THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 774 J.R.]

BETWEEN

Y.Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 5)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 19th day of December, 2017

1. In *Y.Y. v. Minister for Justice and Equality (No. 1)* [2017] IEHC 176, I declined to grant *certiorari* of a deportation order and a decision under s. 3(11) of the Immigration Act 1999 adverse to the applicant. In *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185, I refused leave to appeal to the Court of Appeal. In *Y.Y. v. Minister for Justice and Equality (No. 3)* [2017] IEHC 334, I declined to continue a stay in favour of the applicant. In *Y.Y. v. Minister for Justice and Equality* [2017] IESCDET 38, the Supreme Court gave leave to appeal to that court on limited grounds. In respect of my substantive decision, in *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61, the Supreme Court quashed the s. 3(11) decision and remitted the proceedings, insofar as they related to the original deportation order, to this court, to be considered in conjunction with a proposed further s. 3(11) application. Following this, further submissions under s. 3(11) were made by the applicant on 10th August, 2017. As previously mentioned, I note in passing that one point made in those submissions was unfavourable television coverage in relation to the applicant but that was hardly discouraged by the applicant, having effectively waived anonymisation of the country name, which I had previously ordered as a protection for him. A new s. 3(11) decision adverse to the applicant was made on 27th September, 2017. In *Y.Y. v. Minister for Justice and Equality (No. 4)* [2017] IEHC 690, I *inter alia* allowed an amendment to the proceedings to challenge that s. 3(11) decision, as envisaged by the Supreme Court.

2. Following that amendment, I considered that the appropriate way to deal with the proceedings was in modular form and I now deal with the validity of the second s. 3(11) decision by way of Module I of the proceedings, leaving over to Module II the question of the ramifications, if any, of this decision for the original deportation order. I am not going to repeat the findings already made, and my previous decisions should be read as incorporated by reference, subject of course to the Supreme Court judgment.

3. I have had regard to the tests as set out in the ECHR case law, as outlined in the No. 1 judgment, particularly at paras. 85 and 86. The Minister in the decision under challenge correctly states the test involved in accordance with the ECHR jurisprudence.

4. Generally, I would accept the submission made by Mr. Remy Farrell S.C. (with Ms. Sinead McGrath B.L.) for the respondents, that the applicant's case, as put forward by Mr. Michael Lynn S.C. (with Mr. David Leonard B.L.), is based on "*a minute dissection of the decision*" rather than necessarily focusing on the larger issues involved. In particular, the applicant has, in submissions made on his behalf, shied away from the most striking factual feature of the case, namely that the applicant's brother is living openly in Algeria without difficulty, despite a terrorist conviction in France.

Is there a flaw in the decision because the second s. 3(11) decision is based on different grounds than previous decisions?
5. Mr. Lynn submits that we are on the third decision here and that different decisions have somewhat different rationales, of which he was not given notice, which he says "*goes to the fairness of the procedure*". I reject that submission. If, as here, an original s. 3(11) decision is quashed, the Minister is entitled to make a new decision on a new basis having regard to the material before the decision-maker at that point. No unfairness arises.

Is there a flaw in not reverting to the applicant with the issues of concern to the Minister because the Minister is dispelling doubts under art. 3 of the ECHR?
6. The duty to dispel doubts under art. 3 of the ECHR is an objective exercise. It is not to be equated with dispelling them subjectively in the mind of the applicant or anyone else. No illegality arises here in not giving the applicant a preview of the draft decision simply by virtue of the fact that the Minister is engaged in an art. 3 process, as opposed to any other type of administrative process.

Is there an unfairness on the grounds that the applicant had engaged an expert who was not asked to comment on the Minister's views on the material?
7. In the s. 3(11) submissions, the applicant's solicitor asked for their expert Professor Joffé to be allowed to comment on the Minister's views on the material submitted. Mr. Lynn accepts there is no authority for the proposition that such an opportunity to comment on the Minister's draft decision or provisional views should be allowed. An applicant's rights cannot be greater simply because he or she hires an expert. More fundamentally, and leaving this case aside for a moment, nonsense does not become sense simply because one can find an expert to sign their name to it. One still has to evaluate the basis of the point made. No entitlement to *certiorari* arises under this heading simply because an expert was engaged in this case.

