his judgment.

In North and East Devon Health Authority ex parte Coughlan [2000] 2 WLR 622 the Court of Appeal in England composed of Lord Woolf MR, Mummery LJ and Sedley LJ upheld the argument that the applicant, a lady who had been tragically rendered tetraplegic as a result of a road traffic accident, enjoyed a legitimate expectation that she would not be moved from the institution in which she received long-term care on the basis of an express assurance or promise by the local health authority that the institution was to be her "home for life" and that she could live there

"as long as she chose". The court distinguished Hargreaves on the basis that the only legitimate expectation held by the prisoners in that case was that their applications would be considered individually in the light of whatever policy was in force at the time. The court held that, by contrast, the health authority in Coughlan's case was required, as a matter of fairness, not to resile from its promise unless there was an overriding justification for doing so. Whether there was such an overriding public interest was said to be a question for the court.

In R v Uxbridge Magistrates ex parte Adimi [1999] 4 All ER 520 the applicants argued that they were entitled to be protected from prosecution for travelling on false papers by the provisions of Article 31(1) of the 1951 UN Convention relating to the Status of Refugees and, in support of their arguments they relied upon the remarks of Lord Woolf MR in Ahmed and Patel cited above. The case was heard by a Divisional Court comprised of Simon Brown LJ and Newman J. At page 535 Simon Brown LJ accepted the applicants' argument based upon legitimate expectation saying:

> "By the time of these applicants' prosecutions, at latest, it seems to me that refugees generally had become entitled to the benefit of Article 31 in accordance with the developing doctrine of legitimate expectations; see too in this regard Hobhouse LJ's judgment in ex parte Ahmed [1998] INLR 570 at 591."

At page 539 Newman J referred to the judgments of Mason CJ and Dean J in the Australian case of Teoh and went on to say:

> "It is not in dispute that the 1951 Convention was designed to alleviate the plight of asylum seekers and was driven by humanitarian considerations. The Convention addresses not the population at large, but a particular class of person

> and comprises positive statements about the way in which they will be treated. It would be hollow indeed if those who, having acted so as to become members of the contemplated class and having exposed themselves to the risks and dislocation of becoming refugees are without remedy to obtain some measure of protection in accordance with the Convention. Mere ratification may not be enough but in this case there is more. There has been a large measure of incorporation, and it is not in dispute that there have been Ministerial statements of compliance with the terms of the Convention and a practice of compliance. The very argument in this case has reflected an attitude of comprehensive compliance.
>
> Unlike the law and practice in connection with the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome 4 November 1950; TS71 (1953); Cmd 8969), at issue in R v DPP ex parte Kebeline [1999] 3 WLR 175, British law and practice in connection with the 1951 Convention has assumed that the Convention should be given practical effect."

Newman J recorded that no argument had been advanced on the basis that the facts gave rise to a substantive legitimate expectation, noted that this was a developing area, referred to Coughlan's case and, in the absence of argument, he did not express any view.

In his able submissions on behalf of the respondent, Mr McCloskey criticised a number of the more recent authorities for failing to adequately analyse the historical origins of the doctrine of legitimate expectation. He argued that such analysis would inevitably confirm that the doctrine was restricted to procedural fairness. I accept entirely the wisdom of this submission, but I think that, as always, it is important to bear in mind that history is a continuous process and that the vital dynamic of the common law has been an enduring tension between stability and creative development. As SedleyLJ in England and Girvan J in this jurisdiction have both noted

substantive legitimate expectation is well established in Community Law and the rules and jurisprudence of this system have served to substantially influence domestic law since the passage of Section 2(1) of the European Communities Act 1972. In the field of judicial review of administrative decisions a strict adherence to the formalities of jurisdiction has gradually given way to a much greater emphasis upon the concept of "fairness". This concept lies at the heart of the doctrine of legitimate expectation in so far as it recognises that the particular circumstances of an individual case may have a significant impact upon the way in which a decision-maker exercises his powers and duties. In Coughlan's case the Newcourt patients moved to Mardon on the strength of an assurance that Mardon would be their home as long as they chose to live there. This was an express promise or representation made on a number of occasions in precise terms. It was made to a small group of severely disabled individuals who had been housed and cared for over a substantial period in the health authority's predecessor's premises at Newcourt. It specifically related to identified premises which, it was represented, would be their home for as long as they chose. It was in unqualified terms. It was repeated and confirmed to reassure the residents. It was made by the health authority's predecessor for its own purposes, namely to encourage Ms Coughlan and her fellow residents to move out of Newcourt and move into Mardon House, a specifically built substitute home in which they would continue to receive nursing care. The promise was relied on by Ms Coughlan. I note that these would appear to be precisely the type of circumstances anticipated by Carswell LCJ in the passage from Croft's application cited above.

