High Court of Ireland Decisions

Judgment

Title:	M.Y. -v- Minister for Justice and Equality & ors
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THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 645 J.R.]

BETWEEN

M. Y.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY AND

ATTORNEY GENERAL IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 6th day of September, 2016

1. This is an application for judicial review by way of an order of *certiorari* to quash the decision of the first named respondent (the Minister) dated 29th October, 2015 which

affirmed the deportation order made in respect of the applicant on 2nd August, 2015.

Background and procedural history

2. The applicant is a national of Pakistan who arrived in Ireland on 22nd July, 2008 and applied for asylum. His stated fears arose as a result of the consequences of his claim to have killed a man in self-defence. According to the applicant, the circumstances which gave rise to the killing were as follows: The applicant was engaged to carry out maintenance works at the deceased's house. Shortly afterwards the house was burgled for which blame was placed on the applicant. The police were satisfied that the applicant was not responsible but the deceased and his family continued to blame him and he was twice attacked. The killing occurred in the course of the second attack when the applicant was set upon by the deceased and another individual. The applicant fled his home as a result. A First Information Report (FIR) was filed with the police by a cousin of the deceased. According to the applicant, his family were subjected to attack as a result of these events, with his father imprisoned for six months and only released when he disinherited the applicant.

3. ORAC recommended that the applicant not be declared a refugee as the Commissioner determined, inter alia, that "the applicant's claim amounts to a fear of prosecution, and not of persecution". He was not successful on appeal to the Refugee Appeals Tribunal. The Tribunal determined that the applicant did not fall within a particular social group and, like ORAC, determined that the applicant was fleeing not from persecution but rather from prosecution.

4. After being refused asylum, the applicant applied for subsidiary protection and leave to remain. These applications were refused and a deportation order was made in respect of the applicant. Judicial review proceedings were instituted in respect of the subsidiary protection and deportation decisions which were subsequently compromised. The subsidiary protection and deportation decisions were withdrawn.

5. The applicant's subsequent applications for subsidiary protection and leave to remain were again refused and he was notified by letter dated 10th August, 2012 that a fresh deportation order had been made.

6. Judicial review proceedings were then instituted in respect of the deportation decision, which came on for hearing before the High Court on 5th September, 2013. In the course of the hearing it was argued by the applicant's counsel that the FIR which had been issued in respect of him related to a breach of s. 302 of the Pakistani Penal Code for which the penalties include the death penalty. It was argued that the Minister had no lawful authority to deport the applicant in such circumstances. As a consequence, the proceedings were compromised after Clark J. found merit in the applicant's submission, although she noted that that particular submission had never been made to the Minister. The basis of the compromise was that the Minister would consider a revocation application under s. 3(11) of the Immigration Act 1999 on the basis of a claim that the applicant may face the death penalty if returned to Pakistan.

7. By letter dated 13th September, 2013, the applicant furnished an application to revoke the deportation decision. It was submitted on behalf of the applicant that he may face the death penalty if returned to Pakistan. It was also submitted that the Minister should have due regard to the application of law in Pakistan and that the applicant may face pre-trial arrest, detention and torture if returned to his country of origin. The case was also made that the applicant could face punishment for illegal flight in circumstances where he had fled Pakistan after an FIR had been lodged against him.

8. The revocation application was accompanied by the following country of origin information: An FIDH/HRCP report of a Mission of Investigation on Pakistan entitled

"Slow March to the Gallows: Death Penalty in Pakistan"; "Death penalty back in Pakistan" (Al Jazeera, 2013); and an excerpt from the Pakistani Penal Code.

9. By letter dated 29th October, 2015, the applicant was informed that the deportation order which was made in August, 2012 had been affirmed by the Minister. The consideration of file which led to the decision was attached to the letter.

The impugned decision

10. In the consideration of file, the decision-maker noted that the issues set out in the representations from the applicant relating to arrest, detention, trial procedures, exit controls and exiting Pakistan after the issuance of FIR were issues which had been previously considered in the deportation decision. It was also noted that up to date country of origin information, namely a 2014 U.S. Department of State report on Pakistan, supported the original findings made under s. 3(6) of the Immigration Act 1999 with regard to these matters. It was noted that the applicant's fear of facing the death penalty had not been previously raised and that as a consequence it had not been previously examined by the Minister.

11. There follows a consideration of country of origin information in respect of the death penalty in Pakistan. In this regard, the decision maker referred to the European Asylum Support Office (EASO) Country of Origin Information Report - Pakistan Country Overview, August, 2015." This was information sourced by the decision-maker. It was noted that in December, 2014, in the wake of a Taliban attack on a school in Peshawar, the Pakistani authorities partially lifted a moratorium on the death penalty that had been in place since 2008. The decision-maker noted that at least 24 people had been executed for crimes relating to terrorism since December, 2014 and that Amnesty International had claimed that three of the executions were for non-terrorism related offences. The decision-maker then notes that on 10th March, 2015, Pakistan announced that executions would resume for all capital crimes. The EASO report also documented that Pakistan had more than 8,000 people on death row and that the law mandates the death penalty for 28 offences, including murder, rape, treason and blasphemy. It was noted that according to Amnesty International, 231 people were sentenced to death in Pakistan during 2014.

