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Supreme Court of Ireland Decisions

Judgment

Title:	Y.Y. -v- Minister for Justice and Equality
Neutral Citation:	[2017] IESC 61
Supreme Court Record Number:	43/2017
High Court Record Number:	2016 No 774 JR
Date of Delivery:	27/07/2017
Court:	Supreme Court
Composition of Court:	Denham C.J., O'Donnell Donal J., MacMenamin J., Dunne J., O'Malley Iseult J.
Judgment by:	O'Donnell Donal J.
Status:	Approved
Result:	Other

SUPREME COURT

Denham C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
O'Malley J.

Supreme Court No.: 43/2017

BETWEEN:

Y.Y.

Applicant/Appellant

AND

The Minister for Justice and Equality

Respondent/Respondent

Judgment of O'Donnell J. delivered the 27th of July 2017

1 This is an appeal against the judgment and order of the High Court dated the 13th March, 2017, ([2017] IEHC 176) whereby Humphreys J. dismissed the appellant's challenge to (i) a deportation order pursuant to s.3 (1) of the Immigration Act 1999 ("the s.3(1) decision") and; (ii) a decision refusing to revoke the deportation order pursuant to s.3(11) of the same Act ("the s.3(11) decision"). In this case, the High Court made an order restraining publication of material that would identify the appellant. According, the appellant will be referred to as Y.Y. for the purposes of this judgment. The High Court, from an abundance of caution, also ordered that the country to which deportation was proposed should not be identified, other than as Country X. The parties to this appeal are agreed that this restriction is not required at this stage and accordingly that designation has not been used in this case. As will become apparent, this case presents in a stark way, the difficulties created when it is sought to deport an individual who is considered a threat to the security of this state and others but who contends that he will be subjected to treatment contrary to Article 3 of the European Convention of Human Rights if returned to his country of origin, which in such circumstances is the only country to which he or she can realistically be returned. The appellant has been in custody for the duration of these proceedings, first while serving a sentence, and latterly has been detained pending the execution of the deportation order challenged in this case. The detention period provided for under section 5 of the Immigration Act 1999 (as amended) is limited, but time does not run for that purpose during the currency of proceedings challenging a deportation order, as these proceedings do.

Facts

2 Y.Y. (hereinafter "the appellant") is a national of Algeria. In 1996 and 1997, the appellant was convicted *in absentia* of terrorism related offences in Algeria. The offences he was convicted were as follows:

> (i) on 16th May, 1996, for forming an armed terrorist group intending to spread murder and sabotage, forethought deliberate murder, attempted assignation, arson and theft;
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> (ii) on 23rd December, 1996, for the crimes of forethought deliberate murder, forming an armed terrorist group intending to harm the security of the country and its authorities and possession of war weapons;
>
> (iii) on 21st September, 1997, for forming an armed terrorist group, for forethought deliberate murder, assistance of an armed terrorist group and failure to report;
>
> (iv) on 8th November, 1997, for forming an armed terrorist group, for forethought deliberate murder, assistance of an armed terrorist group and failure to report;
>
> (v) on 18th November, 1997, for forming an armed terrorist group intending to harm the security of the country and forethought deliberate

murder.

He was sentenced to three life sentences and two death sentences. Although Algeria retains the death penalty as a punishment, Algeria has not carried out an execution in over twenty years, and therefore is regarded to be in practice abolitionist. While the fact the death sentences were passed and have not been commuted in any way is striking, they are not relevant to these proceedings since it is not now suggested that there is sufficient risk of enforcement to give rise to any claim.

3 The appellant arrived in Ireland on 15th July, 1997, and applied for asylum under a false identity and false documents. His claim for asylum was refused by the Refugee Applications Commissioner. However, he successfully appealed this decision to the Refugee Appeals Tribunal which in the words of the High Court judge "was taken in by his falsehoods", and he was granted refugee status on 2nd April, 2000. He was also granted travel documentation later that year on 10th October, 2000, which as it happened allowed him to leave Ireland to commit multiple offences abroad. It will be apparent from the facts of this case, up to and including the appellant's conduct in response to the deportation order challenged in this case, that the appellant has lied and misled authorities in this country and in others, and has been guilty of offences, some of which were very serious, in a number of European jurisdictions including Ireland. There is no reason to doubt the assessment of him as someone who poses a threat to the security of this state and others. Nevertheless it is said that his deportation to Algeria is precluded by the obligations of this state in international law, now implemented in national law. His case therefore poses a very difficult issue with which other countries and legal systems have also grappled.

4 The appellant was arrested in Andorra for fraud offences in 2001 and was released on bail. From Andorra, he then travelled to Marseille in France in 2002. On the 23rd July, 2002, he was arrested by the French authorities in connection with terrorist related offences. On 29th November, 2006, the Tribunal de Grande Instance de Paris convicted the appellant of the following offences:

> (i) membership of a criminal organisation preparing acts of terrorism in the UK, Ireland, Spain, Andorra and France between 1997 and 2002;
>
> (ii) terrorism/fraudulent detention of numerous false administrative documents, committed in Marseille in 2001 and 2002;
>
> (iii) terrorism/use of a false administrative document which indicates an identity or an occupation, committed in Marseille in 2001 and 2002;
>
> (iv) receiving stolen goods, committed in Marseille in 2001 and 2002;
>
> (v) illegal entry or illegal stay of a foreigner in France, committed in Marseille in 2001 and 2002.

The Tribunal de Grande Instance de Paris sentenced the appellant to eight years' imprisonment. The appellant's brothers, G.Y. and C.Y., were also before the French court at the same time for terrorist related offences; a fact that was later denied by the appellant in his subsequent representations to the Irish asylum authorities.

5 The appellant applied for asylum in France in January, 2009 prior to his release from custody and this application was refused. After being released from prison, the appellant was declared missing in France on the 26th June, 2009. On 1st, September, 2010, the appellant was convicted *in absentia* in the Criminal Court of Verdun for non-compliance

with a residence order for non-nationals faced with deportation. He was sentenced to 6 months' imprisonment in relation to this offence. That sentence appears to be outstanding.

6 In response to the appellant's failed attempt to apply for refugee status in France, the Irish authorities initiated proceedings on 10th February, 2009, to revoke the applicant's refugee status in Ireland. However, the appellant somehow left France and re-entered Ireland unlawfully at some point during 2009. The Minister for Justice and Equality ("the Minister") proceeded to revoke the declaration of refugee status on 5th August, 2011, on the basis that the appellant had provide materially false and misleading information to the Irish asylum authorities.

7 The appellant subsequently filed applications for permission to re-enter the asylum process (section 17(7) of the Refugee Act, 1996, leave to remain (section 3 of the Immigration Act, 1999), and subsidiary protection (Directive 2004/83/EC). Each of these applications were considered and refused by the Minister.

8 In her decision on the s.17 application to re-enter the asylum process, the Minister, in outlining her reasons for rejecting application, noted that the appellant had assumed an identity previously unknown to the Department. The decision dated 18th September, 2014, highlighted the serious inconsistencies between the appellant's original and subsequent asylum applications, as he previously had contended that his brother was killed in Algeria, and was now claiming that two of his brothers received wrongful convictions for terrorist offences in France. These contradictions were deemed to undermine the appellant's credibility. The s.17(7) refusal of permission to re-enter the asylum process was not challenged by the appellant, other than by a written request for a review, which was rejected by the Minister.

The Application for Subsidiary Protection

9 Much focus in this case has been directed to the appellant's application for subsidiary protection. An application was made on the 30th September, 2014, by new solicitors then acting for the appellant. The letter enclosed certain articles and country of origin information which it was asserted established the risk of "serious harm" if returned to Algeria. A person is entitled to subsidiary protection if, not being a refugee, there is a risk of serious harm if returned to his or her country of origin. See: Regulation 2, European Union (Subsidiary Protection) Regulations 2013 (S.I.426 of 2013) implementing in this regard Council Directive 2004/83/EC. Serious harm is defined in S.I. 426 of 2013 as "the death penalty or execution, torture or inhuman or degrading treatment or punishment of a person in his or her country of origin, or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict." This definition is closely related to the provisions of Article 3 of the European Convention on Human Rights which provides that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". It will be apparent that in this case the core allegation was always that the appellant would be subjected to torture or inhuman or degrading treatment.

10 The information submitted in support of the application was very general in nature being an unattributed online report on a refusal to deport an Algerian terrorist from the UK because he was suicidal, a 2014 report published by Telegraph Media group entitled "No end in sight to terror suspects deportation battle", and a report form the European Court of Human Rights entitled "Terrorism and the European Convention on Human Rights". The solicitors then representing the appellant did not make any specific case about Algeria or the particular position of the appellant. It was said merely that "it was evident from the foregoing that persons who are similarly situated to the applicant

encounter a risk of serious harm". The information relied upon, itself limited, appears to be that already submitted in relation to the application for leave to remain under s.3.

11 The appellant attended an interview on 2nd February, 2015, as part of the application process. During that interview, the appellant was asked: "Does [your brother] have any problems [in Algeria] now?" The appellant replied:

> "When he went back to Algeria they were asking him a lot about where am I and what had become of me but my family came to harm because of me and it affected the business and way of life. My brother is ok though I think" (see: Subsidiary Protection Report interview, p.8).

The applicant made further submissions through his solicitors on 5th February, 2015. They resubmitted the information supplied and argued "on the basis of the enclosed country of origin reports" that persons such as the applicant would be at severe risk of serious harm.