Is there an unfairness on the ground that the applicant was not asked to comment on the Minister's views on the material submitted?
8. Reliance is placed on *Moyosola v. Refugee Applications Commissioner* [2005] IEHC 218 in which Clarke J. comments that applicants are entitled to "*an opportunity to answer*" a matter that is "*likely to be important to the determination of the RAT*". In such a case "*that matter must be fairly put to the applicant*". Clarke J. goes on to say that "*this remains the case whether the issue is one concerning facts given in evidence by the applicant, questions concerning country of origin information which might be addressed either by the applicant or by the applicant's advisors or, indeed, legal issues which might be likely only to be addressed by the applicant's advisors*". However, it seems to me that that case is dealing with the unexceptional situation where an applicant is entitled to notice of the issue being considered in the first place. It has nothing to do with a situation where an applicant asserts an entitlement to a further bite of the cherry by way of a preview of the Minister's provisional views on material of which the applicant is actually or constructively aware. The factual context is set out by Clarke J. as being a situation where "*none of the applicants had*

had the fact that it might be contended that their assertions were contrary to such country of origin information brought to their attention nor, indeed, was the relevant country of origin information itself brought to their attention". That is a totally different situation to that being contended for here, which is a proposition that the applicant is entitled to know what adverse inferences the Minister intends to draw from material of which the applicant is actually on notice. Likewise, where Peart J. in *B.W. (Nigeria) v. Refugee Appeals Tribunal* [2017] IECA 296 is speaking of the right to "*a fair opportunity to address the concern where that opportunity has not already been provided*", he is speaking of a context where the matter of concern to the decision-maker was never suggested to the applicant and therefore "*the applicant had no opportunity of addressing the concerns which it gave rise to in the mind of the Tribunal*" (para. 52). Therefore, it seems to me that there is absolutely no support in the jurisprudence for Mr. Lynn's submission that where adverse inferences are going to be drawn from material of which the applicant is fully aware, there is a duty of fairness to the applicant to engage in a further process where those proposed adverse inferences are put specifically.

9. The deportation context is not a process of dialogue: see *Baby O. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 169 *per* Keane C.J., at p. 183: there is "*no obligation on the [Minister] to enter into correspondence …setting out detailed reasons as to why refoulement does not arise*". The same point was made in *M.A. v. Minister for Justice, Equality and Law Reform* (Unreported, Cooke J., 17th December, 2009). Likewise in *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603 MacMenamin J. said "*Section 3 is not an interactive process"*. There is therefore a major difference between the requirement for notice of what the relevant material or issues are in the first place, as in *Flanagan v. U.C.D.* [1988] I.R. 731, and the contended-for claim to notice of draft decisions or draft decision-maker's analysis, or the proposed inferences or conclusions that a decision maker proposes to draw from such material or issues. Perversely, the applicant sought to rely on case C-277/11 *M.M. v. Minister for Justice Equality and Law Reform*, which in fact decides the opposite proposition. In that case, the CJEU rejected the contention that EU law required authorities to supply in advance the elements on which they intend to base their decisions and to seek the applicant's observations in that regard.

10. Turning then to the specific complaints under this heading, it is claimed that the applicant did not know that reliance was going to be placed on various issues. Generally, I accept the respondent's point that the submission made by Professor Joffé was "*seriously lacking in a number of respects"* (para. 14 of submissions). The claim relating to a particular mention of Ali Attar in a SIAC judgment is not being pressed. A point is made regarding a rejection of material from Amnesty International relating to alleged mistreatment of a journalist, Mr. Mohamed Tamalt (page 23 of the analysis). The Amnesty Report was submitted by the applicant, and he was on notice of it. The Minister's comments were comments on the report. It was noted that no specific allegations of mistreatment are detailed and that seems to me to be an entirely unimpeachable proposition, and that his health deteriorated due to a hunger strike and that he died as a result of (consequent) infection. Mr. Lynn says that "*if we'd known that Amnesty's reference to this treatment was not accepted we would have tried to deal with this*". But this was not a case of Amnesty's reference not being accepted, Amnesty itself was referring not to mistreatment but to *alleged* mistreatment. The applicant's solicitor submits material from the website of the Algerian League for the Defence of Human Rights, indicating further detail of the allegations regarding Mr. Tamalt. While Mr. Lynn submits that "*we are not trying to introduce COI after the event*" he accepts there was nothing stopping the applicant from putting all this material to the Minister in the first place. He says there was no reason to think that the Amnesty report was going to be "*dismissed*" - but it was not dismissed. The Amnesty report is a document entitled "*Urgent Action*", relating to the death of Mr. Tamalt on 11th December, 2016, in a hospital in Algeria. A fair reading of the document certainly suggests that his death was due to hunger strike rather than ill-treatment. It refers only to "*allegations of ill treatment*". Amnesty themselves are not making an allegation of ill-treatment. The main point to his hunger strike seems to have been a protest against his incarceration in the first place.

11. The next specific complaint under this heading is that significance was being attached to the dissolution of the DRS, particularly at pp. 25 to 26 of the analysis, and that new constitutional and legal protections would be regarded as effective. The applicant and his advisors were well aware from the country material that the DRS had been dissolved and that new legislation was in place. They could have said anything they wanted about this. There was absolutely no surprise here and Professor Joffé dealt with this.

