

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN
IRELAND**

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY ANN-MARIE McCALLION
FOR JUDICIAL REVIEW**

Before: Higgins LJ, Girvan LJ and Weir J

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal brought by the appellant Ann-Marie McCallion against an order of Weatherup J ("the judge") who refused her leave to apply for judicial review of a decision of the Secretary of State dated 20 November 2008 whereby he declined to make a discretionary award of compensation to the appellant, the widow of Peter McCallion deceased ("the deceased"), and her children following his death in 1998 as a result of a criminal injury.

[2] On the hearing of the appeal Mr Barry MacDonald QC and Ms Doherty appeared on behalf of the appellant. Mr Maguire QC appeared with Mr McGleenan on behalf of the respondent. The court is indebted to counsel for their helpful written and oral submissions.

Background

[3] The deceased had terrorist convictions. In 1978 he was a member of the Provisional IRA in Londonderry and on 28 August 1978 he was involved in an ambush on an army patrol as a result of which a soldier was wounded. That soldier was subsequently awarded compensation out of the public purse. The deceased was convicted of attempted murder, possession of a firearm and ammunition and belonging to an illegal organisation. He was sentenced

to a total of 18 years in prison. The death of the deceased occurred many years after he was released from prison. He died in circumstances which would have entitled him to compensation under the Criminal Injuries (Compensation) (Northern Ireland) Order 1988 ("the 1988 Order") were it not for the provisions of Article 5(9) thereof. The 1988 Order has since been replaced by later legislation but it was the applicable legislation at all times material to these proceedings.

The statutory context

[4] Under the 1988 Order where the victim of a criminal injury survived after the criminal injury compensation was payable to the victim or to a person responsible for the maintenance of the victim under Article 3(2)(a) and (b). Where, as in the present case, the victim died as a result of a criminal injury, compensation was payable to the victim's relatives, to the spouse or parents in respect of bereavement or if the victim had no relatives to any person who incurred expenses as a result of the victim's injury or death in respect of expenses reasonably incurred. (Article 3(3)(a), (b) and (c)). Where compensation was payable to the victim's relatives under Article 3(3)(c) it was payable in respect of expenses reasonably incurred under Article 3(3)(a)(i) and pecuniary loss under Article 3(3)(a)(ii). Where the victim had died as a result of the criminal injury the application might be made by the victim's spouse on behalf of herself and the deceased children. "Relatives" in respect of the victim includes children of the victim and any person treated by the victim as a child of the family. The deceased had one child of the marriage. He also treated two of the appellant's three children born before the marriage as children of the family.

[5] Article 5(9) of the 1988 Order provided:

"Without prejudice to Article 6(1) or 9(6) no compensation shall be paid to or in respect of a criminal injury to any person –

- (a) who has been a member of a unlawful association at any time whatsoever or is such a member; or
- (b) who has been engaged in the commission, preparation or instigation of acts of terrorism at any time whatsoever or is so engaged."

Since the deceased had been convicted of membership of an unlawful association and of acts of terrorism no compensation was payable in respect of the criminal injury that led to his death.

[6] However, Article 10 of the 1988 Order contained a saving provision conferring a power on the Secretary of State to pay compensation notwithstanding Article 5(9). In relation to such an ex gratia payment Article 10 provides:

“Where, but for Article 5(9), compensation would be payable to any person, the Secretary of State may, if he considers it to be in the public interest to do so pay to him such sum as does not exceed the amount of that compensation.”

[7] Article 10 thus permits the Secretary of State to make an ex gratia payment in respect of a criminal injury in circumstances where Article 5(9) would otherwise preclude the payment of compensation. The ex gratia payment may not exceed the amount of the compensation that would have been calculated but for Article 5(9).

[8] Since an ex gratia payment under Article 10(2) cannot exceed the amount of the compensation which would otherwise be payable in respect of the criminal injury reference must be made to the principles relating to the calculation of and entitlement to the statutory compensation. This brings into play in relation to an ex gratia payment the same principles that apply when determining whether a victim’s relatives would otherwise have a claim for compensation under Article 3. The right of a victim’s relatives to compensation is linked to and dependent on the right which the victim himself would have had to compensation but for his death. It does not appear to be a freestanding right to compensation divorced from the circumstances relating to the victim’s entitlement. If the victim’s compensation would have fallen to be reduced, for example, because of his provocative behaviour under Article 6(1)(a), the relatives’ claim could not be calculated disregarding the appropriate reduction attributable to his behaviour.