12 The Commissioner refused the application for subsidiary protection. The decision ran to 11 pages but the aspect dealing with the risk of serious harm was limited to the submissions made on behalf of the applicant. The Commissioner found that substantial grounds had not been shown for believing that the appellant would face a real risk of suffering serious harm if returned to Algeria. The death penalty had not been enforced for more than 20 years. In concluding that there was no risk of inhuman or degrading treatment, the Commissioner considered it inevitable that the appellant would be arrested on foot of the sentences imposed and imprisoned, but that conditions in such prisons were not such as to amount to such treatment. Furthermore, the Commissioner ruled that that the appellant was excluded from subsidiary protection in accordance with the provisions of Regulation 17 of the EU (Subsidiary Protection) Regulations 2013, by reason of his offending behaviour.

13 The appellant appealed the Commissioner's decision to the Refugee Appeals Tribunal. The letter from the appellant's then solicitor now focused more clearly on the risk of harm/Article 3 issue and submitted more country of origin reports. The information submitted included a factsheet from the ECtHR (2015) on terrorism and the Convention, submissions by Liberty in court proceedings in the UK in 2008 (the relevance of which is not apparent), and reports from the US State Department (2013), Amnesty (2012), a Report by the Refugee Documentation Centre (Ireland) (2009), the Immigration and Refugee Board of Canada (2014), Freedom House (2014), Human Rights Watch (2012 and 2014), and again a 2015 article in the *Daily Telegraph*. As set out above, this information, running to almost 80 pages, was general in nature, and from different periods. Apart from the general assertion referred to earlier, no attempt was made to relate the information to the specifics of the case. The appellant gave evidence and was represented by a solicitor. In his evidence he was asked if his younger brother had any problems since deported to Algeria, and replied "they used to stop him but he's okay now".

14 In its decision dated 3rd February, 2016, the Tribunal addressed the question of whether the appellant was at risk of torture, inhuman or degrading treatment or punishment. The Tribunal member addressed the issue observing:

> "On the basis of this regulation, the practice of this Tribunal and the judgment of the High Court (Hogan J.) *N(S) v Minister for Justice Equality and Law Reform* [2011] IEHC 451, good reasons are required to be set out by the Tribunal if it considers that any serious harm will not be repeated notwithstanding past persecution (in this case, inter alia, he has been shot in the leg and did not receive appropriate medical attention). The passage of over 20 years can be a very good reason why the

> indication factor fades in many cases. In passing, it is noted, that the wording of reg. 13(2)/2013 makes it clear that serious indication is just that, as opposed to a legal presumption . . . but on the facts of the case, there is a personal, present, foreseeable and substantial risk of serious harm by the Algerian authorities. That is not to say that it is probable that he will be tortured or that his fundamental human rights will be abused by the Algerian authorities, simply that there are substantial grounds for believing so. For the avoidance of doubt, imprisoning the appellant following a fair trial for an offence would not constitute serious harm."

15 Nevertheless, the Tribunal upheld the Commissioner's finding that the appellant was excluded from subsidiary protection in accordance with the provisions of Regulation 17(b) of the EU (Subsidiary Protection) Regulations 2013 because he had committed a serious crime. The Tribunal also stated that it was "notable" that the appellant's brother, who had been deported back to Algeria from France after being convicted of terrorist related offences, was "living 'ok' in Algeria" according to the appellant. In his judgment in these proceedings, the High Court judge described the conclusion that the appellant faced a personal present and foreseeable risk of serious harm as having been reached "rather baldly", and continued at para.34:

> ".... it is not at all apparent as to how the tribunal arrived at that conclusion, particularly where it had rejected the claims based on the death penalty and on treatment in prison, and noted that the applicant's brother was not been subjected to serious harm. The tribunal's conclusion seems, with every respect, to be lacking in reasons and in clear grounding in specifically-identified country material, as well as appearing irrational given the rejection of the applicant's case regarding ill-treatment in prison."

16 Following the Tribunal's decision, the Ministerial Decisions Unit of the Department of Justice notified the appellant of the Minster's intention to deport him pursuant to s.3 of the Immigration Act 1999, and notified him of the options open to him, including the possibility of making representations against his deportation. A third firm of solicitors now made representations on behalf of the appellant. In a letter dated 22nd April, 2016, they submitted:

> "Further to this we submit that if our client is returned to Algeria he may face further serious harm. Not only will he be subject to the death penalty, he will face torture and mistreatment. Our client has previously faced this mistreatment before having previously been shot in the leg and not been given the appropriate medical treatment.
>
> There was, and continues to exist, a real risk of torture should our client be returned to Algeria. Not only does the Country of Origin material support and corroborate such an assertion, but it is evidently clear that our client's personal circumstances support this contention. In particular, we refer you to the Refugee Appeals Tribunal which found that the appellant has a real risk of serious harm in Algeria as per Regulation 2 of the European Union (Subsidiary Protection) Regulation[s] 2013."

The submission from the appellant's solicitors to the Minister referred to the following reports:

> (i) Human Rights Watch-World Report 2015- Country Algeria;
>
> (ii) United States Department of State Country Algeria Human Rights Report;
>
> (ii) Material from United States Department of State, Bureau of

Democracy, Human Right and Labour;

(iv) US Department of State Country Report on Human Rights Practices, 2011.

The submission concluded by referring to a submission made by Alkarama, a human rights group, to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (SR TERROR), calling on him to intervene in the case of an activist member of the Algerian League for the Defence of Human Rights who it was alleged for the first 12 days of his arrest had been a victim of torture and ill-treatment while detained incommunicado.

The Minister's Decision

17 The Minister decided that a deportation order should be made. In her analysis accompanying the order to deport on 15th September, 2016, the Minister additionally considered the following country of origin reports:

(i) Country Algeria 2014 Human Rights Reports, US Department of State;

(ii) Amnesty International Report, 2015/16-The State of the World's Human Rights-Country Algeria 24th February, 2016;

(iii) UK Border Agency Report, 17th January, 2013; and

(iv) US State Department Country Report on Human Rights Practices 2015- Country Algeria, 13th April, 2016.

The Minister relied on these country of origin reports to justify her decision that the appellant's deportation would not constitute a violation of his rights pursuant to Article 3 of the European Convention of Human Rights. By letter dated 19th September, 2016, (and stamped the 21st) the appellant's lawyers were notified of the Minister's decision, and provided with a copy of a deportation order made on 15th September, 2016.

18 The decision of the Minister was based upon a report running to 23 pages which the Minister must be taken to have accepted. The decision was made within the Department of Justice by a process of analysis, report and recommendation. It is in law however the decision of the Minister, and for ease of reference I will describe it as such hereafter, even though the reports, decisions and correspondence are all authored by officials in the Minister's Department. Some of the report considered general matters which are not now the subject of dispute or contention. It also recorded the advice by the security and intelligence unit of the crime and security division of An Garda Síochána, that the "appellant's activities and associates within and outside this jurisdiction since his arrival back in the State are considered to be of serious concern and contrary to the State's security."

19 The report referred in detail to a UK Border Agency, Algeria, Country of Origin Information Report (January, 2013) to the effect that "human rights issues are being continually addressed and mechanisms for redress to exist. This is demonstrated through a Commission for the promotion and protection of human rights funded by the Algerian Government". The report also considered the Freedom House, "Freedom in the World 2009 Country Report on Algeria", 14th January, 2009. It referred to a general amnesty contained within the provisions of the Charter for Peace and National Reconciliation which had been approved by the Algerian people by way of referendum in

2005, and considered that this amnesty provided for "the possibility that the Algerian judgements would not be acted upon." It was also noted that the appellant's brother who had been convicted and sentenced to 5 years' imprisonment in France now resided in Algeria "where life "is okay"." The report noted that the last execution for the death penalty had taken place in August, 1993, and concluded in that regard that the fear of execution could be rejected as not being of sufficient weight to establish that there were substantial grounds of a real risk of exposure to execute execution. It is right to reiterate at this point that the question of the enforcement of death sentences has not figured in these proceedings. Indeed, and notwithstanding the references in some correspondence to the death penalty and torture, the risk of harm or breach of Article 3 identified by the applicant has focused rather on the risk of incommunicado detention.

20 The concluding section of the report deserves quotation in full:

> "[The appellant] submits that he was not a member of any political party but that he was a supporter or sympathiser of the Islamic front (FIS). He submits that he provided humanitarian help and financial assistance to those who are in need of that and as a result was arrested on a number of occasions and imprisoned without justification. He further submits that at the end of 1993, following an armed conflict between the opposition groups and the security forces, the security forces stormed his town, rounded up and killed approximately 36 people and that he was shot in the leg. I have noted the medical evidence submitted on [the appellant's] behalf that he was shot in the leg and did not receive proper medical attention which led to adverse physical and mental effects.
>
> I refer to the decision of [the] Tribunal Member for [the appellant's] subsidiary protection appeal hearing, in which it is stated in reference to a foreseeable and substantial risk of serious harm by the Algerian authorities, at page 18; *"That is not to say that is probable that he will be tortured or those fundamental rights will be abused by the Algerian authorities, simple (sic) that there are substantial grounds for believing so. For the avoidance of doubt, imprisoning the appellant following a fair trial for an offence would not constitute serious harm."*
>
> I have noted that the tribunals member found that there was a risk of serious harm as per regulation 2 of the European Union (Subsidiary Protection) Regulations 2013, however he has also determined that crimes committed by[the appellant] constituted serious grounds for excluding the appellant from international protection under reg. 17 (1) (b).
>
> The Judgement of Murray C.J. in the case Meadows v Minister for Justice, Equality and Law Reform, delivered on 21 January 2010, states the following:
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> "On the other hand it may well be that the Minister did consider refoulment an issue and that there was evidence of the appellant in this case being subject to some risk of being exposed to FGM but a risk that was so remote that being subject to FGM was unlikely: alternatively he may have considered that while there was evidence put forward to suggest that the appellant might be subject to FGM that evidence could be rejected as not being of sufficient weight or credibility to establish that there was any risk."
>
> I refer to the recent decision of Humphreys J in X.X. v Minister for Justice

and Equality [2016] IEHC 377 in which it is stated:

> "*Of course the question to be applied by the court is not whether there was any country of origin information supportive of the applicant's position. It is whether the applicant has discharged the onus of proof to show that there was a risk of ill-treatment such that the decision made fell outside the range of decisions that were reasonably open to the Minister. . .*"
>
> I have considered all the facts of this case. It is accepted that there are concerns in Algeria's human rights records and deficiencies in current practices. It is accepted there is that there is a strong possibility that [the appellant] would be sent to prison of return to Algeria however having weighed and considered the submissions, the country of origin information and all the information on file, it is considered that the evidence put forward does not have sufficient weight to establish that [the appellant] is at risk of torture and inhumane treatment or execution of return to Algeria.
>
> Accordingly, I am of the opinion that repatriating [the appellant] to Algeria is not contrary to Section 5 of the Refugee Act 1996, as amended, in this instance."

