Neutral Citation Number: [2013] IEHC 324

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1040 J.R.]

BETWEEN

B. M. (ERITREA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 16th day of July, 2013

1. This is an application for judicial review by way of *certiorari* seeking to quash the decision of the respondent dated 27th September, 2012, refusing to revoke a deportation order made in respect of the applicant on 8th July, 2011. An application had been made at an earlier stage seeking leave to apply for judicial review by way of *certiorari* and a declaration in respect of that order which had been adjourned on the basis that the applicant would make further application to the respondent seeking its revocation under s. 3(11) of the Immigration Act 1999, the refusal of which is now the subject of this application.

2. The case is somewhat unusual in that the applicant, an Eritrean national, came to Ireland on 10th December, 2004, and applied for refugee status which the Office of the Refugee Applications Commissioner recommended be granted on 24th August, 2005. The respondent, as he was obliged to do, pursuant to the provisions of s. 17 of the Refugee Act 1996, granted refugee status. Subsequently, on 18th December, 2007, the applicant was sentenced to seven years imprisonment for the offence of rape. By letter dated 26th November, 2009, the respondent issued a proposal to revoke that status and did so by letter dated 7th May, 2010.

3. By letter dated 25th January, 2011, the respondent issued a proposal to deport the applicant. The applicant contacted the Refugee Legal Service, but was refused assistance. Following an appeal, legal assistance was granted on 19th May, 2011, and on 29th June, a solicitor visited the applicant in prison. In the interim, the applicant wrote to the respondent by letter dated 6th February, 2011, stating that it was impossible for him to go back to Eritrea by reason of the conditions prevailing there.

4. A deportation order was made against the applicant on 22nd June, 2011, before he could receive legal advice. Notification of this order was furnished to the applicant by letter dated 8th July. Initially, an application seeking leave to apply for judicial review of this order was filed in the High Court on 26th October, 2011. This application was listed for hearing on 10th July, 2012, and adjourned by consent to enable the applicant to make an application for the revocation of the order under s. 3(11). An undertaking was given at that time by the respondent not to deport the applicant whilst his application for revocation was being determined.

5. The application for revocation was made by letter dated 20th July, 2012. It was supported by country of origin information, much of which post-dated the making of the deportation order. It was said to support the contention that the applicant would be at risk of torture, inhuman or degrading treatment, or punishment or death if returned to Eritrea. In particular, it focused on the threat posed to those returnees who were evading military service or perceived by the authorities as doing so, failed asylum seekers and those persons who had illegally left Eritrea or were perceived by the authorities as such. The applicant claimed to be a person at risk under each of these categories. A decision issued refusing the application on 27th September. Thereafter, the applicant filed a motion to amend the original proceedings in order to challenge this refusal. This raised important issues concerning the legal principles to be applied when considering whether to revoke a deportation order made against a person who claims that he will be at risk of a breach of Article 3 of the European Convention on Human Rights if expelled, the nature of the s. 3(11) application, and the consideration of new country of origin information when the applicant lacks credibility on an important part of his original claim. On 22nd November, the court permitted the proposed amendment and, by consent, leave was granted to the applicant to bring this application seeking an order of *certiorari* quashing the contested decision on grounds 5 to 12 of the amended statement of grounds as follows:-

> "(5)The decision of the respondent to refuse to revoke the deportation order in respect of the applicant was based on an irrational finding that the applicant could conceal from the Eritrean authorities that he was a failed asylum seeker and/or was unlawful in failing to recognise the risk (as supported by country of origin information) that the applicant would be perceived by the Eritrean authorities to have been an asylum seeker having been outside of Eritrea from 2004.
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> (6) The decision of the respondent to refuse to revoke the deportation order was based on an irrational finding that the applicant had failed to provide a link between his individual/personal circumstances and the country of origin information submitted. The applicant is a failed asylum seeker. The applicant is liable to military service. The applicant left Eritrea illegally. Further, the applicant is at risk of being perceived as a person who left Eritrea illegally and/or as a military service evader.
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> (7) The decision of the respondent to refuse to revoke the deportation order was based on an irrational finding that the applicant's failure to make submissions when served with notices that the respondent was proposing to revoke his refugee status and issue a deportation order meant that he did not have a fear of serious harm on return to Eritrea on the basis of being a failed asylum seeker or being perceived as such; of being a military service evader, or of being perceived as such; or of being a person liable for military service.
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> (8) The respondent did not determine the applicant's revocation application lawfully, by failing to deal with the risk faced by the applicant as a person liable for military service.

(9) The decision of the respondent to refuse to revoke the deportation order was based on an irrational finding that the applicant had "not made a genuine effort to substantiate his claims". There was no basis for this finding.

(10)The respondent failed to apply the correct legal test in determining whether it would be lawful to deport the applicant to Eritrea – 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 treatment in Eritrea and whether the life or freedom of the applicant would be threatened in Eritrea on account of his race, religion, nationality, membership or a particular social group or political opinion.

(11)The respondent failed to exercise the due rigour required in determining an application involving a claim of risk of torture, inhuman or degrading treatment by, for example, failing to weigh the country of origin information with sufficient care, fairness and clarity.

(12)The respondent acted in breach of the applicant's right to fair procedures by making adverse findings that were never put, or even signalled, in advance to the applicant or his lawyers."

These grounds may only be understood by examining the history of the applicant's case, how he came to acquire and lose his refugee status following his conviction, his failure to engage in the deportation process leading up to the making of the order and why the issues raised under s. 3(11) were only addressed for the first time in that application. Ground 12 was not pursued.

The Applicant obtains Refugee Status

6. The applicant applied for refugee status on 7th January, 2005. He gave his date of birth as 24th May, 1988. He stated that he was born in Eritrea but was of Tigrayan ethnicity. He stated that his father and two brothers still resided in Eritrea but that his mother was deceased.

7. The applicant claimed that his father and mother were members of an opposition group, the ELFRC, and that his father had been in prison since March, 2003 in Eritrea. His mother had been detained and died after six months in prison in September, 2002. He had four brothers, two of whom died in the war. Another brother was imprisoned with his father. His fourth brother was, at that time, doing national service.

8. He claimed that he completed ninth grade in primary school, and that in March 2003, he took a magazine supporting opposition to the Government from his home to school. When seen reading this magazine his fellow students reported him to the director of the school who immediately notified the police and security services. When he returned home the police arrested and detained him. He was handcuffed and beaten following which the police returned to his home and arrested his father and brother. He was released in September, 2003. His father informed the police that though he was a member of an opposition group, his children knew nothing about it and should not be held responsible. When he returned home he found the house locked up and could find no other member of the family. As a result, he went to live with his aunt in Asmara. Then his uncle took him to Khartoum in September, 2004 where he resided for approximately three months. He was put in contact with a businessman, who escorted him to Ireland where he arrived on 10th December, 2004, claiming to be a minor.

9. In the s. 11 interview conducted with the applicant he complained of ill treatment while in prison. He stated that he was tied and beaten with a chain as a result of which he had scars on his arms and legs. He said his eye was damaged from the beating. He claimed that in an effort to get information from him about his father's friends, he was handcuffed and had his legs tied, was placed in an awkward, uncomfortable position and beaten nightly with sticks.

10. In the course of the s. 11 interview, it was also suggested to him that he had been in Italy prior to coming to Ireland but he denied this and said that he had never left Eritrea prior to his journey to the Sudan.

11. A medical report from Dr. Jonathon Jacob dated 4th July, 2005, was submitted in support of the application. His findings provided significant support for the applicant's claim that he was tortured. It stated:-

"He informed me that he had been imprisoned in Eritrea for six months in 2003, at which time he had been systematically tortured. This involved the use of a type of screw tightened handcuff which tied his hands behind his back, combined with his legs being tied up behind his back, kept in place with the use of a piece of timber and the chain from the handcuffs. The piece of timber lay against the front of his shins, when his legs were flexed at the knees. He was left lying in this position for long periods. He described being beaten on the feet with timber while tied in this position. He described having been pushed against the jamb of a door by a security man at the prison the day before he was released; this impacted against his right upper forehead.

Examination revealed multiple age appropriate deep pigmented scars on the fronts of his shins at the junction of the middle distal thirds. There were scars on the left and right wrists, more dominant on the right, as this was the side on which he lay when trying to sleep when tied up. These scars on the wrists were circular in shape and overlapping one with the other. There was a linear scar on the right upper forehead. There were numerous small circular areas of deep pigmentation on the soles of feet.

