THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 774 J.R.]

BETWEEN

Y.Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 1)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 13th day of March, 2017

1. The present judicial review arises on unusual facts. When rejecting the applicant's claim for subsidiary protection, the Refugee Appeals Tribunal made a finding, without clearly identifiable reasons and on limited material, that the applicant was at risk of serious harm if returned to his country of origin. However on a subsequent assessment of further more up-to-date and more detailed material and of the applicant's personal circumstances, the Minister took a contrasting view that such risk had not been made out, and made a deportation order (and subsequently declined to revoke it). The validity of those ministerial decisions is now put in issue by the applicant.

Facts

2. The applicant was born in 1964 in Algeria.

3. He was accused of involvement in terrorist Islamist opposition in Algeria and was convicted of a number of terrorism-related offences, for which he was sentenced to three life sentences and two death sentences as follows:

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

4. The applicant arrived in the State on 15th July, 1997, and applied for asylum under the false name of a Mr. B.D. He completed a fraudulent application for refugee status on 28th July, 1997, and continued to give false evidence in a s. 11 interview with the Refugee Applications Commissioner on 11th November, 1998.

5. In the original application for asylum, the applicant falsely stated in his questionnaire that his parents and brother were killed in a raid by extremists and that his sister was arrested, and that after the raid he was shot in the leg by government forces.

6. His application for asylum was rejected by the commissioner and he appealed to the tribunal. Again, his notice of appeal and evidence at the hearing on 10th November, 1999 were fraudulent. The tribunal was taken in by his falsehoods and allowed the appeal on 2nd April, 2000, and the applicant was granted a declaration of refugee status.

7. The Minister issued a travel document to the applicant on 10th October, 2000. Thereafter, the applicant left the State, although he may have returned on or about 22nd August, 2001 to renew the travel document.

8. The applicant was arrested in Andorra for fraud offences in 2001 and was released on bail. I have not been given any information about whether this bail was honoured.

9. He entered France in 2002 and was arrested on 23rd July, 2002, by the French Directorate of Territorial Safety as he sought to leave France for the United Kingdom.

10. Criminal proceedings were then brought against the applicant in France and on 29th November, 2005, he was sentenced by the Tribunal de Grande Instance de Paris to eight years of imprisonment for terrorist-related activities, together with a lifetime ban from France.

11. The applicant was convicted in France of the following offences:

> (i) membership of a criminal organisation preparing an act of terrorism, committed in England, Ireland, Spain, Andorra and France between 1997 and 2002;
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> (ii) terrorism/fraudulent detention of numerous false administrative documents, committed in Marseille in 2001 and 2002;
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> (iii) terrorism/use of a false administrative document which indicates a right, an identity or an occupation, committed in Marseille in 2001 and 2002;

(iv) receiving stolen goods, committed in Marseille in 2001 and 2002; and

(v) illegal entry or illegal stay of a foreigner in France, committed in Marseille in 2001 and 2002.

12. The applicant's brothers G.Y. and C.Y. were before the French court at the same time, a matter to which I will return.

13. Following the expiry of the sentence, the French authorities made arrangements to deport the applicant to Ireland.

14. Prior to his deportation, he applied for refugee status in France on 9th January, 2009, in the name of a Mr. B.D. That application was refused on 22nd January, 2009. While his Irish refugee application had said that he was not involved with any political grouping, his French asylum application stated that he was a sympathiser of a particular Islamic political movement in 1990, and that between 1990 and 1992 he was questioned three times by the authorities following raids.

15. The response of the Irish authorities to developments was that by letter dated the 10th February, 2009, the Minister issued a proposal to revoke the applicant's Irish refugee status. The applicant made representations in relation to the proposed revocation of his declaration as a refugee in March and December, 2009, in which he admitted providing a false identity during the asylum process and involvement in criminality in Andorra.

16. In January, 2010, the applicant wrote to the Minister requesting a temporary identification card, and stating, fraudulently, that he had been issued with refugee status in France in 2000. By this time, the applicant had re-entered the State at some point during 2009.

17. On 1st September, 2010, the applicant was convicted in absentia in the Criminal Court of Verdun for non-compliance with a residence order for non-nationals faced with deportation. He was sentenced to 6 months' imprisonment in relation to this offence. That sentence appears to be outstanding.

18. On 17th May, 2011, the Minister withdrew the proposal to revoke the applicant's refugee status and issued a fresh proposal on the basis of the provision of materially false and misleading information. The applicant made further representations on 21st June, 2011. The applicant's refugee status was duly revoked on 5th August, 2011.

19. The applicant brought an appeal to the High Court against that decision [277 MCA/2011]. In addition, he brought judicial review proceedings seeking to quash the revocation decision [2011 No. 816 JR]. These proceedings came on before Clark J. on 23rd February, 2012. On that date the applicant withdrew the appeal proceedings with an order for the respondent's costs. The judicial review proceedings were struck out with no order.

20. On 5th March, 2012, the respondent issued a proposal to deport the applicant under s. 3 of the Immigration Act, 1999. The applicant made submissions in relation to that proposal on 27th March, 2012, and made an application for subsidiary protection. In that application, he referred to criminal convictions in France but did not disclose such convictions in Algeria.

21. On 17th July, 2014, he applied for permission to re-enter the protection process under s. 17(7) of the Refugee Act, 1996.

22. The application to re-enter the asylum process was refused on 18th September, 2014, on the basis that there was no evidence that persons found guilty of terrorist activities in Algeria have been executed since 1993. The analysis also noted that the applicant appeared to have a further identity previously unknown to the Department. It noted contradictions between the applicant's original asylum application and his statement now, that two of his brothers received wrongful convictions in relation to terrorist offences. These matters were held to undermine the applicant's credibility. The s. 17(7) refusal was not challenged, other than that he wrote seeking a review of the decision in November, 2014, which was refused.

23. The applicant attended for interview in connection with his subsidiary protection on 2nd February, 2015. That is a crucial interview in the context of the present application.

24. The applicant stated in response to Q48 as set out in the report of the interview that his brother had been deported from France to Algeria after the brother had served his sentence for terrorist offences in the former country. (One can note in passing that this clearly meant that the French did not consider the brother at risk of *refoulement*. It does not at all follow (as suggested by a sort of strained *expressio unius* argument advanced on behalf of the applicant) that they *did* consider the applicant to be at such risk, because that decision never came to be made due to the applicant unlawfully fleeing France).

25. Q50 was "*Does [your brother] have any problems there now?" The reply was "When he went back to Algeria they were asking him a lot about where am I and what had become of me but my family came to harm because of me and it affected the business and way of life. My brother is ok though I think*" (see Subsidiary Protection Report interview, p. 8).

26. The applicant made further submissions on 5th February, 2015. The commissioner reported on 21st July, 2015 to the effect that substantial grounds had not been shown for believing that the applicant would face a real risk of suffering serious harm if returned to Algeria, and in addition that he was excluded from international protection by virtue of reg. 17 of the European Union (Subsidiary Protection) Regulations, 2013 by reason of his offending behaviour.

27. The report of the commissioner noted that despite the death sentences against the applicant, the authorities in a number of identified countries, including Algeria, continued to impose death sentences but not to carry out executions, and accordingly the applicant was not in fact at risk of serious harm arising from the sentence.

28. In relation to prison conditions, the report of the commissioner stated that

"there does not appear to be any country of origin information which would support a finding that the applicant would be at risk of suffering torture/inhuman treatment or punishment/degrading treatment or punishment in prison in Algeria. It is also noted that no reference is made to poor prison conditions in the latest Algeria Country Report issued by Human Rights Watch", citing that body's "World Report, 2015 – Algeria". Furthermore it was not accepted that there was a risk arising from a situation of indiscriminate violence.

29. The applicant's involvement in a terrorist organisation or in terrorist activities was regarded as a "*very serious offence*" and it was held that he "*could constitute a danger to the security of the State*". His assertion that he was wrongly convicted of the crime was found to be not credible. Accordingly he was held to be excluded from protection.

30. The applicant filed a notice of appeal to the tribunal on 9th August, 2015, and delivered legal submissions on 7th January, 2016.

31. The tribunal (Mr. Conor Gallagher, B.L.) affirmed the recommendation of the commissioner that the applicant should not be granted subsidiary protection. However he did so on the basis of the exclusion clause, rather than on the basis that there was no risk of harm.

32. In relation to the death penalty, the tribunal noted that the death penalty had not been carried out in Algeria in a number of years. The tribunal considered that it was "*notable*" that the applicant's brother, who was sentenced to 5 years in France, was "*living 'ok' in Algeria*" according to the applicant.

33. While it was "*conceivable that the [applicant] will be arrested by the authorities in Algeria*", the complaint made in relation to prison overcrowding did not reach a threshold such as to require subsidiary protection.

34. The tribunal concluded rather baldly at p. 18 of its decision that "*there is a personal, present, foreseeable and substantial risk of serious harm by the Algerian authorities. That is not to say that it is probable that he will be tortured or that his fundamental human rights will be abused by the Algerian authorities, simply that there are substantial grounds for believing so. For the avoidance of doubt, imprisoning the [applicant] following a fair trial for an offence would not constitute serious harm*". However it is not at all apparent as to how the tribunal arrived at that conclusion, particularly where it had rejected the claims based on the death penalty and on treatment in prison, and noted that the applicant's brother was not being subjected to serious harm. The tribunal's conclusion seems, with every respect, to be lacking in reasons and in clear grounding in specifically-identified country material, as well as appearing irrational given the rejection of the applicant's case regarding ill-treatment in prison.

35. On foot of the refusal of subsidiary protection, the applicant was informed that his entitlement to remain in the State had expired and that the Minister proposed to make a deportation order against him. Representations under s. 3 of the Immigration Act, 1999 were made on 22nd April, 2016. A deportation order was made on 15th September, 2016, notified to the applicant on 19th September, 2016.

36. The accompanying analysis noted the history of the matter and the representations made on behalf of the applicant. The analysis notes a submission from the applicant's current solicitors that the Minister was obliged to consider the personal circumstances of the applicant and country of origin material. The submission considered the reports submitted by the applicant, namely:

> (i) Human Rights Watch – World Report 2015 - Algeria;
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> (ii) United States Department of State Algeria Human Rights Report;
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> (iii) Material from United States Department of State, Bureau of Democracy, Human Rights and Labour referring to "*unrecognised*" detention facilities; and
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> (iv) U.S. Department of State Country Report on Human Rights Practices, 2011.

37. In addition, the Minister considered further country of origin information as follows:

> (i) Algeria 2014 Human Rights Report, U.S. Department of State;
>
> (ii) Amnesty International Report, 2015/16 – The state of the world's human rights – Algeria;
>
> (iii) U.K. Border Agency Report, 17th January, 2013; and
>
> (iv) U.S. State Department Country Report on Human Rights Practices 2015 – Algeria.