21 The appellant was directed to present himself at the Garda National Immigration Bureau on the 19th October, 2016, to facilitate his removal from the State. However, on 16th October, 2016, the appellant was arrested at Dublin Airport while attempting to board a flight to Athens using a false Belgian identity. He was brought to Ballymun Garda Station and was charged with an offence under s.29 of the Criminal Justice Theft and Fraud Offences Act 2001. At the subsequent hearing, he pleaded guilty to the offence and was later sentenced to 6 months' imprisonment. That sentence has now expired and the appellant is detained pursuant to the provisions of section 5 of the Immigration Act 1999.

22 While the appellant was in Garda custody, he commenced judicial review proceedings in High Court challenging the s.3(1) decision, which that court dealt with by way of a telescoped hearing on 26th October, 2016. The matter was subsequently adjourned to allow the appellant to make an application under s.3(11) of the 1999 Act for revocation of the deportation order. The s.3(11) application was made on 22nd November, 2016. This s.3(11) application was refused by the Minister on 6th December, 2016. On 13th December, 2016, Humphreys J. granted the appellant leave to amend the statement of grounds in order to challenge the s.3(11) decision. It might be noted that the question of the entitlement of the appellant to remain in Ireland, or conversely the capacity of the State to deport him, had now been ongoing for more than 7 years. The course adopted by the trial judge, first in fixing a telescoped hearing and then in seeking to have the section 3(11) issue pursued and if challenged, determined in these proceedings, was commendable. The fundamental issue at almost every stage (however formulated) was whether the State was entitled to conclude that there was no real and substantial risk return of the appellant to Algeria would result in treatment contrary to Article 3, and it was sensible to seek to have that issue comprehensively addressed.

The s.3(11) Revocation Application and Decision

23 By letter of 22nd November, 2016, the appellant's solicitors made submissions to the Minister under section 3(11). The submission contained an assertion not previously made that the appellant "was arrested and tortured on several occasions for political

reasons in Algeria in the 1990s." The submission also contained information which appeared to be incorrect such as that his brother had not been convicted of any offence related to terrorism. At paragraph 22, it was asserted that the Minister had failed to consider relevant information in relation to the "use of secret places of detention." Reference was also made to the risk that the intelligence services in Ireland or in other jurisdictions had informed the Algerian authorities that the appellant represented a current threat to national or international security. The submission also relied on European Court of Human Rights cases including *Daoudi v. France* (App. No. 19576/08), *H.R. v. France* (App. No. 64780/09), and *M.X. v. France* (App. No. 21580/10). Reference was also made to the position of the United Kingdom Government that assurances and/or verification mechanisms are necessary when deporting a person to Algeria, and the findings of the UK Special Immigration Appeals Commission as to the inadequacy of those assurances or verification mechanisms (*BB v. Secretary of State for the Home Department*, SIAC decision, 18th April, 2016). It was submitted that the combined effect of the case law was to constitute a body of specialist decisions from which the Minister should only depart if there was a development such as a change in the law relating to the appropriate test to be applied, or significant new evidence which demonstrated a material change in conditions in Algeria, or placed evidence previously considered in a different light. No such development had occurred, it was submitted. It was also argued that there was no material change in the risk of torture to persons suspected or convicted of involvement in terrorism since the publication of the relevant country information reports which had already been submitted to the Minister on the applicant's behalf. The submission then enclosed the United States State Department Report for 2015, which had in any event already been referred to and relied on by the Minister.

24 Again the decision of the Minister on the section 3(11) application for revocation requires to be set out in some detail. The report dated 6th December, 2016, ran to 17 pages. Much of the consideration contained therein is either standard, or no longer in controversy. The report noted that the offences for which the appellant's brother had been convicted in France included involvement in a criminal organisation, preparing an act of terrorism and fraudulent possession of several documents. Accordingly, it was considered that the appellant had misrepresented the age and position of his brother who, despite having convictions for terrorist offences, had been enjoying an "okay" life in Algeria. This misrepresentation it was considered called into question the candour of the applicant (not, it might be said for the first time) and indeed undermined the contention that a person convicted of terrorist offences in France would necessarily be subjected to harsh treatment in Algeria. Again, it was noted that the submission misrepresented the position in relation to another brother who had also been convicted in France.

25 In relation to the question of secret places of detention, the report noted that the Minister had considered the most recent US State Department country report which made no reference to such secret places of detention. It was stated that prison and detention centre conditions in Algeria generally met international standards. In 2013, a presidential decree dissolved the Central Bureau of the Judicial Police under the Intelligence and Security Department (DRS) removing its authority to detain individuals and hold them in separate detention facilities. A June 2014 presidential decree, however, reinstated this authority and permitted the DRS to manage prison facilities. The s.3(11) report considered that the US State Department report made no reference secret places of detention and indicated that detention practices standards and independent monitoring have improved significantly since the US State Department report of 2013. It was considered that the evidence submitted by the appellant in this regard did not contain any significant new information, and did not have sufficient weight to establish that the appellant was at risk of torture and inhumane treatment of

return to Algeria.

26 Under the heading "Article 3 of the European Convention on Human Rights and ECtHR decisions", the s.3(11) report accepted that "there were deficiencies on human rights practices in Algeria." It referred to the United States State Department Country Report on Human Rights Practices 2015-Algeria. The s.3(11) report then repeated the extract from the judgement of Chief Justice Murray in *Meadows* including the underlined portion: "that evidence could be rejected as not being of sufficient weight or credibility to establish that there was any risk". ([2010] 2 IR 701, at p.733). Once again the s.3(11) report repeated the approach of the Minister's decision, by quoting from the judgement of Mr. Justice Humphreys in *X.X. v. Minister for Justice* [2016] IEHC 377, and underlined the words: "the decision made fell outside the range of decisions that were reasonably open to the Minister." The report also paraphrased the dictum of Clarke J. in *Kouaype v. Minister for Justice, Equality and Law Reform* [2011] 2 IR 1 at p.11 that "it would require very special circumstance (sic) to challenge a deportation order unless there was a failure to consider s.5 of the 1996 Act, or the Minister could not reasonably have come to the view she did". The underlining is that contained in the s.3(11) report, which seems to suggest that the author, and for these purposes therefore, the Minister, placed some reliance on the selected passages.

27 The report then addressed the impact of the Tribunal's decision. It was submitted that the decision of the Minister pursuant to section 3 of the Immigration Act 1999 was a process independent of the asylum international protection process which included the duty of the Minister to consider non-refoulement under section 5 of the Refugee Act 1996 (as amended). It observed that the Minister, in her examination of the humanitarian application and the making of a deportation order, was "not bound by the findings of bodies designated to analyse the asylum and subsidiary protection applications. [Its decision related] to different matters and the standards applicable to each are different." The report continued: "it is also the case that the Minister's assessment of conditions in Algeria is more recent than that made by the Tribunal and is done in the light of Country of Origin information which shows an improving human rights situation in Algeria." The report also quoted the decision of Murray J. in *Sivsivadze v. The Minister for Justice and Equality* [2013] IESC 53 and also of the late Mr. Justice Hardiman in *F.P. v. Minister for Justice, Equality and Law Reform* [2002] 1 IR 164 at p.172 as to the status of a person seeking to resist a deportation order: "both the fact that they had been refused refugee status, and the nature of the decision awaited as it appears from the Act of 2000, emphasise that this was in the nature of an *ad misericordiam* application." Again the underlining is that contained in the original s.3(11) report. The report concluded that the country of origin information submitted had been available at the time of the previous application and that the submissions in relation to the United Kingdom and European Court of Human Rights decisions were similarly available. It was further considered:

> "that the evidence put forward to suggest that [the appellant] might be subjected to persecution, harm, or risk of abuse by way of torture or inhumane and degrading treatment in Algeria is not of sufficient weight to establish that that there is any such risk. Further it was for, [the appellant], in asking for revocation under section 3(11), to demonstrate some new basis that has not been previously considered by the Minister. The additional information submitted has been given due consideration."

The report found that there was "no new information submitted that [tended] to suggest that the Minister should depart from the earlier orders."

The Decision of the High Court

28 In his judgment dated the 13th March, 2017, Humphreys J. dismissed the appellant's challenge to both the s.3(1) and s.3(11) decisions. The labyrinthine nature of the

appellant's case was evidenced by the fact that the appellant advanced no less than 16 grounds of challenge. It will be necessary to refer to that judgment in more detail later. This trend continued when the appellant sought leave to appeal to the Court of Appeal pursuant to s.5 of Illegal Immigrants (Trafficking) Act, 2010 on the basis that that fifteen points of law of exceptional public importance arose out of the judgment dated 13th March, 2017. Humphreys J. refused leave to appeal on all grounds of appeal in a decision dated the 24th March, 2017 ([2017] IEHC 185). Subsequent to this decision, Humphreys J. in a judgment dated 24th March, 2017, ([2017] IEHC 334) refused the appellant a stay on deportation pending an application for leave to appeal to the Supreme Court.

