Neutral Citation Number: [2006] IEHC 36

**THE HIGH COURT**

**[Record No. 2003 783 JR]**

**BETWEEN**

**LIDIA COSMA**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM**

**RESPONDENT**

**Judgment of Mr. Justice Hanna delivered on the 15th day of February, 2006**

1. The applicant in this case is a Romanian national who arrived in the State on 5th September, 1999. Thereafter and up to the time of the matters with which this application is concerned no issue arises nor is challenge made to any of the procedures which subsequently took place. The applicant applied for asylum upon the grounds, *inter alia*, that she was suffering religious oppression. She was notified by the Refugee Applications Commissioner on 6th June, 2001 that she was being refused refugee status. This finding she appealed to the Refugee Appeals Tribunal. On 10th August, 2001, this Tribunal refused her appeal. On 5th October, 2001, the applicant was notified by the Ministerial Decisions Unit that the respondent had decided not to declare her a refugee and that he was giving consideration to her case under s. 3 of the Immigration Act, 1999. In addition, she was informed that she had fifteen working days from the date of the letter to make written representations setting out the reasons as to why she should be allowed to remain in the State. Such representations were made on her behalf by the Refugee Legal Service and the applicant herself. These representations were not successful and the Minister signed a deportation order concerning the applicant on 4th July, 2003. This was served on her by letter dated 7th July, 2003.

2. We are concerned with matters which occurred subsequent to the foregoing events. On 1st September, 2003, the applicant's solicitors, Messrs A.C. Pendred and Company, intimated an intention to bring judicial review proceedings and requested a deferral of deportation pending the bringing of such proceedings. This was declined on behalf of the respondent. On 23rd September, 2003, the applicant's solicitors submitted what purported to be a psychiatric report on her behalf and sought reconsideration of the applicant's deportation upon grounds arising from an alleged threat of suicide by the applicant were the deportation to proceed. Further requests for review followed and on 8th October, 2003, the applicant's solicitors submitted copies of two purported psychiatric reports, one to which I have already referred and another dated 3rd October, 2003 which appears to be supplemental to the former. These documents and further representations were given consideration. Subsequently, her application for leave to remain within the jurisdiction was refused. This refusal was communicated by letter bearing the date the 31st October, 2003, from Mr. Noel Dowling, Principal Officer of the Repatriation Unit in the respondent department. Later in this judgment I will set out in detail the material documentation which preceded this decision.

3. The applicant seeks a number of reliefs. Firstly, she seeks an order of *certiorari* quashing the decision of the respondent to deport the applicant under s. 3 of the Immigration Act 1999, an injunction restraining such deportation and an order of mandamus directing the Minister to consider and decide the applicant's case in the light of the suicide threat.

4. Counsel for both parties accepted that the applicant was entitled to the unspecified personal rights guaranteed by Article 40.3.2 of the Constitution. When the matter first proceeded before me it did so on an assumption that the provisions of the European Convention on Human Rights Act 2003 had come into force and that the applicant's constitutional and convention rights were engaged. This is notwithstanding the decision of Laffoy J. in *Lelimo v. The Minister for Justice Equality and Law Reform,* [2004] 2 I.R. 178 inter alia, to the effect that the provisions of the Act were not retrospective. On the 12th May, 2005, after this matter concluded but before judgment was delivered, the Supreme Court handed down judgment in *Dublin City Council v. Fennell* [2005] 2 I.L.R.M. 288, putting this matter beyond debate in deciding that the provisions of the said Act were not retrospective. At a further hearing in which further submissions were made to this court it was accepted by both parties that the Minister's decision to proceed with the deportation of the applicant predated the coming into force of the Act and that, accordingly, the European Convention on Human Rights did not form part of Irish Domestic Law and this Court was not bound to take into account decisions of the European Court of Human Rights.

5. That is not to say that the European Convention or Court are immaterial to this decision. As Denham J. says in her partly dissenting judgment in *O'Brien v. Mirror Group Newspapers Limited* [2001] 1 I.R. 1 at p. 33:

> "The European Convention for the Protection of Human Rights and Fundamental Freedoms is not part of the domestic law of Ireland: In *re Ó Laighléis* [1960] I.R. 93. However, decisions of the European Court of Human Rights on the said European Convention may be persuasive authority in the analysis of similar constitutional rights in the same way as decisions of other constitutional courts; *Norris v. The Attorney General* [1984] I.R. 36 (per Henchy J. at p. 69)."

