Note:
Mademoiselle Biron. - Voila le texte de l'affaire Tavita v. Minister of Immigration (N.Z.L.R....). Je suis toujours a la recherche de l'affaire indienne. Si vous parlez au "droit international", est-ce que vous pensez plutot au "D.I. de Droits de l'homme"? - Salutations. W. Simon

20 of 20 DOCUMENTS

Tavita v Minister of Immigration

Court of Appeal, Wellington

[1994] 2 NZLR 257

HEARING-DATES:
30 November, 17 December 1993

17 December 1993

CATCHWORDS:

Administrative law -- Judicial review -- Relevant considerations -- Whether international obligations required to be taken into account -- International Covenant on Civil and Political Rights 1966, arts 23(1) and 24(1) -- Convention on the Rights of the Child 1989, art 9(1) and (4).

Immigration -- Removal order -- Unsuccessful appeal to Minister on humanitarian grounds -- Prior to execution of removal order, child born in New Zealand and marriage of mother of child -- Whether Minister should have regard to new circumstances in considering whether to execute removal order -- Immigration Act 1987, ss 63, 63C(2) (a) and 130.

International law -- International covenants and conventions -- Whether Minister of Immigration entitled to ignore international instruments to which New Zealand a party -- Observations as to bearing of international human rights

and instruments declaring them on domestic law -- International Covenant on Civil and Political Rights 1966 -- Convention on the Rights of the Child 1989.

Infants and children -- Child welfare -- Removal from New Zealand of father of New Zealand born child -- Whether Minister of Immigration required to take into account basic rights of the family and of the child -- International Covenant on Civil and Political Rights 1966, arts 23(1) and 24(1) -- Convention on the Rights of the Child 1989, art 9(1) and (4).

HEADNOTE:

Mr Tavita, a citizen of Western Samoa, arrived in New Zealand in December 1987 and was granted a visitor's permit. He became an overstayer in March 1989. After a removal warrant was issued by the District Court on 12 March 1990, he appealed to the Minister of Immigration pursuant to the Immigration Act 1987, s 63, seeking the cancellation of the warrant on humanitarian grounds. By letter dated 4 April 1991, the Minister declined the appeal. Mr Tavita's daughter was born in New Zealand on 29 June 1991 and on 7 July 1991, he married the mother of his daughter. In September 1993, the New Zealand Immigration Service took steps to execute the removal warrant issued in 1990, now classified as a removal order by virtue of the provisions of the Immigration Amendment Act 1991. Judicial review proceedings were brought on Mr Tavita's behalf seeking the setting aside of the removal order and a reconsideration of the appeal. Reliance was placed on the International Covenant on Civil and Political Rights 1966, including the First Optional Protocol, and the Convention on the Rights of the Child 1989. An application for an interim order under the Judicature Amendment Act 1972, s 8, was dismissed on 3 November 1993 by McGechan J who pointed out that the decisions attacked were made before the birth of the child and the marriage, so that there was then no call to take the Covenant or the Convention into account. An interim order for a stay of removal was made pending appeal.

In the Court of Appeal it was accepted by counsel for the Minister that at no stage had the Minister or the Immigration Service taken either the Covenant or the Convention into account. It was submitted, however, that they were not obliged to and that in any event, they were entitled to ignore the international instruments. It was also submitted that no request had been made for a reconsideration of the case. The major question in the appeal was whether, against the background of the powers available under the Immigration Act 1987,

the Minister and the Immigration Service should have regard to the international obligations concerning the child and the family in considering whether now to enforce the removal order.

Held: 1 The relevant provisions of the International Covenant on Civil and Political Rights 1966 and the Convention on the Rights of the Child 1989 called for a balancing exercise broadly similar to that required by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 8, but the basic rights of the family and the child were the starting point. It was accepted by the Crown that the case had never been considered from that point of view. Consideration from that point of view could produce a different result (see p 265 line 26).

Berrehab v Netherlands (1988) 11 EHRR 322 (Euro Ct of Human Rights), Beldjoudi v France (1992) 14 EHRR 801 (Euro Ct of Human Rights) and Lamgiundaz v United Kingdom [1993] TLR 453 considered.