The United Nations Convention on the Rights of the Child 1989 (“the UNCRC”)

[9] The United Kingdom is a party to the UNCRC the preambles to which contains a series of recitals setting the Convention context. It recalls that in the Universal Declaration of Human Rights the United Nations proclaimed that children were entitled to special care and protection and by reason of their physical and mental state need special safeguards. It recognises the importance of international co-operation for improving the living conditions of children in every country. Article 1 defines a child as a human being under the age of 18 unless majority is attained earlier under the law applicable to the child. Article 2.1 provides that the state shall respect and ensure the

Convention rights of each child without discrimination of any kind irrespective of their parents' status. Article 2.2 requires that the state shall take all appropriate measures to ensure the child is protected from all forms of discrimination or punishment on the basis of the status or activities of a parent. By Article 3 it is provided that 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 children shall be the primary consideration. The Convention then proceeds to deal with a wide range of matters concerning children in the fields of welfare, relationships and education. It declares rights such as the right to life, the right to freedom of expression, of thought, conscience and religion and of association and of protection against abuse, ill-treatment and exploitation.

[10] Part II of the UNCRC deals with the implementation of the Convention with state parties undertaking to make its principles and provisions widely known by appropriate and active means to adults and children alike. Article 43 provides for the establishment of a Committee on the Rights of the Child. State parties undertake to submit to the Committee through the Secretary General of the United Nations reports on the measures they have adopted to give effect to the rights so declared and of the progress made on the enjoyment of those rights. State parties may be asked for further information relevant to the implementation of the Convention.

The previous litigation

The first judicial review application

[11] The appellant's application for compensation was refused by the Secretary of State having regard to Article 5(9). She then made a claim for an ex gratia payment under Article 10(2). The relevant Minister concluded that it was not in the public interest to make such an award. In considering whether an ex gratia payment should be made the Secretary of State took into account a number of factors which were identified by Sir Kenneth Bloomfield in his review of criminal injuries in Northern Ireland in 1999 as matters taken into account in relation to the payment of such compensation. In her challenge to the refusal of ex gratia compensation the applicant claimed that the decision was procedurally unfair as she was not aware of the criteria being applied. She also alleged that the Minister improperly took into account a number of matters and failed to take into account a number of relevant considerations. She alleged that the decision violated Articles 2, 8 and 14 of the European Convention on Human Rights ("the ECHR") and was contrary to the UNCRC in particular Article 2.2.

[12] Kerr J rejected the appellant's claim. He concluded that even if the Minister's decision was in breach of the ECHR he had taken his decision

before the Human Rights Act 1998 came into force and its decision could not be made retrospectively unlawful in domestic law. He considered that there was no prohibition in the 1998 Order preventing the appellant's renewal of that application and the Secretary of State could be asked again to exercise his discretion in light of the ECHR when it came into force. He did not consider it appropriate to express an opinion on the possible impact of the ECHR on the decision he might be required to make. In relation to the UNCRC issue Kerr J concluded the Convention was not part of the domestic law of the UK. He held that there was an important distinction between a *power* to resort to an international standard and an *obligation* to do so. Kerr J went on to say:

“In any event I am not persuaded that there has been a breach of any of the precepts laid down by the Convention in this case.”

The second judicial review application

[13] While Kerr J concluded that there was nothing to prevent the appellant from re-applying to the Secretary of State to reconsider his refusal of compensation, it is open to question whether the Minister was bound to entertain a fresh application having properly reached a decision refusing an *ex gratia* claim, particularly in the absence of some fresh evidential material as opposed to a reformulation of legal submissions. Nevertheless, he did not refuse to consider further submissions. When the appellant reapplied to the Secretary of State to exercise his discretion under Article 10(2) afresh the Secretary of State again refused the application. Weatherup J dealt with the UNCRC point in his judgment thus:

“[19] Parliament has implemented Article 10(2) and invested the respondent with a discretion to determine whether payment should be made in the public interest. It is not provided that it would be in the public interest to make payment in cases involving dependent children. To take account of the Convention on the rights of the child and to regard the best interests of the child as a primary consideration need not in all circumstances require payment in cases involving dependent children. Nor does the discrimination provision result in a requirement that payments be made in cases of dependent children.