12. Reference is then made by the decision-maker to the 2014 U.S. State Department report which refers to "government-provided state funded legal counsel to prisoners facing the death penalty" and to NGOs providing legal aid in some instances. The decision-maker then records that the report also highlighted that the law in Pakistan provides for an independent judiciary, albeit the judiciary were subject to external influences, but that the media and public generally considered the high courts and the supreme courts credible. The fact of public trial, presumption of innocence, cross-examination, appeal and access by accused and their attorneys to government-held evidence was noted. It was also noted that there was no trials by jury.

13. The decision-maker then addressed a "query response" dated 4th November, 2010 from the Immigration and Refugee Board of Canada, titled "First Information Reports (FIRs) " which advised that there was no national system in place in Pakistan to track FIRs and that there was no systematic co-ordination between the various police organisations at inter-provincial level or inter-organisational level to call attention to a particular FIR, save in a case that was particularly serious, politicised, or subject to public attention, or that required police to more actively search for a suspect. Further information from this source advised that unless the police were really after accused and got orders to search and seize in other districts or provinces an accused may remain at large notwithstanding the existence of an FIR and that this could occur even in "terrorism cases".

14. The consideration of file continued in the following terms:

> "It has not been possible to verify the authenticity of the FIR document submitted by [the applicant]. Similarly, the voracity of his overall claim regarding his alleged dispute… cannot be confirmed. This claim may or may not be true. At asylum stage, the Office of the Refugee Applications Commissioner had doubts as to the veracity of [the applicant's] claim given that he could not state with any degree of certainty as to when the claimed events took place. His position was not matched by the details recorded in the police documents he presented in support of his claim."

The decision maker continued:

> "Based on the country of origin information cited above, it is not possible to state whether [the applicant] would, or would not, come to attention of the authorities in Pakistan on foot of the claimed incident… Similarly, it is not possible to state what, if any, charges [the applicant] might face in Pakistan. In this context, it is noted that [the applicant] stated that he remained in Pakistan for two years after the alleged incident and was not arrested or detained during this time. This position is supported by country of origin information which indicates there is no national system to track for FIRs and no systematic co-ordination between various police organisations at inter-provincial level or inter-organisational level. It is stated that police officers in one district would not be able to know about the FIRs registered elsewhere unless a circular is issued intimating offences and suspects. No evidence has been submitted to suggest that information relating to [the applicant's] alleged crime has been circulated beyond his local police area. This would be more likely to occur in the context of a terror suspect, and no evidence has been submitted to suggest that [the applicant] is viewed in that light. It is also noted that in the context of the circulation of FIR related information, it would appear that inefficiencies occurred in communications between districts.
>
> In the event that [the applicant] killed [the named third party] as he has claimed then it is reasonable he would be held to account for his actions. To not do so would be most unjust on the alleged victim and those who represent the victim's interests. Therefore, in the event that [the applicant] was returned to Pakistan and was apprehended by the Pakistani authorities for his part in… [the] death, then country of origin information shows that he would have access to State funded legal counsel, possibly NGO funded legal aid, an independent judiciary and courts which are generally viewed as being credible. Given that such a defence mechanism would be available to [the applicant], it is clear that any case against him - be it for murder, manslaughter or on a lesser charge - would be tried on its merits before any decision was taken that he should be convicted of the alleged offence. Those are fundamental principles which underpin the criminal justice system of every civilised country and it is evident that these legal principles will be applied to any case [the applicant] has to answer."

15. The decision-maker concluded by stating:

> "[I]n the event that [the applicant] has to answer charges for his alleged crime, he would have access to a fair trial and legal representation and, as such, I do not find that [the applicant] would be subjected to treatment amounting to persecution should he be returned to Pakistan."

16. Accordingly, it was recommended that the deportation order made on 2nd August, 2012 be affirmed.

17. On 23rd, 27th and 28th October, 2015 respectively, a Higher Executive Officer, an Assistant Principal and the Acting Director General of the respondent's department agreed with the recommendation.

18. By order of MacEochaidh J. dated 23rd November, 2015, leave was granted to challenge the refusal the revoke the deportation order.

19. The grounds of challenge are:

> "1. When affirming the deportation order in respect of the applicant, the Minister erred in law and / or acted irrationally that in:
>
> a. Failing to apply the correct test applicable in determining whether it would be lawful to deport the applicant to Pakistan - the respondent failed to consider whether there were substantial grounds for believing that there is a real risk that the applicant would be subjected to torture, inhuman or degrading punishment and/ or the death penalty on his return to Pakistan;
>
> b. Failing to consider that the applicant's exposure to the death penalty is in breach of Article 3 and / or the sixth protocol of the European Convention on Human Rights;
>
> c. Failing to consider the proportionality of returning the applicant to Pakistan in circumstances where he is exposed to the death penalty;
>
> d. Failing to consider evidence tendered in relation to the prospect of the death penalty and in relation to a fair trial;
>
> e. Failing to make an adequately or clearly reasoned decision and in particular failing to deal with the evidence referred to at d. above and failing to make clear whether it was considered or determined that the applicant's exposure to the death penalty was obviated by access to a fair trial and inefficiencies occurring between police districts;
>
> f. Determining that the applicant's exposure to the death penalty was obviated by findings in respect of access to a fair trial and legal representation and inefficiencies occurring between police districts;
>
> g. In circumstances where there had been no previous consideration of the death penalty - either at RAT stage or subsidiary protection stage - breached natural justice in failing to disclose in advance to the applicant all the country of origin material which the Minister intended to consider.