29 The appellant subsequently sought leave to appeal via a "leapfrog" appeal to the Supreme Court pursuant to Article 34.5.4º of the Constitution. For reasons set out in the Determination dated 30th March, 2017, ([2017] I.E.S.C.DET. 38), the Court accepted that as the law stands, a party may apply to appeal directly to this Court under Article 34.5.4º (the so-called leapfrog procedure), notwithstanding the refusal by the High Court of a leave to appeal to the Court of Appeal. In the Supreme Court granted leave on the following grounds:

> (i) Where a Minister orders deportation of an individual and relies on country of origin material which is generally available to conclude that return of an applicant to a country would not be a breach of s.5 of the Refugee Act 1996, and/or that there are no substantial grounds for considering that there is a real risk that the applicant will be subjected to treatment contrary to Article 3 of the Convention, is the Minister required to notify the applicant of the said material and invite submissions upon it?;
>
> (ii) If the Minister is under such an obligation, is it satisfied, or otherwise affected, by the fact that an applicant was provided with the reasons for the making of a deportation order, including the reference to the said material, and is entitled to apply for a revocation of that order (and did so)?;
>
> (iii) Given that in comparable cases the ECtHR or other reputable national immigration authorities, or in the particular case, the Refugee Appeals Tribunal, have made findings that there is a real risk on substantial grounds, if a person in a comparable circumstance [to] the applicant in this case are returned to Country X that they will suffer a treatment which is a breach of Article 3 of the Convention, did the reasons provided by the Minister for (i) making the deportation order under s.3(1) and (ii), refusing to revoke the deportation order under s.3(11) of the 1999 Act, provide a sufficient lawful basis for the said decision?

30 Additionally, the Supreme Court ordered on the 30th March, 2017, that the appellant's deportation order be stayed pending this appeal on condition that the appellant would undertake not to challenge the validity of his detention in prison; an undertaking which was given. Thereafter, the appeal was case managed and heard on the 31st May, 2017.

The Law

31 The argument in this case is focused almost entirely on Article 3 of the European Convention on Human Rights. At the outset it is necessary to observe that the approach to litigation in this jurisdiction, particularly in this field is clearly influenced by the jurisprudence of the ECtHR and also the experience of the UK jurisdictions which have considerable experience of dealing with contentious immigration asylum and deportation

cases, in the context of a common law jurisdiction with a sub constitutional incorporation in domestic law of the ECHR. This is natural and for the most part helpful. But it is necessary to recall that there are differences in the manner in which the Convention is incorporated here, most notably in that the Courts are not public bodies for the purpose of the Act, and in any event there are significant limitations on the remedies available. In principle therefore it is always advisable, and indeed necessary, to address the question as to the impact of the Constitution, which in most cases has an equal if not greater reach than the Convention and more powerful remedies. Here however the Minister is undoubtedly a public authority bound to act in accordance with the Convention and it has not been suggested that the standard required by the Constitution is higher than that required by Article 3 of the Convention which has been much litigated, and was the centrepiece of the argument in the High Court and this Court. Accordingly the Court will adopt this analysis for the purposes of the present case. Article 3 provides that no one shall be subjected to torture or inhuman or degrading treatment. In *Soering v. The United Kingdom* (1989) 11 EHRR 439, the European Court of Human Rights decided that the guarantee could have an impact beyond the territory of the contracting states, and included decisions on expulsion from a contracting state to another state where it was alleged that a person would be subjected to torture or inhuman or degrading treatment in the receiving state. The test to be applied was whether there were *substantial grounds* for believing that there was a *real risk* of torture or inhuman or degrading treatment, and if so a person could not be surrendered, deported or expelled to such a country. In 1996 and again in 2008, the European Court of Human Rights decided that the guarantee under Article 3 was absolute and applied in all circumstances.

32 Accordingly, although the consequence of refusing deportation or expulsion that the applicant would remain within the contracting state, it was irrelevant that there might be compelling national security reasons for expulsion from the state. The same test applied, whether the individual was a pacifist and political activist, or a person believed to pose a serious threat to the security of the contracting state, and perhaps to the life and safety of its inhabitants. While it was a matter for the national decision making bodies to decide whether the Soering test was satisfied on any deportation and in any proceedings challenging a review of that decision, the European Court of Human Rights retains and exercises its own jurisdiction to entertain complaints and will, if necessary, adjudicate on the question of whether there is a real risk on substantial grounds that a deportation, expulsion, or surrender would result in torture or inhumane or degrading treatment.

33 It is useful to consider some of the cases decided by the European Court of Human Rights on Article 3, not least because of some of them concern possible return to Algeria. In Saadi v. Italy [2009] 49 EHRR 30, the applicant was a Tunisian national living in Italy. He was arrested on suspicion of involvement in international terrorism. He was convicted of a criminal conspiracy and other offences, and sentenced to a jail term with an order for deportation at the end of the term. He petitioned the European Court of Human Rights. The UK intervened in the proceedings to argue that where the person concerned posed a threat to national security, then the decision should involve a balancing of the risk, against the danger posed.

34 The Court considered Amnesty International reports on Tunisia. Among other things, the reports mentioned a number of specific cases of named individuals held incommunicado and tortured in police custody. Furthermore, Amnesty International had issued a specific statement concerning the applicant. It expressed the concern that Mr. Saadi would be at risk of torture or other grave human rights violations if removed to Tunisia. It set out in some detail the treatment of individuals considered to be in situations comparable to Mr. Saadi in that they had also been the subject of convictions on terrorism related offences and returned forcibly to Tunisia and tortured. The evidence

recounted by Amnesty International was related to the particular case, and the report stated at paragraph 71:

> "The human rights violations that were perpetrated in these cases are typical of the sort of violations that remain current in Tunisia and effect people arrested inside the country as well as those returned from abroad in connection with alleged security or political offences. We consider therefore that Nassim Saadi would be at serious risk of torture and unfair trial if he were to be transferred to the custody of the Tunisian authorities."

The Court also considered reports from Human Rights Watch and reports from the activities of the International Red Cross, and a further report from the US State Department. All of these reports were essentially consistent.

35 The approach of the European Court of Human Rights in regard to the country of origin information was set out at paragraph 142 of the judgment:

> "Furthermore, the Court has frequently indicated that it applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment in the event of a person being removed from the territory of the respondent State by extradition, expulsion or any other measure pursing that aim. Although assessment of that risk is to some degree speculative, the Court has always been very cautious examining carefully the material placed before it in the light of the requisite standard of proof before indicating an interim measure under Rule 39 or finding that the enforcement of removal from the territory would be contrary to Article 3 of the Convention. As a result, since adopting the *Chahal* judgment it has only rarely reached such a conclusion."

36 This passage is helpful. It sets out a requirement of the application of "rigorous criteria" and "close scrutiny", but also includes a useful description of the yardstick by which to measure the outcome of the test. It is said it is only "rarely" that the Court of Human Rights has reached a conclusion after the application of close scrutiny, that there exists a real risk of ill-treatment. In the *Saadi* case however, the Court found that the test had been satisfied. The Court concluded at paragraph 143, as follows:

> "In particular, these reports mention numerous and regular cases of torture and ill-treatment meted out to persons accused under the 2003 Prevention of Terrorism Act. The practices reported - said to be often inflicted on persons in police custody with the aim of extorting confessions - include hanging from the ceiling, threats of rape, administration of electric shocks, immersion of the head in water, beating and cigarette burns, all of these being practices which undoubtedly reach the level of severity required by Article 3. It is reported that allegations of torture and ill-treatment are not investigated by the competent Tunisian authorities, that they refuse to follow up complaints, and that they regularly use confessions obtained under duress to secure convictions. Bearing in mind the authority and reputation of the authors of these reports, the seriousness of the investigations by means of which they were compiled, the fact that on the points in question their conclusions are consistent with each other and that these conclusions are corroborated in substance by numerous other sources, the Court does not doubt their reliability. Moreover the respondent Government has not adduced any evidence or reports capable of rebutting the assertions made and the sources cited by the applicant."

It should be emphasised for present purposes that this case concerned deportation to

Tunisia. The evidence was focused on the particular applicant and the evidence of likely treatment, was clear, consistent and strong.

37 The approach in *Saadi* was followed in the case of *Daoudi v. France* (App. No. 19576/08) which was decided on the 3rd March, 2010. This Court has been furnished with the text of the judgment in French, and an accompanying detailed press release. The applicant Monsieur Daoudi was an Algerian national how had been living in France for a long time. He was suspected of association with radical Islamist groups and of having prepared a suicide attack on the US Embassy in Paris. He was convicted of offences of conspiring to prepare an act of terrorism and had been sentenced to a lengthy term of imprisonment and also been made the subject of an order of permanent exclusion from French territory on the expiry of his sentence. He was to be deported to Algeria. In this respect, the facts are particularly close to the facts of this case. Monsieur Daoudi had been convicted of acts of terrorism in France and it was proposed to deport him to Algeria. Indeed the similarities went further, in that Monsieur Daoudi had applied for asylum, and the French Court of Asylum observed that the nature and extent of his involvement in radical Islamic movements was such that it was reasonable to believe that he would be subjected to inhuman and degrading treatment on his return to Algeria. However, it found that he was excluded from the asylum process because of the nature of his activities.