[23] Like Kerr J I am not persuaded that there has been a breach of any of the precepts laid down by the Convention. In any event the ratification of the Convention does not create any enforceable legitimate

expectations. Further if there are any legitimate expectations arising from the Convention I am not satisfied that they include any legitimate expectation in relation to payments being made to the applicants with dependent children.”

[14] The appellant appealed Weatherup J’s dismissal of her claim. In relation to UNCRC issue Nicholson LJ considered that there was “an arguable case that the UK was in breach of Article 2.2 of UNCRC under international law”. He did not consider it necessary to decide the question. In his view the discretion under Article 10(2) did not require the Secretary of State to take account of Article 2 or Article 3 of UNCRC having regard to Article 5(9) and because it was not incorporated into domestic law. Coghlin J was unconvinced by the argument that there had been no breach of Article 2.2. In the circumstances he proposed to proceed on the assumption that to refuse to pay compensation to the applicant’s children because of the activities of the deceased further constituted a prima facie breach at least of the discrimination provision contained in Article 2.2. He was of the view that ratification of an international treaty by the UK could not of itself give rise to a substantive legitimate expectation. This did not prevent a decision-maker having regard to standards contained in such a treaty. In this case the Secretary of State’s attention had been drawn to the provisions of the UNCRC prior to his decision. Campbell LJ agreed with the judgment of Coghlin J but did not expand on the question of a potential breach of Article 2.2.

[15] No clear detailed reasons were given for the conclusions that a refusal of an ex gratia payment of compensation would prima facie be a breach of Article 2 of the UNCRC or would be an arguable breach of it. Similarly no detailed reasons had been given by Kerr J or Weatherup J in respect of the opposite conclusion which they drew. All the judges were agreed that the Secretary of State was under no duty in domestic law to give effect to the obligations arising under Article 2.2 though all agreed that he could take the provisions of the UNCRC into account without being bound to do so. This approach was entirely consistent with the decision of this court in Re Adams [2001] NI 1.

The third judicial review application

[16] Following the decision of the Court of Appeal the appellant renewed her application under Article 10(2) by way of further representations. The Secretary of State was again prepared to reconsider the position. The appellant relied on the proposition that the Court of Appeal’s decision made clear that the court had concluded there was a prima facie or arguable breach of Article 2.2 of the Convention. The Minister exercising the powers of the Secretary of State refused to exercise his discretion to award an ex gratia payment. Having considered Article 2.2 in the context of the various

submissions and judgments the Minister concluded that Article 2.2 would not be breached by a decision not to exercise discretion in favour of the appellant. The appellant argued that the Minister misdirected himself as to the correct interpretation of Article 2.2 of the Convention and erred in concluding that the failure to award compensation under Article 10(2) would not be a breach of Article 2.2 of the Convention. The sole basis for the refusal of compensation was the status of the deceased as a person convicted of certain offences and his activities and beliefs which had led to the actions he had taken. But for his convictions compensation would have been awarded. In supporting the Minister's conclusion the senior official who had advised the Minister stated that "The consistent approach throughout the entirety of the decision-making process was that, on the basis of Coghlin J's judgment, a refusal to compensate would not infringe Article 2.2 as it was a unincorporated treaty belonging to the realm of international law."

[17] The appellant challenged the Minister's third decision by a further judicial review application. Morgan J concluded that the Minister's reasoning for concluding there was no breach of Article 2.2 of the UN Convention could not be accepted. He considered that there was an arguable case that the decision to refuse compensation was a breach of the UN Convention and he directed a reconsideration of the question.

[18] Counsel for the Secretary of State in that application had argued that a difference in treatment of the children was justified. He argued that the proper comparison was between the activities of parents who had and those who had not committed serious criminal offences. In relation to that argument Morgan J stated:

"That approach may be appropriate in a domestic law discrimination case when it is necessary to identify the pool of comparators. But in an international instrument focused on differential treatment of children I consider that a broader range of enquiry is necessary. The aim is to establish whether the conduct complained of pays proper respect to the objective of the Convention."

The judge then went on to compare the treatment of the children under the new Criminal Injuries Compensation Scheme as compared to the position under the 1988 Order and he posed the question whether it was justifiable to treat them differently. There was in his view an arguable breach of Article 2 in that regard. Insofar as the judge considered that there would be a different outcome in respect of a child under the new scheme as compared to a child subject to the 1988 provisions, he appears to have been misled. Counsel for the Secretary of State in the present appeal pointed to an identical outcome, a point which was not challenged in argument by the appellant.