38. Reliance was placed in particular on the U.K. Border Agency Report which indicated that "*human rights issues are being continually addressed and mechanisms for redress do exist*". The U.K. Border Agency Report was also relied on in relation to measures to alleviate overcrowding in prisons, as well as information that persons in custody received visits from the International Committee of the Red Cross. The U.S. State Department Country Report of 2015 also took the view that "*prison and detention center conditions generally met international standards*". International monitoring was also noted in that report, as well as improvements in the system. The U.S. Bureau of Democracy, Human Rights and Labor Country Reports on Human Rights Practices for 2014 reinforced the view that prison conditions generally met international standards.

39. The U.K. Home Office Report, Algeria, March, 2011 stated that Islamist leaders had been released from prison in Algeria and that an amnesty issued.

40. The Freedom House Report, Freedom in the World 2009 country report on Algeria also noted the general amnesty and release of Islamist leaders from prison.

41. The conclusion of the analysis was that "*it is submitted that this therefore provides for the possibility that the Algerian judgments would not be acted upon*", and that while prison capacity and overcrowding was "*an issue*", *refoulement* did not arise and there were redress mechanisms. Mr. Michael Lynn S.C. (with Mr. David Leonard B.L.) in the course of an able submission for the applicant, criticises the analysis for referring to the "*possibility*" (rather than likelihood) that the judgment would not be acted upon, a matter to which I will return.

42. The analysis also rejected any risk arising from the death sentences on the same basis as the commissioner and the tribunal had, albeit with more material being relied on.

43. Ultimately the analysis concluded that while "*there is a strong possibility that [the applicant] would be sent to prison if returned to Algeria" … the evidence put forward does not have sufficient weight to establish that [the applicant] is at risk of torture and inhumane treatment or execution if returned to Algeria*".

44. On 16th October, 2016, at approximately 7.20 am the applicant was arrested at Dublin Airport while attempting to board flight no. FR4518 bound for Athens. He was using a false Belgian identity document bearing his photograph and the name of a Mr. M.A. His travel documentation had been fraudulently obtained on the basis of that identity.

45. He was brought to Ballymun Garda Station and charged with an offence under s. 29 of the Criminal Justice Theft and Fraud Offences Act 2001. He was remanded in custody to appear at Cloverhill District Court on 21st October, 2016. He was found in possession of €2,665 and £75 sterling at the time of his arrest.

46. The applicant in due course pleaded guilty and was remanded for sentence on 5th January, 2017. He was subsequently sentenced to a term of imprisonment of 6 months, which he is serving as of the date of this judgment.

Procedural issues subsequent to commencement of the proceedings
47. By the time the leave application was moved in this case, the applicant was already in custody. That added a certain additional degree of urgency to the proceedings. It was agreed between the parties that the leave application should be telescoped and I so ordered.

48. On 7th November, 2016, I gave Mr. Remy Farrell S.C. (with Ms. Sinead McGrath B.L.), who appeared for the respondent, leave to file a further affidavit setting out the full text of the country material which was before the Minister, albeit that, in the analysis, such material was referred to by hyperlink rather than by annexing the full text. In general terms, hyperlinking as opposed to verbatim quotation does not change the character of the documents as material before the decision-maker. All such material, or any relevant information, should be put before the court by the respondent (unless exceptionally confidential): *O'Neill v. Governor of Castlerea Prison* [2004] 1 I.R. 298. As it is helpfully put at p. 125 of Fordham's *Judicial Review Handbook* (6th ed.) (Oxford, Hart, 2012), cited with approval in *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* (No. 2) [2016] UKSC 35 *per* Lord Clarke (diss.), at para. 182 (and see *per* Lady Hale (diss.), at para. 193): "*A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material*." The full text of the material that was considered by the Minister in this case is such relevant material.

49. Mr. Lynn submitted that only the extracts quoted verbatim in the analysis were before the Minister; but the decision itself says otherwise. He also suggests that more senior officials did not access this material; but there is no evidence in favour of that proposition, and even if that were the case, the material was still considered by a responsible agent of the Minister.

50. On 14th November, 2016, the applicant raised the question of a possible amendment of the proceedings relating to the need to consider certain materials which were not in fact included in the s. 3 submission made on his behalf to the Minister prior to the deportation order. The option of making a s. 3(11) application instead was canvassed on that occasion.

51. Mr. Lynn also indicated at that time that the applicant was not pursuing any suggested amendment regarding declaratory relief in relation to an entitlement to an automatic stay (an issue which he had previously flagged), in the light of objections from the respondent that the question was hypothetical and that the applicant did not have standing because he had the benefit of an actual stay.

52. The applicant did however wish to avail of the option to apply for revocation of the deportation order and I adjourned the matter to allow the applicant to make a s. 3(11) application and to allow time for the Minister to reply and for any consequential amendment (if required) to be formulated. A s. 3(11) application was made on 22nd November, 2016. That application was considered and refused by the Minister on 6th December, 2016.

53. The refusal decision notes that para. 10 of the application stated that consequent on the French investigation and conviction, one of the applicant's brothers, G.Y., was sentenced to 5 years' imprisonment in relation to a forgery charge and not in relation to terrorism, and the case against the other brother, C.Y., was dismissed. It went on to allege that when G.Y. was returned to Algeria he was detained for 2 or 3 days and interrogated, and was released "*because he was not convicted or suspected of being involved in terrorist activity"* by the Algerian authorities. This was in the context where the French conviction was said to be non-terrorist.

54. However, contrary to the applicant's representations, the refusal decision noted that the minutes of the Tribunal de Grande Instance de Paris pronounced G.Y. guilty of involvement in a criminal organisation preparing an act of terrorism, "*terrorism: fraudulent possession of several false administrative documents*" and "*terrorism: falsification of an administrative document establishing a right, an identity or a quality*", and illegal entry or stay of a foreigner in France.

55. The refusal decision went on to state that "*despite having convictions for terrorist offences his brother was detained only for three days and now enjoys an "ok" life in Algeria. This misrepresentation calls into question the candour of the applicant*".

56. The refusal decision also went on to state that the case against the other brother C.Y. was not dismissed and that he was found guilty of terrorist-related offences and sentenced to 3 years' imprisonment, suspended for 2 years on certain conditions.

57. On 13th December, 2016, the applicant sought liberty to amend the statement of grounds to challenge the s. 3(11) decision. The applicant submitted four separate sequential versions of a possible statement of grounds and ultimately I granted leave to amend in relation to the final such version.

58. On 14th November, 2016, I gave the respondent liberty to file a further affidavit exhibiting all country material considered but not already exhibited. The parties also helpfully prepared a list of all of the country material before the Minister including that arising from the subsidiary protection claim, the s. 3 process and the s. 3(11) application, and I am grateful to Ms. McGrath in that regard and to Mr. Leonard who assisted its compilation.

Relief sought
59. Apart from injunctive and ancillary relief, the remedy sought in the statement of grounds is *"An order of certiorari quashing the deportation order issued against the Applicant under s. 3(1) of the Immigration Act 1999 and the decision to make that order as notified under s. 3(3)(b)(ii) of that Act by letter of 19 September 2016" and "An order of certiorari quashing the decision to affirm the deportation order, as notified by letter dated 6 December 2016".*

60. As this is a challenge to a deportation order and to a decision under s. 3(11) of the 1999 Act, s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies.

Role of the court in an article 3 case
61. The applicant is entitled to an effective remedy in respect of his claim under art. 3 of the ECHR, by virtue of art. 13 of that instrument: see e.g., para. 76 of *H.R. v. France* (Application no. 64780/09, European Court of Human Rights, 22nd September, 2011) which requires "*un examen indépendant et rigoureux de tout grief aux termes duquel il existe des motifs de croire à un risque de traitement contraire à l'article 3*". The right to an effective remedy is also recognised by art. 47 of the EU Charter of Fundamental

Rights and art. 2 of the ICCPR. Such a remedy includes a right to suspension of the transfer pending such examination: *Shamayev and Others v. Georgia and Russia* (Application no. 36378/02, European Court of Human Rights, 12th April 2005), para. 448, and *M.S.S. v. Belgium and Greece* (Application no. 20696/09, European Court of Human Rights, 21st January, 2011) at para. 293; although it must be understood that that suspension is only pending the initial examination of the complaint by the court and is not a guarantee of continued suspension for the duration of the proceedings, still less pending or for the duration of any appeal therefrom.

62. For many reasons, of which I will mention one, the Constitution of Ireland should generally be construed where possible as affording rights (and requiring obligations) no less extensive than those in international law. The primary jurisprudential basis for that approach is that our Constitution recognises, rather than creates, rights, and thus enshrines a theory of the natural rights of the individual. By definition, that cannot be viewed as a peculiarly national phenomenon; natural rights must be universal rights. Thus, guidance as to the scope and content of such constitutional rights can legitimately be derived from widely-agreed conceptions of rights and duties as recognised at the regional and international level and in individual foreign jurisdictions as appropriate.

63. The philosophy of natural rights has been re-emphasised as recently as 2015 by the enactment of the 31st Amendment inserting Article 42A.1 and 2.1° which expressly acknowledge the natural rights of children. Such natural rights of children are only one example of the natural rights of all human persons recognised by the Constitution, and indeed given the continuity of the human lifecycle, natural rights one enjoys as a child can hardly be taken to disappear on and after one's eighteenth birthday. As Mr. Justice Costello put it in "The Irish Judge as Law-Maker" in Curtin and O'Keeffe (Eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T.F. O'Higgins* (Butterworths, 2002) 159, at p. 161, "*A judge may be a legal positivist and have no use for natural law concepts, but if the Constitution (as it does) explicitly recognises the existence of rights anterior to positive law these jurisprudential views must yield to the clear conclusions which are to be drawn from the construction of the constitutional text*." That being the case, and given that the Constitution clearly acknowledges that rights pre-exist law, are therefore by definition, natural, and by inescapable consequence, universal, it is necessary and appropriate for Irish courts to draw on supranational and international materials in order to derive assistance as to the scope and content of such natural rights, whether enumerated or unenumerated. The same considerations apply to those inseparable although less celebrated companions of fundamental rights, fundamental duties.

64. In the light of such considerations it seems to me that that the right to an effective remedy, involving independent review of a legally cognisable complaint, should be recognised as an unenumerated right under Article 40.3 of the Constitution.

65. The independent review required by the right to an effective remedy, in the present context, must come in the form of judicial review, which in the contemporary context involves a potentially searching examination of the reasonableness, proportionality and legality of the ministerial decision. An effective remedy does not however require the reviewer to substitute his or her own view for that of the decision-maker. In the judicial review context, it is the decision being reviewed that remains in issue, and therefore in broad terms that decision must be judged by reference to the materials before its maker.