6. On behalf of the applicant, Mr. Hogan S.C. argued that this was a case of a clear suicide risk. He argued that this was a case in which there was a real and substantial risk of suicide and, as a consequence, there was a clear risk that the applicant's right to life would be jeopardised if she were deported. Her rights both under the Constitution and under the European Convention on Human Rights (were it to have applied as part of Irish Domestic Law) were engaged. As a consequence, in reviewing the respondent's decision the Court had to apply anxious scrutiny to the Minister's decision and to the materials and evidence relied upon by him in coming to his conclusion to proceed with the deportation.

7. In doing this, the court was not to apply the Wednesbury Test (*See Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223) applying a yard stick of unreasonableness or irrationality in scrutinising the Minister's decision. On the contrary, one was to evaluate the Minister's decision applying less rigorous criteria. In the final analysis, both Mr. Hogan S.C. and Mr. Langwallner B.L. who addressed the Court in reply argued that the engagement of both constitutional and convention rights required of the Court that it engage in an hybrid function, part judicial review and part appeal. Applying such an approach, it was apparent from the material before the Minister that he had set his face as a matter of policy against revoking a deportation order even when confronted with a real and substantial risk of suicide by the applicant were the deportation to be carried out.

8. Mr. Birmingham S.C. for the respondent argued that there was, in reality, no evidence of any real and substantial risk of suicide upon which the Minister could or should act. The threat of self harm and the circumstances giving rise to it were not raised until well

into the year 2003. The applicant had originally sought refugee status on the grounds of religious persecution and no reference was made by her to the circumstances which allegedly gave rise to her suicide threat, namely the tragic death of her sister's child, in her original application. Further, it was argued that the documents compiled by Dr. McCaffrey and submitted by the applicant's solicitors did not amount to psychiatric reports to which any great weight should be attached. They were inadequate and offered no sufficient diagnosis or prognosis. They comprised no more than a handwritten record of a narrative account given by the applicant to the Doctor as a result of one meeting with her and subsequent observations of an unsatisfactory and inconclusive nature.

9. The respondent argues that there is no reason to depart from the established Wednesbury Principles in reviewing the Minister's decision. Even if there was a real and substantial risk of suicide and even if both constitutional and convention rights were engaged the court is and remains a reviewing court and there is no appellate or quasi appellate aspect to its function. The fact that a court might feel obliged to employ anxious scrutiny in a case where there is a real and substantial risk to the life or well-being of a person does not carry with it any element of encroachment upon the decision making process by way of an appellate or quasi appellate function. Put bluntly, where there is a possibility of real and actual risk to life or limb, the stakes are higher and it is incumbent upon the court to apply a special rigour in its examination of the case. However, the ground rules for such examination do not change.

10. The respondent asserts that if there was in being a policy to discount the risk of suicide as a factor to be taken into account in deciding whether or not to proceed with a deportation order then such was an appropriate and proper policy and one which the Minister was entitled to employ. The risk of suicide was and is a medical matter to be dealt with both in the removing and receiving countries. There is no case made nor evidence presented that either jurisdiction had less than adequate medical facilities to deal with this. To permit the threat of suicide to act as a stop on the execution of administrative decisions, such as deportation, would be to open a Pandora's box of potential abuse with the possible effects of paralysing administrative activity in any given area of government.

11. During the course of the hearing before me reference was made to the phrases such as "anxious scrutiny", "careful scrutiny" and "rigorous scrutiny", all of which are to be found in the various authorities when applied to the function of this court in reviewing the ministerial decision making process, carry with them a refining effect on the judicial decision making process. One would have thought, on its face, that requiring a court to engage in anxious scrutiny of a particular kind of case carries with it the implicit suggestion that in less momentous matters that do not involve alleged interference with the right to life of an individual such as, for example, the judicial review of planning permission, the court engages in scrutiny that is of a more flaccid and laconic variety. This would, on one view, imply a criticism of the court.

12. Another view is that the engagement of constitutional and for that matter, convention rights creates something of a hierarchy of scrutiny to the effect that, to use layman's language, that some cases you look hard and at others harder still. In V.*Z. v. Minister for Justice* [2002] 2 I.R. 135 at p. 158 McGuinness J. says:

> "I have a certain difficulty in the interpretation of the phrases used by the English courts in the cases to which we have been referred – "anxious scrutiny", "heightened scrutiny" and similar phrases. From a humane point of view it is clear that any court will most carefully consider a case where basic human rights are in question. But from the point of view of the law, how does one define the difference between, say, "scrutiny", "careful scrutiny", "heightened scrutiny", or "anxious scrutiny"? Can it mean than in a case where the decision-making process is subject to "anxious scrutiny" the standard of unreasonableness or irrationality is to be lowered? Surely not. Yet it is otherwise difficult to elucidate the legal significance of the phrase."