2 Whatever the merits or demerits of either of her parents, Mr Tavita's daughter was not responsible for them, and her future as a New Zealand citizen was inevitably a responsibility of New Zealand. Universal human rights and international obligations were involved. It might be thought that the Minister would welcome the opportunity of reviewing the case in the light of an up-to-date investigation and assessment. As nothing of the sort appeared to have occurred, the opportunity of reconsideration should be given. Appeal adjourned sine die and the stay to remain in force to enable Mr Tavita to make such application as he is advised to make in the light of current circumstances and to enable the Minister to consider such application (see p 266 line 39, p 266 line 51).

Appeal adjourned accordingly.

Observations: (i) The submission that the Minister and the New Zealand Immigration Service are entitled to ignore international instruments is an unattractive argument, apparently implying that New Zealand's adherence to the International Covenant on Civil and Policital Rights 1966 and the Convention on the Rights of the Child 1989, has been at least partly window-dressing. Although in the circumstances a final decision on the argument was neither necessary nor desirable, there must at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and the instruments declaring them is undergoing evolution (see p 266 line 1).

(ii) In the circumstances it is not appropriate to discuss how far Brind, in some respects a controversial decision, might be followed in New Zealand on the question whether, when an Act is silent as to relevant considerations,

international obligations are required to be taken into account as such (see p 266 line 12).

R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696; [1991] 1 All ER 720 and Ashby v Minister of Immigration [1981] 1 NZLR 222 (CA) discussed.

(iii) If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol, the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could also extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them (see p 266 line 29).

INTRODUCTION:

Appeal This was an appeal from a decision of the High Court dismissing an application for an interim order under the Judicature Amendment Act 1972, s 8.

COUNSEL:

SK Fliegner for the appellant (V Tavita); IC Carter for the respondents (Minister of Immigration and Attorney-General).

JUDGMENT-READ:

Cur adv vult The interim judgment of the Court was delivered by

PANEL:
Cooke P, Richardson, Hardie Boys JJ

JUDGMENTBY-1:
COOKE P

JUDGMENT-1:

COOKE P: This is an appeal from an order refusing interim relief in a judicial review proceeding. The facts of the case have some familiar features as for overstaying, but they also have some particular features which make the case difficult.

Viliamu Tavita arrived in New Zealand from Western Samoa on 22 December 1987. He was granted a visitor's permit, which is a type of temporary permit under the Immigration Act 1987, s 24, and there were subsequent extensions to 22 March 1989. In the meantime his application for a residence permit was

herself,
and relies on charity from family in New Zealand.

. . .

8. I understand that Viliamu has been told he must leave, and not come back to New Zealand for five years. His family cannot and will not go with him. By the time he returns, he would be a stranger to his daughter. We have relatives here, but none that can take on the care of another child."

An affidavit sworn on 28 October 1993 by Dr AA Kerr of Lower Hutt, consultant paediatrician, includes the following:

"2. On 19 October 1993 at Lower Hutt hospital I interviewed Viliamu Tavita and his daughter Natia Ricka Tavita, born on 29 June 1991. Mr Tavita is married, and while his wife works during the day, he is the Chief Caretaker for their three year old daughter. The family situation appears to be a stable one, with Mr Tavita providing good and appropriate care and security for the child.

3. If Mr Tavita were to leave New Zealand, the care he provides now for the child would no longer be available: this would certainly have a detrimental affect on the child's emotional well-being and development, and is against the best interests of this child.

4. The first years of a child's life are critical to any child's development. As a Paediatrician with my experience in dealing with children with problems, I am very much aware that separation of parents from children has a major psychological effect on children. This is no less so for this child, as she is closely bonded with her father.

5. If the father were to be separated from this child, I believe that in addition that this is counter to the spirit and requirements of the Children Young Persons and their Families Act 1989, in which the interests of the child are stated as being paramount, and which sets responsibility for the welfare of children as being primarily with the family, and not the state."

In September 1993 the New Zealand Immigration Service took steps to execute the removal warrant granted in 1990. The judicial review proceeding was then brought on Mr Tavita's behalf. We were informed from the Bar that later he was taken to the airport and that his removal was halted on notice of a stay granted in the proceeding.