66. But can subsequent or other materials be looked at in order to assess the reasonableness or proportionality of the decision? Mr. Lynn submitted at one stage (although he later decided not to pursue the submission) that this should exceptionally be so in order to give effect to art. 3, relying on *N. v. Finland* (Application no. 3885/02, European Court of Human Rights, 30th November, 2005) (2006) 43 E.H.R.R. 12. On the other hand, Feeney J. in *Izevbekhai v. Minister for Justice, Equality and Law Reform [*2008] IEHC 23 (Unreported, High Court, 30th January, 2008) and Hogan J. in *Efe v. Minister for Justice and Equality* [2011] IEHC 214, held that the appropriate remedy was a s. 3(11) application rather than putting new material before the court. In that regard, there is the general difficulty that s. 3(11) broadly relates to a change of circumstances (*Smith v. Minister for Justice and Equality* [2013] IESC 4 (Unreported, Supreme Court, Clarke J. (Denham C.J. and McKechnie J. concurring), 1st February, 2013). Given that the submission was abandoned, I do not need to consider it further. The s. 3(11) revocation option was chosen in this case and I am now considering challenges both to the original decision and as affirmed.

The challenge to the deportation order

The applicant's main point

67. The applicant's primary submission was that the Minister was bound by the view of the tribunal that the applicant would suffer serious harm if returned to Algeria. The jurisprudential ground for this proposition was put on three alternative bases:

> (i). that the deportation decision was subject to EU law, which required such decisions to be made by the tribunal;
>
> (ii). that general rule of law considerations compelled such a conclusion, because otherwise the Minister's decision would be based on "*happenstance*" and would be arbitrary; and
>
> (iii). that art. 3 of the ECHR requires independent review of the assessment of the claim, which cannot be achieved unless the Minister is bound by the tribunal.

68. I will consider each of these propositions in turn.

Is the deportation decision subject to EU law?

69. Mr. Lynn submits that the deportation decision is subject to EU law because article 21(1) of the EU qualification directive (Council Directive 2004/83/EC of 29 April, 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted) prohibits *refoulement*. However this argument is based on a fundamental misunderstanding of the scope of the directive. Article 2(a) of the directive defines international protection as confined to refugee and subsidiary protection processes. As I pointed out in *S.A. v. Minister for Justice and Equality* [2016] IEHC 462 (Unreported, High Court, 29th July, 2016) at para. 27, art. 21 of the directive only applies to *refoulement* of recognised refugees. That conclusion is supported by Hemme Batjes, "Asylum Qualification Directive 2011/95/EU (Articles 20-42)", in Part DIII of Hailbronner and Thym, *EU Immigration and Asylum Law* (2nd Ed.), (München, C.H. Beck, 2016), at p. 1257. In addition it is clear from the fact that the returns directive (Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals) deals with *refoulement* of unsuccessful applicants for asylum, and that the procedures directive (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status) deals with *refoulement* of applicants pending a decision, that the strictures of art. 21 of the qualification directive apply only to recognised refugees. A significant part of the reason for the Irish opt-out from the returns directive was to preserve the domestic sovereignty over treatment of failed asylum seekers and others in a similar category. That approach would be set at nought by the proposed unwarranted interpretation of the directive urged by Mr. Lynn.

70. The somewhat tortured argument made under this heading is founded on a laboriously literal reading of one part only of art. 21. Reading the article as a whole, and reading the directives together, it is clear that art. 21 applies only to the return of recognised refugees and not to "*all protection seekers*" as incorrectly contended in oral argument. Obviously, breaking fragments off any text and reading them in isolation can produce arbitrarily incorrect meanings; that is why reading in context is perhaps the first rule of interpretation. It is even a logical prerequisite to the paramount rule of reading in accordance with the document's purpose, because the purpose can only be determined from the overall context. No rational legal system can permit parties to cherry-pick which portions of an overall text should be wrenched out of context in order to shape a result. Any coherent reading of the directive as a whole, and of the sequence of EU immigration and asylum directives taken together, makes clear that the point is meritless and bordering on unstateable.

71. Reliance was placed on the opinion of Advocate-General Sharpton of 31st May, 2016, in Case C-573/14, *Commissaire général aux réfugiés et aux apatrides v. Lounani*, a case concerning an alleged terrorist asylum-seeker, in which it was noted that the exclusion clause has an effect "*to deprive an applicant of the protection of refugee status*" (para. 33) and not necessarily to imply that he or she may be returned (para. 21, citing art. 4 of the Charter of Fundamental Rights, art. 3 of the ECHR, and *Chahal v. United Kingdom* Application no. 22414/93, 15th November, 1996). This is unexceptional and does not in any way suggest that art. 21 has any relevance to persons who are not refugees.

72. Mr. Lynn in oral submissions suggested that the Minister was bound by the decision of the tribunal that the application was at risk of serious harm, submitting that "*the whole procedure is an EU law one and for that reason we have a cast-iron case because the Refugee Appeals Tribunal is the body entrusted by the EU to determine subsidiary protection*". However that proposition is fundamentally misconceived because the whole procedure is not an EU law one. The process passes over to domestic law as soon as the international protection decision has been made adversely to an applicant.

73. Mr. Lynn also submits that national legislation, in the form of regulations (a type of instrument that of course has "*a definite legislative character*" Hogan and Morgan, *Administrative Law in Ireland* (4th ed.) (Dublin, Thompson Round Hall, 2010), p. 47, para. 2-104), should be interpreted in a manner that requires the Minister to follow the view of the tribunal. However the national legislation in question is designed to implement EU law and therefore should be interpreted in harmony with it rather than in a manner that creates some restriction on the Minister's powers unknown to EU law. If (as is the case) EU law does not require the Minister to make her deportation decisions in accordance with *obiter* views that might be expressed by the tribunal when rejecting an application for subsidiary protection, then there is simply no basis to construe national regulations designed to implement EU law in a way that would produce a result which EU law does not require. That this is the effect of the applicant's submission only goes to show the convoluted and essentially misconceived nature of what is being argued.

74. Mr. Lynn submits that subsidiary protection is in some circumstances an absolute protection, relying on *N.A. v. U.K.* (Application No. 25904/07), 17th July 2008, paras. 115-117, as cited in Case C-465/07 *Elgafaji v. Staatssecretaris van Justitie* (Court of Justice of the EU, 17th February, 2009) [2009] 1 W.L.R. 2100 at para. 44. *N.A.*, however, only stated that art. 3 of the ECHR would be engaged "*in the most extreme cases of general violence*" (para. 115); thus implying that other cases where subsidiary protection applies would not be covered by the absolute bar on return under art. 3.

75. Reliance is placed on the proposition that it is an inescapable obligation of the qualification directive that functions be vested in an identified agency, in this case the tribunal (*B.A. v. Minister for Justice and Equality* [2014] 2 I.R. 377, p. 392). But that has been done. The tribunal has carried out its function by rejecting the application for subsidiary protection. The statute does not give life to its *obiter* statements or secondary findings by making them binding on the Minister.

76. While in *O.S. v. Minister for Justice Equality and Law Reform* [2011] 4 I.R. 595 the discretion to grant asylum despite rejection of a claim by the tribunal was discussed, and the action by the tribunal and Minister were described as part of a "*single administrative adjudication*" (p. 602), this does not arise in subsidiary protection where the tribunal's decision is itself binding. Mr. Lynn extrapolates from this fragment of the language used in that case a supposed principle that the decision of the tribunal as to the level of risk must also be binding. That conclusion does not follow and would re-write the statute. The tribunal's decision was to reject the claim and that decision was indeed followed by the Minister. The precise reasoning is not binding in any sense that is apparent from the statutory provisions. Again, judgments are not statutes and must not be read as such. Comments in judgments must be read in context and are not a basis to warp actual statutory language which did not arise and was not considered in such judgments.

77. Mr. Lynn submits that if the country situation changed between a tribunal decision of the kind at issue here and a ministerial decision then it could be revisited, but no such change has been appropriately demonstrated. That submission seems fundamentally inconsistent with the idea (the applicant's primary submission) that the tribunal's conclusions on particular issues (as opposed to its final decision) is binding *per se*. But the statute does not limit the Minister's power to herself assess whether to deport by reference to the question of whether the situation has so changed. In any event, for what it is worth, it is clear that the situation in Algeria has been continuously evolving, a matter to which I will return.

78. Mr. Lynn submits that art. 4(3)(c) of the qualification directive requires the protection decision-maker to take into account the internal situation in the country concerned and suggests that this implies that a consideration and assessment of country of origin material is necessary in every case. This is an argument that I have already considered and rejected in *G.I. v. Minister for Justice and Equality* [2015] IEHC 682 (Unreported, High Court, 6th November, 2015) (see paras. 19 to 26). As it has recently been put, "*There is now a considerable body of case-law that stands as authority for the proposition that, because asylum claims require a number of essential elements to be established, it is unnecessary to require a decision-maker to decide on every such element where an adverse finding has been made in respect of one, save in exceptional circumstances of no relevance here*": per Keane J. in *N.N. v. Minister for Justice and Equality* [2017] IEHC 99 (at para. 48), citing, *inter alia*, *E.K.K. v. Minister for Justice and Equality* [2016] IEHC 38 (at para. 52).

79. In this case, all material was considered including country of origin material. Neither national nor EU law require narrative discussion or findings on country material if there is a separate ground to determine the matter. In G.I., the separate ground was credibility. In this case, it was the exclusion clause.

80. I therefore uphold para. 6 of the Statement of Opposition, which correctly asserts that "*at the time of the examination of his representations under section 3 of the Immigration Act, 1999 (as amended), the Applicant was no longer an applicant for refugee status under the terms of the 1951 Convention on the Status of Refugees and / or an applicant for subsidiary protection under the terms of S.I. 426 of 2013 / Directive 2004/83/EC. In the premises, it is pleaded that the application was not governed by EU law and, specifically, it was outside the scope of Directive 2004/83/EC.*" It follows that para. 8 of the statement of opposition is also correct to assert that "*the allegation of the application of S.I. 426 of 2013 and Directive 2004/83/EC to the Respondent when considering the representations under section 3 of the Immigration Act, 1999 (as amended) is fundamentally misconceived.*"

Is it arbitrary to acknowledge that the Minister can determine refoulement issues in a manner contrary to the tribunal's approach?
81. Mr. Lynn submits that it is only the "*happenstance*", as he calls it, of a determination by the tribunal that the exclusion clause applies. That finding means, on the respondent's case, that the Minister feels free to depart from a tribunal finding that would otherwise be binding (by virtue of reg. 20(1)(b) of the EU (Subsidiary Protection) Regulations 2016). This result, he submits, is arbitrary.