[19] Whether Morgan J was correct to enter into the question whether the Minister had arguably breached the international obligations of the United Kingdom under the UNCRC raises essentially the same issue which falls to be determined in this appeal. It is to that issue that we must now turn.

The appellant's further application for ex gratia compensation

[20] Following Morgan's J decision quashing the Minister's decision on 25 October 2007 the appellant under a cover of a letter dated 12 November 2007 made a fresh submission as to why ex gratia compensation should be paid under Article 10(2) of the Order. It was argued that as the Minister had decided that he should consider the substance of the objection under Article 2.2 in assessing the application it was not now open to him to refuse to consider Article 2.2 when he was revisiting the application. The applicant had, it was argued, a legitimate expectation that Article 2.2 would continue to form part of the decision-making process. The appellant relied on the view expressed by the judge who considered that there was an arguable breach of Article 2.2.

[21] By letter of 20 November 2008 the Secretary to the Minister of State informed the appellant that the Minister had decided that a discretionary payment should not be made. The Minister had considered that making a discretionary payment to the appellant would not be in the public interest. In dealing with the appellant's submissions in relation to the Article 2.2 point the letter stated:

"In respect of your contention that he should consider the relevant provisions of the United Nations Convention on the Rights of the Child as part of his consideration of whether or not to make a discretionary payment, and your contention that not to make a discretionary payment in this case would represent discrimination against the children of Mr McCallion, the Minister decided that he would consider the provisions of Article 2.2 of the Convention in this case. He was not persuaded by the representations made on Mrs McCallion's behalf or his own analysis that a decision not to exercise discretion would in fact result in a breach of Article 2.2. The United Kingdom's obligations under the Convention was a factor he kept in mind in considering whether or not a payment should be made."

The letter then proceeded to deal with the other submissions which had been raised on behalf of the appellant. It set out the factors which were taken into account leading to the decision to reject the application. The letter concluded:

“In reaching his decision the Minister was mindful of his obligations under domestic law in considering the exercise of Ministerial discretion under the 1988 Order and the United Kingdom’s international Treaty obligations under Article 2.2 of the UN Convention on the Rights of the Child.”

[22] The appellant seeks to challenge the Minister’s decision essentially on two grounds. Firstly, she alleges that the Minister was in error in concluding that a refusal to award compensation would not be a breach of Article 2.2. Secondly, he failed to give any or adequate reasons for his conclusion that Article 2.2 was not breached. It was argued that the circumstances demanded a clear explanation in the light of the views expressed by the Court of Appeal and Morgan J. Weatherup J refused the appellant leave. He stated at paragraph [20] of his judgment:

“[20] A domestic decision-maker may purport to make his decision in accordance with the terms of an unincorporated international treaty. Or he may merely take into account the terms of the treaty in making his decision or he may declare that, having taken account of the terms of the treaty, the decision that he has made is in accordance with the treaty. Or he may declare that he will make his decision without regard to the terms of the treaty. In the present case the decision-maker concluded that a decision adverse to the applicant would not involve a breach of the Convention. Further in the present case, the decision-maker did not purport to exercise his discretion in accordance with the Convention provision but rather, in reaching his decision, he took into account the Convention and his conclusion that a finding adverse to the applicant would not involve a breach of the Convention.”

After analysing the speeches of the House of Lords in R (Corner House Research) v Director of the Serious Fraud Office [2009] 1 AC 753 (“the Corner House decision) Weatherup J at paragraph 23 concluded:

“[23] My conclusions in the particular circumstances of this case are these. First, in the light of dispute as

to the meaning of Article 2.2 and the absence of any settled Convention jurisprudence on the issue, the court will not and should not seek to determine the correct interpretation of Article 2.2 and apply that interpretation to circumstances such as the present. Secondly even if the Secretary of State had purported to exercise its discretion only in accordance with Article 2(2) the court would not itself adopt an interpretation of Article 2.2, given that there is dispute as to the meaning of the provision and in the absence of any settled Convention jurisprudence. Thirdly, even on the basis that it is arguable that the action of the Secretary of State is in breach of Article 2(2), which I accept in the light of the judgments of the Court of Appeal, that does not establish that the court should seek to interpret Article 2.2 nor does it make this an arguable case for the grant of leave. Fourthly, even if the tenable view approach outlined by Lord Brown is applied, the position expressed on behalf of the Secretary of State as to the meaning of Article 2.2 represents a tenable view and the court would not and should not intervene. I am satisfied on the basis of the approach that has been taken in the Corner House research case that it is not arguable in the circumstances of the present case that the court should adopt a role in apply a domestic interpretation of Article 2.2. Leave to apply for judicial review is refused."