The judgment of the court in Coughlan's case was delivered by Lord Woolf MR who identified three categories of legitimate expectation. These were:

(*a*) cases in which the public authority is only required to bear in mind its previous policy or other representation, giving it the weight that it thinks right, but no more, before deciding whether to change course;

(*b*) cases in which the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken; and

(*c*) those cases in which the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural.

In cases in the third category the court held that, once a 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. Rather than asking whether the decision was ultra vires in the restricted Wednesbury sense the court went on to focus upon the issue as to whether, through unfairness or arbitrariness, it amounted to an abuse of power. I pause simply to note that whereas arbitrariness, or capriciousness, might well be understood by judicial review practitioners as forms of Wednesbury "irrationality", "unfairness", falling short of irrationality, would be regarded as a significant development by those taking a traditional view of legitimate expectation. At page 648 Lord Woolf, after noting that the court's task was to ensure that the power to make and alter policy was not abused by unfairly frustrating legitimate individual expectations went on to say:

> "In such a situation a bare rationality test would constitute the public authority judge in its own cause, for a decision to prioritise a policy change over legitimate expectations will almost always be rational from where the authority stands, even if objectively it is arbitrary or unfair."

It is not altogether easy to see how a decision could be both described as rational, whether "bare" or otherwise, and at the same time be objectively "arbitrary". Provided that it was rational the fact that it might also be seen as "unfair" by an applicant would not be sufficient to fall foul of the traditional Wednesbury test. I also note that, ultimately, the Court of Appeal found that the Health Authority failed to take into account that it had a legal obligation to provide Ms Coughlan with 'a home' thereby revealing territory much more familiar to the traditional Wednesbury practitioners. However, it is clear that the court did intend to revisit the Wednesbury limits in adopting the "abuse of power" test and at page 649 the approach was summarised in the following terms:

> "This approach, in our view, embraces all the principles of public law which we have been considering. It recognises the primacy of the public authority both in administrative and in policy development but it insists, where these functions come into tension, upon the adjudicative role of the court to ensure fairness to the individual. It does not overlook the passage in the speech of Lord Browne Wilkinson in R v Hull University Visitor, ex parte Page [1993] AC 682, 701, that the basis of the 'fundamental principle … that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully' is the Wednesbury limit on the exercise of powers; but it follows the authority not only of ex parte Preston [1995] AC 835 but of Lord Scarman's speech in R v Secretary of State for the Environment, ex parte Nottinghamshire County Council [1986] AC 240, 249, in treating a power which is abused as a power which has not been lawfully exercised."

The court went on to confirm that fairness in such a situation, if it is to mean anything, must include "fairness of outcome".

The final authority that I intend to mention is that of R v Secretary of State for Education and Employment ex parte Begbie [2000] 1 WLR 1115. This case is significant in the development of the doctrine of substantive legitimate expectation in so far as it appears to indicate a reconciliation between Laws LJ and Sedley LJ as well as some degree of reconsideration of Hargreaves. The issue was whether a child had established a legitimate expectation that her assisted place at an independent school would continue on the basis of various statements made by Ministers of the present Government both when in opposition and subsequent to election. The court comprised Peter Gibson, Laws and Sedley LJJ. At page 1124 Peter Gibson LJ, who, in Hargreaves, had agreed with his fellow Lord Justices in describing the doctrine as "heresy" and "wrong in principle", accepted that the rule did operate in the field of substantive as well as procedural rights although he went on to emphasise that it would be wrong to understate the significance of reliance in this area of the law. In his view it was very much the exception, rather than the rule, that detrimental reliance would not be present when the court finds unfairness in the defeating of a legitimate expectation. At page 1129 Laws LJ said:

> "Abuse of power has become, or is fast becoming, the root concept which governs and conditions our general principles of public law. It may be said to be the rationale of the doctrines enshrined in Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223 and Padfield v Ministry of Agriculture, Fisheries and Food [1968] AC 997, of illegality as a ground of challenge, of the requirement of proportionality, and of the court's insistence of procedural fairness. It informs all three

categories of legitimate expectation cases as they have been expounded by this court in R v North and East Devon Health Authority, ex parte Coughlan [2000] 2 WLR 622."