13. In fairness, it should be pointed out that this point was not argued in the Supreme Court in *V.Z. v. Minister for Justice* [2002] 2 I.R. 135.

14. For the purpose of the exercise in which I am engaged in this case I would view such phrases as enjoining the court to apply a special and particular rigour to its analysis of the questioned decision where the court is satisfied that a prima facie issue has arisen concerning a possible significant interference with a person's right to life or bodily integrity. An applicant should face only a modest hurdle in impressing the court to embark upon this course. However, the court should be wary of such rights being invoked in circumstances which are manifestly frivolous, vexatious, clearly ill founded or which amount to an abuse of process.

15. In urging the applicant's case upon me, Mr. Hogan S.C. relied upon a number of decisions of the Irish Courts as well as the British Courts and the European Court of Human Rights. He placed reliance, inter alia, on the decision of the Supreme Court in *Ryan v. The Attorney General* [1965] I.R. 294 in which the Supreme Court upheld a decision of Kenny J. that one of the unenumerated rights protected by Article 40.3 of the Constitution was the right to bodily integrity. So too in the *State (C) v. Frawley* [1976] I.R. 365 Finlay P. (as he then was) held that the right to bodily integrity did not just apply to legislation, but also operated to prevent acts or omissions of the executive which, without justification, would expose the health of a person to risk or danger, including persons in prison. Deporting the applicant would expose her to what the applicant says would be a real and substantial risk of suicide as a result of administrative action, namely, the deportation of the applicant pursuant to the deportation order. In addition, the applicant also says that her right to life as enshrined in Article 2 of the European Convention of Human Rights and her right not to be subject to torture or inhumane or degrading treatment or punishment pursuant to Article 3 of the said Convention have also been engaged.

16. Reliance was placed upon *D. v. The United Kingdom* (1997) 24 E.H.R.R. 423 and a number of decisions of the European Court of Human Rights and the English Courts. One must have regard to the fact that the European Court cases operate with a different dimension to their determination to that employed by this court. The European Court considers "up to the minute" evidence as part of its process. In *Ahmed v. Austria* (1996) 24 E.H.R.R. 278 the Court observed:

> "However, in order to access the risks in the case of an expulsion this has not yet taken place, the material point in time must be that of the Court's consideration of the case. Although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive."

17. It is difficult to see how a court hearing a judicial review could engage in such a process as matters happening subsequent to the decision sought to be impugned can have no relevance to the decision itself and, more particularly, the process engaged in leading to it. No evidence was offered to suggest that the applicant's circumstances or wellbeing had in any material way altered since the Minister made his decision. In any event, since the provisions of the European Convention on Human Rights Act, 2003 do not apply in this case this issue does not arise for consideration. Of course, decisions of the European Court of Human Rights may be of persuasive authority. They also provide useful guidelines as to the circumstances which would dictate court intervention in the deportation process.

18. In *D. v. the United Kingdom*, the applicant was a convicted drug dealer who was in the terminal stages of AIDS. The European

Court of Human Rights condemned the British government and courts for attempting to deport the applicant back to his native country, St. Kitts where, due to lack of facilities, the plaintiff's life would have been foreshortened and he would have died in immensely distressing circumstances. Taking an up to date view of the condition of the applicant's state of health the Court said:

> "51. The Court notes that the applicant is in the advanced stages of terminal and incurable illness. At the date of the hearing, it was observed that there had been a marked decline in his condition and he had to be transferred to a hospital. His condition was giving rise to concern (see paragraph 21 above). The limited quality of life he now enjoys results from the availability of sophisticated treatment and medication in the United Kingdom and the care and kindness administered by a charitable organisation. He has been counselled on how to approach death and has formed bonds with his carers (see paragraph 19 above).
>
> 52. The abrupt withdrawal of these facilities will entail the most dramatic consequences for him. It is not disputed that his removal ill hasten his death. There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering. Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of his lack of shelter and of a proper diet as well as exposure to the health and sanitation problems which beset the population of St Kitts (see paragraph 32 above). While he may have a cousin in St Kitts (see paragraph 18 above), no evidence has been adduced to show whether this person would be willing or in a position to attend to the needs of a terminally ill man. There is no evidence of any other form of moral or social support. Nor has it been shown whether the applicant would be guaranteed a bed in either of the hospitals on the island which, according to the Government, care for AIDS patients (see paragraph 17 above).
>
> 53. In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3."

19. It is worthy of note that, at para. 54, the court refers to the very exceptional circumstances of this case and the compelling humanitarian considerations at stake. Indeed, the D. case does present very exceptional circumstances. A harrowing, lonely and dehumanising end was the inevitable consequence, albeit unintended, of the deportation of D. It was in these truly exceptional circumstances that the European Court of Rights found there to be a breach of these rights under Article 3.