In the Statement of Opposition, the respondents deny the grounds advanced by the applicant and assert, *inter alia*, that the circumstances of the case demonstrate that even if the applicant were to come to the attention of the authorities in Pakistan country of origin information showed that he would have access to state funded legal representation and that he would receive a fair trial under an independent judiciary.

20. In the course of oral submissions to the court, the challenge based on

proportionality was not pursued given that the central challenge to the Minister's decision did not admit of questions of the proportionality of the decision. Nor was the challenge in ground g. pursued, counsel for the applicant acknowledging that the established jurisprudence did not support the challenge inherent in that ground.

The applicant's submissions

21. It is contended that the decision to refuse the revocation application is fundamentally flawed for the reasons set out in grounds a, b, d, e and f of the statement of grounds. The principal submission advanced on behalf of the applicant is that the decision-maker did not address the question as to whether he would be exposed to the death penalty in Pakistan. It is submitted that there was a real risk of his being exposed, yet the decision- maker's focus was on the question of whether the applicant would ever stand trial at all and, if he did, that he would get a fair trial. The failure to address the applicant's likely exposure to the death penalty was in the teeth of country of origin information which had been submitted on his behalf, and indeed in the teeth of more recent information which the decision-maker herself had sourced and which showed that the erstwhile suspension in Pakistan of the death penalty was no longer operative and that Pakistan had announced in March, 2015 that executions would resume for all capital crimes, including the crime the applicant had committed. While the decision-maker quoted this information, it was not engaged with in any sense in the consideration of the representations which had been put forward on behalf of the applicant. Counsel contends that on the basis of the information in 2015 EASO report sourced by the decision-maker the applicant's challenge to the revocation refusal is made out.

22. The applicant provided the FIR which had been filed against him to the Minister, together with country of origin information on the re-activation of the death penalty. This latter factor was independently known to the decision-maker through her own investigations. It is submitted that these factors constituted substantial grounds of a real risk to the applicant that he would be exposed to the death penalty. Thus, it was for the Minister to dispel any doubts about the risk that presented in respect of the applicant. Counsel submits that country of origin information regarding the tracking of FIRs in Pakistan cannot be said to dispel such doubts given that the Minister acknowledged the possibility that the applicant may be apprehended and tried.

23. Furthermore, it is submitted that even if the basis of the decision centred on the deficiencies in the tracking of FIRs in Pakistan, the FIR in respect of the applicant, by virtue of its reference to s. 302 of the Pakistani Penal Code, itself raised the issue of the death penalty, yet this was not addressed in the decision.

24. It is the applicant's contention that the very fact of an FIR report which concerned him, and which referred therein to an offence which is subject to the death penalty in Pakistan, equates to substantial grounds which show a real risk for the applicant. Furthermore, it is not the case that the applicant would just be sent back to a country which has the death penalty, his position is that of someone who has killed and in respect of whom an FIR has been filed.

25. Insofar as the respondent relies on the inefficiencies of the FIR system, it is the applicant's case that he evaded detection by simply moving from place to place in Pakistan.

26. It is submitted that the failure of the decision-maker to consider the applicant's exposure to the death penalty is in breach of Articles 2 and 3 of the European Convention on Human Rights (the Convention) and of the 6th and 13th Protocols to the Convention.

27. It is contended that the Minister failed to make an adequately or clearly reasoned decision and in particular failed to deal with the evidence before her. Furthermore, there was a failure to make clear whether the decision-maker considered and determined that the applicant's exposure to the death penalty was obviated by access to a fair trial and/or by reason of inefficiencies in tracking of FIRs which were found to occur between police districts. Insofar as the decision-maker determined that the applicant would get a fair trial, she failed to grasp the essential question before her which was whether the applicant would be exposed to the death penalty. That was the question to be determined, having regard to the applicable standards, as set out in jurisprudence of the EctHR and the Irish courts.

28. In aid of the submission that the decision-maker erred in law in failing to consider the essence of the case made by the applicant to have the deportation order lifted, counsel relies on the decision of the European Court of Human Rights in *Al-Saadoon v. U.K*.. (2010) 51 EHRR 9

29. It is submitted that in the present case the decision- maker erred in failing to consider the applicant's circumstances in accordance with the applicable standards, as referred to in *Al-Saadoon*, namely whether "*substantial grounds*" had been shown for believing that the applicant would face "*a real risk*" of being subjected to the death penalty in Pakistan.