<u>Impression</u>

B.M. described systematic torture from which he sustained injury. The scars on his wrists are in keeping with trauma from small circular bolt marks from the shackles in which he was tied. The scars on the front of the legs are in keeping with blunt vague trauma from the friction of his shins against the timber which was used to tie him up. Marks on the feet are in keeping with an inflammatory response to beating of the first (sic). The scar on the forehead is in keeping with hitting the corner of a squared piece of timber, for example, a door jamb.

Internal

Summary: the scars and marks which B.M.'s body displays are in keeping with systematic torture as described by him at consultation on 27th June, 2005."

12. The applicant's credibility was undermined by his untruthfulness concerning his detention at a border crossing in Italy in 2004. This had been established by independent evidence from Eurodac. Nevertheless, the Refugee Applications Commissioner decided on 26th July, 2005, to recommend that the applicant should be declared a refugee because he had provided a sufficiently credible account of

events to render his claim to be a person in danger of persecution in Eritrea valid. This finding is of particular importance because it is based partly on the medical evidence set out above and the fact that he was Eritrean.

13. In accordance with that positive recommendation the Minister, as he was obliged to do under s. 17 of the Refugee Act 1996, as amended, granted refugee status to the applicant on 24th August, 2005.

14. The applicant, having been declared a refugee, was thereafter entitled pursuant to s. 3(1) of the 1996 Act, to "the same rights and privileges as those conferred by law on persons generally who are not Irish citizens (as distinct from such rights or privileges conferred on any particular person or group of such persons)". He was entitled to seek and enter employment, to carry on any business, trade or profession and have access to education and training in the state in the like manner and extent in all respects as an Irish citizen. He was entitled to the same medical care and services, the same social welfare benefits and the same right to travel in or out of the state as an Irish citizen. Various supports were available to assist his integration into Irish society.

15. Most applicants who are successful and obtain refugee status in accordance with the provisions of the Act contribute in a meaningful, positive and enriching way to Irish society. Following a period of time they are entitled to apply for a certificate of naturalisation: many do and succeed in obtaining Irish citizenship. However, three weeks prior to the grant of refugee status on 24th August, 2005, the applicant committed a rape offence on 3rd August. He was convicted of this offence following a trial that lasted thirteen days on 2nd February, 2007. He was sentenced to seven years imprisonment on 18th December, 2007, backdated to the date of his original detention on 29th June, 2006.

The Sentence Imposed

16. Following his conviction Clark J. was furnished with a number of reports on the applicant's personal circumstances. The following excerpts from her ruling indicate the nature of the applicant's background and character:-

> "13. He arrived in the country either on 10th December, 2004 or on 7th January, 2005 and claimed asylum on the basis that he was fleeing persecution from government agents in Eritrea. He claimed to be sixteen years old at the time although doubts were very soon cast as to the truth of this assertion. The management of various shelters for unaccompanied juvenile asylum applicants expressed concerns that he was considerably older than asserted. A medical report was furnished doubting that he could be sixteen as claimed as his appearance and his violent, aggressive and anti-social behaviour was considered inappropriate for a person of his age. It seems that he was ejected from a number of these hostels because of violent behaviour and for damage to property. Following this, he took to living on the streets where he was introduced to drugs and alcohol and where convictions for theft and public order offences have been recorded against him. He also travelled outside the state which is not permitted when one is an asylum seeker where he was arrested and sent back to Ireland…
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> 15. Mr. M's reports of his history and arrival in the country are not always consistent. He stated that all members of his immediate family were either dead or imprisoned and that he was unaware of whether they are still alive or at other times that his family is unaware that he is in prison for a sex offence. Whatever the truth of his origins and background it is clear that we are dealing with an angry, damaged, desensitised, anti-social and potentially dangerous young man who owes loyalty to no one but himself and who has threatened to get even with all those involved in his trial and conviction. The experts who evaluated him warned that he is in the high risk category of re-offending sexually. He is utterly without insight for the damage his offence has caused and remains in total denial. It is, however, possible that because of alcohol and substance abuse that he genuinely has no recollection of events. The clinical psychologist report warns that:-
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> > 'Should Mr. M be released into the community in the future, his victim and investigating members of An Garda Síochána should be notified so that they may take appropriate steps to remain safe.'
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> This Court takes the warning seriously following long observation of the convicted man's attitude to his interpreters, his jailers and the court and his highly suspicious attitude towards expert staff who prepared reports.
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> 16. The court is left in a dilemma. Mr. M is himself a victim of torture and ill treatment of a very extreme kind. The psychological damage consequent to his mistreatment has left him suspicious and paranoid and inured to the pain of others and without the ability to empathise. He abuses drugs and alcohol. He poses a risk to all those in authority and those more vulnerable than he is…
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> 18. The profound irony of a man who has himself suffered torture who then inflicts fear and physical degradation on a woman who he did not know and who did him no harm, in the country which offered him asylum is inescapable. He is now a damaged and disturbed man who is a high risk of re-offending. He is clearly deeply unhappy with his lot since arriving here and I inquired whether he would prefer to return to his country to serve his sentence there or to be deported there on completion of his sentence. I intend to write to the Minister for Justice and Law Reform to notify him of the situation in the full knowledge that the decision to deport is one uniquely confined to the Minister…
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> 22. …I therefore recommend that while in prison and in accordance with recommendations made by…the clinical psychologist that serious attempts are made to treat this very damaged refugee with compassion and that a structured general education programme with mandatory attendance and involvement in a sexual treatment course be set in place to prepare him for return to his own culture or to integrate him into society. He has no family or friend to speak up for him and to tell us his life story or indeed to visit him in prison…The court has listened carefully to the mitigating factors I must consider but find myself unable in all the circumstances to impose a sentence of less than seven years to be backdated to the time of his original incarceration. With some stability and structure in his life he may develop a capacity to trust and to reduce anxiety and anger. In the meanwhile he must serve a fairly lengthy custodial sentence for the brutal crime he committed and for the danger he poses to society in the country which gave him asylum and to which he feels no loyalty."

17. It is unsurprising, having regard to the seriousness of this crime and the assessment that the applicant was at a high risk of re-offending, that the Minister ultimately revoked his refugee status and viewed him as an appropriate candidate for deportation. However, it is well established that when considering the risk to a proposed deportee of torture, inhuman or degrading treatment or punishment contrary to Article 3 of the European Convention on Human Rights, his or her misconduct, however heinous, may not be invoked or weighed against that risk because the duty cast upon a contracting state to provide protection under Article 3 is absolute.

The Revocation of Refugee Status
18. By letter dated 7th May, 2010, while serving this sentence, the applicant was informed that the respondent had decided to revoke his status as a refugee pursuant to the provisions of s. 21(1)(g) and (h) of the Refugee Act 1996 (as amended). These provisions enabled the respondent to do so on the grounds that he was a person whose presence in the state posed a threat to national security or public policy or was a person to whom a declaration had been given on the basis of information furnished to the Refugee Applications Commissioner which was false or misleading in a material particular. In addition, the Minister was empowered under Regulations 11(1)(b) and (2)(b) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006) to revoke the declaration if the applicant had been convicted by a final judgment of a particularly serious crime that constituted a danger to the community and/or misrepresented the facts which were decisive to the granting of a declaration. The reasons furnished for the revocation of refugee status were that the applicant had been sentenced to seven years imprisonment following a criminal conviction and that he had given false or misleading information during the course of his asylum application in respect of the taking of his fingerprints in Italy on 4th October, 2004, under a different name. The applicant was notified that he had a right of appeal to the High Court against the respondent's decision under s. 21(5) of the Refugee Act 1996, within fifteen working days of the revocation notice. No appeal was submitted by the applicant.

The Deportation Order
19. The applicant was informed of the respondent's proposal to deport him under s. 3 of the Immigration Act 1999, by letter dated 25th January, 2011. By letter of 8th July, the applicant was further informed of the decision to make the order, a copy of which was enclosed together with the Minister's considerations in the form of an examination of file completed on 5th May, 2011. The deportation order was signed on 22nd June. The examination of file considered the applicant's case under s. 3(6) of the Immigration Act 1999, and s. 5 of the Refugee Act 1996 (Prohibition of Refoulement). It also considered the applicant's private and family rights under Article 8(1) of the European Convention on Human Rights and whether his deportation was proportionate in all the circumstances. The rights of the state to maintain control of its own borders and operate a regulated system for the control, processing and monitoring of non-nationals in the state, and to ensure the economic wellbeing of the state, and the prevention of disorder and crime were all considered. Refoulement was found not to be an issue in the case.