20. The applicant further sought to rely upon the decision of the European Court of Human Rights in *Soering v. The United Kingdom* [1989] ECHR 14 in which the extradition of the applicant, a German national, to the State of Virginia in the United States of America was a potential breach of his convention rights since he almost inevitably would face the death penalty there if convicted of the murder with which he was charged. Reliance was also placed on the case of *Finucane v. McMahon* [1990] 1 I.R. 165 where the real and substantial risk of ill treatment at the hand of prison officers was sufficient to prevent the extradition of the applicants to Northern Ireland.

21. Mr. Hogan S.C. on behalf of the applicant placed significant reliance upon the case of *R. (Razgar) v. The Secretary of State for the Home Department* [2003] EWCA Cir 840. In that case, the applicant, an Iraqi of Kurdish origin sought to challenge a ministerial decision to remove him from the United Kingdom to Germany as a safe third country. He had entered the United Kingdom from Germany originally. Under the relevant British legalisation Section 72(2)(a) of the Immigration and Asylum Act, 1999 the Secretary of State had certified that Mr. Razgar's challenge to deportation was manifestly ill founded. Mr. Razgar had been treated since 1999 by an eminent consultant psychiatrist. Some six months after commencing treatment the said psychiatrist submitted a medical report which was forwarded to the Secretary of State. Their report described the applicant as suffering from severe depression although not at that time thinking of self-harm. He had been diagnosed, further, as suffering from post-traumatic stress disorder as well as from depression, and the psychiatrist expressed concerns that incarceration and custody might inhibit any progress he is making from the psychiatric illness for which he had been diagnosed. A subsequent letter (approximately two weeks later) from the psychiatrist referred to a worsening of the plaintiff's depressive mood which was complicating his post. Further, there was a possibility that the applicant might commit suicide.

22. This case is of some assistance in that, *inter alia*, the House of Lords held that the right to respect for private life guaranteed by Article 8 of the European Convention of Human Rights protected those features of a person's private life which were integral to his identity or ability to function socially and preservation of mental stability was recognised to be an indispensable precondition to effective enjoyment of the rights. Where removal of a claimant from one jurisdiction to another in circumstances in which might gravely prejudice his or her health then, in such circumstances where this could be demonstrated by a claimant, such would amount to a denial of the claimant's rights under Article 8. However, the fact that the medical facilities in the receiving country were not as accessible or up to the same standard as in the removing country would not of itself offer grounds for resists to such removal. In the instant case, the applicant does not seek to make a case even along these lines.

23. In *Razgar*, there was uncontested medical evidence from a doctor who had been treating the claimant over a number of months prior to the Secretary of State's decision and who had diagnosed specific mental illness as a suicide risk. Notwithstanding this and in the absence of any other evidence, the Secretary of State had determined that the case was manifestly ill founded. Nothing of this sort happened to Ms. Cosma. She was afforded and properly availed of the full panoply of the rights and protections of domestic law.

24. This court is engaged in a review of the Minister's decision to proceed with the deportation having reached this decision based on all the salient evidence, documentary and otherwise. All procedures, it is conceded, had been fully exhausted by the time the Minister made his decision to proceed with deportation. This position contrasts to a significant degree with what obtained in the *Razgar* case. There, the Secretary of State literally stopped the procedures "in their tracks". Had he not done so, the matter could well have been adjudicated on and maybe a different outcome arrived at. Given the evidence available to him and in the absence of any contradictory evidence, both the Court of Appeal and the House of Lords concluded that the Secretary of State could not correctly have come to the view that the case was manifestly ill founded in that an adjudicator might possibly and correctly come to a conclusion that the application was well founded.

25. The applicant also relied upon *Attorney General v. X* [1992] 1 I.R. 1. This case dealt with the issue of whether the right to life of the mother prevailed over that of an unborn child where there was a real risk of suicide. Finlay C.J. said at p. 55:

> "In my view, it is common sense that a treat of self-destruction such as is outlined in the evidence in this case, which the psychologist clearly believes to be a very real threat, cannot be monitored in that sense and that it is almost impossible to prevent self-destruction in a young girl in the situation in which this defendant is if she were to decide to carry out her threat of suicide."

26. He goes on to say:

> "I am, therefore, satisfied that on the evidence before the learned trial judge, which was in no way contested, and on the findings which he has made, that the defendants have satisfied the test which I have laid down as being appropriate and have established, as a matter of probability, that there is a real and substantial risk to the life of the mother by self destruction which can only be avoided by termination of her pregnancy."