30. The applicant's case was not one which entitled the Minister to rely on such previous findings as made in the asylum and subsidiary protection processes since the question of the consequences for the applicant if convicted had not been addressed previously. There was no s. 5 or Article 3 finding by the RAT such as might have insulted the Minister from the necessity to conduct a rigorous examination of the death penalty issue. Thus, the applicant's situation was not one to which the jurisprudence set out in *Kouaype v. Minister for Justice, Equality and Law Reform* [2011] 2 I.R. applied, such as might have absolved the Minister from embarking on the assessment which was required to be made.

31. Counsel contends that what was required of the decision-maker was a "*rigorous examination*" of the kind articulated by McDermott J. in *E.M. (Eritrea) v. Minister for Justice, Equality and Law Reform* [2013] IEHC 324.

32. Counsel submits that in all the circumstances the decision-maker did not abide by the test set out in *Saadi v. Italy* (2009) 49 EHRR 30 or in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 IR 783, as referred to by McDermott J. in *BM Eritrea*.

The respondents' submissions

33. On behalf of the respondents, it is submitted that while the arguments canvassed by the applicant relate to the alleged failings of the decision-maker on the question of the applicant's exposure to the death penalty, the salient issue is whether the applicant made out to the decision-maker that there were substantial grounds of a real risk of him being exposed to the death penalty. It is submitted that this was not established by the applicant.

34. Counsel contends that the Minister considered the issue before her appropriately. Reference was made in the decision to the fact that the applicant remained in Pakistan for two years post the filing of the FIR and that he was not apprehended or detained during that time. This conclusion was supported by country of origin information which indicated there was no national system in Pakistan for the tracking of FIRs. While the decision-maker went on to consider the question of whether the applicant would get a fair trial in Pakistan, the thrust of the decision, counsel submits, was the applicant's

ability to reside there undetected and un-apprehended for two years.

35. Insofar as it is contended, *inter alia*, in ground 1 of the statement of grounds that the decision was irrational in the *Meadows* sense, that is not the case. There was evidence before the decision-maker to ground her decision, as is clearly recorded in the consideration of a file. Thus, it cannot be said that the decision flies in the face of common sense or fundamental reason.

36. Moreover, the examination of file which accompanied the deportation order had expressly considered questions of arrests and detention, fair trial, judicial independence, convictions *in absentia*, prison conditions and the police in Pakistan. It is submitted that nothing was furnished by the applicant in the context of the revocation application which disturbed these original findings.

37. While it is contended in ground 1.a. that the decision maker erred in law, counsel submits that even if there was such an error it is not a fundamental error of law as the decision-maker addressed the claim advanced by the applicant. Notwithstanding that the applicant had not raised any issue regarding the death penalty until the eleventh hour, and the fact that in his revocation application he was to specifically focus on the issue of the death penalty, the applicant only really addressed the subject of the death penalty in the final four pages of his representations - most of which comprise a lengthy quote from the country of origin information he relied on. That information itself was based on an examination of Pakistan carried out in 2006. The representations made by the applicant merely stated that there "would be a reasonable degree of likelihood that the applicant would be subjected to serious harm and or inhumane treatment, and possibly face the death penalty". Thus, the applicant did not make the case that there were "substantial grounds" that there was a "real risk" of his being subjected to the death penalty.

38. Counsel contends that a great many of the representations made on the applicant's behalf referred to prison conditions within Pakistan, matters which had been previously determined not to give rise Article 3 concerns. Thus, the height of the applicant's claim vis a vis the death penalty was that he could "possibly face the death penalty".

39. While the applicant submitted country of origin information which referred to some 7,400 prisoners "lingering on death row", there was nothing in the representations furnished which were specific to the applicant. In any event, the decision-maker noted the re-activation of the death penalty in Pakistan and she made reference to it in the context of the 2015 EASO report which she had sourced. The decision-maker went on to conclude that it was not possible to verify either the FIR the applicant had furnished or the veracity of his claim to have killed a named third party. Counsel submits that these findings equally remain undisturbed by the late entry into the fray of the death penalty issue. A key finding by the decision- maker was the applicant's ability to remain un-apprehended in Pakistan for two years after the FIR was filed.

40. In all those circumstances, on the basis of what was actually before the Minister by way of representations from the applicant, there is no merit in the argument that the decision was irrational, particularly given the information which the decision-maker had on the operation of FIRs in Pakistan and the non-detection of the applicant for a period of two years. Accordingly, the decision complies with the test set out by Fennelly J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, as follows:

> "*[449] I prefer to explain the proposition laid down in The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642 and O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39, retaining the essence of the formulation of Henchy J. in the former case. I would say that a court may not*

> *interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word, "substantive" to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision maker. This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. The applicant must discharge that burden by producing relevant and cogent evidence*."

41. In accordance with the jurisprudence of the EctHR in *Saadi*, and *Al-Saadoon*, the burden was on the applicant to show a real risk that he would be exposed to the death penalty, which, counsel submits, was not discharged.

42. While it is acknowledged that the assessment as to whether there was a real risk must be a "rigorous" one, it is submitted that such a rigorous examination took place in this case by the noting of the country of origin information referable to FIRs and the noting of the applicant's own circumstances in the two years post the lodging of the FIR.