20. The examination of file concentrates on two important matters. It was noted that a serious credibility issue had arisen in the course of the applicant's asylum application concerning his stated age and his presence in Italy in 2004. Initially, the applicant claimed to be a minor aged seventeen and, if so, would have been sixteen years old at the time he alleged that he was arrested for bringing the magazine into school. Further, in the course of his application information was furnished by the Italian Immigration Authorities via Eurodac that he was photo fingerprinted in Italy on 4th October, 2004, under a different name and gave a date of birth of 1st January, 1982, making him 22 years old. Although he was initially accepted as a minor by the Refugee Applications Commissioner, a medical officer furnished an opinion on 8th February, 2005, that the applicant was a young adult in his early twenties. This age discrepancy and his presence in Italy in 2004 were, therefore, known to the Refugee Applications Commissioner at the time the positive recommendation was made and to the Minister at the time he granted refugee status. A reference is also made in the examination of file to the receipt by the Irish Immigration Authorities on 11th June, 2008, of further information from the Italian authorities, but it is not clear how this information added to that which was in their possession from Eurodac prior to the grant of asylum in August, 2005.

21. The other important factor considered was the conviction of the applicant of a number of criminal offences. He was convicted of theft on 29th November, 2005, in respect of which a fine of €400 was imposed and threatening and insulting behaviour in a public place on 26th September, 2006. He was then convicted and sentenced for the rape offence as already described.

22. The credibility issues were considered under the heading of 'Prohibition of Refoulement' under s. 5 of the Refugee Act 1996. It was concluded that, by reason of his lack of credibility when claiming to be a non-minor and his denial that he had crossed into Italy under a different name and date of birth, that the applicant had failed to establish to a reasonable degree that he was arrested as a school boy for bringing a subversive magazine to school. Medical findings were also said to have been negated by this new information.

23. It was concluded that the facts established the applicant's total disregard for the integrity of the asylum and immigration procedures of the state. The applicant's convictions made his prospect of future employment poor in the light of the high unemployment rate in the state. It was considered that there was no less restrictive means than deportation by which the legitimate aims of the state in maintaining control of its borders, the prevention of disorder and crime and ensuring the economic wellbeing of the country could be secured. It was also concluded that deportation would not breach the applicant's rights to private or family life under Article 8 of the Convention. No issue was found to arise under s. 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000, though Article 3 of the Convention was not relied upon or mentioned. The applicant's deportation was, therefore, recommended and the order signed on 22nd June, 2011.

The Applicant's Response
24. The applicant sent a letter to the respondent in relation to the proposal to revoke his refugee status dated 6th February, 2011, which stated that the fingerprint evidence furnished by the Italian authorities was in error, and that he intended to appeal his conviction and sentence for rape.

25. In his affidavit, the applicant stated that legal aid was only made available to him following an appeal against a withdrawal of legal services on 19th May, 2011, following which he met with his solicitor in prison on 29th June. This was one week after the making of the deportation order. Thereafter, an opinion from counsel was sought in respect of a proposed judicial review of the deportation order. On his release from prison on 27th September, 2011, he retained a new solicitor, who obtained his file from the Refugee Legal Service on 7th October. This led to the initiation of proceedings by notice of motion dated 26th October seeking an extension of time for the bringing of proceedings and leave to apply for judicial review or an order of *certiorari* quashing the deportation order.

26. As already stated those proceedings were listed for hearing in the High Court on 10th July, 2012, but were adjourned by consent to enable the applicant to make an application pursuant to s. 3(11) of the Immigration Act 1999, for the revocation of the deportation order.

Application to Revoke the Deportation Order
27. By letter dated 20th July, 2012, the applicant's solicitors applied for the revocation of the deportation order on the basis of:-

> "country of origin information showing the risk to the life and freedom of the applicant on account of imputed political opinion and/or the risk to the applicant of suffering serious harm (*i.e.* execution, torture or inhuman or degrading treatment) if returned to Eritrea. The risk to the applicant in this regard arises, *inter alia*, from his status as a failed asylum seeker, and/or as a military service evader or so perceived, and/or as a person liable for military service and/or as someone who has departed illegally from Eritrea or so perceived".

It was claimed that country of origin information demonstrated that if returned to Eritrea, the applicant would be at a real risk of detention by the Eritrean authorities which would expose him to prison conditions, in themselves so appalling as to amount to torture or inhuman or degrading treatment as well as exposing him to a real risk of death. It was also submitted that he would be subject to compulsory military service on his return which entailed a significant risk of torture or inhuman or degrading treatment in breach of Article 3 of the European Convention on Human Rights or enslavement or compulsory labour in breach of Article 4. A considerable body of country of origin information was submitted in support of this application:

(i) UNHCR Eligibility Guidelines for assessing the International Protection needs of Asylum Seekers from Eritrea dated 20th April, 2011.

(ii) MO (Legal Exit - Risk on Return) Eritrea CG [2011] UKUT 00190(IAC) 27th May, 2011.

(iii)Eritrea: Treatment of Returned Failed Asylum Seekers, 21st January, 2010, from Refugee Documentation Centre.

(iv)US State Department Country Report on Human Rights Practices: Eritrea [released 24th May, 2012].

(v) Amnesty International Annual Report 2012 Eritrea [24th May, 2012].

(vi)Human Rights Watch 'World Report 2012: Eritrea' [22nd January, 2012].

(vii)Amnesty International Annual Report 2011 [May 2011].

(viii)Human Rights Watch, Service for Life, State Repression and Indefinite Conscription in Eritrea [April 2009].

A good deal of this material post-dated the decision to deport or was created at or about the time of the examination of his file or prior to his obtaining legal advice.

28. By letter dated 27th September, 2012, the applicant was informed that the Minister's decision to make a deportation order against him remained unchanged. A copy of the 'Consideration of Application for Revocation of Deportation Order pursuant to Section 3(11) of the Immigration Act 1999' dated 20th August, 2012, was enclosed.

29. It is important to recall the factors that had been considered up to this point by the authorities. The Refugee Applications Commissioner had already considered the case on the basis of a "critical analysis of all the circumstances and factors pertaining to the case…". The core of the applicant's claim concerned his fear based on what he allegedly suffered as a schoolboy when found in possession of a magazine published by the ELFRC. It was acknowledged by the Commissioner that the Health Service Executive did not accept his claim that he was a minor. Even if he were a minor, it was considered unlikely that an opposition magazine would be left lying around his home or that he would bring it to school. It was thought unlikely that the applicant was persecuted for the reason he gave, but it was thought to be within the bounds of possibility. The Commissioner thought it reasonable to conclude on the basis of Dr. Jacobs' medical report that the applicant had been tortured. The Commissioner also determined that the applicant's reported denials that he had been stopped and fingerprinted when entering Italy undermined the credibility of his account of leaving Eritrea. However, it was concluded that he had produced sufficient evidence of events in Eritrea to make his claim to be in fear of persecution a valid one and he was afforded the "benefit of the doubt".

30. The court is satisfied that the core facts considered by the Refugee Applications Commissioner have not substantially changed since 22nd July, 2005. It has not been disputed that he is an Eritrean of the Tigrayan ethnic group. The credibility issues relating to his age and his entry to Italy using a different name were known to and considered by the Refugee Applications Commissioner. It is difficult to understand how these factors could be regarded as new information in the subsequent decision made to revoke his refugee status or in the course of the examination of file prior to the making of the deportation order. However, it is clear that the commission of three criminal offences, one of which was the extremely serious offence of rape, was a factor that was new and justified the revocation of refugee status by the respondent. It also gave rise to what could be regarded on its own, or together with the economic considerations relating to his poor employment prospects, as a substantial reason to deport him.

31. The applicant was given the opportunity by the respondent to make submissions as to why he should not be deported and to submit country of origin information in that regard. He could have made submissions about his fears of being returned as a failed asylum seeker to Eritrea or in respect of the likelihood of his being conscripted because he was of military age or that he was in danger of being arrested, imprisoned and/or death because he was a person who left Eritrea illegally. No submissions were made on his behalf prior to the making of the deportation order. The applicant claims, as set out above, that this was because he had no legal advice at the time.

32. The court accepts that it was incumbent upon the applicant to make such submissions and submit such material as he wished at the earliest possible time in the immigration process. A process of drip-feeding information to the authorities is not acceptable. However, in this instance, five of the eight reports relied upon in the application to revoke the deportation order postdate the examination of file. In summary, the applicant claims that no submissions were made on his behalf prior to the making of the deportation order because he had no legal advice, and also that much of the material upon which he now relies was not available until after the completion of the examination of file.