82. But it is not arbitrary. Nor is the application of the exclusion clause some sort of external accidental happenstance which has nothing to do with the applicant. The application of the exclusion clause in effect transfers the final decision on serious harm from the tribunal to the Minister, and renders the tribunal's views on harm or any other issue essentially *obiter*. At the deportation order stage, the Minister is not obliged to follow any findings made in the course of the protection claim such as regarding the applicant's account, or even as to harm, internal relocation or state protection, if the application is ultimately rejected, because it is the outcome of the protection process that binds, not views expressed along the way. To hold otherwise would be to give the tribunal decision an ongoing status not warranted by the statutory scheme. It is the final outcome of the tribunal (in this case, rejection of the applicant's claim) that is binding on the Minister, not necessarily the reasoning process by which it got to that point. I might observe that in the present case, as it happens, the tribunal's reasoning process on the harm issue is far from evident given that the applicant's submissions on the detail of this issue were pretty much rejected. The reasoning of the tribunal on this point seems to me to be largely if not entirely absent and certainly to fall short of the sort of clear standard mandated by the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701.

83. The argument that the process is seamless and that the tribunal decision is *res judicata* is lacking in merit. As it happens, that argument was not made when the applicant made submissions under s. 3 of the 1999 Act originally.

84. Ultimately the applicant's argument under this heading is a sort of legal version of "*if 'ifs' and 'ands' were pots and pans".* Yes, if his conduct had not triggered the exclusion clause, things would be different. But it did, and the present case cannot be judged in accordance with the fantasy landscape of a parallel alternative legal universe.

Does the applicant's entitlement to an independent review of an art. 3 decision mean that the tribunal view is binding?
85. In assessing the decisions in this case under this and any other ECHR headings, I have had regard to the art. 3 caselaw as referred to in this judgment and including that set out in my previous decision in *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 (Unreported, High Court, 24th June, 2016): *Saadi v. Italy* (Application no. 37201/06, European Court of Human Rights, 28th February, 2008); *Soering v. United Kingdom* (Application no. 14038/88, European Court of Human Rights, 7th July, 1989) (1989) 11 E.H.R.R. 439; *Vilvarajah v. United Kingdom* (Application nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, European Court of Human Rights, 30th October, 1991) (1992) 14 E.H.R.R. 248; *Fatgan Katani v. Germany* (Application no. 67679/01, European Court of Human Rights, 31st May, 2001); *Mamatkulov v. Turkey* (Application nos. 46827/99 and 46951/99, European Court of Human Rights, 4th February, 2005) (2005) 41 E.H.R.R. 25; *Müslim v. Turkey* (Application no. 53566/99, European Court of Human Rights, 26th July, 2005) (2006) 42 E.H.R.R. 16; *F.H. v. Sweden* (Application no. 32621/06, European Court of Human Rights, 20th January, 2009); *Othman v. United Kingdom* (Application no. 8139/09, European Court of Human Rights, 9th May 2012) (2012) 55 E.H.R.R. 1 para. 192; *A. v. The Netherlands* (Application no. 4900/06, European Court of Human Rights, 20th July, 2010); *Ramzy v. the Netherlands* (Application no. 25424/05, European Court of Human Rights, 27th May, 2008); *Daoudi v. France* (Application no. 19576/08, European Court of Human Rights, 3rd December, 2012); *Nabid Abdullayev v. Russia* (Application no. 8474/14, European Court of Human Rights, 15th October, 2015); *Nnyanzi v. U.K.* (Application no. 21878/06, European Court of Human Rights, 8th April, 2008); *Cruz Varas v. Sweden* (Application no. 15576/89, European Court of Human Rights, 20th March, 1991); Al *Hanchi v. Bosnia and Herzegovina* (Application no. 48205/09, European Court of Human Rights, 15th November, 2011); *Thampibillai v. the Netherlands* (Application no. 61350/00, European Court of Human Rights, 14th February, 2004); *H.L.R. v. France* (Application no. 24573/94, European Court of Human Rights, 29th April, 1997); *Jabari v Turkey* (Application no. 40035/98, European Court of Human Rights, 11th July, 2000).

86. It is clear that the applicant is entitled to "*independent scrutiny*" of the claim that there are substantial grounds for hearing a real risk of treatment contrary to art. 3 (*Chahal*, para. 151). However that decision must be read in the context that some scrutiny can be provided either by an independent administrative body or by the courts.

87. A conclusion that the ultimate decision falls to the Minister, subject to judicial review, rather than the tribunal, does not dilute the independence of the tribunal in relation to the matters which it can decide (reg. 28(1) of the 2016 regulations).

88. The European Court of Human Rights had held in Soering at paras. 121 to 124, that judicial review was an effective remedy for the purposes of art. 3 for the purposes of the matters considered in that judgment. That approach was reaffirmed in *Vilvarajah v. United Kingdom* (Application nos. *13163/87, 13164/87, 13165/87, 13447/87* and *13448/87*, European Court of Human Rights, 30th October, 1991), at paras. 122 to 127.

89. However in *Chahal*, while reaffirming the *Vilvarajah* jurisprudence, the court, at paras. 148 to 153, noted that United Kingdom judicial review was not an effective remedy in circumstances where the courts of that country could not assess the art. 3 risk independently of questions of national security. In coming to that view, it is clear that the court has taken the United Kingdom's legal approach as being that only a minimal level of judicial scrutiny was involved in national security cases, citing *Council of Civil Services Unions v. Minister for the Civil Service* [1985] A.C. 374, at p. 402, *R. v. Secretary of State for the Home Department ex parte Cheblak* [1991] 2 All E.R. 319. Such an approach has not been the Irish law; quite the reverse. The courts here are not inhibited from reviewing ministerial deportation decisions because security considerations are alleged to be involved.

90. Further, the Court of Appeal in the recent decision of *N.M. (D.R.C.) v. Minister for Justice, Equality and Law Reform* [2016] IECA 217 [2016] 2 I.L.R.M. 369 held (per Hogan J.) that the wide scope of contemporary judicial review "*does indeed provide an effective remedy for the purposes of Article 39*" of the Asylum procedures directive (Directive 2005/85/EC) (para. 59).

91. Overall, the respondents are correct to plead as they do at para. 10 of the statement of opposition, that "*the examination of the Respondent carried out on the 7th September 2016, the subsequent signing of the Deportation Order, was a process which was independent of the asylum and international protection process. It is pleaded that the Applicant has sought to erroneously conflate the section 3 process with the international protection process. The Respondent had access to the entirety of the Applicant's files and analysed further country of origin information in the light of the separate and distinct duty of the Respondent to consider non refoulement under section 5 of the Refugee Act, 1996 (as amended).*" I also uphold the contention at para. 11 of the statement of opposition that "*the Respondent was not bound / constrained and /or limited in that decision and / or analysis by matters stated by the bodies designated by statute to analyse the asylum and subsidiary protection applications*".

92. The Minister's failure to follow the view of the tribunal is not unlawful and does not infringe any constitutional, EU or ECHR rights

of the applicant.

93. As the main complaint fails I turn now to what the applicant refers to as his subsidiary grounds of challenge.

Is it a breach of fair procedures to revisit the finding of the tribunal when this was not signalled to the applicant?
94. The applicant relies on *P.S. v. Refugee Appeals Tribunal* [2010] IEHC 177 (Unreported, High Court, Cooke J., 11th May, 2010) and *Victoria Idiakheua v. Minister for Justice, Equality and Law Reform* [2005] IEHC 150 (Unreported, High Court, Clarke J., 10th May, 2005) in support of the conception that "*a reasonable opportunity to know the matters which may be likely to affect the judgment of [the decision-making] body*" should be afforded (per Clarke J.), as should notice of matters that would come as a surprise (*per* Cooke J., at para. 29). Those views were of course in the context of the asylum system, but even apart from that, the fact that an applicant is surprised (in this case, by the reversal of a finding of the tribunal) does not of itself mean that fair procedures have been undermined. To go down that jurisprudential rabbit-hole would be to put a premium on a failure or unwillingness by lawyers for applicants to anticipate reasonably foreseeable outcomes. It would create a perverse incentive for failure to engage with the process.

95. The applicant was put on notice of possible deportation by the s. 3 notice. That constitutes sufficient notice that any argument against deportation (e.g., that the Minister should be bound by the tribunal) should be put forward. Further spoon-feeding of the applicant's representatives is not required.

96. Wide *obiter* statements must be read in their context and as subject to development in subsequent cases under different factual situations. Notice is not literally required of anything that could be a surprise or that could affect the decision-maker. There is no logical (or therefore legal) reason to be required to give notice of something that an applicant is actually aware of, or must be taken to be aware of.

97. I thus agree with the contention at para. 21 of the statement of opposition that "*the Applicant was fully on notice of this issue in the section 3 process and addressed the same in the representations made to the Respondent*".

Is it a breach of fair procedures to rely on country material not signalled to the applicant?
98. The answer to this question depends on the nature of the material rather than just on whether it is going to be relied on. Widely-known and standard material such as reports of Amnesty International, Human Rights Watch, Freedom House, the U.S. State Department or the U.K. Border Agency do not need to be notified. Any applicant must be taken to have access at all times to general published country information of this kind, and must be taken to be aware that such general material is the background against which protection claims will be assessed. Obscure material that is going to materially change the picture appearing from the basic and universal material should however be notified. Mr. Lynn plaintively asks in relation to generally available country reports, "*is the solicitor in a pre-emptive move expected to go through all those reports?*" Unfortunately, he is. It seems odd that over 20 years on from the enactment of a statutory protection system, the need to read generally-available country reports as a matter of course could come as a surprise ; or in particular that solicitors holding themselves out as acting in the immigration and asylum area should pleadingly seek exemption from the plight of having to look up such material.

99. I therefore uphold the plea at para. 24 of the statement of opposition that "*requirements of constitutional and/or natural justice and/or the law on fair procedures do not require notice to be given to the Applicant of well-known, objective and publicly accessible country of origin information, including country reports from the United States State Department, or country information from the United Kingdom Home Office. Specifically, it is pleaded that no obligation arose in the circumstances of the case to canvass the views of the Applicant in respect of same*".

Was the decision to favour certain country information over that preferred by the applicant lacking in reasons?
100. Overall the challenge to the analysis of art. 3 risk in the original order has been superseded by the fresh and more up-to-date consideration of those issues in the s. 3(11) context. Even if there was some non-consideration of material not put forward originally by the applicant, that was cured by the s. 3(11) review.

101. Mr. Lynn submits that the decision of Edwards J. in *D.V.T.S. v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 476 precludes the Minister rejecting favourable country of origin information and following other such information without giving some explanation (para. 44). But there is an explanation: the Minister is relying on more recent information and in particular on the specific elements of the new information quoted in the decision. Admittedly the Minister does not specifically use a laborious formula such as: "*I favour this information over the applicant's preferred information because it is more recent*"; but one cannot be over-prescriptive about how decisions are phrased. That rationale is quite clear when one considers both the annual nature of country information and the circumstances of this case. Again, it is not for an applicant or indeed the court to dictate the format and wording of administrative decisions.