43. Moreover, while the applicant relies on the decision of the EctHR in Al-Saadoon, in that case the issue was the handing over of the two applicants into the hands of the Iraqi authorities. In the applicant's case, he would simply be returned to Pakistan *per se* and not into the hands of any state authority.

44. Counsel contends that self-evidently from the contents of the country of origin information on FIRs in Pakistan there is no real risk to the applicant. That, counsel submits, in the thrust of the Minister's decision.

45. While the issue of the death penalty was assessed and its reality in Pakistan acknowledged, it was nonetheless lawfully concluded that the applicant could return to Pakistan.

46. With regard to ground b. of the statement of grounds, counsel submits there is no basis for this challenge given the clear indication in the decision that all evidence was assessed. Insofar as in ground d. it is alleged that the Minister failed to consider the applicant's prospects of the death penalty, counsel submits that there were no submissions made to the decision-maker such as might have prevailed over the conclusions which were arrived at with regard to the tracking of FIRs.

47. Furthermore, contrary to what is stated in ground e., there is no lack of clarity in the decision. The decision was a reasoned one based on country of origin information and other factors, including the applicant's circumstances and the treatment of FIRs in Pakistan. Insofar as ground f. appears to suggest irrationality on the part of the decision-maker in determining that the applicant's exposure to the death penalty was obviated by the existence of a fair trial together with the availability of legal representation for the applicant together, and by the inefficiencies in the FIR system, counsel states that this ground appears to contradict the earlier challenge that there was no assessment by the Minister of the death penalty issue.

Considerations

48. It goes without saying that if the decision-maker finds substantial grounds are established of a real risk to the applicant of being subjected to the death penalty should

he be returned to Pakistan, he cannot be returned to that country as such a return would be in breach of Arts. 2 and 3 ECHR, and, furthermore, contrary to Protocol 13 to the Convention which abolished the death penalty in all circumstances. Ireland has signed and ratified Protocol 13.

The absolute prohibition on refoulement in such circumstances and the duties of a returning State is comprehensively set out in the decision of the EctHR in *Al-Saadoon v. U.K*. (2010) 51 EHRR 9, Moreover, in *Al-Saadoon*, the EctHR had occasion to consider the evolutionary process of Protocol No. 13 in the context of Art. 3 of the ECHR.

49. The background to *Al-Saadoon* was as follows: The applicants were two Iraqi nationals who had been senior officials in the Ba'ath party. They were arrested by U.K. forces in April, 2003 and October, 2003 respectively, and subsequently detained in U.K. run detention facilities as security internees. In October, 2004, following investigations, the U.K. authorities concluded that the applicants had been involved in the deaths of two British soldiers murdered in southern Iraq. In December, 2005, the U.K authorities decided to refer their case the Iraqi Criminal Courts. In May, 2006, the applicants appeared before an Iraqi Criminal Court on charges of murder and war crimes. The Iraqi court issued arrest warrants against them and made an order authorising their continued detention by U.K. forces. The case was thereafter transferred to Iraqi High Tribunal (IHT) which had been established to try Iraqi nationals or residents accused of genocide, crimes against humanity and war crimes committed during the period 17th July, 1968 to 1st May, 2003. On 27th December, 2007, the IHT formally requested the British forces to transfer the applicants into its custody. Repeated requests were made in that regard until May, 2008. In 2008, the applicants brought judicial review proceedings before the English Courts which were unsuccessful. Following the dismissal of their appeal by the Court of Appeal the applicants applied to European Court for an interim measure that they not be transferred from U.K. custody until further notice. This measure was granted. On 31st December they were transferred into the custody of the Iraqi Police, the UK authorities stating that they could not comply with the interim measure because of a UN mandate. In February, 2009, the applicant's appeal to the House of Lords was dismissed. Their trial before the IHT commenced in May 2009. They were charged with killing the two British solders an offence which carried a maximum penalty of the death sentence. This charge was subsequently dropped and replaced by a lesser charge which did not carry the death penalty. However, a week later an additional charge was added which could in principle have been punishable by death.

50. In their case before the European Court, the applicants complained that their transfer by the U.K. authorities into Iraqi custody put them at real risk of violation of the right to life under Article 2 of the Convention and that their rights under Article 3 and Article 6 were violated. They also complained that the transfer violated Article 1 of Protocol No. 13 relating to the abolition of the death penalty.

51. In the course of its assessment of the claim, the European Court of Human Rights considered "*that, in respect of those States which are bound by it, the right under Article 1 of Protocol No. 13 not to be subjected to the death penalty, which admits of no derogation and applies in all circumstances, ranks along the rights in Articles 2 and 3 as a fundamental right, enshrining one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed* ..." (Para.118)

52. The effect of signature and ratification of Protocol No. 13 on the interpretation of Articles 2 and 3 of the Convention were addressed, inter alia, as follows:

> *"120. It can be seen, therefore, that the Grand Chamber in Öcalan did not exclude that Article 2 had already been amended so as to remove the*

exception permitting the death penalty. Moreover, as noted above, the position has evolved since then. All but two of the member States have now signed Protocol No. 13 and all but three of the States which have signed it have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty (compare Soering, cited above, §§ 102-04).