33. The court granted the applicant an adjournment of his initial judicial review proceedings on 10th July, 2012, to enable him to apply under s. 3(11) of the Immigration Act 1999, to revoke the deportation order based upon the new material set out above. A formal consideration of this application was made on 20th August, 2012, and subsequently approved by other officials on 18th September, following which the applicant was informed by letter dated 27th September, that the Minister's earlier decision remained unchanged. The issues in these proceedings relate entirely to the new country of origin information submitted under the s. 3(11) application.

The Challenge

34. The applicant submits that the decision to refuse revocation of the order is fundamentally flawed on the grounds set out at para. 5 of this judgment. The applicant contends that it was unreasonable to conclude that he was not within the category of persons who would come to serious harm as a military service evader, or as a person so perceived, or as a person liable for military service and/or as a failed asylum seeker, if returned to Eritrea. It was also submitted that the respondent did not adequately consider the risk to the applicant if deemed by the authorities to be a person who had illegally left Eritrea. He claimed that there was a substantial risk of violation of his rights under Article 3 of the European Convention on Human Rights if he were to be returned which had not been considered adequately, or at all, and that the respondent had applied the incorrect legal test to the assessment of risk under Article 3. Further, it was submitted that the respondent failed to assess properly the relevance of the applicant's lack of credibility to the

assessment of risk in respect of these categories as supported by the new country of origin information.

35. It was submitted on behalf of the respondent that the applicant's claim to have left Eritrea illegally was not believed and that he was found to be lacking in credibility in respect of the issues already outlined. It was also submitted that the applicant's illegal departure from Eritrea and issues concerning military service did not form part of his application for asylum, nor were they made the subject of submissions in respect of the proposal to revoke his asylum status, nor did he make any appeal against that decision or any submission as to why he should not be deported prior to the making of that order. It was contended, therefore, that the respondent's conclusion that the applicant had failed to demonstrate that he was at risk was reasonable in all the circumstances. It was further submitted that it was necessary for the applicant to establish his credibility in relation to these matters before he could be considered to be a person within the category of risk of persecution on return to Eritrea. It was not accepted that an incorrect legal test had been applied in assessing the risk to the applicant.

Article 3 of the European Convention on Human Rights – Ground 10
36. Article 3 of the European Convention on Human Rights provides that:-

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The European Court of Human Rights in the case of *Chahal* (Application 22414/13) [1997] EHRR 413 determined that it was impermissible for the United Kingdom Government to return a Sikh separatist to India because the evidence established that there would be a real risk that the applicant would suffer a breach of his Article 3 rights at the hands of elements of the Punjabi police. Of more relevance to this case is the decision of the court in *Ahmed v. Austria* (Application No. 25964/94) [1996] ECHR 63. In Ahmed, the applicant had been granted refugee status by the Austrian government because of his political activities and his fear of being arrested and executed if returned to Somalia. Two years later the applicant was convicted of attempted robbery and sentenced to two and a half years imprisonment following which his refugee status was revoked. A deportation order was made against him, but he alleged that his expulsion to Somalia would expose him to a serious risk of being subjected to treatment contrary to Article 3 of the Convention. The court accepted that the expulsion of a non-national by a contracting state may give rise to an issue under Article 3:-

> "39. …where substantial grounds had been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country…
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> 40. The court further reiterate[s] that Article 3, which enshrines one of the fundamental values of democratic societies, prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victims conduct. Unlike most of the substantive clauses of the Convention…Article 3 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…
>
> 41. The above principle is equally valid when issues under Article 3 arise in expulsion cases. Accordingly, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Article 33 of the 1951 Convention relating to the status of refugees…
>
> 42. Like the Commission, the court attaches particular weight to the fact that on 15 May 1992 the Austrian Minister of the Interior granted the applicant refugee status within the meaning of the Geneva Convention…Finding credible his allegations that his activities in an opposition group and the general situation in Somalia gave grounds for fear that, if returned there, he would be subjected to persecution…Although the applicant lost his refugee status two years later, this was solely due to his criminal conviction; the consequences of expulsion for the applicant were not taken into account…
>
> 43. However, in order to assess the risks in the case of an expulsion that has not yet taken place, the material point in time must be that of the courts consideration of the case. Although the historical position is of interest insofar as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive…
>
> 44. With regard to the present situation in Somalia the court bases its assessment on the findings of the Commission to which, under the Convention, the tasks of establishing and verifying the facts are primarily assigned. In its report of 5th July, 1995, the Commission noted that the situation in Somalia had changed hardly at all since 1992. The country was still in a state of civil war and fighting was going on between a number of clans vying with each other for control of the country. There is no indication of the dangers to which the applicant would have been exposed in 1992 had ceased to exist or that any public authority would be able to protect him.
>
> 45. Before the court the government did not contest the applicant's submission that there was no observable improvement of the situation in his country. On the contrary they explained that the Austrian authorities had decided to stay execution of the expulsion in issue because they too considered that as matters stood, Mr. Ahmed could not return to Somalia without being exposed to the risk of treatment contrary to Article 3…"

The court, therefore, concluded that the applicant's deportation to Somalia would breach Article 3 of the Convention for as long as he faced a serious risk of being subjected to torture or inhuman or degrading treatment there.

37. These principles were also applied in the case of *Said v. Netherlands* (Application No. 2345/02) (Judgment 5th July, 2005) in the case of an Eritrean deserter who claimed that he would be exposed to a real risk of execution or torture or inhuman or degrading treatment contrary to Articles 2 and 3 of the Convention if expelled from the Netherlands and returned to Eritrea. The court concluded that if returned the applicant would be exposed to a real risk of a violation of Article 3 based on up to date country of origin information.

38. In *Saadi v. Italy* (App. No. 37201/06) [2009] 49 EHRR 30, the European Court of Human Rights reaffirmed these principles. The applicant in that case submitted that it was a matter of common knowledge that persons suspected of terrorist activities, as he was, were frequently tortured in Tunisia. He claimed successfully that the enforcement of a decision to deport him to Tunisia would, therefore, expose him to a risk of being subjected to treatment contrary to Article 3 of the Convention. 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 I.R. 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."

39. In *Rettinger* a proposed extraditee challenged his rendition to Poland on the basis that there were reasonable grounds for believing that he would be tortured or subjected to other inhuman or degrading treatment due to prison conditions in Poland under s. 37(1)(c) of the European Arrest Warrant Act 2003. The Supreme Court concluded that s. 37(1)(a)(i) and (ii) provided that a person should not be surrendered under the Act if his surrender would be incompatible with the state's obligations under the Convention or its protocols, including Article 3 in accordance with these principles.

40. The court is, therefore, satisfied that these principles apply to the consideration of the making of a deportation order and/or an application to revoke the order under s. 3(11) when considering whether there are substantial grounds for believing that there is a real risk of a breach of Article 3. The court is also satisfied that the respondent failed to apply them in this case. The court notes that there is no reference in the examination of file prepared in the course of the deportation process to the Saadi principles. Further, the revocation "consideration" does not set out what legal principles applied or how the Article 3 issues were addressed. The court is not satisfied that such examination as did take place was "rigorous". In particular, as discussed later in the judgment, "the foreseeable consequences of sending a person to a requesting state" were dealt with in a manner which the court considers to be unreasonable. Although the respondent found that the applicant failed to provide a link between his personal circumstances and the country of origin information submitted, based on his lack of credibility as to how, why and when he left Eritrea, the court is not satisfied that the respondent considered adequately, much less rigorously, the accepted facts in respect of the applicant namely, that he was Eritrean, of military draft age and a failed asylum seeker in the context of the extensive country of origin information relevant to those factors. However, it is appropriate before addressing these issues to consider whether the failure to rely on these factors at an earlier stage of the deportation or asylum process precludes the applicant from doing so under s. 3(11) or in these proceedings, or could reasonably be regarded as negating the existence of the risk claimed.