12. The next issue was the fact that International Committee of the Red Cross (ICRC) visits to Algeria would be relied on (see p. 8 of the decision referring to the ICRC annual report). Professor Joffé was clearly well aware that the ICRC did have access. Mr. Lynn says that if he knew reliance was going to be placed on this he would have reminded the Minister of para. 146 of *Saadi v. Italy* (Application No. 37201/06, European Court of Human Rights, 28 February 2008). However, there was nothing stopping him making that point originally. So it seems to me the complaint under this heading also fails. I will come back to the Menas Associates report specifically later.

Is the decision irrational?

13. Mr. Lynn relies on the judgment of O'Donnell J. in the Supreme Court at para. 54 that "*it is critically important that the national decision maker apply that test in a searching with real care and rigour*". As construed on behalf of the applicant, Mr. Lynn effectively interprets this as meaning the decision-maker must find for the applicant. That is not a correct interpretation. It would be tedious to list in extenso the large amount of country material considered by the Minister. I have already done so in the No. 1 judgment, as matters stood at that point. The Minister has engaged in a lengthy and detailed analysis citing relevant case law. It is certainly not careless or lacking in rigour. It could perhaps be more favourable to the applicant but that in itself is not sufficient. Obviously it is important that decisions under art. 3 of the ECHR are reasonable. However, the fact that the Minister is dispelling doubts that have been legitimately raised by an applicant does not mean that the hurdle should be unrecognisably high in that regard. A vast quantity of material was considered by the Minister, and a clear pattern emerges from that material of an overall improving situation in Algeria. That is acknowledged by O'Donnell J. as having been recognised by SIAC (see para. 46 of the Supreme Court judgment). While there is a micro-analysis of certain select issues by the applicant's expert, many pertinent aspects are left out. (I will return later to the question of whether that expert has complied with the duty to give a fair view of all aspects or whether he has in effect adopted a partisan stance for the applicant.) O'Donnell J. notes at para. 55 of the Supreme Court judgment that a rigorous assessment 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 for breach of Article 3, was lawfully and properly grounded in a rigorous assessment of the evidence".*

14. Mr. Lynn claims that it was irrational to have found there was no risk given the lack of inspection at detention facilities and further that it was irrational to rely on ICRC access, because that was not reliable evidence based on *Saadi*. It seems to me one cannot generalise from *Saadi*. In its own terms it is phrased as an assessment in relation to that particular case. The Minister is entitled to consider all material in any given case. The Minister derives some support from the U.S. State Department 2016 Country Reports on Human Rights Practices – Algeria (3 March, 2017) and in that context the finding under this heading was not unreasonable.

15. The next complaint is that it was irrational to have found that human rights training by police officers mitigated risk. Again, the Minister had material from the U.S. State Department report, 2016. Various points were made as to what the report does or does not say but the Minister was entitled to form a view based on all material as long as that view was reasonably open. The Minister does not need to find material that answers all possible objections from an applicant.

16. The next complaint was that it was irrational to rely on new legislation in Algeria. Mr. Lynn submits that new legislation is not evidence of any change on the ground. Taken entirely in the abstract that proposition could in certain circumstances have some possible validity, but the fact that legislation has changed could reasonably be taken up as an indicator of changing attitudes as part of an overall view of a continually improving context over a period of years, which is the case here.

17. The next complaint is that the finding regarding the dissolution of the DRS was irrational. Again, under this heading the Minister is not obliged to take the most favourable view of material from the applicant's point of view. That development was something that the Minister was entitled to take into account.

18. Further, the applicant claims that it was irrational to have made the impugned decision given that the U.K. will not deport terrorist suspects to Algeria without diplomatic assurances. However, given that, as the Irish Free State, Ireland attained executive independence from the U.K. on the 1st April, 1922, we are no longer obliged to follow the practice in the U.K. It is not irrational to do something different to the practices in that jurisdiction.

19. Having regard to all of the foregoing, I reject the argument from unreasonableness, but will come back to the issue of the closure of Antar Barracks separately later.

20. To put this matter in context and to underline the conclusion I have independently arrived at, very recently the Administrative Court of Appeal of Paris summarily rejected the argument that the return of a terrorist suspect to Algeria was in breach of art. 3 of the ECHR: see *Bouhabila*, Case No. 15PA02906, 7th March, 2016, para. 19. The Minister's analysis here was considerably more detailed and discursive in relation to the claim of breach of art. 3 on return to Algeria. It is perhaps a strange situation where Irish administrative decision-makers, and indeed courts, feel obliged to beat themselves up over a micro-level of detail, where other European countries legitimately take a broader view of the bigger picture. Naturally enough, Mr. Lynn submits that "*no reference or regard should be had*" to this decision, obviously because he does not feel it assists his case. It is an almost ludicrous situation that Mr. Lynn is condemning the Minister's decision for failing to slavishly follow U.K. jurisprudence in practice favourable to him, while at the same time submitting that it would be a fundamental error of law for me to have regard to French jurisprudence, which is not so favourable. I do have regard to the latter, but it only reinforces the view I have arrived at completely independently.