Was the decision unreasonable, given the evidence regarding incommunicado detention in the country concerned?
102. The applicant relies on a range of country material submitted to the Minister regarding detention by the security services in Algeria, in particular the following:

(i). Amnesty annual reports, 2011 and 2012;

(ii). Refugee Documentation Centre Legal Aid Board report of 2nd April, 2009 referring to a case in June, 2006;

(iii). Immigration and Refugee Board of Canada material referring to a case in January, 2007;

(iv). Freedom in the World report 2014 for Algeria, published by Freedom House;

(v). Human Rights Watch World reports, 2012 and 2015; and

(vi). State Department Algeria Human Rights Report 2011.

103. Much of the country of origin's material is supportive of the proposition that there is a real risk that terrorist suspects (and in some cases convicted prisoners) are held for periods in possibly secret detention centres and incommunicado; a lack of facilitation of visits from Amnesty, the UN *rapporteur* on torture or the UN working group on enforced or involuntary disappearances; and a lack of implementation of UN Committee against Torture recommendations on the death of a detainee in December, 2006. On the basis of this material Mr. Lynn says in oral submissions that the country "*does not have any respect whatsoever for the rule of law" and that this "must be one of the most disquieting countries that exist*".

104. The original s. 3 submissions of 22nd April, 2016 referred to two cases of persons held incommunicado and reportedly tortured in February, 2015 and September, 2015. However the Minister did consider the submission even if it was not narratively discussed. There is generally no obligation to engage in narrative discussion of all of an applicant's material, save in limited circumstances: see per Keane J. in *N.N.*, at para. 49, citing *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 (at para. 40) and *per* Hardiman J. in *G.K. v. Minister for Justice* [2002] 2 I.R. 418 (at pp. 426-427).

105. The material referring to two cases of ill-treatment in 2015 is not such that it renders unlawful the Minister's conclusion that this particular applicant is not at substantial risk. Such material (and other public-domain material related to Algeria, such as for example that listed in the annex to this judgment, or other judgments and decisions such as the Views adopted by the UN Human Rights Committee in *Mejdoub Chani*, Application no. 2297/2013, 11th March, 2016) may support the contention that particular individuals were treated inhumanely at particular times, but such a conclusion cannot be generalised in the manner sought by the applicant unharnessed from the country material generally. The failure to refer expressly to this material has to be read in the light of the fact that the Minister acknowledges human rights shortcomings in Algeria.

106. The detention practices of Algeria are of crucial importance because the European Court of Human Rights has over time expanded the boundaries of the protections of art. 3. On a literal reading of the provision as adopted, art. 3 precludes the contracting party itself from engaging in inhuman or degrading treatment or punishment or torture. In *Chahal*, the provision was extended to preclude the removal of a person to a territory where there are substantial grounds for believing in a real risk of such treatment or punishment, as opposed to a probability. An attempt by the U.K. government to argue for a higher level of probability, at least in terror cases, was knocked back in *Saadi*, paras. 124 to 133. A further expansion of the provision has arisen from *Daoudi v. France* (Application no. 19576/08, European Court of Human Rights, 3rd December, 2009), an important case for present purposes, to the effect that, if the country has a practice of incommunicado detention, there may be inadequate safeguards to guarantee that the person will not be subject to such treatment or punishment, and that therefore art. 3 precludes removal to such a country. At one level that is quite an expansion of the (absolute) provisions of art. 3 in that it extrapolates a conclusion as to risk of torture from a mere absence of information as to detention practices. However I say that not by way of criticism of Strasbourg but by way of emphasis that, where absolute provisions (not susceptible to normal checks and balances) are at issue, considerable care must be taken before concluding that a violation arises.

107. In *Daoudi*, the court reviewed a great deal of country of origin material in relation to Algeria, in particular the following:

(i). Amnesty International reports in 2006 on torture by the military security in Algeria;

(ii). Annual reports from Amnesty in 2007 and 2008;

(iii). Communique from Amnesty regarding the release of a prisoner in 2008;

(iv). 2008 communication from Amnesty to the UN Human Rights Committee;

(v). Human Rights Watch report on detention in Algeria, 2007;

(vi). Human Rights Watch report on U.K. Diplomatic assurances, 2008;

(vii). Country summary published by Human Rights Watch in January 2009;

(viii). UN Human Rights Committee report 2007;

(ix). UN Committee on Torture final observations of 2008 on Algeria;

(x). Report to the Human Rights Council of the UN by special rapporteur 2009;

(xi). State Department country report on human rights practices 2007 and 2008 (published January 2009);

(xii). Country of Origin Information Report (Algeria) published by the U.K. Home Office 2008; and

(xiii). Judgments of the U.K. Asylum and Immigration Tribunal: *H.S. v. Secretary of State for the Home Department* [2008] UKAIT 00048 (19th May, 2008*); A.F. v. Secretary of State for the Home Department* [2009] UKAIT 00023 (22nd June, 2009).

108. On the basis of that material, the court was of the view in the context of that particular applicant (who had a French, but not an Algerian, conviction) that there were substantial grounds for believing that the applicant would be subjected to treatment contrary to art. 3. That arose from an intersection between his personal circumstances and the general situation in the country. The personal circumstances included:

(i). the applicant's terrorist conviction in France of which Algeria was aware;

(ii). the applicant being suspected of links with terrorism by Algeria; and

(iii). the fact that an amnesty that occurred in the country in 2005 did not apply to the applicant.

109. The features of the country situation that were important to the court were:

(i). the fact that persons suspected of terror involvement were arrested and detained in unforeseeable circumstances and without clearly established legal grounds for the purpose of being interrogated;

(ii). the absence of adequate judicial safeguards;

(iii). secret detentions lasting up to several months;

(iv). the impossibility of monitoring developments in the country;

(v). the absence of a control system to ensure that detainees would not be tortured in secret detention centres;

(vi). the inability of such prisoners to submit complaints to the domestic or international courts.

110. The *Daoudi* decision was subsequently considered in *H.R. v. France*. In that decision the court considered further country of origin information including:

(i). Country summary published by Human Rights Watch in January, 2010;

(ii). U.K. Home Office Country of Origin Information Report, March, 2010;

(iii). Annual Report of Amnesty International, 2010; and

(iv). 2009 country report on human rights practices, published by US State Department March, 2010.

111. The court recalled the principles of *Saadi* and *Daoudi*. It was noted that the government of Algeria had ended the state of emergency but, nonetheless, based on the country material, it was concluded that the human rights situation had changed little ("*peu évolué*") (para. 51) between the decision in *Daoudi* in December, 2009 and the lifting of the state of emergency in February, 2011. The situation thereafter continued to pose a real risk for the applicant (who had an Algerian terror conviction) because;

(i). the court did not have specific information as to the situation in view of the fact that the state of emergency had been lifted only recently (para. 62);

(ii). information provided by the French government from lawyers of the country was too imprecise (para. 61); and

(iii). a press release from the Council of Ministers of Algeria suggested that the lifting of the state of emergency did not amount to a change in the situation but to a continuation of the struggle to put an end to terrorism (para. 62).

112. Two recent admissibility decisions were also opened to me, although they are not directly in point.

113. In *M.K. v. France* (Application no. 76100/13, European Court of Human Rights, 24th September, 2015), the court recalled its decisions in *Saadi* and *M.S.S. v. Belgium and Greece* (Application no. 30696/09, European Court of Human Rights, 21st January, 2011). It noted that national decision-makers were normally better placed to evaluate the evidence before them (citing *Klaas v. Germany* (Application no. 15473/89, European Court of Human Rights, 22 September, 1993), para. 29 Series A no 269). In that case, it was held that internal relocation was an available option to address a threat emanating from non-governmental persons.

114. *M.X. v. France* (Application no. 21580/10, European Court of Human Rights, 1st July, 2014) was also cited, but also appears to turn on a ground that does not arise here.

115. In *Sihali v. Secretary of State for the Home Department*, SC/38/2005, Special Immigration Appeals Commission (26th March, 2010), at paras. 52 to 64, the commission considered the fate of a series of persons with suspected terror links who had actually been returned between 2007 and 2010, some with diplomatic guarantees and some without. Generally no art. 3 breaches were established. At paras. 65 to 73 the commission set out reasons why an *external* verification system for assurances was not a legal requirement (see also decision of the House of Lords in *R.B. v. Secretary of State for the Home Department*, [2009] UKHL 10, per Lord Hoffman, para. 193); and held that assurances were capable of being verified by other means. For example, detainees were spoken to by Amnesty International, lawyers and relatives after release and offered the opportunity to speak to British officials.

116. But in *B.B. v. Secretary of State for the Home Department* [2016] UKSIAC SC/39/2005 (18th April, 2016) the existing systems of verification (protest by families, lawyers, official scrutiny, press, international attention, NGOs and the British Embassy (para. 75)) were held to be insufficiently robust. Para. 119 notes that after the case had been argued, the Algerian Security Service, which had loomed large in previous country of origin material, was "*disbanded*". That was held to be an insufficient basis to hold that the risk to the applicants had been resolved (para. 121). Improvements in the country situation were not such as to obviate the need for "*effective verification"* of diplomatic assurances given. Thus deportation, even with diplomatic assurances, of a person likely to come to security service attention, would be unlawful. Such an approach is pitching the level of judicial second-guessing of the executive at a very high level indeed: in my view, at a level that is far too high to be compatible with the principle of separation of powers.

117. One then has to ask how the decision of the Minister in the present case measures up against the analysis of the Strasbourg Court. The personal circumstances of the applicant here are, superficially, not unduly dissimilar from those of the applicants in *Daoudi* and *H.R.* in particular, with the one very significant exception that the applicant's brother, also a terrorist convict in France, is living openly in Algeria and is apparently "*ok*".

118. In relation to the general situation, the Minister had more up-to-date country of origin material than that referred to by the Strasbourg court. That information is capable of putting some of the features relied on by the Strasbourg court in a new light having regard to ongoing improvements in Algeria.

119. To take one example of the ongoing changes in Algeria, Mr. Lynn suggests that because the new human rights body is funded by the Algerian Government (per the UK Border Agency) it cannot be an effective guarantor of rights. But that is policy commentary and not a basis on which the court could substitute its view for that of the Minister. It does not follow that because a body is funded by the State that it is not independent of the State.