Judicial Review and Section 3(11) Applications – Ground 7

41. An application to revoke a deportation order under s. 3(11) of the Immigration Act 1999, usually occurs at the end of an extensive process of case review in the course of which the applicant has failed to secure refugee status. A failed applicant for asylum may apply for subsidiary protection and/or for leave to remain in the state under s. 3 of the Immigration Act 1999, following which a deportation order may be made. At each stage of the process the applicant will have the benefit of a detailed scrutiny of the relevant issues including a fear of persecution, whether there is a risk to the applicant if he is returned to his country of origin notwithstanding his failure to establish such a fear or whether there are other humanitarian reasons why he should be allowed to remain in the state. The issue of non-refoulement will also have been considered before a deportation order is made. Thereafter, an application may be made under the provisions of s. 3(11) of the 1999 Act, to the Minister to revoke or amend the deportation order.

42. Hogan J. in *Efe & Ors v. the Minister for Justice, Equality and Law Reform and Ors* [2011] 2 I.R. 798, described how s. 3(11) provides a mechanism whereby material facts which post-date the initial deportation decision may be considered by the executive and provide a basis for the reassessment of the decision. This is especially important when new facts affect or pose a risk to the exercise of the applicant's constitutional rights or rights under the European Convention on Human Rights. As stated by Hogan J. the absence of s. 3(11) might be regarded as a failure to vindicate constitutional rights for the purposes of Article 40.3 of the Constitution and a failure to provide an effective remedy under Article 13 of the European Convention on Human Rights. It follows that any consideration of an application under s. 3(11) must concentrate on the new material upon which it is based.

43. Consequently, when an application for revocation of a deportation order is made, the nature and scope of the inquiry is defined and constrained to a considerable degree by what has gone before. As O'Neill J. stated in *Dada v. Minister for Justice, Equality and Law Reform* (Unreported, 3rd May, 2006) at pp. 5 – 6:-

> "In this regard it must be borne in mind that the decision sought to be challenged comes at the end or at the last potential stage of an elaborate and lengthy process of inquiry into the status in this State of the applicants. First, there was the asylum process in which it was ultimately determined that the applicants were not entitled to refugee status. Secondly, there was the immigration process in which the applicants sought leave to remain in the state but in the end a deportation order was made and executed against them. Finally, he made application to have that

> deportation order revoked under s. 3(11) of the 1999 Act, and this was refused…It is clear that the nature and extent of the inquiry which was appropriate in this later phase of the process thus described is significantly more restricted than, for example, in the asylum phase. Likewise, the extent of review of the later phase is undoubtedly more restrictive than in the earlier phase. In the case of *Baby O v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. at 129, it was held that an applicant seeking to oppose a deportation order relying on the prohibition on refoulement under either s. 5 of the Refugee Act 1996, or s. 4 of the Criminal Justice (UN) Convention on Torture Act 2000, was merely entitled to have his representations considered and was not entitled to a discourse or reserved judgment. The scope for review by this Court of a decision to revoke a deportation order under s. 3(11) is, if anything, more restricted still."

44. In the *Baby O* case the Supreme Court considered a challenge to a refusal to revoke a deportation order on the ground of changed circumstances in Nigeria. In response the Chief State Solicitor stated that the Minister was not aware of any changed circumstances which warranted a revocation or a full reconsideration of the case. The Supreme Court determined that it was entirely a matter for the Minister to decide whether the circumstances relied upon were such that he was obliged to revoke the deportation order already made. It concluded that the court had no jurisdiction to interfere with the decision that the suggested change of circumstances did not justify revocation of the order.

45. In this case the applicant (as in *Ahmed*) had succeeded in his initial application for a declaration of refugee status on the basis of the evidence adduced of fear of persecution in Eritrea. This status was revoked primarily because of his conviction for rape. An unusual feature of this case was his failure to make representations to the Minister prior to his deportation. He claimed that he was not in a position to do so as he was imprisoned, and isolated in that he had no friends or relations in the state. He was only granted legal aid in respect of the matter a number of days after the making of the order. In these circumstances he made an application for judicial review of the deportation order, but it became clear at the hearing that the real difficulty in the case lay in his inability to make submissions prior to the making of the order. It was, therefore, agreed that the first set of judicial review proceedings would be adjourned to enable the applicant to formulate and make submissions under s. 3(11) of the Act to the Minister. His solicitors made a very detailed application and submitted a large body of country of origin information, much of which was new. The respondent in declining to revoke the deportation order concluded that this failure to advance the new material at the deportation stage indicated that the applicant did not have any real fear of return to Eritrea.

46. The court accepts and it is well established that an applicant for asylum or subsidiary protection or leave to remain in the state under s. 3 of the Immigration Act 1999, must put their best case forward at the earliest possible opportunity. It is to be expected that the material presented on an application under s. 3(11) will advance matters which are materially different from those presented or capable of being presented in the earlier application for leave to remain. MacMenamin J. in considering the operation of s. 3(11) in *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603, stated that:-

> "39. Section 3 is not an interactive process. The requirements of natural justice and the statutory requirements are satisfied once the prospective deportee has been afforded an opportunity to make submissions and these submissions have been considered by the Minister, particularly in the consideration of whether the principle of non-refoulment under s. 5 of the Act of 1996 has been satisfied. There is a substantial overlap between the matters to be considered in an asylum application and under s. 5. The very fact that a person has been refused asylum may be highly relevant to the question of non-refoulment.
>
> 40. The applicants here did not set out their alleged fears nor advance arguments nor submit country of origin information which they now advance in these proceedings as being part of their representations to the Minister under s. 3 of the Act of 1999, despite such information being available or within their procurement at the time of making such representations. As a corollary of facilitating the making of representations to the Minister in advance of a decision to make a deportation order pursuant to s. 3, there is an onus upon an applicant to provide the necessary detail for such consideration at that time if it is within the procurement of the applicant…
>
> 43. Thus, an applicant making representations to the Minister for leave to remain on humanitarian grounds is obliged to actively put his or her best case forward in such representations. To address the second issue directly any such application under s. 3(11) to revoke a deportation order made having considered such representations, must advance matters which are, truly materially different from those presented or capable of being presented in the earlier application. There must be, in the words of Clarke J. in *Kouaype* "unusual, special, or changed circumstances". Furthermore, the test in law must include one further test which is as to whether the material was capable of being presented earlier. To omit this latter aspect might have the effect of actually encouraging delay in the making of an application for humanitarian leave to remain and might permit the approach which was specifically criticised and rejected by Peart J. in *Mamyko.*"

47. Peart J. in *Mamyko v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 6th November, 2003) concluded that no new facts had been put forward in correspondence seeking the revocation of a deportation order and that no new information was in fact available which could not have been made known to the Minister when representations were made to him prior to the making of the original order. The learned judge commented on the undesirability of eleventh hour applications based on grounds which could have been advanced at a much earlier stage of the asylum process. This is a view endorsed by the Supreme Court in *Smith v. Minister for Justice and Equality & Ors* [2013] IESC 4, in which Clarke J. stated that:-

> "…It is only where a relevant applicant can point to some significant feature, not present when the original deportation order was made, that there can be any obligation on the Minister to give detailed reconsideration to the question of deportation. It likewise follows that a similar situation arises where, as here, there is a second or subsequent application for revocation of a deportation order. Where, as here, neither the original deportation order nor the first or earlier application for revocation was challenged in the courts by judicial review (or where any such challenge failed), it must be assumed that the analysis of the Minister, on the basis of the facts, materials and considerations then before the Minister, was correct. It follows that the only basis on which a challenge to a second or subsequent refusal on the part of the Minister to revoke a deportation order can be brought is where reliance is placed on a suggestion that there were new circumstances not before the Minister when the deportation order or any previous decision not to revoke same was determined and where the challenge is directed to the consideration by the Minister of the application in the light of such new circumstances." (para. 5.4)

48. Clarke J. also stated that there was an obligation on persons seeking to apply for the revocation of a deportation order to put before the Minister all relevant materials and circumstances on which reliance is sought to be placed:-

> "The question of the presence of new and significantly material considerations such as might justify a reconsideration of a previous deportation decision (including a previous refusal to revoke) must be judged against that obligation. The mere fact that what is said to be a new consideration was not before the Minister when an earlier decision was made does not of itself render it the sort of consideration which requires the Minister to actively reconsider. If what is asserted to be a significant and material new consideration was actually available to the applicant at the time of the previous application, but was not advanced or brought to the Minister's attention, then, in the absence of special circumstances, it is difficult to see how the existence of such a consideration can properly be advanced as a new consideration requiring an active reassessment by the Minister of the substantive merits of the case. For a new circumstance to require such a reassessment it must either have arisen after the earlier decision of the Minister or there must be a compelling explanation as to why, notwithstanding its existence at the relevant time, it was not then advanced." (para. 5.7)