27. I think this brings us to the crux of the applicant's case. In my view this applicant must establish, in order to succeed, three factors on the balance of probabilities:

> 1. When the Minister decided to refuse to rescind the deportation order, there then existed, to the Minister's knowledge, a real and substantial threat to the applicant's life by suicide as a direct consequence of his decision.
>
> 2. The applicant's threatened act of suicide could only be forestalled by him acceding to the applicant's request and stopping the process of deportation and not by any other means such as medical intervention.
>
> 3. The Minister either missed or disregarded, to the point of irrationality, compelling medical and other material evidence of the foregoing.

28. No case is made that, in any other respect, the Minister or his officials, at all times did anything other than observe the requirements of fair procedures and constitutional justice.

29. What I believe to be the material extracts from the documentary evidence in this case begin with that document which was first furnished in manuscript form by the applicant's solicitors on 23rd September, 2003.

> "PSYCHIATRIC REPORT on Lidia Cosma. Date of Birth 8th May 1969
>
> Current address:61 Mountjoy Square, Dublin 1
>
> At the request of A.C. Pendred and Co. Solicitors, Derrynane House, 77 Lower Dorset Street, Dublin 1
>
> Interview at 140 St. Lawrence's Road, Clontarf, Dublin 3 on 5 September 2003
>
> My understanding is that Ms Cosma is a refugee in Ireland and is due to be deported back to her home country Romania because she failed to satisfy the requirements of the immigration authorities for acceptance into Ireland as a permanent resident.
>
> Ms Cosma told me that she came to Ireland in September 1999 as a refugee. She lives alone in a flat and is single. As she has no work permit she is unable to gain any employment.
>
> She was born and reared a village in Transylvania where her parents Paver and Virginia live. Her father is a retired mechanic.
>
> She has three sisters and seven brothers.
>
> After completing her days in secondary school she participated in a six month training course and from 1990 to 1999 she worked in a cable factory.
>
> During those years she enjoyed good health and had an excellent work record. She was a confident young woman who was able to take what happened to her in her stride. Then in March 1999 her sister asked her to look after her new baby, Luisa Patricia Aron – born on September 25th 1997 – as her sister wanted to return to work. Ms Cosma had helped look after the little girl for short periods before that but this request was for her to look after Luisa Patricia – on a full time basis. She had no difficulty in accepting the request to look after the chid. Towards the end of her first week with the child Luisa Patricia developed what appeared to be a mild type of flu like illness. Our client asked her brother's wife for advice and she gave the child half a paracetamol tablet three times a day. On the Saturday the child seemed to have a problem with her throat and her breathing was difficult our client thought the child had an obstruction in the throat and tried to clear up the obstruction. But the child's condition deteriorated. She became cyanosed and our client brought the sick baby to the local Hospital where she was pronounced dead. The police were called and an investigation into the circumstances of the child's death took place. Eventually after what seems to have been an inquest – not really clear from the way the client describes what happened but evidently the death was recorded as being an accident. With no foul play. However after that Ms Cosma was blamed by the Grandparents and father of the child – and this blame then came from other friends and neighbours. She reacted by becoming very depressed and traumatised. She couldn't sleep. She had nightmares and seriously thought of suicide. She wanted to hang herself and could not come face to face with her accusers. Life became intolerable for her and she managed to escape away to Ireland via Germany. Her brother Simon was already living in this country. She showed me a copy of a medical certificate from a Doctor – copy enclosed which indicates what her mental state was in September 1999.
>
> Since coming to Dublin she gradually became less upset and the nightmares eased off. She belongs to the Pentecostal Church and at the Church services she meets her fellow Romanians in the city.
>
> As she talked about the traumas she experienced she was very tearful. I was impressed by her sincerity. However I am deeply concerned when she tells me that if she is deported back to Romania she will certainly kill herself. She is a lonely woman with little social supports. She told me that she may have to give up her religion before her suicide. I don't know her well enough to be certain but I have to take her threat of suicide with the strong possibility that she will end her life if sent back to a country where she still feels as if she were looked upon as a criminal. She is not an economic or political refugee.
>
> Brian McCaffrey. MB, D.P.M., F.R.C. Psych
>
> Consultant Psychiatrist with special interest in Forensic Psychiatry."

30. The foregoing document was handwritten and a typed script was provided in addition. The applicant's solicitors clearly intended it to be treated as a psychiatric report. However, it comprises almost entirely a narrative by the applicant offering reasons as to why she was threatening to commit suicide. Dr. McCaffrey, the Consultant Psychiatrist who prepared the document, confesses that he did not know the applicant although he does remark that he was impressed by her sincerity. There is no diagnosis made of any actual mental illness nor any suggested modality of treatment for same.