38 The European Court of Human Rights held that the implementation of the order deporting him from France to Algeria would be a violation of Article 3. The conclusion was set out in the press release as follows:

> "It was clear from many corroborative, reliable and recent sources (including reports of the United Nations Committee Against Torture, a number of non-governmental organisations, the US Department of State, and the UK Minister of the Interior) that in Algeria persons involved in terrorist acts were arrested and detained by the Department for Information and Security (DRS) unpredictably and without a clearly established legal basis essentially for the purposes of being interrogated or obtaining information and not with a purely judicial aim. According to those sources, such persons placed in detention without review by the judicial authorities and without any communication with the outside (lawyer, doctor or family), could be subjected to ill-treatment including torture. The Government had not produced evidence to refute those assertions, and, furthermore the National Court of Asylum had also considered it reasonable to believe that given the interest which the Algerian Security Services might take in him, Mr Daoudi might, on his arrival in Algeria, be subjected to inhuman or degrading treatment."

39 *H.R. v. France* (App. No. 64780/09) was decided nearly two years after *Daoudi*. It also concerned an Algerian national. In this case the Algerian authorities had sought to prosecute him for the establishment of a terrorist group and for murder. He found his way to France, and while there had been convicted of criminal offences. It was proposed to deport him from France to Algeria. Application was made to the European Court of Human Rights which noted that there had been "little change" in the situation of Algeria from the time the case of *Daoudi* was decided in December 2009 to the date of judgment in *H.R*. in September 2011, even though the state of emergency had been lifted. The Court considered that the conviction for terrorism-related offences would be sufficient to draw the applicant to the attention of the authorities in Algeria if returned. Accordingly:

> "Until the lifting of the state of emergency on the 23rd February, 2011 the army and the civilian authorities (in particular the Ministry of the Interior) had been responsible for conducting the fight against terrorism. Several

> international organisations had reported cases of torture of suspected terrorists. In view of the fact that the state of emergency had been lifted only recently, the Court did not have specific information capable of confirming or refuting the existence of such practices. It noted that the fight against terrorism in Algeria was now conducted exclusively by the army and that, according to a press release from the Algerian Council of Ministers on the subject of two pieces of legislation enacted when the state of emergency was lifted, that did not amount to any "change in the situation", but to a continuation of "the role of the national people's army in the struggle to put an end to terrorism". . . [T]he Court considered that [H.R.] faced a real risk of being subjected to ill- treatment contrary to Article 3 of the Convention should the order for his removal be enforced."

40 Another case submitted to the Court was the case of *J.K. v. Sweden* (App. No. 59166/12). *J.K*. did not concern Algeria, but rather the question of the proposed deportation of an Iraqi national who had run a construction business servicing exclusively American clients with an office at a US military base and who had been the target of murder attempts and bomb attacks by Al-Qaeda. It was proposed to deport him to Iraq. The case is useful in that it elaborates upon the approach that a national authority should take in relation to a claim that removal or deportation should not take place because of the risk of the violation of Article 3. The decision emphasised the principle of subsidiarity and that it was generally not the task of the ECtHR to substitute its own assessment of the facts for that of a domestic court.

41 Furthermore, the Court in *J.K.* ruled that it was in principle for the applicant to adduce evidence capable of proving that there were substantial grounds for believing that if the measures complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. It stated that that assessment must focus on the foreseeable consequence of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances. The contracting state had an obligation to take into account, not only the evidence submitted by the applicant, but also all other facts relevant in the case under examination. In assessing the weight to be attached to country of origin material, the Court had found that consideration must be given to the source of such material, in particular its independence, reliability and objectivity. The authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, and the consistency of their conclusions and their corroboration by other sources, were all relevant considerations. It should be noted here that the information submitted in the present case appears more general and unfocused, and the analysis more rudimentary than the material considered in J.K. and other comparable cases.

42 At paragraphs 94-99 of the judgment, the Court said that:

> "As a general rule, an asylum-seeker cannot be seen as having discharged the burden of proof until he or she provides a substantiated account of an individual, and thus a real, risk of ill-treatment upon deportation that is capable of distinguishing his or her situation from the general perils in the country of destination. . .
>
> It is also important to take into account all the difficulties which an asylum- seeker may encounter abroad when collecting evidence. . . The Court notes that, as far as the evaluation of the general situation is concerned, a different approach should be taken. In respect of such matters, the domestic authorities examining a request for international protection have full access to information. For this reason, the general situation, including the ability of its public authorities to provide protection, has to be established *proprio motu* by the competent domestic

> immigration authorities."

The Court observed that a similar test was applied by the UNHCR and under the qualification directive of the EU.

43 A concurring judgment noted that under the Court's well established case law, the court examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one, in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe. A separate concurrence referred to the judgment of the Irish High Court in *X.X. v. The Minister for Justice and Equality* [2016] IEHC 377 which expressed the hope "that the finding of a violation would arise only where the breach was clearly established", and concluded that rigour and care were essential.

44 Finally, the Court was also referred to a decision of the Special Immigration Appeals Commission, *BB & ors v. The Home Department* delivered on the 18th April, 2016. This involved litigation described by the Commission as by any standards exceptionally long and fraught, which concerned a proposal to deport a number of individuals from the UK to Algeria. The case however did not involve a determination as to whether the test of a violation of Article 3 was met in these cases. Instead that fact was conceded for the purposes of the argument and the issue to be determined was the effectiveness of assurances offered by the Algerian authorities. Nevertheless, in considering those assurances, the Commission made a number of observations on the position in Algeria.

45 Expert evidence was given by two witnesses: Dr Claire Spencer and Dame Anne Pringle. Dr Spencer, an academic with long experience and knowledge of the Maghreb including Algeria, and who had been formally attached to the International Institute for Strategic Studies and the International Crisis Group, held a post at King's College London in the Centre of Defence Studies and was attached to Chatham House. The other witness, Dame Anne Pringle, was a very senior former British diplomat who had risen to the level of ambassador, and held the appointment as the UK's Special Representative for Deportation with Assurances. At paragraph 35 of the judgment, it was stated:

> "Both expert witnesses agreed, with unimportant differences of emphasis, that Algeria's progress since the dark days of the civil war in the 1990s had been marked. The terrible brutality of that decade, said Dame Anne, was a thing of the past and "there are no longer widespread or systematic cases of abuse by the authorities". Dr Spencer's view was much less sanguine, whilst accepting that there had been major change since the end of the civil conflict."

46 The Commission observed that in its view, there could be no doubt that there has been marked improvement in Algeria over the last 20 years. Much of the case considered the position of the Algerian Intelligence Services, the DRS. Again, the Commission noted that "there had been some shift in recent times in the powers and position of the DRS" which had its powers much reduced. Nevertheless, it was agreed that the DRS had detention facilities in Algeria "where it is beyond doubt that serious mistreatment of prisoners on a significant scale had happened in the past." The 2015 report of the US State Department had identified detention by the DRS as a particular problem, and noted:

> "Overuse of pre-trial detention remained a problem. Authorities held individuals detained as terrorism suspects at facilities administered by the DRS."

47 This evidence was supported by Amnesty International. The Commission also heard

specific evidence about the detention of an individual. At paragraph 84, the Commission made observations about the risk to the families:

> "In this context, Dame Anne gave her view that fears of reprisal or difficulties on the part of families were "overblown". Dr Spencer conceded that the climate of fear for Algerian citizens generally was diminished, given the improvements in society over the last five to ten years. Dr Spencer maintained her view that families would be fearful. We understand that Dr Spencer was unable to cite specific examples of reprisal. However we note the historic evidence of Mr Layden on this issue in relation to 2012. In our view this is of some significance. For the reasons we have given we do not accept that there has been a complete sea change atmosphere over the last three years."

48 It is apparent therefore, that as discussed in passing in *H.K*., that the position in Algeria has not been static in recent years, and that there appears to be general agreement that it has improved. Nevertheless, the Commission concluded that on the specific issue which it had to decide, that it was not possible to treat the assurances offered by the Algerian Government as sufficient to permit the applicants to be deported to Algeria. It should be noted furthermore, that the procedure before the Commission involved both closed and protected evidence modules, and that the judgment referred only to evidence which had been given in open court. An addendum to the decision noted that the Commission had received a message from the UK authorities stating that by presidential decree of the 20th January, 2016, the DRS had been disbanded. Nevertheless, the Commission considered that that information was not sufficient to conclude that there was a material change in the personnel or culture or security of the intelligence services. It is clear from this however that the situation in Algeria continues to develop and therefore up-to-date information and analysis are particularly important.

49 Before turning to the judgment of the High Court, it may be useful to consider the task facing the national authorities faced with making decisions on this issue, in this case the Minister and the courts, but in other circumstances the Commissioner and Refugee Appeals Tribunal in the asylum process. Given the statutory restriction on appeal to the Superior Courts from decisions on deportation and other related issues, the legal burden falls largely upon the High Court. The decision of this Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 is one component of a well developed code of judicial review which permits exacting scrutiny of the legality of the decision of the Minister.

50 The analytic framework established in *Meadows* and other case law is applied to a decision or series of decisions in which the major components are not within the power of the national authorities, executive or judicial but rather are set by the provisions of the ECHR as interpreted by the ECtHR. The national decision maker must take as given therefore the terms of Article 3, the determination of the scope of that Article and in particular the definition of what is contained in the concept of inhuman or degrading treatment. The case law also established that as it stands no distinction is made between a case in which a person with a legal right to remain in a country and who alleges that they will be subjected to treatment which is not permitted by Article 3, and one where a person has been determined to have no legal right to remain in the country, and who indeed may pose a real threat to the host state and friendly neighbouring states. The jurisprudence of the ECtHR also fixes the test to be applied: a real risk on substantial grounds of conduct being subjected to treatment which itself is forbidden by Article 3. All of this is overlaid upon a refugee and asylum process which is now largely, if not completely, controlled by the law of the European Union. What remains within the province of the national decision maker is the determination in the individual case of the existence of a real risk on substantial grounds. That is an issue which may also be addressed by the ECtHR.