Was there a failure to consider whether the improvements in Algeria are significant and non-temporary?
21. I dealt with this issue in *Y.Y. (No. 1)* at para. 191 and it would be tedious to repeat that discussion here.

Did the Minister apply an incorrect test as to risk of harm?
22. Mr. Lynn submits that on the basis of the wording of para. 63 of the statement of opposition, which refers to the applicant not having shown compelling justification as to why he should not be deported, the Minister has misstated the correct test. It seems to me that any allegation of misstatement of the correct test has to be positively pleaded. Mr. Lynn says that this is by way of a reply and he is "*entitled to simply argue it*". However, even assuming that the contents of para. 63 of the statement of opposition are misconceived, the consequence of a misconceived plea in defence is not that an applicant wins when otherwise he would not. There is no basis to grant relief under this heading.

Was there a breach of fair procedures by reason of failure to notify specific country of origin material?
23. This complaint relates to a blog article dated 28th January, 2016 by Menas Associates, which was relied on by the Minister. The respondent's deponent says that the article was dated 18th August, 2017, but that appears to be an error. It would seem the material was accessed on the latter date. This is said to be a publicly accessible document "*accessed by a case worker carrying out a routine search process*" (para. 11 of the affidavit sworn on behalf of the respondent). In the Supreme Court decision in *Y.Y.,* at para. 60, O'Donnell J. said 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*". It is clear that Professor Joffé was fully aware of the report (see para. 18 of his supplementary report). That does not in and of itself mean that no fair procedures issues could potentially arise. It seems to me that Professor Joffé's report is somewhat evasive in that it does not identify who the author of the Menas Report is, even though he says he knows that information, or what his or her views are, even though he says he knows that information as well, or in what way they do not reflect the respondent's interpretation, which is the conclusion asserted by Professor Joffé. In his original report, Professor Joffé emphatically trumpets his awareness of his duties to the court at para. 6, although remarkably he does not say what he thinks those duties are. No particular reason has been advanced as to why he did not specify those duties. It is not clear to me that he really understands this issue. The vague, evasive and oblique wording (at para. 18) of his supplementary report does not seem to me to be a very effective implementation of his duty to the court, or one that would normally be associated with an expert report.

24. Mr. Lynn submits that the supplementary report is prepared at short notice, which is not an excuse, or that he was only asked to say what he would have said had he been given the opportunity to make submissions, which is clearly not an answer because that is the very point at issue. Mr. Lynn suggests that maybe if pressed he would have given the name of the author, but again clearly an expert should not have to be pressed to state all relevant information. He also says that maybe there is a reason not to name the author, but that seems to me to be pure speculation. It is not clear why the shortcomings in Professor Joffé's report were not explained given that the respondent expressly commented in submissions that the report had significant omissions. Mr. Farrell submits that "*the real issue is whether Professor Joffé considers himself obliged to state both sides of the issue. It would appear he does not*" and it seems to me that criticism is borne out. However, the point remains that even if Professor Joffé has, as I consider is the case, been somewhat evasive and has failed to understand and give effect to his duty to the court, he would have been in a position to comment on the blog post had it been put. It seems to me that for legal purposes I cannot hold the applicant responsible for not anticipating that the Minister would take a point on this. Furthermore, it would not have been very much trouble for the Minister to put the applicant on notice of this particular blog post. It seems to me the Menas report is quite different from regular annual country reports issued by the likes of the U.S. State Department, Amnesty or Human Rights Watch, for example, and is unusual material which should be put on conventional principles; and that therefore the failure to put the applicant specifically on notice of the report is a breach of fair procedures. It cannot be said to be immaterial to the result. Certainly the next time case workers dig up such material going beyond normal country reports that is intended to be relied on that should be shared with an applicant, and the opportunity to make submissions should be given. As regards irrationality, under this heading Mr. Lynn submits there is no evidence that Antar Barracks are not being used and are therefore the finding in this regard is irrational. Since I find the Minister was not entitled to make that finding without putting it to the applicant then the question of whether the conclusion is reasonable does not arise.

Order
25. The order therefore will be:

(i). that an order of *certiorari* do issue removing for the purpose of being quashed the second decision under s. 3(11) of the Immigration Act 1999; and

(ii). that I will move on forthwith to deal with Module II of the case, which is to determine whether the original decision should fall or whether the Minister should be directed to reconsider the s. 3(11) application.