The judicial review proceeding was commenced on 5 October 1993. The proceeding sought an interim order preserving the position of the applicant and

declined, as was his application for reconsideration of that decision. On 12 March 1990 the Lower Hutt District Court, on the application of an immigration officer, granted a removal warrant under s 54, subject to residence and reporting conditions pending removal. Mr Tavita appealed to the Minister under s 63B to cancel the warrant on humanitarian grounds or for a reduction of the five-year period following removal for which such a warrant remains in force. By letter dated 4 April 1991 the Associate Minister declined the appeal. That is the last occasion of any ministerial involvement in Mr Tavita's case, apart from an affidavit hereinafter quoted.

On 29 June 1991 the child Natia Tavita was born in New Zealand. She is a New Zealand citizen by birth (Citizenship Act 1977, s 6), and is the daughter of Mr Tavita and his wife Keiana, whom he married on 7 July 1991. The evidence is that Mrs Tavita is employed and that Mr Tavita looks after the child during the day. He does some panelbeating work at home. Neither parent receives a Social Welfare benefit.

An affidavit sworn on 5 October 1993 by Mr Tavita includes the following:

"6. My father is dead. My mother who is in her sixties, lives with one of my sisters in Apia. My mother has no house of her own, and owns no land, she is being supported by me and other family who send money over from New Zealand.

7. She is the only close relative I could turn to for support in Samoa. But she cannot support me. I have no property, land, or job to go to in Samoa.

. . .

12. If I were forced to leave New Zealand, I would lose contact with my daughter, and with my wife. I on my own would have no support in Samoa, it would be impossible for me to support my wife and child as well. If we all went to Samoa, we would have no support. My wife and child have to stay in New Zealand where we are settled.

13. If I were allowed to stay in New Zealand, I would not be receiving a social welfare benefit. My wife has applied for Permanent Residence and believe her application is being processed. It is very important for me, for my wife and for our child that I am allowed to stay here."

An affidavit sworn on 5 October 1993 by the appellant's brother, Frank Farani Tavita Pouniu, includes the following:

{260"5.} Our mother is in her sixties, and is not able to provide any support for Viliamu should he be deported. She is not able to support

his child and his wife; an order quashing the removal order (as the warrant is now classified under the current legislation: see the Immigration Amendment Act 1991, ss 2(6) and 34); an order directing a rehearing of the applicant's appeal or appeals; an order requiring the Minister to cancel the removal order and issue a permit under s 35 or otherwise allow the applicant to remain in New Zealand; and further or other relief. Reliance was placed on the International Covenant on Civil and Political Rights 1966 and the Optional Protocol thereto. The Protocol gives an individual subject to New Zealand jurisdiction who has exhausted all available domestic remedies a right to apply to the Human Rights committee of the United Nations. That Committee is in substance a judicial body of high standing. Reliance was also placed on the Convention on the Rights of the Child 1989. Certain administrative law grounds not related to those international instruments were also pleaded but were not relied on as separate grounds in the argument in this Court.

The application for an interim order under the Judicature Amendment Act 1972, s 8, came before McGechan J on 1 November 1993 and was dismissed by him on 3 November, but the Judge made an interim order for in effect a stay of {261} the removal pending appeal. On the hearing of the appeal this Court reserved judgment. The stay remains in force.

The Secretary for Foreign Affairs and Trade has advised that New Zealand ratified the abovementioned International Covenant on 28 December 1978 and acceded to the Optional Protocol on 26 May 1989; and that with certain reservations New Zealand ratified the Convention on the Rights of the Child on 13 March 1993. It is not in dispute that sufficient instruments of ratification or accession have been deposited to bring the Convention into force under art 49. It is important to note that, at the dates of the declining of the residence applications, the granting of the removal warrant, and the Associate Minister's decision to reject the appeal, the appellant's child had not been born. The circumstances now are of course quite different.