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

121. Ultimately therefore I would uphold the contention set out at para. 18 of the statement of opposition that "*the Respondent carried out her section 3 and section 5 examinations having regard to the entirety of the applicant's asylum and immigration history. The respondent had regard to the entirety of his file, including the findings of the Refugee Appeals Tribunal. However, it is pleaded that the Respondent carried out an independent examination of up-to-date country of origin information and examined whether the applicant was in danger of suffering a real risk of torture or inhuman or degrading treatment or punishment in breach of art.3 of the European Convention on Human Rights or the European Convention on Human Rights Act, 2003 or s. 4 of the Criminal Justice (United Nations Convention Against Torture) Act, 2000 and/or a threat to his life or freedom in breach of s.5 of the Refugee Act, 1996 Act".*

122. If I am incorrect about that, any infirmity in the art. 3 analysis at the deportation order stage has been cured by the further consideration of the issue at the s. 3(11) stage, which I will deal with further below. No injustice to the applicant could thereby arise

in relation to such issues. Judicial review being a discretionary remedy, it would be an improvident exercise of such discretion, and a precious piece of legal purism detached from practical considerations, to quash an original decision in relation to any failure to consider a matter which has now been fully considered in the affirmation decision. As with points considered in *K.A.S. v. Minister for Justice and Equality* [2016] IEHC 657, such an approach would be strictly "*[f]or aficionados of pointless formalism*", to whom "*[r]eal-world facts are irrelevant*" (per Alito J. (diss.) in *Mathis v. U.S.* 579 US __ (2016) (slip op. p. 9)).

Was an incorrect standard of proof applied?
123. Mr. Lynn suggests an incorrect standard of proof was applied and objects to the wording of the analysis on two grounds.

124. Firstly, it refers to a "*possibility*" that the applicant may not be imprisoned. But, the Minister is not saying that it is anything more than a possibility and the decision does not turn on that. The analysis is essentially saying that it may be the case that the applicant will not in fact be imprisoned if returned, but in any event that if he is, his treatment in prison will not be such as to constitute inhuman or degrading treatment or punishment, or torture. Such an alternative analysis does not have to determine as a matter of probability which of two eventualities would transpire if neither of them would infringe art. 3 of the ECHR. As the respondent correctly contends at para. 27 of the statement of opposition, "*the allegation … is highly selective and wholly fails to reflect the entirety of the extensive reasoning adopted by the Respondent in her examination*".

125. Secondly, it is submitted that it is not expressly stated in the analysis that the test is less than a balance of probabilities. But this is to have the applicant dictate the form of the decision. The decision does not misstate the test and the respondent's affidavit (unchallenged) confirms that the correct test was applied. On the materials before me I would uphold the contention at para. 28 of the statement of opposition that "*the Respondent applied the correct test under both article 3 of the European Convention on Human Rights and section 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000 when examining the Applicant's representations under section 3 of the Immigration Act, 1999 (as amended). Specifically, it is clear from the substance of the examination that she was satisfied that there were no substantial grounds, on the basis of the publically available material before her, that the Applicant was in danger of suffering a real risk of torture or inhuman or degrading treatment or punishment in breach of article 3 of the European Convention on Human Rights or the European Convention on Human Rights Act 2003 or section 4 of the Criminal Justice (United Nations Convention Against Torture) Act 2000 and / or a threat to his life or freedom in breach of section 5 of the Refugee Act, 1996 Act*".

126. Accordingly this ground also fails.

Grounds of challenge to the s. 3(11) decision
127. The applicant's grounds of challenge to the s. 3(11) decision are as follows:

> (i). the decision was wrongly treated as an ad misericordiam decision;
>
> (ii). the decision was wrongly arrived at on the basis of the incorrect premise that the standard was different to that of the tribunal;
>
> (iii). the Minister failed to properly consider the Strasbourg and U.K. caselaw put forward by the applicant;
>
> (iv). the Minister failed to clearly deal with the applicant's evidence that Algeria operated secret detention centres, and insofar as that matter was inferentially dealt with, the finding lacked a proper evidential basis and relatedly failed to explain why country material supporting the applicant was not operative;
>
> (v). the decision appeared to apply a judicial review test at first instance;
>
> (vi). more generally, the decision failed to give adequate reasons or was unreasonable; and
>
> (vii). insofar as the decision suggests that there has been an improvement in Algeria, the correct legal test has not been applied insofar as the Minister relied on improvements without determining the significance and durability of the changes in line with the cessation provisions of the qualification directive, which the applicant submits reflects the test under art. 3 of the ECHR.

Preliminary objection – lack of candour
128. The respondent submits that the applicant had displayed "*an egregious lack of candour and* mala fides" (supplementary submissions para. 8) (see *R.C. v. Refugee Applications Commissioner* [2010] IEHC 490 (asylum applicants knowingly provided commissioner with false and misleading information, amounting to a "*conspiracy to deceive*" (per Clark J. at para. 28)).

129. I will proceed on the assumption (without so deciding) that the applicant's lack of candour, which has been clearly established, is not a bar to his prosecuting the present proceedings. However the Minister found that it was relevant to the assessment of his personal circumstances, a finding that appears clearly reasonable. Any factual claim made by this applicant has to be viewed with scepticism given his history of fraudulent applications and deceptive conduct.

Preliminary objection – abuse of process
130. Mr. Farrell submits that the applicant "*has unlawfully and/or as an abuse of process sought to submit an application for revocation of the deportation order in circumstances, and during the course of judicial review proceedings, where he has also sought an order of certiorari quashing the deportation order*" (supplemental submissions para. 4). Reliance is placed on *Odulana v. Minister for Justice, Equality and Law Reform,* (Unreported, High Court, Clarke J., 25th June, 2009), para. 43, where criticism is made of "*procedural gambling*" by making a revocation application and "*on receipt of an unfavourable decision*", only then seeking to challenge the underlying order. However, that is not an analogy to the present case because the applicant had already challenged the deportation order before making a revocation application based on material that he had not previously relied on.

131. I do not think the applicant can be accused of any abuse of process in those circumstances, especially where I permitted the matter to be adjourned in order to allow the applicant make a s. 3(11) application. In any event, the respondent was aware of the procedure being adopted and only cried foul after the event. If there really was an abuse of process (which there was not), that point should have been made in advance. The "*abuse*" (for want of a better word) is rather on the respondent's side in complaining a procedure after the event, having failed to so complain when it was put in motion.

Preliminary objection – failure to explain why the material was not proffered earlier
132. Mr. Farrell submits that no explanation was offered as to why the material in the s. 3(11) application was not offered at the time of the s. 3 proposal. Mr. Lynn explained at the hearing that the ECHR material did not come to light because he searched originally on the Strasbourg website for the English name of Algeria and only at a late stage did he think of searching for the French name, at which point the cases came to light. That seems to be a fair explanation in the context of this case, although it might be less convincing in a second case now that lawyers might be taken to be on notice of the need to search in both languages.

133. In any event, even if I am wrong about that, no explanation is really required here, in the sense that the absolute nature of art. 3 means that material relevant to that provision must still be considered even if not put forward the first time, as long as it gives rise to a real and substantial issue regarding a risk of ill-treatment.

The complaint that the matter was treated as ad *misericordiam*
134. The decision refers at p. 15 to the decision of the Supreme Court (Hardiman J.) in F*.P. v. Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164, at p. 172, in which it was held that a s. 3 decision "*was in the nature of an ad misericordiam application*" (underlined in the s. 3(11) decision). A further quotation at p. 173 refers to reconsideration of matters "*at the respondent's discretion*".

135. It is not clear as to why the reference to the *ad misericordiam* nature of a s. 3 application is quoted and underlined, but the underlining is not terribly apposite to the present case as it could suggest the possibility that this principle has particular relevance to a determination of *refoulement* or art. 3 of the ECHR. Insofar as a s. 3 decision (including s. 3(11)) is a consideration of whether deportation of an individual is substantively unlawful (e.g., by reference to *refoulement* or arts. 3 or 8 of the ECHR), the Minister is not conducting an *ad misericordiam* process. This is clear from the judgment of Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, at p. 713 para. 21, and p. 726 at para. 66, where the distinction between *refoulement* and humanitarian grounds *("where the discretion of the [Minister] is much broader"*) is emphasised. At the same time, any other points made by an applicant (including that an unchallenged or unsuccessfully challenged decision at an earlier stage of the process was procedurally rather than substantively defective, such as due to lack of notice, a wrong test, irrationality and so forth) are discretionary and *ad misericordiam*. That is why I emphasise the distinction between substantive lawfulness (which is not discretionary) and procedural lawfulness (in relation to which objection must be taken at the appropriate time, failing which the Minister has no obligation to reconsider issues at a later stage).

136. It is not unlawful for the Minister to give effect to an unchallenged, or unsuccessfully challenged, decision even if some procedural argument is made at a later stage about its lawfulness. However, the Minister must at all times be satisfied that deportation does not breach the substantive rights of the individual.

137. I would be inclined to think that the references to *ad misericordiam* and discretionary matters in the analysis here are probably boiler-plate language that is resorted to in any given s. 3(11) decision. Those references in the context of this particular application may have been inapposite, and perhaps sub-optimally drafted, but on a fair reading of the decision as a whole one could not take the view that the art. 3 points were in fact treated as merely *ad misericordiam*. Even if one would categorise the wording as having semantic shortcomings, those did not actually taint the consideration of the s. 3(11) application.

Complaint that there was an incorrect decision that the Minister was applying a different standard to the tribunal
138. The decision under s. 3(11) replies to the submission that the Minister incorrectly departed from the tribunal's finding of serious harm by stating that the Minister was not bound by the tribunal and that "*Each decision relates to different matters and the standards applicable to each are different*".

139. The reference to different matters is correct, as accepted by Mr. Lynn, because for example the exclusion clause is relevant to the tribunal decision whereas not so to the s. 3(11) decision. The reference to "*different standards*" is possibly ambiguous. In essence, the tribunal in considering a risk of serious harm (art. 2(e) of the qualification directive) and the Minister in considering a risk under art. 3 of the ECHR. They are both considering substantial grounds that the person would face a real risk of serious harm, in this case by way of torture or inhuman or degrading treatment (see Case C-465/07 *Elgafaji v. Staatssecretaris van Justitie*, para. 28).

140. However this is, at most, a semantic issue. If different matters arise then different standards also arise. For example, insofar as the s. 3(11) decision considers *ad misericordiam* matters, then *different standards* do apply. Given the choice between an interpretation of "different standards" that is correct and one that is incorrect, the applicant, predictably, urges the latter. That is not a permissible approach where the former is a more natural and correct interpretation, and where that interpretation is available to the court.

141. In any event, the decision-maker gives a reason for taking a different view, namely that the Minister had more up to date material than the tribunal. If that is a good reason, which it is, the decision would stand even if the sentence about different standards were knocked out.

Alleged error in purporting to apply a judicial review test
142. The decision is criticised for referring to the law on the judicial review test (*Baby O v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 169 and *X.X.*, at paras. 125, 127 and 134). Those references are essentially background material and not directly relevant. The Minister does not purport to rely on those decisions in framing the test being applied. The particular passage from *X.X.* cited in the affirming decision was also cited with approval by Judge O'Leary in her concurring opinion in *J.K. v. Sweden* (Application no. 59166/12, European Court of Human Rights, 23rd August 2016) at para. 6.