51 The test of real risk on substantial grounds, is one used in many comparable areas of domestic law, and it is important to recognise that it has certain consequences. As observed in the concurring judgment of Judge Zupanèiè in *Saadi v. Italy* [2009] 49 EHRR 30, this is a different task to that normally performed by courts in the sense that it considers the probability of future events, rather than the likelihood that an event has occurred in the past. As he observed at page 774, "while in both cases we are dealing with situations that are cognitively never completely accessible, the "evidentiary" problem concerning future events is far more radical". This is particularly important given the fact that the assessment of the evidence is the essential function of the national authorities charged with both decision making and review.

52 It is in the first place difficult to identify precisely what is a "real risk", even in numerical terms, and even more difficult to agree that in any given case what passes, or falls short of that threshold. However framed, the test necessarily means the refusal of deportation of people who on the balance of probabilities would not suffer torture or inhuman or degrading treatment, and the lower the threshold for risk, the higher the number of persons who will not be permitted to be deported to that country. Where the only downside consequence is that a person becomes entitled to remain in the host country, it is easier to err on the side of caution, but it is much more difficult if the person poses serious risk in the host country. It become very important to ensure that the test of what constitutes conduct contrary to Article 3 is closely scrutinised, and the evidence alleged to establish such a risk is rigorously examined.

53 The real risk test leads to another phenomenon which is sometimes overlooked. Addressing the possibility of the risk of a future event occurring is subtly different from assessing the probability that a past event occurred. Assessment of a risk of a future event places an unintended premium on vague generalisations and sometimes irresponsible assertions over cool measured and informed expertise. From an applicant's point of view, if there is information and evidence of whatever strength establishing some instance of conduct which would contravene Article 3, then there may be little incentive to encourage further consideration of such matters. Further investigation may of course firm up the evidence and give substance to the concern but it may also reduce the risk as assessed, by establishing that the events are unusual, random and may have no real relationship with the applicant or a person in a comparable category. But if the generalised concerns of uncertain origin are already sufficient to establish a real risk, then an applicant may deploy that evidence and has little incentive to go further and seek to establish that matter with greater certainty. The test therefore provides a perverse incentive towards confusion and generalisation, rather than clarity and precision. This is all the more difficult because given that the core activities prohibited by Article 3 are matters which are rarely publicised when they occur and often go hand in hand with restrictions on human rights such as the existence of an independent judiciary and free press in such countries, clarity and precision are ideals which are particularly difficult to achieve.

54 None of this in intended to cast doubt upon the jurisprudence of the ECtHR. The interpretation of the Convention is a matter for that court. Since the implementation of the Convention into domestic law in 2003, the Irish courts must and do apply that jurisprudence. Indeed, in a global world which does not necessarily share human rights values enshrined in the 1937 Constitution or the 1950 European Convention, and where in some countries which do espouse such values, such values themselves are under attack, it follows that any system of adjudication would struggle with balancing the competing demands of responding to threats to state security while staying true to fundamental values. Any such legal system may almost inevitably come to some version of the approach adopted by the ECtHR. It would be quite wrong to suggest there is any easy legal solution to this difficult problem. Indeed, for national courts the jurisprudence of the ECtHR may be positively helpful since it sets agreed boundaries, and a definite

structure for analysis and providing examples of its application. The significance of all this for present purposes is however to identify the relatively narrow field for decision by the national decision makers. That is the assessment of whether the evidence discloses a real risk on substantial grounds of the individual being subject to treatment which would breach the standard contained in Article 3. It is critically important that the national decision maker apply that test in a searching way with real care and rigour.

55 This case however does not involve the Court making its own decision on the material in this case. It is a review of the decision by the national decision maker by the Court. It is important in that regard to be aware that the purpose of rigorous and searching scrutiny of the evidence is to assess the risk of conduct breaching Article 3 if the individual is returned, deported or expelled. That is not the same as a minute and unforgiving analysis of the decision itself. A decision made by decision makers such as the Minister in conjunction with his or her officials, must necessarily consider and apply legal tests. However, such a decision is not to be condemned for failing to achieve the standard of refined logical reasoning and precision of expression to which judgments of the Superior Courts aspire, but do not always achieve. Rigorous scrutiny does not involve a search for any error, or for some doubt about the language used. Rather it should involve an attempt to understand fairly what the decision maker has decided in that regard, and to consider then whether the decision that there is or is not a real risk on substantial grounds of a breach of Article 3, was lawfully and properly grounded in a rigorous assessment of the evidence.

Judgment of the High Court

56 The High Court judgment is an impressive exercise which gathers together the quite diffuse evidence and arguments in this case, and provides a penetrating and lucid analysis of both. The bulk of the High Court hearing was concerned with arguments that the Minister's decision was governed by EU law, and that in any event in approaching that decision he was bound by the finding of the Refugee Appeals Tribunal. It is not necessary to consider those or any of the other non-certified issues in detail since they no longer are the subject of these proceedings. However, this should not be understood as an endorsement of all that is said in an extensive judgment. I would myself expressly reserve for a further occasion to which it was relevant and necessary to decide, the question considered in the judgment, as to whether there is an unenumerated right to an effective remedy as suggested at paragraph 64 of the judgment, or indeed the novel theory of natural rights which appears to underpin it. Concentrating for the moment on the issues which have been certified by this Court as of importance to merit appeal to this Court, the trial judge considered first, that the Minister was not required to notify the applicant of any mainstream country of origin information. Thus, at paragraph 98, he concluded that any applicant (and more pertinently any legal representative) must be taken to have access at all times to general published country information of this kind, and must be taken to be aware that such general material is the background against which protection claims will be assessed. Obscure material that is going to materially change the picture appearing from the basic and universal material should however be notified. Accordingly, it was not necessary to consider whether if such information had been notified, the s.3(11) procedure for revocation was a sufficient opportunity to make submissions in respect of such material.

57 The trial judge also addressed the question of the reasonableness of, and the associated question of the reasons for, the Minister's decision. At paragraph 103, he observed that much of the country of the origin information is supportive of the proposition that there is a real risk that terrorist suspects (and in some cases convicted prisoners) are held for periods in possibly secret detention centres and incommunicado; a lack of facilitation of visits from Amnesty, the UN Rapporteur on Torture, or the UN Working Group on Enforced or Involuntary Disappearances; and a lack of implementation of UN Committee Against Torture recommendations on the death of a

detainee in December, 2006. At paragraph 117 having considered all the material, he concluded that the personal circumstances of the applicant here superficially were not unduly dissimilar from those of the applicants in *Daoudi* and *H.R.* with the significant exception that the applicant's brother also a terrorist convict in France, and was living openly in Algeria and apparently was "okay". However, he noted that the Minister had more up-to-date country of origin material than that referred to by the Strasbourg Court, and concluded at paragraph 120:

> "Overall, the decision is within the range of decisions reasonably open to the Minister having regard to both the personal circumstances of this particular applicant, and the totality of the country material including the up-to-date material."

Accordingly, the High Court dismissed the application.

58 On the 24th March, 2017, the Court delivered a further written judgment on the applicant's application for leave to appeal to the Court of Appeal. The trial judge was critical, in my view with some justification, of the indiscriminate nature of the grounds advanced. In any event however, he considered the 15 points of law alleged to be matters of exceptional public importance, and concluded that none of them met the statutory test. On the same day, the High Court delivered an ex tempore judgment refusing to extend further the stay which had been granted in the judicial review proceedings. On the 30th March, 2017, this Court granted leave to appeal on three grounds set out at paragraph 29 above and granted a stay pending the determination of this appeal. That exercise was greatly assisted by the detailed and searching consideration given by the High Court judge to the application for leave to appeal to the Court of Appeal.

Submissions of the parties

59 The submissions of the parties were extensive. The respondent Minister's written submissions complained, with some merit, that the applicant sought to go outside the grounds certified and address additional grounds of appeal both relating to law and fact. In this case given the urgency of the proceedings, this issue was not addressed at case management, but practitioners should not expect the same indulgence to be applied in future cases.

60 On the first issue certified, the notification of country of origin information, the applicant did not make extensive submissions. Having considered the affidavit evidence and the case law, I am persuaded that the High Court was correct to consider that unless the country of origin material considered was in some respect unusual, there was no obligation on the Minister to confine himself or herself to the country of origin information submitted by the applicant, or to notify the applicant of any additional country of origin information of the same general nature considered by the Minister. This was not a case of submission to an independent decision maker expected to bring to the issue nothing more than an open mind. The Minister is an office holder obliged by law (as set out in case such as *JK v. Sweden* referred to at para. 41 above) to be aware of up-to-date information in respect of a country, and to act on it, even if it had not been adverted to by or on behalf of the applicant. It is also clear from the correspondence submitted by the applicant, from the very outset, that county of origin information from standard publicly available sources, is the lingua franca of any deportation decision making process. Again, it is clear from the evidence that the applicant made copious and repeated use of such information which was presented in a fashion that clearly assumed the Minister was familiar with the same information and sources. Tellingly, when the applicant made detailed representations under the s.3(11) procedure for revocation of a deportation order, he did not complain of the fact that the Minister had

considered materials such as the 2015 US State Department Report, which had not been submitted by the applicant, or notified to him or his representatives by the Minister. Indeed, the applicant made his own submissions on that material and furnished a full copy. In the circumstances of this application, I agree with the High Court that there was no obligation to notify the applicant that the Minister was going to have regard to contrary information of the same nature as that submitted by the applicant.