In an affidavit sworn on 21 October 1993 the Associate Minister, the Hon [illegible] Maxwell (now the Minister), stated inter alia:

"15. THE applicant's marriage and the birth of his child both occurred after I had made my decision to decline the s 63 appeal. I can say however that had these new facts been before me it is unlikely that my decision would have been any different. For an appeal to succeed under s 63 I had to be first satisfied that, because of exceptional circumstances of a humanitarian nature, it would be

unjust or unduly harsh for the person concerned to be removed from New Zealand or for the removal warrant to remain in force for the full five years. In my experience it is common to find persons, in New Zealand unlawfully, who have entered into relationships or marriage with New Zealand citizens or residents; it is also common to find persons, in New Zealand unlawfully, who have children born in New Zealand. While the new circumstances which have arisen since I declined the applicant's appeal are clearly of a humanitarian nature, they are not exceptional."

The Associate Minister's affidavit makes no reference in any way to the international instruments. In the statement of defence it is admitted that the Minister did not take either the Covenant or the Convention into account when making "his decision". The meaning of "his decision" was not entirely clear, but counsel for the Crown accepted in this Court that at no stage has the Associate Minister or the Department taken the instruments into account. The essential argument for the Crown has been that they are not obliged to do so.

The primary provisions of the Covenant invoked for the applicant are in arts 23(1) and 24(1):

"[art 23] 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

[art 24] 1. Every child shall have, without any discrimination as to race, colour, . . . national or social origin . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

It may be noted also that art 24(3) states "Every child has the right to acquire a nationality".

The primary provisions of the Convention invoked for the applicant are in art 9(1):

"(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."

{262} That must be read together with art 9(4):

"(4) Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned."

In his judgment McGechan J pointed out that the decisions attacked, up to April 1991, were made before the birth of the child and the marriage, so that there was then no call to take the Covenant or the Convention into account. While expressly leaving the point open, the Judge recognised that on a 1993 reconsideration it might be appropriate to take those international obligations into account. The Judge did say that it was made clear in the submissions to him that the applicant would want the Minister to reconsider on the basis of current factors. The statement of claim includes allegations bringing the execution of the removal order within the scope of the proceeding. Possibly because of the urgency of his decision, possibly because of the general nature of the argument before him, the Judge does not appear to have focused on what certainly has emerged as the major question in the appeal: namely, against the background of such powers as are available under the Immigration Act, should the Minister and the Department have regard to the international obligations concerning the child and the family, in considering whether now to enforce the removal order?

Two decisions of the European Court of Human Rights appear distinctly relevant. Neither was cited to us in argument, but that implies no criticism, for the case had to be prepared under pressure and such decisions are not always easy to locate. For that reason we will quote the main passages in the judgments in extenso. Both cases relate, so far as now relevant, to art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:

"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 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."

In Berrehab v Netherlands (1988) 11 EHRR 322, the first applicant, a Moroccan citizen, was refused an entry permit after his divorce from his Dutch wife. The second applicant was his minor daughter, who lived with her mother. The first applicant had since remarried the mother but that point was not treated as important. The applicants complained that the father's deportation, inhibiting further contact between them, amounted to a violation of their rights to family life. By six votes to one it was held that there had been a breach of art 8. The majority judgment stated at pp 329-331:

"B. Compliance with Article 8

1. Paragraph (1) of Article 8

22. In the applicants' submission, the refusal to grant Mr Berrehab a new residence permit after the divorce and his resulting expulsion amounted to interferences with the right to respect for their family life, given the distance {263} between the Netherlands and Morocco and the financial problems entailed by Mr Berrehab's enforced return to his home country.

The Government replied that nothing prevented Mr Berrehab from exercising his right of access by travelling from Morocco to the Netherlands on a temporary visa.

23. Like the Commission, the Court recognises that this possibility was a somewhat theoretical one in the circumstances of the case; moreover, Mr Berrehab was given such a visa only after an initial refusal. The two disputed measures thus in practice prevented the applicants from maintaining regular contacts with each other, although such contacts were essential as the child was very young. The measures accordingly amounted to interferences with the exercise of a right secured in paragraph (1) of Article 8 and fall to be considered under paragraph (2).

2. Paragraph (2) of Article 8

(a) 'In accordance with the law'

24. The Court finds that, as was submitted by the Government and the Commission, the measures in question were based on the 1965 Act; and indeed, the

applicants did not dispute that.

(b) Legitimate aim

25. In the applicant's submission, the impugned interferences did not pursue any of the legitimate aims listed in Article 8(2); in particular, they did not promote the 'economic well-being of the country', because they prevented Mr Berrehab from continuing to contribute to the costs of maintaining and educating his daughter.