31. It would seem clear that the applicant's solicitor sought clarification of certain matters from Dr. McCaffrey and this, in turn, led to the second document which I set out hereunder.

> "The question I have been asked relates to the seriousness and strength of the patients threat of suicide. The answer to this question is not so simple.
>
> Studies have so far failed to accurately predict which patients will eventually go on to end their lives by suicide and studies of patients who threaten to end their lives this way are again unreliable. So I am left with the question in this particular case of Lidia Cosma and her threat of suicide if she were sent back to Romania.
>
> A number of factors have to be considered, first of all she is a lonely single female – age 34 years – an immigrant into this country. Studies have shown that immigrants into countries such as the USA have a bigger rate of suicide than their Country of Origin and yet the suicide rate of former Eastern European block countries always had a higher rate of suicide than Ireland. Hungary was always near the top for suicide and many of these Hungarians were originally from the same part of the world Transylvania as Miss Cosma.
>
> Other factors in her case which increase the likelihood of her becoming a successful suicide case are – 1] she is unemployed - 2] she had a marked psychological reaction – probably a depression following the death of her sisters baby and Miss Cosma was blamed for the death of the little girl. She still feels guilty about this. If she died Miss Cosma does not think anyone would care about her. Religion is a help but she threatens to give this up if it is a barrier to suicide.
>
> There are therefore too many factors in this case to consider before one could take a risk with deporting this woman back to what she considers to be a hostile environment in Romania.
>
> I would have grave concerns for her safety.
>
> Brian McCaffrey
>
> MB., D.P.M., F.R.C. Psych
>
> Consultant Psychiatrist with special interest in Forensic Psychiatry"

32. It would seem apparent that there was no further interview with the applicant and that as noted above, Dr. McCaffrey was dealing with certain issues raised by Messrs. A.C. Pendred & Company.

33. The letter then was referred to Ms. Kathleen Keane, Assistant Principal in the respondent's Repatriation Unit. Ms. Keane reviewed the case and prepared a memorandum entitled "Re: Affirmation of Deportation Order in respect of Lidia Cosma (69/7834/99)". This document sets out, at paras 1 and 2 thereof, a history of the case up to and including the receipt of the documents set forth above. Ms. Keane then set out her analysis of those documents and proceeds to recommend affirmation of the deportation order:

> "3. Dr McCaffrey stated, inter alia, that he interviewed Ms. Cosma to ascertain the seriousness and strength of her threat of suicide. This threat of suicide would appear to arise from the accidental death of Ms. Cosma's infant niece in Romania, who was in her temporary care. This matter was fully detailed in Ms. Cosma's asylum application, and in the Department's examination of her case-file. As outlined in the O.R.A.C. Section 13 Report, Ms. Cosma's sister and her husband, parents of the dead infant, did not condemn Ms. Cosma in any way. (Tab 9) It is noted that Ms. Cosma stated to Dr. McCaffrey that she was blamed by the father of the child but it should be noted that in the O.R.A.C. interview, Ms. Cosma stated inter alia, that "*I speak to my sister. She never accused me of anything but I do not know what would happen if we had a disagreement. Her husband is the same, he never accused me of anything.*" (Tab 10) It should be further noted that Ms. Cosma stated to Dr. McCaffrey that after an inquest, the death was recorded as an accident with no foul play. It is apparent from this, that if returned to Romania, Ms. Cosma will not face a criminal investigation.
>
> 4. Dr. McCaffrey stated, *inter alia*, that Ms. Cosma may have suffered depression following the death of her niece, and stills feel guilty about the death. However, while Ms. Cosma may have unresolved issues regarding the death of her niece, no definitive argument has been raised as to why Ms. Cosma's deportation from the State should compound these factors. It is noted that Dr. McCaffrey stated that Ms. Cosma considers Romania to be a hostile environment. However, as outlined previously, Ms Cosma stated in her O.R.A.C. interview that she was not held to blame by the parents of the child, and she stated to Dr. McCaffrey that the inquest recorded the death as accidental. It is noted that Ms. Cosma stated that she was blamed by certain friends and neighbours, and could not come face to face with her accusers. However, if returned to Romania, Ms. Cosma is not compelled to return to her previous residence, as the law in Romania provides for freedom of movement within the country. (Tab 11)
>
> On examining the psychiatric reports forwarded by A.C. Pendred & Co. Solicitors, I do not find that they would have had any bearing on this Department's recommendation that a deportation order be signed in respect of Ms. Cosma, and I do not consider these factors which should cause the Minister to re-consider his decision in this case.
>
> 4. In the circumstances outlined, I recommend that the deportation order in respect of Ms. Cosma be affirmed in this case.
>
> _____
>
> Kathleen Keane
>
> Assistant Principal
>
> Repatriation Unit

28 October, 2003."

34. The foregoing memorandum was then passed to one Mr. Noel Dowling, a Principal Officer in the respondent's department. He wrote the following note in the margin of Ms. Keane's memorandum:-

"Runaí Aire

This is a situation becoming more common – where a case is being made that a deportation order should be revoked on the basis that the person will harm herself if sent back to her country.