The parties' contentions

[23] Mr MacDonald QC called in aid a decision of the House of Lords in R v Secretary of State for the Home Department Ex parte Launder [1997] 1 WLR 839 ("Launder") to support the proposition that if a claimant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on a treaty or Convention provision which he himself says he took into account it must surely be right to examine the substance of the argument. The ordinary principles of judicial review permit this approach because it was to the rationality and legality of the decision that the party directed his argument. In this case, if the Minister was wrong about Article 2.2 of the Convention (as counsel submitted he was) then his decision could be challenged on that basis. When one analysed the Corner House decision it became clear that only one Law Lord, namely Lord Brown, had firmly expressed an opinion on the question of the undesirability of the domestic court construing an unincorporated treaty. His view was in any event obiter. Counsel contended that the House made clear that there are

circumstances in which the exercise of interpreting unincorporated treaties would be undertaken by the courts. Clarification of when that should take place was expressly left for the future development of the law. At the leave stage it was arguable that the Minister's interpretation of Article 2.2 was not tenable given the lack of explanation that accompanied it. Weatherup J had failed to deal with the ground alleging that no or no adequate reasons had been given for the decision. Counsel called in aid the UNICEF Implementation Handbook for the Convention of the Rights of the Child which stressed the width of the provisions of Article 2.2 which indicated action was required against all forms of discrimination and was not confined to the issues specifically raised by the Convention.

[24] Mr Maguire QC on behalf of the respondent pointed out that the Convention is of a standard setting type. It contains no method of judicial enforcement and thus differs radically from the European Convention on Human Rights. There is no body of precedents to interpret the provisions of the Convention. The Article 2 obligations are expressed only in broad and general terms. It was submitted that Article 2.2 concerns the state parties taking appropriate measures to ensure certain results. The language was not apt to deal with the exercise of administrative discretion in an individual case. Article 2.1 cannot be read literally and as a matter of logic there must be limits to this widely stated obligation. The key issue was whether it could be said that it was the function of the court to determine whether the Minister was wrong in his view that there was no breach Article 2 of the UN Convention. He argued that it was not. Counsel contended that Weatherup J had correctly analysed the Corner House decision. The gravamen of that decision was that it was not the function of the court to determine the meaning of Article 5 of the OECD Convention, the treaty provision in question in that case. Applying the same rationale the court should not seek to determine the meaning of Article 2 of the UN Convention. The claim that there had been a breach of Article 2 of the Convention was in effect non-justiciable in domestic courts and there was no proper basis for the grant of leave to apply.

Discussion

[25] The House of Lords in J H Rayner (Mincing Lane) Limited v Department of Trade and Industry [1990] 2 AC 418 affirmed the well established principle that international treaties which have not been incorporated into domestic law do not form part of the law of the United Kingdom and that the courts do not generally have a jurisdiction to interpret or apply them. The two governing and underlying principles justifying that approach were identified in the leading speech of Lord Oliver. Firstly, such an issue is non-justiciable. Secondly, the lack of any direct effect in domestic law in relation to an unincorporated treaty means that it confers no rights and thus no remedies in relation to individuals. Lord Oliver drew from the

principle stated by Lord Kingsdon in Secretary of State in Council of India v Karmachee Boyo Sahara (1859) 13 Moo. PCC 22 namely that the transaction of independent states between each other are governed by other laws than those which municipal courts administer. Domestic courts have neither the means of deciding what is right between states and between states and international organisations nor the power of enforcing any decision which they may make. Lord Oliver concluded that it was a matter of constitutional law. In the absence of Parliamentary intervention the Royal Prerogative, while it embraces the making of treaties, does not extend to the alteration of the domestic law or to the conferring of rights upon individuals or the denial of individuals of rights which they enjoy in domestic law. He said:

“So far as individuals are concerned it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.”