61 If follows that it is not necessary to address the second question, which was contingent on the first question being answered affirmatively. However, the fact that there is a procedure for applying for revocation of a deportation order under s.3(11), is itself a useful safeguard against the possibility that the Minister has relied on information, or an interpretation of existing information, which has genuinely taken the applicant by surprise. While the line between mainstream country of origin information and unusual material might be difficult to draw in some cases, the section 3(11) procedure provides an opportunity to make submissions on any material that was included in the ministerial decision to deport.

62 The third issue occupied the largest part of the argument in this Court. Many of the arguments in the High Court overlap, or the boundaries between them were blurred. In this Court, the applicant sought to maintain the contention that once the Refugee Appeals Tribunal, an independent decision making body which heard evidence including oral evidence from the applicant and other witnesses had decided that there was a real risk of serious harm, that the Minister, when considering the risk of torture or inhuman or degrading treatment was bound, as a matter of law, by that determination so that he or she could not depart from it. In this regard the applicant relied in this Court on the decision of the UK Supreme Court in *R (Evans) v. Attorney General* [2015] UKSC 21, [2015] AC 1787, a case which may not have been cited in the High Court since it is not mentioned in the otherwise comprehensive judgment of that court.

63 For the reasons already addressed however, that matter is not at least as so framed, a matter on which leave was granted. Accordingly I do not propose to address it in any detail. In any event, I consider that caution would be necessary before concluding that a decision maker who is an office holder in the executive branch, and is charged by statute with an important decision in an area which has traditionally been a core element of national sovereignty, is significantly restricted in the range of decisions which may be made on the evidence, and without such restriction being provided for by statute. It is noteworthy perhaps, in this respect, that the applicant in making his submissions both as to deportation and under s.3(11) did not argue that the Minister had failed to comply with some binding legal obligation to accept the Refugee Appeals Tribunal finding. However, this is a matter which it is not necessary to resolve definitively in this case.

64 The decision of the Refugee Appeals Tribunal is however a plainly significant aspect of the decision making process, and a matter along with other important points such as the determination of the ECtHR in *Daoudi*, which would normally require to be addressed in any logical reasoning process. Indeed, the manner in which the decision addresses those issues is a test of the reasons as provided, the reasoning process, and ultimately the reasonableness and lawfulness of the decision. The ECtHR had decided relatively recently in *Daoudi* (which was at hearing, *in camera*, on the 19th May, 2009), that it was not possible to return a person similarly situated to the applicant to Algeria because of the real risk of torture or inhuman or degrading treatment. Later still the UK authorities had it appears taken the same approach, so that the issue in *BB* (which was heard in November, 2015) was whether the assurances offered by the Algerian Government were sufficient to remove such a risk. All these decisions however are taken against a background of a situation which appeared to be changing positively.

65 However, little if any of the information addressed the question that was obviously central to this case. No specific evidence was adduced by the applicant in the respect of the treatment, he or someone similarly situated, could expect. Indeed the only specific evidence to the applicant's personal position was the acknowledgement was that this brother was living "okay" in Algeria. The remainder of the material available was country of origin information in the form of general written reports which were not accompanied by any expert evidence. The material did not address to the specific risk of a breach of Article 3 in general, or to the position of the applicant (or any similar situated person) in particular. Instead general observations were made about the state of human rights in Algeria in a number of respects. The difficulty for a decision maker faced with such evidence is increased since it is not necessarily in the nature of such reports to mark specific improvements: a failure to mention matters which in previous years had been highlighted, is sometimes the only indication of a positive development.

66 It is useful to focus upon the decision of the Refugee Appeals Tribunal. It is plain that the Minister came to different conclusion on what was in effect the same issue: the risk that if deported, the applicant would be subjected to inhuman or degrading treatment. It is fair to say that in that respect the decision of the Refugee Appeals Tribunal, while not extensively reasoned, was at least superficially broadly consistent with the decision in *Daoudi*. While the Refugee Appeals Tribunal, and indeed the asylum process more generally, are not given any specific statutory status in relation to the decision in respect of deportation, nevertheless, the Refugee Appeals Tribunal has a specific expertise in considering risks in countries of origin, and furthermore has a specific fact-finding role. Accordingly, its views must normally be treated with respect. That entails a reasoned explanation of why the decision maker has come to a different conclusion.

67 Assuming for present purposes that it was legally permissible for the Minister to come to a conclusion different to that of the Refugee Appeals Tribunal, there are broadly speaking a number of possible reasoning processes which, as a matter of simple logic, could validly lead to this conclusion.

68 First, it could be concluded that the Refugee Appeals Tribunal was simply wrong in the information available to it. In this regard it might be said that very little information was referred to in the Refugee Appeals Tribunal decision which was focused rather on the question of whether the applicant was not entitled to asylum because of the offences committed. Furthermore, the paragraph of the decision which contained the bald finding that the applicant now relies upon, was addressed to an approach to the decision making which treated the fact that an applicant had already suffered serious harm as a serious indicator that he or she would be likely to suffer serious harm in the future. In this regard the Refugee Appeals Tribunal referred to the fact that the applicant claimed to have been shot in Algeria some 20 years earlier, and not to have been provided with medical attention. The approach therefore that this could be treated as a serious indicator of future conduct contrary to Article 3 seems less than compelling, particularly when it is contended that what the applicant is concerned about the prospect of incommunicado detention. No other information is addressed in that regard. The evidence of shooting and lack of medical treatment is, it appears, evidence from the applicant himself whose credibility was low. In any event, it might be thought that much more information and explanation would be necessary before it would be logical to read across from an event 20 years ago to a risk of incommunicado detention by the authorities today.

69 It is conceivable that the Minister could have concluded therefore that even on the information available to the Refugee Appeals Tribunal, she would not have come to the same conclusion. The fact that the ministerial decision emphasises by underlining that portion of the judgment of Murray C.J. in *Meadows* at p. 733, that in that case "evidence of [female genital mutilation] could be rejected as not being of sufficient weight or

credibility to establish whether there was any risk", that this dictum suggests perhaps that the Minister may perhaps have taken a similar view in relation to the risk of incommunicado, detention or another breach of Article 3 in the applicant's case.

70 On the other hand, it might have been possible to conclude that while, on the information available it, the Tribunal's conclusion was correct, more information and up-to-date country of origin information now showed that there was no longer any real risk of a breach of Article 3. Indeed it is possible that the Minister could have concluded both that the Tribunal decision was not compelling on its own terms, but that in any event the more recent country of origin information showed that any risk had receded to the point where it could be said to no longer represent a real risk leading to a refusal of deportation. There may indeed be other variations, but on any view if the Minister was to depart from the finding by the Refugee Appeals Tribunal, the ECtHR and the approach of the UK authorities in relation to the risk to the applicant to Algeria if deported, clear reasons were required, which could be assessed by the Court. Approached fairly, I find it difficult to understand precisely how the Minister reached the conclusion that she did. This uncertainty is compounded by the citation in the s.3(11) decision of a portion from the judgment of Humphreys J. in *X.X. v. The Minister for Justice and Equality* [2016] IEHC 377 at para.134:

> "Of course the question to be applied by the court is not whether there was any country of origin information supportive of the applicant's position. It is whether the applicant has discharged the onus of proof to show that there was a risk of ill-treatment such that to the decision made fell outside the range of the decision that were reasonably open to the Minister."

This is a clear and correct statement of the law. However, as it makes clear, it is a test for the Court reviewing a decision of a primary decision maker. It is difficult to see how it is relevant to the exercise being carried out by the decision maker himself or herself.

Are Reasons Provided by the Decision under s.3(11)?

71 In my view, the extended process of decision making through the asylum process, asylum application, an application for subsidiary protection, the deportation decision and an application for revocation of that decision, make it appropriate in this case to consider however if any uncertainty as to the reasoning process, can be resolved by consideration of what occurred in the s.3(11) revocation process. If that exercise made it clear why the Minister had come to the decision that there was no real risk of inhuman or degrading treatment, I do not think that this Court would or should interfere even if it considered that the original decision was unclear and unsatisfactory in the manner in which it was expressed. It is accordingly necessary to consider the submissions and reasoning in the s.3(11) process.

72 The submissions of the applicant in respect of the s.3(11) application were much more focused. In particular, the applicant specifically relied on the decision of the ECtHR in *Daoudi*, *H.R.* and indeed on the UK decision in *BB*. Furthermore, the applicant relied on those decisions as establishing that at the relevant times, both the ECtHR and the UK authorities certainly considered that it was not possible in dealing with persons in situations clearly comparable to the applicant, to deport then to Algeria because of the real risk of torture or inhuman or degrading treatment. Again however the submission included further country of origin information which was in general terms, and which considered such points relating to the treatment of HIV Aids, workers' rights and child labour.