No-one can say whether such a threat will be effected or not. Suicides happen among nationals and non-nationals. However, public policy cannot be such that the law will not be applied in the face of such a threat. If the Minister agrees I propose to send out the attached draft letter. I recommend that the Minister affirms the deportation order.

Noel Dowling."

35. This note does not purport to interfere with or disagree with the analysis of the case carried out by Ms. Keane. It is a recommendation as to a line of policy which the author feels that the first named defendant should follow. There is no dispute but that the draft submitted by Mr. Dowling became the letter of 31st October, 2003, sent by Mr. Dowling to Messrs. A.C. Pendred and Company informing them of the Minister's decision. That decision is written in manuscript on the bottom of Ms. Keane's memorandum and reads as follows:-

"I have carefully considered the matter and I affirm the deportation order."

36. This note is initialled by the respondent.

37. The letter of which I am satisfied the respondent had sight before making his decision, is set out hereunder.

" Re: Lidia Cosma

A Chairde 31st October, 2003

I am directed by the Minister for Justice, Equality and Law Reform to acknowledge your letter of 10 October, 2003 and previous correspondence enclosing medical certificates in the above.

The key point to be borne in mind in this matter is that your client no longer has any right to remain in the State. Ms. Cosma's application for refugee status was examined and refused, in accordance with the law, by the Office of the Refugee Applications Commissioner and the by the Refugee Appeals Tribunal. Her further application for leave to remain was fully considered and refused having regard to the provisions of section 3 of the Immigration Act, 1999, as amended, and section 5 (prohibition of refoulement) of the Refugee Act, 1996. That decision was made taking into account all representations made by and on behalf of your client.

The medical evidence which you have submitted on Ms. Cosma's behalf subsequent to the Minister's decision to deport has now been carefully considered by the Minister and he has decided to affirm his decision. Ms. Cosma's deportation will now proceed in the interests of upholding the integrity of the immigration and asylum laws of the State. Her removal from the State is now for the Garda National Immigration Bureau to effect.

It is a matter of serious concern that a person should threaten self harm if the law is applied to her but it cannot reasonably be held that the law should not apply in such a circumstance. Your client's mental state is not a matter for an administrative resolution. It is a clinical matter. It is suggested that you make her psychiatrist, Mr. Brian McCaffrey, aware of the confirmed decision in this case so that he can consider, according to his professional judgement, the appropriate psychiatric treatment for your client's depressive state in light of the pending deportation. When a flight is arranged in respect of your client's deportation we will seek advice as to whether an accompanying medical escort should be provided.

Mise, le meas

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Noel Dowling

Principal Officer

Repatriation Unit Cc Garda National Immigration Bureau."

38. Having reviewed the evidence in this case I am satisfied that a *prima facie* issue concerning potential compromise of the applicant's right to life and bodily integrity was raised in the circumstances and was very properly responded to by the Minister and his officials. Turning to the three ingredients which the applicant must prove, however, firstly, I am not satisfied that the applicant has established that there was a real and substantial risk that she would kill herself. There was undoubtedly a threat to do so. The background circumstances to this threat were investigated and analysed in detail. Indeed during the course of this consideration, in my view, more weight was attached to the medical reports by Ms. Keane than I would consider appropriate. In the first instance, they do not evidence whether or not the doctor ever treated or had any intention of treating the applicant. It is reasonable to infer that they were brought into existence at the behest of the applicant's solicitors rather than as a result of any interface between Ms. Cosma and the medical services. By any yardstick the reports fall well short of what one would expect in terms of actual analysis of the applicant's condition, an objective diagnosis and, most significantly, no attempt to address the issue of treatment even in the event of the deportation going ahead. It is not, however, part of my function to engage in the decision making process. I am satisfied that more than sufficient account was taken of the alleged threat to the applicant's life.

39. Secondly, the applicant has not established that revoking the deportation alone would avert her threatened suicide. No consideration has been given to removing the alleged danger by treatment either here or in Romania. Indeed the question of whether

some other means of dealing with the situation exists was not even addressed.