143. At one level the applicant's argument assumes an absence of sophistication of thought on the part of the Minister. It seems to me that the references to the judicial review test were inserted not so much to specifically guide the decision-maker as to make clear to the court dealing with a hypothetical future judicial review that the Minister was cognisant of the overall legal framework in which her decision would be examined. I would prefer to interpret the decision, as the doctrine of separation of powers would require, in a manner consistent with law, rather than seek to artificially read into it some sort of fundamental misunderstanding on the part of the decision-maker.

144. Referring to the judicial review test does not misstate the test for the decision-maker or render the decision unlawful, or liable to be quashed on judicial review. It is not for the applicant to dictate the form of the decision, or for the court to impose either some standard of academic perfection or, still less, particular notions of style and content that might appeal to a given judge on a given day.

Alleged failure to consider the Strasbourg and UK caselaw relied on

145. The s. 3(11) application relied on the decisions of the European Court of Human Rights in *Daoudi v. France* (Application no. 19576/08, European Court of Human Rights, 3rd December, 2012), *H.R. v. France* (Application no. 64780/09, European Court of Human Rights, 22nd September, 2011), and *M.X. v. France* (Application no. 21580/10, European Court of Human Rights, 1st July, 2014). In addition, reliance was placed on some U.K. decisions, but the focus of the submission in relation to the U.K. decisions was in relation to diplomatic assurances, which do not arise here as the Minister was of the view that there were not substantial grounds to contend that there is a real risk of inhumane treatment.

146. In the s. 3(11) decision, the Minister referred to the *M.X*. decision, but without narrative discussion of the other two Strasbourg decisions, other than by way of noting that the applicant relied on them. The U.K. decision in *B.B. v. Secretary of State for the Home Department* was referred to (at p. 15 of the decision) in the context of a view that difficulties with verification mechanisms and assurances would arise if there was a finding that there was a real risk, which was not the case here.

147. The analysis cites *Smith v. Minister for Justice and Equality* [2013] IESC 4, (Unreported, Supreme Court (Clarke J.), 1st February, 2013) para. 5.6 and *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603 (referring to *Kouaype v. Minister for Justice* [2005] IEHC 380 (Unreported, High Court, Clarke J., 9th November, 2005) and *Mamyko v. Minister for Justice* (Unreported, High Court, Peart J., 6th November, 2003)), in support of the proposition that material should be put forward at the deportation stage and not submitted belatedly at the s. 3(11) stage.

148. It went on to say that the information "*was available at the time of [the applicant's] previous application for State protection (albeit later country of origin information was also considered)".*

149. Mr. Farrell also relies on *Dada v. Minister for Justice, Equality and Law Reform* [2006] IEHC 140, (ex tempore, O'Neill J., 3rd May, 2006), *Baby O. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 129, *Irfan v. Minister for Justice, Equality and Law Reform* [2010] IEHC 422, (Unreported, High Court, Cooke J., 23rd November, 2010), and *M.A. v. Minister for Justice* (Unreported, High Court, Cooke J., 17th December, 2009) in support of the proposition that the court has "*an extremely limited role*" (*Irfan*, para. 7) on a s. 3(11) review, a proposition which I entirely endorse and which needs to be emphasised. However, at the same time, the Minister cannot do anything substantively unlawful (see *Sivsivadse v. Minister for Justice and Equality* [2015] 2 I.L.R.M. 73, para. 23).

150. In particular, it must be emphasised that the prohibition on torture and inhuman or degrading treatment or punishment is absolute. Certain things follow from that. One is that a proposed expellee should not be generally shut out on procedural grounds (such as failure to make the material available at an earlier stage) from making a case that the expulsion would violate art. 3. This was to some extent recognised in *P.B.N. v. Minister for Justice, Equality and Law Reform* [2013] IEHC 435 (Unreported, High Court, Clarke J., 16th September, 2013, at para. 26) where the option of making a fresh and full s. 3(11) application in such circumstance was canvassed, although there may in some cases be benefits to the course adopted in this case, namely adjourning and amending the underlying proceedings (rather than striking them out as suggested in *P.B.N*. (see also *M.Y. v. Minister for Justice and Equality* [2016] IEHC 515 (Unreported, High Court, Faherty J., 6th September, 2016)).

151. However, the contention that a revocation application only arises in very limited circumstances is not in fact the basis of the decision in this case, because the analysis goes on to say that "*the additional information submitted has been given due consideration*" and that it is not of sufficient weight to establish that there is a risk of breach of art. 3. Thus no particular weight was given to the complaint that the material could have been advanced earlier. Even if such weight had been given, that was not fatal because the Minister did actually consider the material.

Alleged inadequate art. 3 assessment

152. The applicant criticises the decision in relation to art. 3 from a number of different and related standpoints:

(i). it is submitted that the decision fails to have regard to the issue of secret detention;

(ii). it is suggested that the decision is lacking in reasons;

(iii). it is suggested that there is no explanation for preferring certain material over other material supportive of the applicant; and

(iv). insofar as there are reasons, it is suggested that the decision is irrational.

153. While the applicant submits that the decision is materially wrong in fact, unreasonable and irrational, and in breach of the duty to give reasons because there is no cogent and adequate explanation as to why conflicting information is not accepted (*D.V.T.S. v. Minister for Justice* [2008] 3 I.R. 476), it is really the existence of conflicting country information that is at the core of the applicant's point. If the applicant had no such information, the Minister's reliance on the State Department Report would not be materially wrong in fact, unreasonable or irrational.

The situation up to September 2011 - ECHR decisions

154. The s. 3(11) submission asserts that "*the ECtHR has held that the deportation to Algeria of persons alleged to be terrorists will violate Article 3 of the ECHR, and there is no subsequent judgment which suggests that there has been any recent, material change in the conditions facing such persons in Algeria*". As a proposition of law suggestive of a bar to deportation, that is of course fundamentally misconceived. The Strasbourg court does not lay down general rules as to where a person may or may not be deported to in an overall sense. Rather, individual applications are decided on a case-by-case basis. A new Strasbourg decision is not required in order to permit a member state to take a different view of the situation in a particular country, especially where based on more up-to-date country material.

155. Furthermore, the submission contended that "*the Minister acted unlawfully by failing to have regard to all relevant information and materials*", specifically information and materials not put before the Minister by the applicant. That is an attempt to make a judicial review point by way of submissions; and for good measure in relation to matters for which the applicant is responsible by his failure to rely on this material in the first place. Again, it is an attempt to make a point regarding procedural (as opposed to substantive) illegality, which the Minister is under no obligation to consider favourably. At the risk of repetition, points regarding alleged lack of reasoning, alleged lack of fair procedures, or other procedural flaws in a deportation decision, are matters the Minister is free in her discretion to reject at the revocation stage.

156. Turning to the Strasbourg jurisprudence, starting with *Daoudi*, Mr. Farrell submits that that was a case on somewhat dated material from 2009.

157. Separately, he submits, in addition, the National Court of Asylum had accepted the risk of inhumane treatment but the exclusion clause applied (as indeed happened in the present case during the protection process) and the French Government did not produce evidence to contradict that.

158. As regards *H.R.*, the kernel of that decision is that there had been little change in the situation in Algeria between the date of the judgment in *Daoudi* on 3rd December, 2009, and 23rd February, 2011, when the state of emergency was ended. As the state of emergency had only recently been lifted, the court "*did not have specific information capable of confirming or refusing the existence of such practices*" ("*En raison du caractère récent de la levée de l'état d'urgence, la Cour ne dispose d'aucun élément concret permettant d'infirmer ou de confirmer cette pratique"),* at para. 62. The decision was given on 22nd September, 2011.

159. Mr. Farrell submits that *H.R.* speaks to the necessity that a decision address the country material at a given point in time, and implicitly suggests that things may be changing in Algeria, but at that point it was too soon to tell.

160. The decision in *M.X.* was delivered on 1st July, 2014. That is a decision rejecting the application as inadmissible for non-exhaustion of domestic remedies (see para. 39). The un-availed of remedy was to apply for asylum, which would have given rise to a possible decision in the applicant's favour (para. 37). Mr. Lynn accepts that there is no assessment of the conditions in Algeria as of 2014. Thus, the decision does not assist on this point, or at all back up the point made in the s. 3(11) application by the applicant.

161. Mr. Farrell submits that there is no obligation to engage in an elaborate or any narrative analysis of caselaw, or indeed of anything submitted by the applicant, as long as the material is considered (as opposed to discussed) and the correct test is applied. I accept that approach and therefore the decision cannot be condemned for not narratively discussing the Strasbourg caselaw in a manner favourable to the applicant. As has been repeatedly stated, there is a fundamental distinction between the need to consider something and the (normally non-existent) need to narratively discuss it.

162. The Strasbourg caselaw does however indicate grounds for significant concern as to the situation in Algeria up to September, 2011, but does not provide a definitive answer to the situation thereafter.

The situation post-September 2011 - Country information
163. The applicant relies on a body of country information supportive of the risk of secret detention of terrorist suspects, in particular;

(i). the Human Rights Watch report of 2014, which refers to a legal framework which permits secret detention;

(ii). the Amnesty International report of 2014.

164. The Minister's decision relies on the U.S. State Department country report of 2015, published on 13th April, 2016, which makes no reference to secret places of detention and cites some improvements in the country situation. The report is far from exonerating the regime, in that it refers to allegations of torture. It also refers to impunity as remaining a problem. It refers to the permission for I.C.R.C. and local human rights groups to visit "*regular*" places of detention. To a substantial extent, ongoing issues are acknowledged in the Minister's analysis which accepts significant concerns in relation to the situation in Algeria. However, this does not in itself render invalid the Minister's conclusion that there was not a risk to this particular applicant.

165. The 2015 State Department report had already been referred to in the underlying deportation decision (p. 9). Secret places of detention do not appear to have featured in the 2014 report either.

166. The applicant's original submission under s. 3 relied on the 2013 US State Department report which stated that prison facilities in Algeria did not meet international standards.

167. However, the 2014 and 2015 US State Department reports held differently and stated that Algerian detention conditions "*generally met international standards*". Curiously, the 2015 report was available when the applicant made his original submission, but he chose to rely on out-of-date material.

168. The applicant himself then relied on the 2015 report at the s. 3(11) stage, but then, remarkably, in submissions criticised the Minister for placing reliance on it.

169. Finally, Mr. Lynn expressed some mystification as to why there was a reference to the situation having improved since 2013; but 2013 was clearly a reference back to a date relied on in the original submission made on behalf of his own client.

170. The ultimate decision is to the effect that the evidence put forward "*does not contain any significant new information*" and "*does not have sufficient weight to establish that [the applicant] is at risk of torture and inhuman treatment"* (p. 11). This was a conclusion that was open to the Minister on the full range of material available.