49. The court is satisfied that there were special circumstances in the applicant's case which inhibited him from making submissions on his proposed deportation because he was in custody at the time the proposal was made, was isolated as a foreign national without relatives or friends in the state, and did not have legal advice available to him until a number of days after the making of the deportation order. In addition, the court is satisfied that his s. 3(11) application relied upon material the preponderance of which came into existence at or about the time of the making of the deportation order or after it was made. The respondent consented in the unusual circumstances of this case to adjourn the challenge to the deportation order on 10th July, 2012, when these difficulties emerged in the course of the hearing. The court permitted the adjournment in the interests of justice to enable the applicant through his solicitors to make an application under s. 3(11) unburdened by the previous difficulties. The respondent clearly did not decide that he was not required to consider the material because it was previously available or ought to have been submitted at an earlier stage. On the contrary, the respondent implicitly acknowledged the difficulties under which the applicant was operating at the time the deportation order was made. The respondent facilitated the adjournment and the making of the s. 3(11) application on the basis of the new issues and materials. The court is satisfied that this was a fair and proper course to adopt in the special circumstances of the case because the explanation for the failure to advance these matters at an earlier stage was clearly compelling. The court is also satisfied that the challenge now brought is properly limited to the respondent's decision in respect of these new issues and materials. Notwithstanding the respondent's very fair approach to the adjournment application, the s. 3(11) application and the amendment of the pleadings in these proceedings, a conclusion was nevertheless reached that the applicant's failure to rely on these new issues and materials at an earlier stage undermined his claim that he was at real risk if returned to Eritrea. However, if the failure to advance the new issues and materials at an earlier stage did not preclude their consideration under the s. 3(11) application, it is difficult to understand how, having implicitly accepted that special circumstances applied which enabled the respondent to consider the new issues and materials, the respondent could conclude that the same circumstances undermined the applicant's claim that he had a fear of serious harm if returned to Eritrea. The court is satisfied that that conclusion was unreasonable.

New Country of Origin Information – Grounds 5, 6, 8 and 9
50. The new material consisted of eight new documents submitted in the course of the s. 3(11) application dealing with three issues - military service, treatment of failed asylum seekers and those who left Eritrea illegally.

Military Service
51. In assessing the applicant's claim concerning his fear of return to Eritrea as a person who was a military service evader or likely to be perceived as such, the "consideration" submitted to the Minister concluded that the applicant could not be considered as a person who fell within this category because of his lack of credibility on his core claim and his failure to raise the issue at the time when his refugee status was withdrawn or the deportation order was made. In addition, it was stated that the applicant had made no genuine effort to substantiate his claim, notwithstanding evidence that he was Eritrean, his age, and the existence of country of origin information, the integrity of which was said not to be in doubt. It was also concluded that the submissions failed to provide a link between the applicant's personal circumstances and the country of origin information submitted in that there was a failure "to connect the categories specifically to Mr. M."

52. The additional country of origin information submitted in relation to military service was the "*United Nations High Commissioner for Refugees (UNHCR) 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Eritrea' 20th April 2011*" issued to assist in the assessment of the international protection needs of asylum seekers from Eritrea. It stated that military service was mandatory for every male or female Eritrean between the ages of 18 and 40:-

> "Active national service is compulsory for all citizens between the ages of 18 and 40. It consists of six months of military training and 12 months of active military service and development tasks in the military forces for a total of 18 months, save in situations of mobilisation or war when it can be extended. Persons under the age of 50 who have completed active national service or have been demobilised are nevertheless subject to compulsory service in the reserve army, and as such are liable to be called for national mobilisation (further) military training or 'defence in artificial or natural disasters' . . . Since the obligation to undertake military service applies to all citizens, Eritreans living abroad since childhood and those born in exile are not exempt from military service. Hence, Eritreans who were forcibly returned, or who returned voluntarily, would be subject to conscription in the military service if they satisfied the age criteria and are medically fit . . ."

53. The guidelines then set out the various penalties for attempting to avoid national service which range from substantial fines to two years imprisonment as a standard sanction. Those who fled abroad to avoid military service and did not return to undertake it before the age of 40 are liable upon conviction to five years imprisonment. The offences of failure to enlist, or re-enlist, seeking fraudulent exemption, desertion, absence without leave, and refusal to perform military service attract penalties of between six and ten years imprisonment, depending on the gravity of the offence. Desertion was the most severely sanctioned offence and attracted imprisonment of up to five years, or in times of mobilisation or emergency, five years to life imprisonment, or in the gravest cases, the death penalty. The guidelines state:-

> "In practice, punishment for military offences is carried out extra-judicially, and has been reported to include 'shoot to kill' orders, detention for long periods, often in inhumane conditions, torture and forced labour. Draft evaders/deserters are reported to be frequently subjected to torture, while conscientious objectors can face severe physical punishment as a means of forcing them to perform military service. Furthermore, extra-judicial executions are allegedly ordered by local commanders and carried out in front of military units for what are considered serious military offences . . . in practice, the punishment for desertion or evasion is so severe and disproportionate such as to amount to persecution."

54. The guidelines also noted that military conscripts were used as forced labour and that in 2002 the Government had introduced a national, social and economic development plan:-

> "which effectively rendered the national service open ended and indefinite. As a result, national service conscripts, not in active military service, are required to undertake 'national development' activities, including in the agricultural and construction sectors for indefinite periods of time and survival wages. The Government reportedly uses human resources as a nationalised asset, utilising the labour of military conscripts under the guise of development programmes . . . incidents of torture have been reported in cases where conscripts on farms owned by military commanders have left their posts without permission."

55. The guidelines state that:-

> "Following their arrest, draft evaders and deserters are often reported to be subjected to torture. Persons who evade or desert military service may be regarded as disloyal and treasonous towards the Government, and therefore punished for their perceived disloyalty. Once arrested, many detainees reportedly "disappear". Furthermore, there are reports of death in custody as a result of ill treatment, torture, denial of access to medical treatment and other harsh prison conditions. . . Eritreans are reportedly subjected to repeated periods of military service far exceeding the statutory limit of 18 months. Furthermore, the authorities reportedly do not grant exit visas to those of draft age, although payment of bribes to obtain visas has been reported. Among those routinely denied exit visas are men up to the age of 54, regardless of whether they have completed national service or have been demobilised, and women under the age of 47, as well as students wanting to study abroad. Individuals of draft age, who left Eritrea illegally, may be perceived as draft evaders upon return, irrespective of whether they have completed active national service or have been demobilised".

56. It has already been accepted that the applicant is an Eritrean of Tigrayan ethnicity. He claimed to be a minor at the time he arrived in Ireland. This was not accepted and it was concluded that the applicant was in his early 20s, a fact supported by the date of birth which he gave to the Italian authorities. Therefore, the applicant remains a person who, on country of origin information may reasonably claim to be within the category of military service evader, the subject of the UNHCR guidelines and, if so, a person who may be subject to the risks described above. It is noteable that the applicant never claimed to be a deserter or to have been inducted into the Eritrean army. The only claim advanced in the s. 3(11) application is that he is a man of military age who upon return to Eritrea may be regarded as a person who left Eritrea as a draft evader. He did not advance a fear of persecution on that basis at the time of the proposed deportation order. However, the court is not satisfied that in respect of military service, the respondent was entitled to conclude on the evidence available that the applicant had not made a genuine effort to substantiate that aspect of his claim apart from asserting that he was of military age. The very fact that he was of military age could give rise to the perception that he was a military service evader. This required careful and rigorous consideration because the country of origin information suggested a threat to the Article 3 rights of persons in that category: this conclusion was in the circumstances unreasonable.

The Applicant as Failed Asylum Seeker

57. The applicant claimed that as a failed asylum seeker he faced a threat to his life and freedom or was at a real risk of suffering serious harm if returned to Eritrea. The "consideration" emphasised that under s. 19 of the Refugee Act 1996, the State was precluded from revealing the identity of any asylum applicant to the authorities in his country of origin. It was stated that this guaranteed that the applicant's asylum application in Ireland would be unknown to the Eritrean authorities and that if he were to return home, they would have no way of discovering that he had sought asylum in Ireland. Further, it was stated that the deportation order did "not require the State to remove the person". A person could make their own arrangements when complying with the statutory obligation to leave the State. It was further determined that if the applicant believed that the Eritrean authorities targeted known former asylum applicants on arrival that "even if such a belief was well founded, the solution is in Mr. M's own hands. Unless he decides to reveal to the authorities that he sought asylum in Ireland (a decision which would prove the absence of any fear of ill treatment) they would have had no way of knowing about it". It was also noted that the applicant had failed to raise this issue following the notification of a proposal to revoke his status as a refugee and the notification proposing to deport him. It was, therefore, concluded that he would not fall within the category of persons who might come to serious harm as a failed asylum seeker if returned to Eritrea.