40. Thirdly, I am not satisfied that any material evidence, documentary or otherwise, was either missed or disregarded by the Minister or his officials.

**Conclusions**
41. It is clear that this applicant has been through all of the procedures prescribed by law and her application has failed. The Minister has made what is, in effect, an administrative order and no challenge is mounted to the making of that order.

42. The suicide threat first arose in October, 2003, approximately one month after the plaintiff's new advisors, Messrs. Pendred and Company, had started acting for her. The first document emanating from Dr. McCaffrey is not so much a report but rather a recital of matters narrated to him by the applicant. This is based on one interview with the applicant whom the doctor had not previously met nor treated prior to the interview. Indeed, I find it difficult to disagree with the suggestion of Mr. Birmingham S.C. for the respondent that this report could have been prepared in respect of any application for a State service to deflect an unwanted administrative order of any category.

43. The Minister had before him all the available evidence and the careful and detailed analysis and consideration of the matter by Ms. Keane. However, a Minister is entitled not just to look at cases in total isolation, although each case must be dealt with on its own merits. He can and indeed should apply his mind to matters of public policy. Such an exercise is integral to his executive and administrative function. A matter of public policy was properly brought to his attention by the margin note written on Ms. Keane's report by Mr Dowling.

44. A further matter of significance in this case both in terms of what was presented to the Minister and, indeed, in the court's consideration is that the applicant does not seek, through her doctor, to address the issue of therapy or counselling or treatment of whatsoever nature. She does not attempt to make the case that treatment would be better in Ireland than in Romania. It seems to me that the circumstances of this applicant contrast significantly with the *D* and *Soering* cases or the *X* case, all of which dealt with a very real and substantial (in the D case certain) risk of death were the deportation to occur. Indeed, of all of the European Court of Human Rights and United Kingdom cases cited none of them deal with a bare threat of suicide in response to a threat of deportation.

45. The letter from Mr. Dowling dated 31st October, 2003, correctly points out that the applicant has no right to be in the State, evidences careful consideration of the medical evidence, makes what is an unobjectionable statement of public policy with regard to the threat of suicide and focuses on dealing with any such threat medically. It is, in my view, a proper response to a threat of suicide. He seeks to ensure that Dr. McCaffrey is made aware of the decision so that treatment can be considered.

46. The applicant has not demonstrated to me any fault or defect in the process engaged in by the Minister leading to the refusal by him of the application to remain within the jurisdiction. What we are left with here is a deportation order. As McKechnie J. said *in O v. The Minister for Justice Equality and Law Reform* (Unreported, High Court, 18th June, 2003) at p. 86 of the transcript:-

> "It seems to me that this Court and the Supreme Court on several occasions over the past number of years have been at pains to emphasise and repeat the integrity of the statutory process and have been at pains to make the distinction between what is exclusively a matter for the Minister and the other decision that making bodies under this code and what is within the province of the Court on judicial review applications."

47. In this case, because a prima facie question of possible compromise to core personal rights has been raised by the applicant it behoves the reviewing court to proceed with caution. Alleged threat to life and limb must, perforce, invite the most careful scrutiny. But this does not mean that the court must lay aside the standard of review, in the absence of the Convention forming part of our domestic law and embark upon some hybrid appeal/review. The court remains firmly engaged in a process of review and review only. That this process may evolve otherwise remains to be seen as the impact of the Convention on our domestic law becomes bedded down. However, perhaps not much will change. Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly* (2001) 3 All ER 433 says at page 446 addressing the principle of proportionality:-

> "(This) does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell has pointed out, the respective roles of judges and administrators are fundamentally distinct and will remain so (see (2000) PL 671, at 681) To this extent the general tenor of the observations in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 are correct. And Laws LJ (at 847 (paragraph 18)) rightly emphasised in *Mahmood's* case 'that the intensity of review in a public law case would depend on the subject matter in hand'. That is so even in cases involving convention rights. In law context is everything."

48. In this case I am of the view that one should not depart from the Wednesbury principles as applied by the Supreme Court, *inter alia*, in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. It is the appropriate test to apply to the process of consideration engaged in by the Minister. We must ask did the Minister consider everything he should? Has he come to a conclusion wholly unwarranted by the evidence both oral and documentary? Is the conclusion he arrived at in refusing leave to remain within the jurisdiction rational on its face?

49. How ever much a court may agree or disagree with the decision which a Minister makes it is not part of the court's function to substitute its decision for that of the Minister. Even applying the most careful scrutiny to what transpired leading to the confirmation of the applicant's deportation I am not satisfied that the applicant has demonstrated any defect or shortcoming in the decision making process detrimental to the applicant's legal or constitutional rights.

50. I dismiss the application.