At page 1130 he went on to say:

"As it seems to me that the first and third categories explained in the Coughlan case [2000] 2 WLR 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 R v Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council [1991] 1 AC 521, exemplified this. As Wade and Forsythe observe (Administrative Law, 7th Edition (1994), page 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 WLR 622 that few individuals were effected by the promise in question. The case's facts may be discreet and limited, having no implication for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layer effects, upon whose merits the court is asked to embark. The court may be able to visit clearly and with sufficient certainty what the full consequence 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 enjoy expectations generated by earlier policy."

It seems clear that, if the applicant in that case had been able to show reliance and detriment in consequence, Laws LJ would have been prepared to uphold the claimed legitimate expectation. Sedley LJ indicated his agreement with his brethren observing, in relation to the argument in relation to legitimate expectation, that the representation had not been made to the applicant and that it had been corrected before she had altered her position in reliance upon it. However, the circumstances in both Coughlan and Begbie are very different from the present case.

Applying the principles which appear to have emerged from the above review of authorities, I am quite satisfied that the applicant cannot establish a legitimate expectation that Article 31 or any of the other provisions of the 1989 Convention will be directly applied to her case. To permit her to do so would be to incorporate the provisions of the Convention by the "back door".

In Thomas and another v Baptiste and others [1999] 3 WLR 249 the Privy Council specifically recognised 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, emphasising that the making of a treaty is an act of the executive government and not of the legislature.

In the Court of Appeal in Kebeline [1999] 4 All ER 801 Laws LJ said, in relation to a similar argument, at page 825:

> "At whatever time the claimed legitimate expectation is said to have arisen, Lord Lester's argument involves, in my judgment, the proposition that the Convention has without the aid of statute become part of our substantive domestic public law, in the pragmatic sense that the courts must compel government to apply the Convention and to do so correctly. He made it admirably clear that the relief he was seeking would prevent the DPP from continuing these prosecutions so far as to do so would be inconsistent with the application of Article 6(2). But Article 6(2) is not yet here in force. In my judgment the argument ignores the dual nature of our constitutional arrangements in relation to the legal nature of international treaties. And it is contradicted by authority of their Lordships' House in Brind's case."

However, as Laws LJ himself went on to say in Kebeline this does not necessarily mean that a relevant Convention is a "dead letter" in the law of England. In that case, dealing with Article 8 of the ECHR, Laws LJ went on to observe:

> "Were the Secretary of State to declare in such a case that he took no account of the Convention, regarding it as wholly irrelevant to his decision, there would I think nowadays be a question whether judicial review might lie. Minister for Immigration and Ethnic Affairs v Teoh, so far as its reasoning was adopted by the Court of Appeal in ex parte Ahmed, vouchsafes in our domestic law no wider proposition than this, that in a case where his decision potentially touches Convention rights the Secretary of State (or other public decision-maker) must consider and decide whether in his view the Convention right in issue has been violated. In such cases however no question of statutory interpretation generally arises. The Secretary of State's assessment is a factual one."

It is also important to note, at this point, that in the course of giving judgment in Minister for Immigration and Ethnic Affairs v Teoh [1995] 128 ALR 353 at 365 Mason CJ and Deane J in the High Court of Australia referred to the relevant Convention as an adequate foundation for legitimate expectation "absent statutory or executive indications to the contrary". The 1989 Convention was adopted by the United Kingdom Government on 16 September 1991 subject to a reservation in the following terms:

> "The UK reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the UK of those who do not have the right to enter and remain in the UK and to the acquisition and possession of citizenship, as may be deemed necessary from time to time."

As Mr Stephen Still of the Home Department Immigration and Nationality Directorate recorded in his affidavit dated 14 April 1998, the applicant appealed from the initial determination by Mr Waddell. This appeal prompted a reconsideration of the determination which concluded that the determination had been properly made. Subsequent to the application for judicial review the determination was reviewed for a second time on behalf of the Secretary of State and, upon this occasion this involved an assessment of the applicant's grounds of challenge by way of judicial review together with her affidavits and exhibits thereto. At paragraph 8 of his said affidavit Mr Still confirmed that the Secretary of State did have regard to the provisions of the 1989 Treaty concluding that the domestic immigration laws and policies which had produced the impugned determination were broadly consistent with the thrust of the

Convention. The Secretary of State also noted that the Convention did not form part of domestic law and that the reservation thereto was valid.