The Government considered that Mr Berrehab's expulsion was necessary in the interests of public order, and they claimed that a balance had been very substantially achieved between the various interests involved.

The Commission noted that the disputed decisions were consistent with Dutch immigration-control policy and could therefore be regarded as having been taken for legitimate purposes such as the prevention of disorder and the protection of the rights and freedoms of others.

26. The Court has reached the same conclusion. It points out, however, that the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 2 of Article 8 rather than the prevention of disorder: the Government was in fact concerned, because of the population density, to regulate the labour market.

(c) 'Necessary in a democratic society'

27. The applicants claimed that the impugned measures could not be considered 'necessary in a democratic society'.

The Government rejected this argument, but the Commission accepted it, being of the view that the interferences complained of were disproportionate as the authorities had not achieved a proper balance between the applicants' interest in maintaining their contacts and the general interest calling for the prevention of disorder.

28. In determining whether an interference was 'necessary in a democratic society', the Court makes allowance for the margin of appreciation that is left to the Contracting States.

In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. According to the Court's established case law, however, 'necessity' implies that the interferences corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

29. Having to ascertain whether this latter condition was satisfied in

the instant case, the Court observes, firstly, that its function is not to pass judgment on the Dutch immigration and residence policy as such. It has only to examine {264} the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Dutch Court of Cassation also noted the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life.

As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr Berrehab already had real family ties there -- he had married a Dutch woman, and a child had been born of the marriage.

As to the extent of the interference, it is to be noted that there had been very close ties between Mr Berrehab and his daughter for several years and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young.

Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8."

In Beldjoudi v France (1992) 14 EHRR 801 the facts are summarised in the headnote:

"While a minor, the first applicant lost his French nationality because his parents, Algerian by birth, failed to comply with French nationality legislation. Thereafter he consistently showed a desire to regain his French nationality, continued to live and work in France, and married a French woman. They had no children. After reaching the age of majority, the first applicant was convicted of numerous criminal offences for which he served a total of ten years' imprisonment. A deportation order was subsequently made against

him and appealed unsuccessfully. While appeals were pending, he and his wife continued to live in France. The applicants complained that the deportation order would interfere with their right to private and family life within the meaning of Article 8 of the Convention and discriminated against the first applicant within the meaning of Article 14 of the Convention."

The Court held by seven votes to two that, if the decision to deport the husband were implemented, there would be a violation of art 8 with respect to both applicants. The majority judgment acknowledged that it was for the contracting states to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens. But the decisions of the contracting states in that field must, in so far as they might interfere with a right protected under art 8(1), be necessary in a democratic society: that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. The Court went on to say at pp 833-834:

"77. Mr Beldjoudi, the person immediately affected by the deportation, was born in France of parents who were then French. He had French nationality until 1 January 1963. He was deemed to have lost it on that date, as his parents had not made a declaration of recognition before 27 March {265} 1967. It should not be forgotten, however, that he was a minor at the time and unable to make a declaration personally. Moreover, as early as 1970, a year after his first conviction but over nine years before the adoption of the deportation order, he manifested the wish to regain French nationality; after being registered at his request in 1971, he was declared by the French military authorities to be fit for national service.

Furthermore, Mr Beldjoudi married a Frenchwoman. His close relatives all [illegible] French nationality until 1 January 1963, and have resided in France for several decades.

Finally, he has spent his whole life -- over 40 years -- in France, was educated in French, and appears not to know any Arabic. He does not seem to have any links with Algeria apart from that of nationality.

78. Mrs Beldjoudi for her part was born in France of French parents, has always lived there and has French nationality. Were she to follow her husband after his deportation, she would have to settle abroad, presumably in

Algeria, a State whose language she probably does not know. To be uprooted like this could cause her great difficulty in adapting, and there might be real practical or even legal obstacles, as was indeed acknowledged by the Government Commissioners before the Conseil d'Etat. The interference in question might therefore imperil the unity or even the very existence of the marriage.

79. Having regard to these various circumstances, it appears, from the point of view of respect for the applicants' family life, that the decision to deport Mr Beldjoudi, if put into effect, would not be proportionate to the legitimate aim pursued and would therefore violate Article 8."