….

122. Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. It makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct, the nature of any offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see Saadi v. Italy [GC], no. 37201/06, § 127, ECHR 2008)."

53. As to a contracting State's responsibility under the Convention for the imposition and execution of the death penalty in another State, the court opined:

"123. The Court further reiterates that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country (see Saadi, cited above, § 125). Similarly, Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there (see Hakizimana v. Sweden (dec.) no. 37913/05, 27 March 2008; and, mutatis mutandis, Soering, cited above, § 111; S.R. v. Sweden (dec.), no. 62806/00, 23 April 2002; Ismaili v. Germany (dec.), no. 58128/00, 15 March 2001; Bader and Kanbor, cited above, § 42; and Kaboulov v. Ukraine, no. 41015/04, § 99, 19 November 2009).

124. In this type of case the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of the above Articles. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment (see Saadi, cited above, § 126).

125. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation

there and his personal circumstances (ibid., § 130). The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion (ibid., § 133). Where the expulsion or transfer has already taken place at the date of the Court's examination, it is not precluded, however, from having regard to information which comes to light subsequently (see Vilvarajah and Others v. the United Kingdom, 30 October 1991, § 107(2), Series A no. 215; Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, 69, ECHR 2005-I; and, mutatis mutandis, A. and Others, cited above, § 177)."

54. With regard the U.K.'s responsibility in the context of the applicants' circumstances, the court stated, *inter alia*,:

> *"137. Protocol No. 13 came into force in respect of the United Kingdom on 1 February 2004. The Court considers that, from that date at the latest, the respondent State's obligations under Article 2 of the Convention and Article 1 of Protocol No. 13 dictated that it should not enter into any arrangement or agreement which involved it in detaining individuals with a view to transferring them to stand trial on capital charges or in any other way subjecting individuals within its jurisdiction to a real risk of being sentenced to the death penalty and executed. Moreover, it considers that the applicants' well-founded fear of being executed by the Iraqi authorities during the period May 2006 to July 2009 must have given rise to a significant degree of mental suffering and that to subject them to such suffering constituted inhuman treatment within the meaning of Article 3 of the Convention."*

This is the legal landscape against which the refusal to revoke the deportation order in the present case must be assessed.

55. Before considering the principal issue which arise in this case, namely whether the Minister erred in law or acted irrationally in failing to apply the requisite legal principles in determining whether it would be lawful to deport the applicant, and/or whether she failed to consider whether the applicant's deportation would be in breach of the ECHR, it is I believe apt to firstly have regard to the findings which were made by the respondent in July, 2012 and which led to the deportation order, dated 2nd August, 2012, which was the subject of the subsequent application to revoke.

56. It is accepted by both sides that the issue of the potential for the applicant to be exposed to the death penalty, were he to be returned to Pakistan, was a new factor in his case and which was articulated for the first time in the course of the challenge to the deportation order made in respect of the applicant on 2nd August, 2012, the claim not having been advanced in the course of the earlier subsidiary protection and leave to remain applications, or indeed at either stage of the asylum process which preceded those applications.

57. In the consideration of file dated 24th July, 2012, which grounded the decision to deport the applicant, refoulement was not found to be an issue. This was in circumstances where the context of the Minister's consideration included country of origin information which showed that there was no national system for the tracking of FIRs (not unlike similar country of origin information on FIRs considered by the Minister in the course of the subsequent revocation application which is the subject of the present challenge), and in circumstances where the Minister was satisfied that the applicant would not be at real risk of a flagrant denial of a fair trial. With regard to the prospect of the applicant being brought to trial, the consideration of file grounding the deportation order also stated: "Having considered the information provided by the applicant it is submitted that the applicant may be convicted because of his role in [the

third party's death] and might face a prison sentence if he is returned to Pakistan". Reference is then made to a UK Border Agency OGN, published in April 2012, in relation to prison conditions in Pakistan. The author of the consideration of file goes on to state "although conditions in prisons in Pakistan remain extremely poor, the evidence does not demonstrate that in general such conditions are persecutory or amount to serious harm or ill-treatment contrary to Article 3 ECHR." Thus, as can be seen from the quoted extract, consideration was expressly given to whether deporting the applicant would breach Art. 3 ECHR, which was found not to be the case. As I have said, this was in the context where the representations which had been made to the Minister to that point had concentrated on claimed serious deficiencies in the Pakistani criminal justice system and on prison conditions in Pakistan.

58. However, the representations which were put forward on the applicant's behalf in the revocation application specifically referred to the basis of his claim as being, *inter alia*, that "the applicant may face the death penalty if returned to Pakistan". The representations stated, "it is submitted that there is a reasonable degree of likelihood that the applicant if returned to Pakistan would encounter serious harm at the pre-trial stage, and possibly face the death penalty in respect of the offence, and that this submission is supported by country reports which indicate that torture in detention still occurred "regularly", that police corruption was wide spread, that prison conditions were abysmal, that there are significant delay (sic) in the prosecution process, and that the death penalty could apply to someone in his position."

59. Later on in the submissions, there is again reference to "a reasonable degree of likelihood that the applicant would be subjected to serious harm, and or inhumane treatment, and possibly face the death penalty."