73 The Minister's decision was once again lengthy. In relation to the central issue of the risk of torture or inhuman or degrading treatment, it accepted that there were "deficiencies" in the human rights practice in Algeria. In that regard it quoted from the

US State Department Report for 2015 (which had been published on 13th April, 2016):

> "**Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment**.
>
> The law prohibits torture but nongovernmental organisations (NGOs) and local human rights activists alleged that government officials sometimes employed torture and abuse treatment to obtain confessions. The government denied these charges. Government agents face prison sentences of between 10 and 20 years for committing such acts, but there were no convictions during the year. There were no reported cases of prosecution of civil or military security services officials for torture or abusive treatment. Local and international NGOs asserted that impunity was a problem." (pp.2-3)

This quotation was however followed by the same portion of the judgment in *Meadows* which was underlined in the same way as in the original decision. Again, there was a further and this time more extensive reference to X.X. in this case underlining the statement "the decision made fell outside the range of decisions that were reasonably open to the Minister". The decision also cited another High Court decision, *Kouaype v. Minister for Justice, Equality and Law Reform*, that it would require special circumstances to challenge the deportation order unless it could be established that "the Minister could not reasonably have come to the view which she did". Once again this was underlined for emphasis. However, this is less than clear. As already observed, it is difficult to see how the test for review of a substantive decision assists in the making of that decision itself.

74 The decision also sought to distinguish the Tribunal decision from that of the Minister on the basis "each decision relates to different matters and the standards applicable to each are different." While clearly a different decision is being made, (serious risk as opposed to a risk of conduct prohibited by Article 3) with different consequences (denial of subsidiary protection and therefore a right to remain in the state as opposed to deportation to Algeria), a core question for both the Tribunal and the Minister was the same: was there a real and substantial risk to the applicant of torture or inhuman and degrading treatment in Algeria? If, as appears to be implied, the Minister considered that a substantially different test was being applied then it was in my view necessary to elaborate upon that, if it was being asserted as a justification for a different conclusion on essentially similar material.

75 However the following sentence in the decision asserts however that the Minister's decision was based on up-to-date information which showed an improving human rights situation. In principle this could be a justifiable reason for differing from the Refugee Appeals Tribunal but again, it could have been elaborated on, particularly in the light of the extract from the US State Department report quoted in the decision, which as the Minister acknowledged showed some deficiencies in human rights protection in Algeria. Of course, that general observation in itself would not establish a real risk on substantial grounds of inhuman or degrading treatment either in general or to this individual, but plainly, the up-to-date information available was not clear-cut. It did not for example say that there was no longer a risk of inhuman or degrading treatment or that persons, or a class of persons, could be deported to Algeria, without real risk of serious harm. Accordingly, I am inclined to consider that it was necessary to explain why the up-to-date information here could lead to a different conclusion to that arrived at by the Refugee Appeals Tribunal.

76 It is however unnecessary to consider whether if it stood alone the paragraph just quoted is a sufficient, if laconic, statement of reasons for the conclusion to which the

Minister came. That is because the decision does not simply rest on the statement that further information was available to the Minister. The decision also seems to rely upon the observation of Murray C.J., that from the time of deportation a person has no legal right to remain in Ireland. To the same effect is the quotation from the judgment of Hardiman J. in *F.P. v. The Minister for Justice, Equality and Law Reform* [2002] 1 IR 164 at p.172:

> "Both the fact that they had been refused refugee status, and the nature of the decision awaited as it appears from the Act of 2000, emphasise that this was in the nature of an *ad misericordiam* application."

Again the underlining seems to suggest that this observation was given particular emphasis.

77 It is important in the light of the foregoing to make it clear, as indeed the High Court judge did, that when the Minister is considering a deportation decision where it is alleged that there are substantial grounds for considering that there is a real risk of torture or inhuman or degrading treatment, that is not a matter of discretion or indulgence: if the Minister were to conclude that there was such a risk, then he or she would be obliged by national law implementing the Convention, and by the Convention itself as a matter of the State's international obligations, not to deport the person. In such circumstances, it becomes pointless to consider whether it can be said that such a person has a "right" to remain in the State: there is certainly no right or entitlement to deport the person. In that sense there is a negative right to resist deportation at least to a particular country, which in most cases is the only country who will accept or can be obliged to accept the person.

78 The ministerial decision also refers to both the ECtHR decisions and that of the UK Special Immigration Appeals Commission in BB. However, it is stated that this material was available at the time of the original decision and could have been advanced then. While as a matter of fact this is correct, the reasoning suggests perhaps that it was a reason to disregard that information. If so, this in my view would be incorrect. First, these were legal decisions, albeit relied on in part for their factual content. More significantly, they went directly to the Article 3 issue. As already explained, the Minister was obliged to consider that question, and to do so again at the s.3(11) stage, and on the basis of the information then available.

79 The High Court judge analysed these matters both carefully and lucidly, and considered it was possible to treat the more troubling aspects of the reasoning as no more than what he helpfully described as boilerplate general phrases included routinely in s.3 decisions. Indeed, it can be said that much of the interaction between the applicant and the Minister here consisted at every stage of generalised statements detached from the precise focus of the case, submitted without any link being made to the particular case on behalf of the applicant, and responded to by a collection of generalised and sometimes enigmatic statements on the part of the Minister.

80 Having considered the matter, I have come to the conclusion that the reasons provided by the Minister were inadequate to support the decision here. In requiring more by way of reasons, I consider that a court should be astute to avoid the type of over-refined scrutiny which seeks to hold civil servants preparing decisions to the more exacting standards sometimes, although not always, achieved by judgments of the Superior Courts. All that is necessary is that a party, and in due course a reviewing court, can genuinely understand the reasoning process. But even taking that broad and common sense approach, I have come to the conclusion that it is not sufficiently clear why the Minister came to the conclusion that the applicant could be deported to Algeria without a real risk of torture, or inhuman or degrading treatment, and why the Minister considered that such a decision ought not to be revoked. I have come to the conclusion

that I cannot have the level of assurance that is necessary that the decision sets out a clear reasoned path, and moreover one that was not flawed or incorrectly constrained by unjustifiable limitations or irrelevant legal considerations.

Decision

81 This is not a case however where it can be said that the Minister was not entitled in any circumstances to come to such a conclusion, or conversely that there was no reasonable basis upon which any minister could conclude that there was no real risk of a breach of Article 3. Accordingly, the matter must be remitted to the Minister for further consideration.

82 In this case there has moreover been an extended chain of painstaking decision making. I consider that the decision on deportation and revocation can, for these purposes, be looked at together. In this case, it can be said that the applicant's case only became focused, to the extent that it did, at the stage of the revocation application. Accordingly I consider that it is appropriate to quash only the decision of the Minister refusing to revoke the deportation order. This will allow the issue to be addressed by focused submissions in the light of up-to-date information. All other issues having been disposed of, the question for the Minister under the s.3(11) application is simply whether there is a real risk on substantial grounds of treatment of this applicant contrary to Article 3, and any submissions and evidence should be focused on precisely that issue. That issue cannot, or at least ought not, to be addressed by broad generalisations disconnected from the facts of this case. The issue here is whether there are substantial grounds for believing that this applicant by reason of his background and history and any other relevant characteristic, faces a real risk of torture or inhuman or degrading treatment if deported to Algeria. It ought to be possible to identify the treatment which it is said is likely, and the basis for that belief, and also why it is contended to be prohibited by Article 3. The Minister is entitled, and indeed obliged to subject any submission to rigorous scrutiny in the light of the observations of the ECtHR, recognising that there is a real and significant threshold to be surmounted here. If the applicant advances only a generalised complaint with no attempt to focus the submissions on both the applicant's personal situation and the up-to-date position in Algeria, then he will find it difficult to complain about a decision which treats the issue at the same level of generality.

83 I have treated the original decision under s.3(1) and the revocation decision under s.3(11) as part of a single process for the purposes of considering the adequacy of the reasons offered. The only remaining issue in these proceedings is whether the Minister can decide in the light of up-to-date information, that there is or is not a real risk on substantial grounds of treatment prohibited by Article 3. That is the same issue at both the s.3(1) and the s.3(11) stages. As already mentioned I would at this stage refuse to quash the deportation decision of the Minister communicated by letter dated the 19th September, 2016, but I would quash the decision of the Minister communicated by letter dated the 6th December, 2016, refusing to revoke the decision under s.3(11) of the Immigration Act 1999 (as amended). This means that the question of revocation must be addressed again, and the applicant may make submissions and the Minister must come to a decision based on up-to-date information as to the current position. There is no reason why that should not occur promptly.

84 I would also remit the proceedings to the High Court list. If the decision of the Minister is revoked, then save for any issue as to costs the proceeding would be determined. If the Minister refuses revocation giving reasons and the decision is not challenged, then similarly the proceedings would be at an end and could be dismissed, again subject to any issue of costs. If however revocation is refused and the appellant

seeks to challenge that decision by reference to the reasons given in respect of Article 3, then the appellant should have 7 days to bring an application to amend the proceedings to challenge both decisions (deportation and non-revocation) having regard to the reasons given on the Article 3 issue so that if he succeeded on that point, the deportation order could be quashed if considered the appropriate relief. The appellant is currently in custody and it is desirable from all perspectives that this matter be addressed promptly. I would extend the stay on execution of the deportation until the expiry of the 7 day period and if within that period an application is brought in these proceedings to quash the decision on the ground of the alleged inadequacy of any reasons, the stay to continue until 14 days after the determination of the High Court proceedings, on the applicant's continuing undertaking. I would remit this matter to the High Court list therefore to await the outcome of any renewed application under s.3(11), so that any fresh renewed challenge can be prosecuted within these proceedings. I would however also give liberty to apply to the High Court to vary, amend or set aside the stay, or any of the other provisions of this Court's order relating to the future conduct of the proceedings, to the intent that the High Court should have seisin of this matter hereafter, and full power to ensure that the single remaining issue of reasons is addressed, if it should be necessary to do so, within these proceedings. This, it seems to me, is in the interests of both parties and in any event, in the interests of justice. These are the only proceedings in which the applicant has challenged and can challenge, the deportation order. It is also in the Minister's interests to ensure that the remaining issue of the Minister's reasons in respect of Article 3 is brought to a speedy conclusion in a single set of proceedings.