In relation to a similar argument based on the 1989 Convention in Gangadeen and another v The Secretary of State for the Home Department [1998] IMM AR 106 Hirst LJ observed, at page 116, that the reservation amounted to an "insuperable difficulty" in bringing into play the provisions of the 1989 Convention. After quoting the reservation he went on to say, at page 117:

> "This distinguishes the position in the United Kingdom from that in for example, Australia and New Zealand where the United Nations Convention has been directly applied (Minister of Immigration and Ethnic Affairs v Teoh 128 ALR 353 and Tavita v Minister of Immigration 2 NZLR 257)."

Mr Larkin accepted the significance of the UK reservation to the 1989 Convention, but submitted that the proper way for this to be dealt with was for the decision-maker first to consider the interests of the child and then to determine whether, in the circumstances of a particular case, it was right to apply the domestic legislation ie the 1971 Immigration Act and Rules. He argued that the respondent's affidavits did not disclose any material to indicate that the interests of the child had been properly considered. In my view this submission simply does not do justice to paragraphs 5-10 of Mr Still's affidavit of 14 April 1998. I consider that any legitimate expectation enjoyed by the applicant would have been limited to an expectation that the provisions of the 1989 Convention, including the reservation, as interpreted by domestic law would be taken into account by the decision-maker in relation to her

child. I am satisfied on the basis of Mr Still's affidavit that this expectation has been fulfilled in this case.

While I accept the cautionary words of Laws LJ in Begbie's case that the categories are not "hermetically sealed", if it was necessary for me to do so, I would be quite satisfied that the facts of this case place any legitimate expectation which the applicant might enjoy in relation to the provisions of the 1989 Convention firmly in the first of the three categories identified by Lord Woolf MR at page 645 of the judgment in Coughlan's case and that, consequently, the court is confined to reviewing Mr Still's decision upon Wednesbury grounds. It will be clear from my previous remarks that I am quite satisfied that such grounds have not been established in this case. Accordingly, I reject Mr Larkin's submissions in relation to this aspect of the case.

Irrationality and the 1989 Convention

As he had in relation to Article 8 of the ECHR, Mr Larkin also argued that it was Wednesbury irrational to merely "have regard to" rather than to apply the provisions of the 1989 Convention. I reject this argument also for the reasons set out in the previous section relating to "Irrationality and Article 8 ECHR".

Paragraph 5 – Mis-direction in relation to the risk to the applicant's life

During the course of setting out the applicant's history I have already referred to an alleged suicide attempt together with subsequent threats to commit suicide. During the course of her hospital admissions she was psychiatrically assessed by both a Psychiatrist and a Clinical Psychologist with the latter recommending referral to the Community Psychiatric Service. As I have already noted, on 25 April 1997, she presented to the Night Staff at the Royal Victoria Hospital in a very distressed

condition expressing suicidal thoughts. After the birth of her child, staff on the ward requested further assessment after becoming increasingly concerned at the applicant's level of distress, although I have also noted that, ultimately, the child's name was removed from the Child Protection Register.

In the course of his report dated 9 July 1998 Dr Philip Megarry, Consultant Psychiatrist, recorded that he had been involved in the applicant's treatment during her stay in the Royal Maternity Hospital in July 1997 and that he had seen her again on 9/10 June 1998 for the purpose of carrying out a medical examination and recording a full personal, social and medical history. Dr Megarry noted that, upon that occasion, he found no evidence of psychotic symptoms, current suicidal thinking or clinical depression. The applicant told him that she could not face the possibility of being returned to America and that, if this happened, she thought that the best thing might be for her to give up the baby for adoption and commit suicide. Dr Megarry advised the applicant to continue on her anti-depressant medication and concluded his report in the following terms:

> "Ms Thomas has indicated very clearly that not only would she be very unhappy about returning to the United States but she has stated openly to me that she would be likely to take her own life. She has clearly given serious thought to this and it is clearly a major concern if she is to be deported."

On 30 September 1998 Stephen Still lodged a further affidavit dealing with his consideration of the Report of Legal Aid of Central Texas as well as the affidavits sworn by Janique Burden and Dr Megarry. Mr Still referred to Dr Megarry's negative

findings on examination and, in relation to the applicant's suicide threat, he said, at paragraph 4:

> "I note that the applicant expressed this in terms of a possibility and there is no firm evidence to suggest that it would in fact occur. Dr Megarry has not analysed or discussed in any detail the motivation or genuineness of this threat nor has he analysed in detail the prospect of the threat materialising on the basis of the concluding paragraph in Dr Megarry's report, I accept that there is a risk of the applicant committing suicide in the event of deportation to the USA and this is one of the factors which I have taken fully into account."