60. The Minister was apprised of the provisions of s. 301 and 302 of the Pakistani Penal Code which provide:

> "**Causing death of person other than the person whose death was intended**:
>
> Where a person, by doing anything which he intends or knows to be likely to cause death, causes death of any person whose death he neither intends nor knows himself to be likely to cause, such an act committed by the offender shall be liable for qatl-i-amd.
>
> Whoever commits qatl-i-amd shall, subject to the provisions of this Chapter be:
>
> (a) punished with death as qisas;
>
> (b) punished with death for imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in Section 304 is not available; or
>
> (c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the injunctions of Islam the punishment of qisas is not applicable. …"

61. The Minister was referred to an extract from a 2007 report of the FIDH/HRCP which reported that over 7,400 prisoners were lingering on death row and which stated:

> "In recent years, Pakistan has witnessed a significant increase in charges carrying capital punishment, in convictions to death, as well as in

executions.

The HRCP and FIDH find the application of death penalty in Pakistan falls far below international standards. In particular, they find that, given the very serious defects of the law itself, of the administration of justice, of the police service, the chronic corruption and the cultural prejudices affecting women and religious minorities, capital punishment in Pakistan is discriminatory and unjust, and allows for a high probability of miscarriages of justice, which is wholly unacceptable in any civilised society, but even more so when the punishment is irreversible. At every step, from arrest to trial to execution, the safeguards against miscarriage of justice are weak or non-existent, and the possibility that innocence had been or will be executed remains frighteningly high."

62. Furthermore, even more recent country of origin information, namely the 2015 EASO report sourced by the decision-maker herself clearly showed that the death penalty applied for all capital crimes, including the crime claimed to have been committed by the applicant and that there were "more than 8000 people on death row".

63. As acknowledged in the jurisprudence of the EctHR, the burden is on an applicant to establish that there are substantial grounds for believing that there is a real risk that he would be subjected to inhumane or degrading punishment or the death penalty if returned to Pakistan.

64. In *Saadi v. Italy* (2009) 49 EHRR 30, in the context of a consideration of whether a real risk of treatment incompatible with Art.3 of the ECHR had been established, the EctHR stated:

"128. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained proprio motu (see H.L.R. v. France, cited above, § 37, and Hilal v. the United Kingdom, no. 45276/99, § 60, ECHR 2001-II). In cases such as the present the Court's examination of the existence of a real risk must necessarily be a rigorous one (see Chahal, cited above, § 96).

129. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see N. v. Finland, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.

130. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see Vilvarajah and Others, cited above, § 108 in fine)."

65. Thus, while the burden was on the applicant, it goes without saying that it fell to the Minister to consider whether the applicant's circumstances met that burden.

The obligation on the Minister in this case was to examine the foreseeable consequences of sending the applicant to Pakistan bearing in mind the general situation there and the applicant's personal circumstances. The necessary assessment must be rigorous. In *B.M. (Eritrea) v. Minister for Justice, Equality and Law Reform* [2013] IEHC 324,

McDermott J., in quashing the refusal to revoke the deportation order in that case, enunciated, *inter alia*, the principles to be applied to the assessment of risk, by reference to *Saadi v. Italy* and the decision of the Supreme Court in *Minister for Justice v. Rettinger* . He stated:

> *"The principles applicable to the assessment of the risk in Saadi were summarised and applied by Denham J. (as she then was) in Minister for Justice v. Rettinger [2010] 3 IR 783 at para. 16 as follows:-*
>
> *"(i) the court takes as its basis all the material placed before it or, if necessary, material obtained of its own motion;*
>
> *(ii) the court's examination of the existence of a real risk is necessarily rigorous;*
>
> *(iii) it is in principle for the respondent to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it;*
>
> *(iv) the court must examine the foreseeable consequences of sending the respondent to the receiving country, bearing in mind the general situation there and his personal circumstances;*
>
> *(v) the court has attached importance to the information contained in recent reports from independent international human rights protection associations such as Amnesty International, or governmental sources, including the State Department of the United States of America;*
>
> *(vi) the mere possibility of ill treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of article 3, and, where the sources available describe a general situation, a respondent's specific allegations in a particular case require corroboration by other evidence;*
>
> *(vii) in cases where a respondent alleges that he or she is a member of a group systematically exposed to a practice of ill treatment, the court considers that the protection of article 3 of the Convention enters into play when the respondent establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned;*
>
> *(viii) if the respondent has not yet been extradited or deported when the court examines the case, the relevant time will be that of the proceedings before the court; accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive."*

The foregoing comprise the principles which are required to be applied by a decision-maker to an application to revoke a deportation order when considering whether there are substantial grounds for believing that there is a real risk of a breach of Arts. 2 or 3 of the European Convention on Human Rights, or indeed Art.1 of Protocol 13. With regard to the present case, the first observation the court makes is the absence to any

reference in the decision to the applicable principles. Nor is it apparent to a reader of the decision what legal principles were applied, or how the decision-maker addressed the applicant's specific submission that returning him would be in breach of the prohibition on refoulement and the State's obligations under Art. 3 of the Convention. Certainly, it is the case that discrete issues were addressed in the decision, namely the "inefficiencies" surrounding the implementation of FIRs across Pakistan and the fact that the applicant remained undetected for two years following the lodging of the FIR against him.