The approach so stated was reasserted by the House in R v Lyons [2002] 4 All ER 1028 (see Lord Bingham’s speech at para [27]).

[26] Mr MacDonald argued that it is clear from cases such as Launder and R v DPP Ex parte Kebilene [2002] AC 326 that the House of Lords was prepared to construe the ECHR at a time when it had not yet been incorporated into domestic law. In Launder counsel for the respondent contended that the Secretary of State having said that he took the ECHR into account was bound to construe and apply it correctly. Lord Hope, delivering the main speech, appeared to accept that the question whether a decision-maker properly construed the unincorporated provisions which he said he was taking into account was a question that went to the legality and rationality of the decision.

[27] While the strictness of the principle stated by Lord Oliver was qualified in cases like Launder and Kebilene at least in the context of rights arising under the European Convention prior to incorporation the views of the House in the Corner House decision confirm the principles which Lord Oliver had stated. This emerges most clearly in the speech of Lord Brown (with which Lord Rodger expressly agreed) and in the somewhat more tempered terms in the speech of Lord Bingham. Lord Brown at paragraph 65 said:

“Although, as I have acknowledged, there are occasions when the court will decide questions as to

the state's obligations under unincorporated international law, this, for obvious reasons, is generally undesirable. Particularly it is so where as here the contracting parties to the Convention have chosen not to provide for the resolution of disputed questions of construction by an international court but rather (Article 12) to create a working group through whose continuing processes it is hoped a consensus view will emerge. ... For a national court itself to assume the role of determining such a question (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons."

He went on to state in paragraph 67:

"The critical question is not as the respondent's arguments suggest whether the Director's successor would make the same decision again once the courts have publicly stated that this would involve a breach of the Convention; rather it is whether the court should feel itself impelled to decide the true construction of Article 5 in the first place. It simply cannot be the law that, provided only a public officer asserts that his decision accords with the state's international obligations, the courts will entertain a challenge to the decision based upon his misunderstanding of that obligation and then itself decide the point of international law at issue. For the reasons I have sought to give it would certainly not be appropriate to do so in the present case."

[28] Lord Brown quoted and considered a passage from an article by Philip Sales QC and Joanne Clement in 124 Law Quarterly Review 388:

"Part of the problem is that the Executive may not have any practical option but to direct itself by reference to international law, and if the rule of law in Launder is treated as unlimited it will lead to very extensive direct application of treaties and international law in the domestic courts, thereby for practical purposes undermining the basic constitutional principle against non-enforceability of unincorporated treaties. One solution might be for

the domestic courts, in recognition of the limits of their competence to provide a fully authoritative ruling on the point, the limits of their competence under domestic constitutional arrangements to rule on the subject matter in question and the dangers posed to the national interest by them ruling definitively on the point at all, either to decline to rule or to allow the Executive a form of margin of appreciation on the legal question and to examine only whether a tenable view has been adopted on the point of international law (rather than ruling on it themselves, as if it were a hard edge point of domestic law)."

Lord Brown went on to state:

"I have no doubt that in this particular context the 'tenable view' approach is the furthest that the court should go in examining the point of international law in question."

[29] Reading the speeches of their Lordships as a whole there can be no doubt that the House sought to qualify and restrict the ambit of the decision in Launder and to reassert the approach stated in Lord Oliver's speech in Rayner and by Lord Bingham in R v Lyons. The statements of principle in Corner House, even if they may be strictly obiter, are of the highest authority and are in any event in line with the earlier House of Lords caselaw. Thus this court should follow and apply the approach the House has stated. In the light of Corner House it is clear that the court will require a very compelling reason to become involved in seeking to interpret a treaty provision unincorporated into domestic law. There may be situations in which the courts are driven to interpret an unincorporated treaty provision. This can arise if the parties contractually incorporate such a provision into a binding agreement which falls to be construed. It may happen if the Minister makes it abundantly clear that he is seeking to make his decision strictly in accordance with the correct legal interpretation of a treaty provision. In that event if he misconstrues the treaty provision then he has misdirected himself by the standard which he has set himself. However in considering whether he has misconstrued a treaty or Convention provision the court in reviewing the Minister's decision ought to recognise that the Minister must be afforded a wide margin of appreciation. The negotiation of a treaty or the development of a practice which comes to contribute to the development of a ruling of customary international law takes place without the detailed domestic internal political debate and compromise appropriate to determining detailed domestic rules of law. Treaty and Convention provisions are often deliberately ambiguous or flexible and aimed at encouraging incremental

developments in particular fields of international interest. That sets the context of international treaty provisions in which a Minister's interpretative function is to be carried out. Furthermore, a Minister in construing a treaty provision is doing so in the context of deciding whether a resultant decision will or will not breach the international law obligations of the state. Since the unincorporated treaty does not confer rights on the individual citizens the Minister is not construing a provision giving rights but is seeking to construe a provision breach of which has international political implications.