At paragraph 7 of the same affidavit Mr Still confirmed that the determination to deport the applicant remained unchanged stating, specifically in relation to the suicide threat:

> "The Secretary of State is not persuaded that, in all the circumstances, the applicant's statement of threatened suicide whether in isolation or in conjunction with other factors on which she relies is sufficient to displace the considerations highlighted in my first affidavit and, in particular, the normal course prescribed in paragraph 364 of the Immigration Rules."

Mr Larkin submitted that the content of paragraphs 4 and 7 of his second affidavit indicated that Mr Still had mis-directed himself with respect to the nature and gravity of the risk to the applicant's life in the event of deportation as detailed in Dr Megarry's report. By way of response, Mr McCloskey refuted the suggestion on any mis-direction and reminded the court that Mr Still had indicated that he had taken into account the risk and Dr Megarry's report. In such circumstances, according to Mr McCloskey, the relevant test was that of Wednesbury unreasonableness with weight being a matter for the decision-maker.

The right to life is recognised as fundamental not only by Article 2 of the ECHR but, I venture to suggest, in common with a number of other Convention rights, also at common law. In practice, the applicant in these proceedings is a "single mother" and consequently the risk of her suicide also has devastating implications for her child. In Austin's application [1998] NI Report 327 I respectfully adopted the approach of Sir Thomas Bingham MR, as he then was, in R v Ministry of Defence ex parte Smith [1996] QB 517 when he approved the test of irrationality in this type of circumstance in the following terms:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before being satisfied that the decision is reasonable in the sense outlined above."

I would also refer to the judgment of Lord Woolf MR in R –v- Lord Saville ex parte A [1999] 4 All ER 860 at 870g-872e and 881f to 882c.

The correct approach to this type of issue has been recently further considered by the Court of Appeal in R v Secretary of State for the Home Department ex parte Turgut (The Times, February 15, 2000). Turgut's case concerned a potential violation of Article 3 of the Convention not to be subjected to torture or inhuman or degrading treatment or punishment. In the course of giving his judgment, Simon Brown LJ concluded that the domestic court's obligation on an irrationality challenge in an Article 3 case was to subject the Home Secretary's decision to rigorous examination

and it did that by considering the underlying factual material for itself to see whether or not it compelled a different conclusion to that arrived at by the Home Secretary. Only if it did would the challenge succeed. However, he observed that the court would not pay any special deference to the Home Secretary's conclusion of the facts firstly, because of the fundamental nature of the Article 3 right and secondly because the court was hardly less well placed than the Home Secretary to evaluate the risk once the relevant material was placed before it. His Lordship rejected the applicant's contention that the Home Secretary had knowingly mis-represented the evidence or shut his eyes to the true position, but accepted that the court must recognise at least the possibility that the Home Secretary had:

> "… even if unconsciously, tended to depreciate the evidence of risk and, throughout the protracted decision-making process, might have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than re-assess the position with an open mind."

In this context I note that Dr Megarry's report was exhibited to his affidavit dated 17 July 1998 subsequent to three considerations of the issue each of which was determined against the applicant.

Taking into account the fundamental nature of the right concerned and subjecting the decision to anxious and rigorous scrutiny in accordance with the decisions of the Court of Appeal in Smith and Turgut I have come to conclusion that the Secretary of State has mis-directed himself in relation to the risk of the applicant's suicide. It is clear from paragraph 4 of Mr Still's second affidavit that he did depreciate the evidence of this risk by reason of the fact the applicant expressed it only in terms of

a possibility, that Dr Megarry did not analyse in detail the prospect of the threat materialising and that he did not analyse or discuss in any detail the motivation or genuineness of the threat. In my view this simply does not reflect a proper or balanced assessment of the opinion expressed by an eminent Consultant Psychiatrist who, after taking into account his personal knowledge of the applicant, together with a detailed personal, social and medical history, came to the clear conclusion in relation to the risk of suicide that it was "clearly a major concern if she is to be deported". In my view this opinion in itself was quite capable of providing firm evidence that the risk would occur.

Accordingly, I will make an order of certiorari quashing the decision of the Secretary of State upon this ground.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY TINA LEE THOMAS
FOR JUDICIAL REVIEW

JUDGMENT

OF

COGHLIN J