It would appear therefore that under the European Convention a balancing exercise is called for at times. A broadly similar exercise may be required under the two international instruments relevant in the present case, but the basic rights of the family and the child are the starting point. It is accepted by the Crown that this case has never been considered from that point of view. Consideration from that point of view could produce a different result. It is instructive to note that in Lamgiundaz v United Kingdom [1993] TLR 453, where a Moroccan whose family were settled in England and who had a criminal record in England was ordered by the Secretary of State to be deported, it was agreed that the order would be revoked as part of the terms of a friendly settlement of a claim of violation of art 8 of the European Convention. The United Kingdom Government did not admit a breach of the Convention but settled the case on agreed terms.

Comparing the facts of this case with those of Beldjoudi and Lamgiundaz, it has to be mentioned that Mr Tavita has New Zealand convictions for Transport Act 1962 offences arising from an episode in 1990. He was sentenced to ten months' periodic detention. It is certainly not helpful to him, but it was before the birth of the child and the marriage and can have little significance for present purposes.

Reference was made in argument to various provisions of the Immigration Act 1987, as amended, under which the Minister and his Department may be able now to review this case, including s 130 read with s 7(3)(a)(ii), s 52A, s 65 and s 35. It would not be appropriate at this point to explore the highly complicated legislation in depth, apart from mentioning that there does not appear to be

substance in the suggestion that s 63C(8) would in the circumstances of this case prevent the Minister from giving a special direction under s 130 while the applicant remains in New Zealand. Mr Carter for the respondents did not go as far as to submit that it is not possible under any provision of the Act to give the case effective reconsideration in the light of the birth and New Zealand citizenship of the child and the family situation. He pointed out correctly, however, that since the birth of the child no request had been made for reconsideration; and the main burden of his argument was that in any event the Minister and the Department are entitled to ignore the international instruments.

{266} That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although, for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there must at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution. For the appellant Mr Fliegner drew our attention to the Balliol Statement of 1992, the full text of which appears in [67 ALJ 67], with its reference to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights. It has since been reaffirmed in the Bloemfontein Statement of 1993.

R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696 does not go as far as Mr Carter contended. It was accepted in that case that the Secretary of State in fact did have regard to the relevant Convention (see p 761, per Lord Ackner). Lord Templeman's speech at p 751 recognised that it was a relevant (and perhaps mandatory) consideration, but that a margin of appreciation must be afforded. Lord Bridge at pp 748-749, while holding that the judiciary could not import the Convention into domestic law, accepted that any restriction of the right to freedom of expression required to be justified: he also held that, even when administrative discretions are considered in terms on their face unlimited, the Courts are not powerless to prevent their exercise in a way which infringes fundamental human rights. In Ashby v Minister of Immigration [1981] 1 NZLR 222 there were recognitions in this Court that some international obligations are so manifestly important that no reasonable Minister could fail to take them into account. It is not now appropriate to discuss how far Brind, in some respects a controversial decision, might be followed in New Zealand on the question whether, when an Act is silent as to

relevant considerations, international obligations are required to be taken into account as such.

If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.—

This emerges as a case of possibly far-reaching implications. On the other hand it can be seen as dependent on its own facts. The Minister or Associate Minister has had no opportunity to consider it in the light of the rights of the child. Whatever the merits or demerits of either of her parents, she is not responsible for them, and her future as a New Zealand citizen is inevitably a responsibility of this country. Universal human rights and international obligations are involved. It may be thought that the appropriate Minister would welcome the opportunity of reviewing the case in the light of an up-to-date investigation and assessment. Nothing of the sort appears to have occurred within the Department. Still less has the case been reconsidered, in the light of current circumstances, at ministerial level. This is fully understandable. The opportunity of reconsideration should be given.

For those reasons we adjourn the appeal sine die, to be brought on at seven days' notice, to enable the appellant to make such application as he is advised to make in the light of current circumstances; and to enable the Minister and his Department to consider any such application. In the meantime the stay remains in force.

DISPOSITION:

Appeal adjourned accordingly.

SOLICITORS:

Solicitors for the appellant: Gill & McAsey (Lower Hutt); Solicitors for the respondents: Crown Law Office (Wellington).