58. In this respect, the "consideration" relied upon the UNHCR Guidelines for the assessment of international protection needs of asylum seekers from Eritrea published in April 2009. In fact, the guidelines support the applicant's contention concerning the risk to returning failed asylum seekers to Eritrea. They state that Eritreans who were forcibly returned may face arrest without charge, detention, ill treatment, torture or sometimes death at the hands of the authorities:-

> "They are reportedly held incommunicado, in overcrowded and unhygienic conditions, with little access to medical care, sometimes for extended periods of time. According to credible sources, 1,200 persons were forcibly returned from Egypt to Eritrea in June 2008, where the majority was detained in military facilities. UNHCR is aware of at least two Eritrean asylum seekers who have arrived in Sudan having escaped from detention following deportation from Egypt in June 2008. Eritreans forcibly returned from Malta in 2002 and Libya in 2004, were arrested on arrival in Eritrea and tortured. The returnees were sent to two prisons on Dahlak Island and on the Red Sea coast, where most are still believed to be held incommunicado. There are also unconfirmed reports that some of those returned from Malta were killed. In another case, a rejected asylum seeker was detained by the Eritrean authorities upon her forcible return from the United Kingdom. On 14th May, 2008, German immigration authorities forcibly returned two rejected asylum seekers to Eritrea. They were reportedly detained at Asmara Airport upon arrival and are being held incommunicado, and are believed to be at risk of torture or other ill treatment.
>
> For some Eritreans being outside the country, may be sufficient cause on return to be subjected to scrutiny, reprisals and harsh treatment, individuals may be suspected of having sought asylum particularly in Diaspora based opposition meetings or otherwise posing a real or perceived threat to the government particularly, where they have exited the country illegally."

59. The Amnesty International Report ("Annual Report 2011: Eritrea") 13th May, 2011, noted that the guidelines issued by UNHCR in 2009, recommending that States refrain from forcibly returning rejected Eritrean asylum seekers to Eritrea remained in force. The court is satisfied that the applicant was entitled to have this aspect of his claim determined on the basis of such cogent, authoritative and objective evidence as exists in respect of returned failed asylum seekers (see *F.V. v. Refugee Appeals Tribunal* [2009] IEHC 268 and *M.T.T.K. (DRC) v. Refugee Appeals Tribunal* [2012] IEHC 155).

60. The conclusion reached as to how a failed asylum seeker might address his or her predicament on arrival in Eritrea following deportation by remaining silent or dissembling is naïve and unrealistic. The evidence suggests that the Eritrean authorities adopt a robust, confrontational and unwelcoming attitude to returnees to Eritrea. The court does not accept that the fate and safety of a

returning failed asylum seeker should be dependent upon his or her ability to remain silent, or capacity to dissemble convincingly. This conclusion implicitly acknowledges that it may be necessary for a returning failed asylum seeker to engage in subterfuge and deceit with the Eritrean authorities so as to avoid torture, inhuman or degrading treatment or death which country of origin information demonstrates has been suffered by other returnees. It forces the returned asylum seeker to play a dangerous game with the officials of one of the most repressive regimes in existence. It is a prospect which would be all the more daunting for a returnee who bears scars and marks on his body which "are in keeping with the systematic torture as described by him". The court is satisfied that this aspect of the "consideration" of the prospects of returning the applicant safely to Eritrea utterly fails to take into account the country of origin information cited and is so unreasonable as to render the challenged decision fundamentally flawed. It has no regard for the *Ahmed* or *Saadi* principles.

Illegal Departure from Eritrea

61. The applicant also claims that he would be at risk if returned to Eritrea because the authorities would deem him to have left the country illegally. This claim was not made at the time of the application for asylum nor was it made in respect of the proposal to revoke his refugee status or to deport him; the argument was made for the first time in his solicitor's submission of 20th July, 2012. It was based partly on the decision of the upper Tribunal of the Immigration and Asylum Chamber of the United Kingdom in *M.O. (Illegal Exit – Risk on Return) Eritrea C.G.* [2011] UKUT 00190 (IAC). This determination was promulgated on 27th May, 2011. It was submitted on the basis of *M.O.* that the applicant if deported to Eritrea would be perceived as a person who had left Eritrea illegally because he was of draft age. It was submitted that persons considered to have left Eritrea illegally would be regarded with serious hostility on return and that failed asylum seekers were perceived to have done so. The *M.O.* decision was not specifically addressed in the consideration. The court accepts that the respondent might have interpreted that decision as inapplicable to the facts of this case or as capable of being distinguished from them. However, no importance was attached to this decision but reference was again made to the applicant's lack of credibility.

62. The "consideration" relies heavily on the applicant's lack of credibility in his account of his alleged arrest and detention following the magazine incident in concluding that it was not necessary for him to leave Eritrea illegally. It stated:-

> "Mr. M. has stated previously on file that he left Eritrea illegally. However, he also previously stated he left Eritrea on 6th September, 2004 and arrived in Sudan on 9th September, 2004, and remained there for three months that is until December, 2004. However, he could not have been fingerprinted in Italy in October, 2004 if he was in Sudan as he claimed during this time. It has been shown in the decision under s. 3 that Mr. M. did not leave Eritrea for political reasons as claimed. Therefore, it is not accepted that it was necessary for Mr. M. to have left Eritrea illegally for these same political reasons as he has also claimed. From the outset, Mr. M. failed to be truthful in relation to his journey to Ireland, even though factual evidence was presented which ran counter to his claims. Country of origin information alone cannot verify if Mr. M. left his country by legal or illegal means."

Lack of Credibility and the Assessment of Risk in the Section 3(11) Application – Ground 11

63. The court accepts that the applicant never offered any additional evidence as to how, when or why he left Eritrea beyond the account which has been found to be unbelievable and instead he now relies upon a claim that he is a person who will be perceived to have left the country illegally. The applicant attempted unsuccessfully to link that claim to the submission that a person perceived to be of military age or a failed asylum seeker will be presumed to have left the country illegally. Similar conclusions based on the applicant's lack of credibility were reached in the "consideration" in respect of military service and the applicant's status as a failed asylum seeker, namely, that though country of origin information showed a risk to the life and freedom of defined categories of persons in Eritrea, the applicant's submissions failed to connect these categories specifically to his situation because he was disbelieved on core elements of his claim. However, the court is not satisfied that this takes proper account of the more limited aspects of the applicant's personal circumstances which were established and accepted by the respondent namely, that he was an Eritrean of military age, capable of being perceived as a deserter and/or a person who left Eritrea illegally and was a failed asylum seeker: what might be regarded as his residual credibility. The court is satisfied that even though the core account of how, when and why the applicant left Eritrea as furnished in the asylum and deportation process was disbelieved, there remained a sufficient basis for establishing a connection between the remaining accepted facts of the applicant's case and the three categories of risk outlined in his s. 3(11) claim which ought to have been considered. The question then arises as to how the country of origin information in respect of these three matters is to be assessed when determining whether there is a real risk to the applicant's Article 3 rights on return to Eritrea when important aspects of his story were not accepted.