[30] The question which arises in this case is how Article 2.2 of the Convention actually featured in the Minister's decision-making process and what task the Minister was setting himself in taking Article 2.2 into account in this process. As a state party to the UNCRC it was the duty of the United Kingdom to give effect to the treaty. But it was a duty which was unenforceable in the domestic courts. The question whether there was or was not a breach of an international law obligation in the event of a particular decision being taken is non-justiciable. In the present instance the Minister clearly decided that he would consider the UNCRC provisions and he thus did not disregard them. From the terms of his decision letter the question which he posed to himself appears to have been whether he was satisfied that a decision to refuse an ex gratia payment would be contrary to Article 2.2. Article 2.2 clearly conferred no right on any child within the United Kingdom so the Minister cannot have been deciding whether a failure to pay ex gratia compensation breached the rights or expectations of the children. The Minister was directing his mind to whether the United Kingdom would be acting in a manner incompatible with the country's treaty obligations under the Convention. He was not persuaded that it would. For the court to conclude that he was wrong in concluding that the United Kingdom would be in breach of its treaty obligations the court would have to trespass into forbidden territory. The making and breaking of treaties and the conduct of foreign affairs are outwith the purview of the courts. It is for this reason that Lord Bingham stated:

"It simply cannot be the law that provided only a public officer asserts that his decision accords with the state's international obligations the courts will entertain a challenge to the decision based upon his arguable misunderstanding of that obligation and then itself decide the point of international law at issue."

The court cannot go behind the Minister's conclusion that in his view Article 2.2 of the Convention was not being broken in such a way to show that the United Kingdom was acting incompatibly with its treaty obligations. It would also be inconsistent with the principle to demand of the Minister an explanation of the reasons he had for reaching the conclusion which he did in

order to scrutinise those reasons. That would be itself an impermissible exercise.

[31] The way in which the Minister has expressed himself makes clear that he was not asking himself the question "What precisely in law does Article 2.2 mean". He was asking himself a different question, namely "Is it clear to me that the State would be in breach of Article 2.2 if ex gratia compensation were refused." He was entitled to approach the matter in that way bearing in mind that he was not to consider Article 2.2 at all. The court is thus not compelled to adjudicate on the precise meaning of Article 2.2, a task which should only be undertaken (if at all) if the court is left with no other choice.

[31] Applying a "tenable view" approach was one which Lord Brown regarded as the "most" that a court could do. He does not appear to have concluded that it was necessarily the correct approach. Such an approach would in any event only be called for if the court had no alternative to deciding whether a Minister had misconstrued a treaty provision. Even then that approach may still be open to objection. If the court concluded that the Minister's approach is not a tenable one it would necessarily be concluding that he has reached a view which is incompatible with the international law obligations of the state. The court in that event would again be drawn into forbidden territory. However, assuming at the leave stage that it is arguable that such an approach is legally the correct and permissible one to apply in this case, the conclusion reached by the Minister in the present instance was unarguably a tenable one. There is a live question whether Article 2.2 was only intended to prohibit discrimination in the context of rights to which Part I of the Convention applies and no more. The question arises as to whether discrimination necessarily involves the identification of true comparables in like situations. A live question arises as to whether a claim by dependent children is entirely dependent on the rights which the deceased would have had but for his supervening death. If so, no question of discrimination against the children would arise. Furthermore two very experienced judges in earlier proceedings concluded that there was no apparent breach of Article 2.2. It cannot be suggested that a Minister of State taking account of these factors and taking a broader view of the international context was bound to conclude that Article 2.2 would be infringed and that the United Kingdom would be in breach of its international obligations if he decided to refuse ex gratia compensation.

[32] For these reasons we conclude that Weatherup J was right to refuse leave. We dismiss the appeal accordingly.