66. In the course of his submissions to this court, counsel for the applicant argued that it was not sufficient that the decision-maker would cite and focus on country of origin information from the Immigration and Refugee Board of Canada (2010) to the effect that police in one area of Pakistan do not generally become aware of an FIR against someone in another area of the country. He argues that insofar as it is contended by the respondent that the rationale for the decision was based on inefficiencies in the implementation of FIRs, it was not sufficient or lawful for the decision-maker to focus on the fact that the applicant had not been apprehended in the two years he remained in Pakistan following the filing of the FIR. This was because the decision- maker went on to recognise that it was possible that on a return to Pakistan the applicant could be apprehended and held to account for his crime.

67. Counsel for the applicant also argues that while the decision-maker had regard to this possibility, she proceeded to rely solely on the country of origin information which showed that the applicant would get a fair trial and have access to legal aid, including possible NGO funded legal aid, and that any trial would be "on its merits before any decision was taken that he should be convicted of the alleged offence". Counsel submits that this reasoning underpins the key challenge in the within proceedings, which is that the real issue to be determined was not whether the applicant would get a fair trial, but rather what it was he would face if convicted. Counsel argues that if there is a substantial chance of his facing the death penalty, then the applicant cannot be deported irrespective of the nature of his conduct. Counsel contends that, in effect, the decision-maker completely missed the point of the submissions advanced on the applicant's behalf with regard to the death penalty.

68. The basic thrust of the arguments canvassed on behalf of the Minister is that the central premise upon which it was decided that the deportation order should be affirmed was the account taken by the decision-maker of the fact that there was no national tracking system for FIRs in Pakistan and the applicant's own circumstances in the two years subsequent to the lodging of the FIR. Counsel submits that this central finding is not disturbed or diluted by the applicant's representations with regard to the death penalty, even in circumstances where the issue of the death penalty was being considered by the decision maker for the first time. The respondent also argues that the decision maker's noting of the death penalty was "secondary" to the conclusions reached in respect of the FIRs and it is submitted that the decision-maker's engagement with the applicant's prospects of getting a fair trial in Pakistan in the event that he killed the named third party and were he to be apprehended, amounted to what counsel described as a "stream of consciousness" on the part of the decision-maker. He asserts that this was so because the decision-maker had already determined the basis of the decision not to revoke the deportation order, namely the conclusions arrived at with regard to the tracking of FIRs in Pakistan and the fact that the applicant had remained un-apprehended in Pakistan for two years following the lodging of the FIR. The applicant's non-detection bore out the country of origin information on the inefficiency of the FIR system and which, counsel argues, was the decisive issue as far as the decision-maker was concerned.

69. I am not persuaded by the argument advanced on behalf of the respondent. In the course of her deliberations, the decision-maker specifically alludes to the possibility of

the applicant being apprehended and prosecuted for his crime. She goes on to opine that, if prosecuted, he would get a fair trial. However, the consequences for the applicant were he to be convicted was not then assessed in the decision, as they should have been. That is the fundamental flaw in the decision. Once the decision-maker embarked upon a consideration of the possibility of the applicant being prosecuted within a criminal justice system which provides for the death penalty she was obliged to consider whether substantial grounds of a real risk of exposure to the death penalty had been established. It was not sufficient for the decision-maker to content herself with the fact that the applicant would get a fair trial and have access to legal representation. Of themselves, these factors could not be determinative of the assessment of the issue, which was required to be determined having regard to the general circumstances in the country as pertained to the penalties for the crime of which the applicant stood accused. As such, there was a failure on the part of the respondent to consider the submissions advanced on the applicant's behalf in accordance with the requisite legal principles.

70. Moreover, I am of the view that the approach of the decision-maker, in considering only the availability of a fair trial and access to legal representation for the applicant and not the consequences for the applicant if convicted, did not accord with the principle of rationality, in the face of objective evidence which shows that the crime which the applicant maintains he committed may be subject to the imposition of the death penalty in Pakistan. The conclusion arrived at in respect of the applicant cannot be considered rational in the absence of further elaboration by the decision-maker as to why it was considered unnecessary to pursue, in the consideration of file, the likely consequences for the applicant were he to be convicted.

71. Counsel for the applicant also makes the case that there is a lack of clarity in the decision. I agree. While findings are made about the inefficiencies of the FIR system and indeed about the availability of a fair trial for the applicant, it is not sufficiently clear to the court, on judicial review, whether these were the factors which were found to obviate the applicant's exposure to the death penalty, irrespective of whether the prospect of a fair trial could be said to be a rational assessment of the question of exposure to the death penalty, if the applicant were to be convicted.

Summary

The challenges to the decision on grounds a, b, d, e and f have been made out. The court will grant an order of certiorari quashing the decision of the first named respondent dated 29th October, 2015 and remit the matter to be determined by the first named respondent in accordance with the applicable legal principles.