64. This issue was considered by the United Kingdom Supreme Court in *M.A. (Somalia) v. Secretary of State for the Home Department* [2010] UKSC 49. In *M.A.,* the applicant, a Somali national, was served with a notice of intention to make a deportation order following his conviction for rape and indecent assault in respect of which he was sentenced to eight years imprisonment. It was determined that he had not told the truth concerning important aspects of his life in Somalia and the question arose as to whether, notwithstanding lies told in relation to a central issue in the case, the decision maker could nevertheless rely upon general evidence such as country of origin information in considering whether the applicant would face a risk of torture or inhuman and degrading treatment on his return to Somalia and, therefore a violation of his rights under Article 3 of the Convention. In delivering the judgment of the court Sir John Dyson S.C.J., summarised the issue and the principles applicable as follows:-

> "21. For appellants who appeal to the AIT in Refugee, Convention or Article 3 cases, the stakes are often extremely high. The consequences of failure for those whose cases are genuine are usually grave. It is not, therefore, surprising that appellants frequently give fabricated evidence in order to bolster their cases. The task of sorting out truth from lies is indeed a daunting one. It is all too common for the AIT to find that an appellant's account is incredible. And yet there may be objective general undisputed evidence about the conditions in the country to which the Secretary of State wishes to send the appellant which shows that most of the persons who have the characteristics of, or fall into the category claimed by, the appellant would be at real risk of treatment contrary to Article 3 of the ECHR…but that a minority of these, because of special circumstances, are not subject to such risk. How should the AIT approach such general evidence where they do not believe the evidence given by the appellant that bears on the question of whether such special circumstances apply? That was the problem which confronted the AIT in the present case. The Secretary of State wished to return M.A. to Somalia. This involved sending him to Mogadishu. The objective evidence about conditions in Somalia was that only a person who had close connections with powerful actors (such as prominent businessmen or senior figures in the insurgency or in powerful criminal gangs) was likely to be safe if returned to Mogadishu. M.A. gave a great deal of conflicting evidence to the effect that he had no connections in Mogadishu at all. The AIT found that he had not told them the truth about his links and circumstances in Mogadishu. But they were unable to find positively that he did have connections there, still less that he had close connections with "powerful actors"…

> 32. Where the appellant has given a totally incredible account of the relevant facts, the Tribunal must decide what weight to give to the lie, as well to all of the other evidence in the case, including the general evidence. Suppose for example, that at the interview stage the appellant made an admission which, if true, would destroy his claim; and at the hearing before the AIT he withdraws the admission, saying that his answer at interview was wrongly recorded or that he misunderstood what he was being asked. If the AIT concludes that his evidence at the hearing on this point is dishonest, it is likely that his lies will assume great importance. They will almost certainly lead the Tribunal to find that his original answers were true and dismiss his appeal. In other cases, the significance of an appellant's dishonest testimony may be less clear cut. The AIT in the present case was rightly alive to the danger of falling into the trap of dismissing an appeal merely because the appellant had told lies. The dangers of that trap are well understood by judges who preside over criminal trials before juries. People lie for many reasons…
>
> 33. …so the significance of lies will vary from case to case. In some cases, the AIT may conclude that a lie is of no great consequence. In other cases, where the appellant tells lies on a central issue in the case, the AIT may conclude that they are of great significance. MA.'s appeal was such a case. The central issue was whether M.A. had close connections with powerful actors in Mogadishu. The AIT found that he had not told the truth about his links with Mogadishu. It is in such a case that the general evidence of the country may become particularly important. It will be a matter for the AIT to decide whether the general evidence is sufficiently strong to counteract what we have called the negative pull of the appellant's lies."

65. The UK Supreme Court was satisfied that undisputed objective evidence about conditions in the relevant country may go a long way to making good the shortcomings in a claimant's evidence, even if the account is rejected as wholly incredible. However, the general evidence adduced would have to be extremely strong to negative the effect of the lies told. The court drew an analogy with circumstances in which a lie may be regarded as amounting to corroboration in criminal law as determined in *R. v. Lucas* [1991] Q.B. 720. In doing so, the court was emphasising that care must be taken in assessing the nature and relevance of the lie by examining whether it was deliberate or related to a material issue or its motivation. If the lie does not have a "heavy bearing" on the issue in question, the decision maker may consider that it is of little importance. For example, in this case it might be thought that lies told about how, when and why the applicant left Eritrea were highly relevant to a consideration of the issue as to whether he left Eritrea illegally. It might have less importance in considering the risk of his return as a failed asylum seeker in the face of substantial evidence of risk to that category of returnee.

66. The court considers that the approach adopted in the *M.A.* decision to the issue of credibility is persuasive for the reasons set out in the judgment of Sir John Dyson. S.C.J., and is particularly apposite to the facts of this case. A similar approach was adopted, in analogous circumstances, by Cooke J. in *M.A.M.A. v. The Minister for Justice* [2011] 2 I.R. 721, an asylum case, in which it was held that the sole fact that particular facts or events relied upon as evidence of past persecution were disbelieved, did not relieve the decision maker of the obligation to consider whether there was a risk of future persecution of the type alleged in the event of repatriation. Cooke J. stated:-

> "18. …Accordingly, if the finding on credibility goes so far as to reject a claim that the asylum seeker has a particular nationality or ethnicity or that he or she comes from a particular region or place in which the source of the claimed persecution is said to exist, there may be no obligation upon the decision maker to engage in "reasonable speculation" as to the risk of repatriation in the case. On the other hand, if the decision maker concludes that the asylum seeker is opportunistically seeking to place himself in the context of verifiable events in a particular place but decides that while such events did occur, the asylum seeker was not involved in them, the risk of future persecution may still require to be examined if there are elements (the language spoken or obvious familiarity with the locality, for example) which establish a connection with that place. Thus, opportunistic lying about participation in events involving previous persecution will not necessarily foreclose or obviate the need to consider the risk of future persecution provided there are some elements which furnish a basis for making that assessment."

67. The court is not satisfied that the assessment of the applicant's credibility and country of origin information was carried out on a proper basis. The appropriate weight to be assigned to the applicant's lack of credibility is not analysed. There is no assessment of the extent to which lack of credibility was relevant to the central issues in respect of each of the three headings, or why the applicant's case was not or could not have been saved by the general evidence adduced, particularly in respect of his claim as a failed asylum seeker. It is not clear that any weight was assigned to the fact that he was Eritrean and of military service age. This was of particular importance having regard to the rigorous analysis to be applied in assessing whether there was a risk of a breach of the applicant's right to life or rights under Article 3 of the Convention.

Conclusions

> 1. An application seeking the revocation of a deportation order pursuant to s. 3(11) of the Immigration Act 1999, must be based upon new circumstances or materials which were not before the respondent at the time of the making of the deportation order, or were not capable of being presented at that time. In the absence of "special" circumstances or a "compelling explanation" as to why such material was not or could not have been advanced previously, the respondent cannot be required to reassess the deportation order.
>
> 2. The court is satisfied that the respondent's determination that the applicant failed to advance his fears as a military service evader, a failed asylum seeker or a person who had left Eritrea illegally prior to the s. 3(11) application was evidence of his not having a fear if returned to Eritrea on those grounds was unreasonable because of the unusual circumstances of this case. The applicant, a prisoner serving a sentence at the time of the proposal to deport him was further disadvantaged by being a foreigner without family or friends or other social supports and without the benefit of legal advice, and the preponderance of the material submitted in support of his application was new and unavailable at the time of the deportation decision.
>
> 3. The applicant was not precluded from challenging the refusal to revoke the deportation order by way of judicial review since the challenge was confined to the findings made in respect of the new issues and materials submitted.
>
> 4. The respondent failed to apply the appropriate legal principles to the assessment of the risk of deportation to Eritrea for the applicant based upon these new issues and materials in that he failed to determine, following a rigorous examination of the facts, whether there were substantial grounds for believing that, if deported, the applicant would suffer a real risk of torture, inhuman or degrading treatment or punishment in Eritrea.

5. The respondent failed to assess rigorously the extent to which the applicant's lack of credibility was relevant to the claim to be at risk because he was a military service evader, a failed asylum seeker and/or a person who might be perceived as having left Eritrea illegally. Although the applicant lacked credibility in respect of a core element of his story, nevertheless, it was accepted that he was an Eritrean of military age and was now a failed asylum seeker. The respondent failed to consider whether these facts, together with medical evidence that scars and marks on his body were "in keeping with systematic torture described by him", and a substantial body of country of origin information demonstrating the risk to persons in those categories, were sufficiently strong to negative the effect of the applicant's lack of credibility.

6. The respondent in determining that the applicant had not made a genuine effort to substantiate the fact that he was a person who could be perceived to be a military service evader failed to assess the evidence rigorously and to consider the fact that the applicant was an Eritrean of military service age, and the country of origin information submitted in respect of the treatment of military service evaders. The court is satisfied that this decision was unreasonable.

7. The respondent's determination that the applicant as a failed asylum seeker could protect himself by not revealing his personal history when returned to Eritrea or dissembling to the Eritrean authorities was unrealistic and unreasonable and, if acted upon, could expose the applicant to a significant danger, if discovered.

8. The court is satisfied that the applicant has established that the decision to refuse to revoke the deportation order was in all the circumstances fundamentally flawed on grounds 5, 6, 7, 8, 9, 10 and 11 of the amended statement of grounds.

The court will, therefore, grant an order of *certiorari* quashing the decision of the respondent dated 27th September, 2012, and remit the matter to be determined by the respondent in accordance with the applicable legal principles.