The UK decisions 2008-16
171. The UK material relied on is not directly relevant.

172. *B.B.* (18th April, 2016) is not in point as Mr. Lynn accepts, in that it is a case where there seems to have been no real contest on the issue of risk in relation to the particular applicants and the issue was one of mitigation and assurances.

173. By contrast, *Sihali* (26th March, 2010) took the view that the system of assurances was robust enough to alleviate any real risk.

174. In the applicant's submission, reliance is placed (without reasons or elaboration) on SIAC decisions in *H.S.* [2008] UKAIT 00048, *A.F.* [2009] UKAIT 00023 and *A.H.* [2013] UKUT 00382. Two of these are of some vintage predating H.R., and A.H. is an exclusion decision under Article 1F of the Geneva Convention in which the risk to the applicant was based on a protection finding and was not put in issue.

Alleged invalidity of, or lack of reasons in, the decision in the light of this material
175. Mr. Lynn submits that, on the information referred to by the decision-maker, the finding that the applicant is not at real risk is lacking in reasons, and is unreasonable and irrational.

176. It is submitted that in assessing unreasonableness the court must look at the overall quality of the decision, its reasoning and the information relied on. Reliance was placed on *Meadows*, but that decision related to a finding of inadequacy in a bald and

unreasoned assertion that s. 5 of the 1996 Act was not in issue. *Meadows* decided that, within the contours of the traditional *O'Keefe* test, there was flexibility to ensure that a decision affecting fundamental rights was itself proportional.

177. It is submitted that in the case of "*an arguable breach of an absolute right, the range of reasonable findings open to the decision maker is necessarily more limited than in, e.g., a planning decision not involving any absolute right*". That is an issue more of reasonableness rather than proportionality, because the test under art. 3 of the ECHR is an absolute one, so there can be no question of balancing of rights or proportionality of impact. Thus, in *M.Y.*, Faherty J. at para. 65 referred to the need for a "*rigorous*" assessment of art. 3 issues and a clear statement of what principles were applied, and how the applicant's specific submissions were addressed (citing *B.M. Eritrea v. Minister for Justice Equality and Law Reform* [2013] IEHC 324, Unreported, McDermott J., 16th July, 2013).

178. Article 8(2)(b) of the procedures directive (Directive 2005/85/EC) requires member states to obtain precise and up-to-date information from various sources including UNHRC in relation to the situation prevailing in countries of origin and transit countries in the context of an asylum claim. By analogy, it seems to me that the requirements of art. 3 of the ECHR should be taken to be similarly exacting. However even if the Minister did not consider all possible general country material (and it was not argued that she should have), she did consider a great deal of such material going well beyond a representative sample.

179. I accept the respondent's contention at para. 34 of the statement of opposition that "*the Respondent was entitled to find and did find that* 'the report makes no reference to secret places of detention and it indicates that detention practices, standards and monitoring have improved significantly since the report of 2013'. *It is therefore further denied that the Respondent failed to outline her reasons and / or any cogent or adequate basis for this finding / analysis as alleged or at all*." In addition, reliance was placed on the personal circumstances of the applicant.

180. Even if the country material had not shown an improvement in the situation, the applicant's brother represents "*a control sample*", as Mr. Farrell puts it, being a person who has returned to Algeria with a terrorist conviction with a similar background.

181. The s. 3(11) application only relies on extremely limited and selective country material: a Canadian report of 2006, and the US State Department country report of 2015 (which was already before the Minister at the deportation stage and oddly was enclosed again by the applicant on making the s. 3(11) application). No other country information is relied upon by the applicant.

182. It is clear from the ECHR caselaw that there are a number of essential elements to assessing an art. 3 claim:

> (i). in order to determine whether there is a risk of ill-treatment, the decision-maker must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his or her personal circumstances (*Vilvarajah and Others*, para. 108; *Saadi*, para. 130);
>
> (ii). 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 art. 3 (*Vilvarajah and Others*, para. 111, *Fatgan Katani and Others v. Germany* (dec.), (Application no. 67679/01, European Court of Human Rights, 31 May, 2001; *Saadi*, para. 131);
>
> (iii). where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (*Mamatkulov and Askarov*, para. 73; *Müslim*, para. 68; *Saadi*, para. 131);
>
> (iv). in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of art. 3 of the ECHR enters into play when the applicant 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 (*Salah Sheekh v. Netherlands* (Application no. 1948/04, European Court of Human Rights, 11th January, 2007), paras. 138-149);
>
> (v). it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to art. 3 (*N. v. Finland*, no. 38885/02, para. 167, 26 July 2005; *Saadi* para. 129);
>
> (vi). where such evidence is adduced, it is for the Government to dispel any doubts about it (*Saadi* para. 129).

183. This approach does not meaningfully apply to a mere *pro forma* art. 3 claim, or one with no, or insubstantial, grounds, because such a claim never gets over the hurdle at para. (v) above. It is important to emphasise that, as discussed in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783 at p. 816, paras. 78-79, the person must first produce "*evidence of sufficient substance that, if uncontradicted, would oblige the [state] to refuse to surrender him*". The position arising from *Saadi*, at paras. 128 to 133, is that the obligation to consider the general situation and the applicant's personal circumstances only arises if the person first adduces "*evidence capable of proving that there are substantial grounds for believing that … he would be exposed to a real risk*" of inhuman treatment. An examination of the country material and the applicant's situation only arises in the context of dispelling doubts so raised: if the applicant fails to cross the first threshold, there are no doubts to dispel.

184. However, in the case of a person with a real and substantial art. 3 claim, the absolute nature of the prohibition under art. 3 and the clear jurisprudence from Strasbourg requires the Minister to consider the question having regard to the principles set out in the Strasbourg jurisprudence, the main elements of which are summarised above. That could be a very summary consideration if the matter is a revocation application and the point had already been discussed at the deportation order stage. Reference can be made back to the original decision in such circumstances.

185. In the case of an applicant, such as the present one, who has overcome that initial threshold, the onus then falls on the Minister to dispel the doubts by an examination of the general situation in the country and the personal circumstances of the individual.

186. The first leg of that duty involves an examination of the country situation.

187. It is clear that the Minister can have regard to such material as she may decide to obtain *proprio motu* (*Saadi*, para. 128, *N v. Finland*).

188. At the hearing, some discussion arose as to whether the Minister was obliged (as opposed to entitled) to consider, of her own motion, either a full suite of, or a representative sample of, generally recognised country reports, whether raised by an applicant or not. However, this point was expressly abandoned by Mr. Lynn on 15th December, 2016, and he confined his challenge to a failure to consider the material actually submitted by the applicant rather than to an assessment of the country information as a whole. That

abandonment speaks for itself; the applicant is not making any point that the Minister failed to take a holistic view on the up to date country material. That posture hardly speaks of confidence that a full review of the up-to-date country material is supportive of the applicant's case or of a view that the severity of risk in Algeria, as existed in September 2011 at the time of the *H.R.* decision, continues at the present time. Such a stance appears to turn the case into legal point-scoring regarding failure to consider very limited cherry-picked materials selected by the applicant, rather than being a claim about the reality of a risk of inhumane treatment.

189. Furthermore, by failing to pursue the question of the duty of the Minister to consider general country materials of her own motion, indeed by expressly abandoning it, as well as by failing to take up a suggestion during the hearing to seek an order that the respondent give further and better reasons (as in *RPS Consulting Engineers Ltd. v. Kildare Co. Council* [2016] IEHC 113, paras. 106-111), the applicant can hardly be said to have exhausted domestic remedies for the purposes of art. 26 of the ECHR. Such remedies cannot be postponed because, in domestic law, remedies going to the validity of a decision on an application under s. 3 or regarding revocation must be sought in the context of an action initiated within 28 days from the decision complained of. Given the procedural exclusivity of the s. 5 procedure, there is no "later" to which any points of challenge to the deportation decisions could be postponed. The present action was the only vehicle within which any and all such arguments could have been advanced. I do not consider that the *obiter* comments of Hogan J. in *C.A. v. Governor of Cloverhill Prison* [2017] IECA 46, at paras. 30 to 31, can be taken to suggest otherwise, because he is speaking of a completely independent illegality that occurs for the first time during the detention due to the cessation of an intention to deport, and not an illegality traceable to the original deportation order or an affirmation of it. Any suggestion that an applicant could, in any subsequent proceedings (including Article 40 proceedings), raise issues which amount to a collateral challenge to a deportation order or any other decision subject to s. 5 of the Illegal Immigrants (Trafficking) Act 2000, would fly in the face of the decision of the Supreme Court in *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360, at 398-399, *per curiam*.

190. In the present case the s. 3(11) decision does deal in a summary manner with the country situation (mainly by reference back to the original material) and with further discussion of the material in the s. 3(11) material, together with reference to the personal circumstances of the applicant (2nd para. on p. 14). No illegality has been demonstrated.

Alleged failure to be satisfied that improvements are significant and non-temporary

191. It is submitted that, insofar as matters have allegedly improved in Algeria, the appropriate test is that such improvement must be "*significant and non-temporary*", relying by analogy on art. 11(2) and 16(2) of the qualification directive 2004/83/EC. The directive itself acknowledges (recital 25) that it draws on international obligations. However, the Minister relied on recent country reports; and a change in circumstances that is significant and non-temporary enough to influence a country report that can reasonably be taken to fit that criterion, all other things being equal. Overall, the country material in relation to Algeria shows a pattern of continuous improvement. The latest changes fit into that pattern. If it was lawful for the Minister to arrive at the conclusion she did by reference to updated country material, then that conclusion was not invalid by reference to any failure to consider whether, or find that, the changes were significant and non-temporary. There is no magic formula to be used in decisions, and the decision is not invalid because the words "*significant and non-temporary*" are not used. Yet again, it is not for the applicant or the court to dictate the form and wording of administrative decisions.

Conclusion and order

192. One approach to litigation is that urged by Lord Pearce, speaking of lawyers who, "*…where ten possible points were available … ruthlessly select the best, sacrifice nine, and thereby win on the tenth*" (*Rondel v. Worsley* [1969] 1 A.C. 191, at p. 255-256). By contrast, in the present case, the applicant expressly abandoned the point that a holistic view of the country material should be taken and that the Minister should be required, in a case where the applicant overcomes the burden of a *prima facie* real risk under art. 3, to take into account all (or at least a representative set) of the most recent major country reports of her own motion. In place of that point, no less than sixteen grounds, not counting sub-grounds, have been urged upon me, each one a tottering construction of intricate legal complexity.

193. In the course of the process of making and affirming her *refoulement* decision, a decision that under law is hers, and not one where the tribunal's views are binding, the Minister had regard to a large body of country material which is set out in an annex to this judgment. That material supports the view that the situation in Algeria has improved step by step over a lengthy period of time. The conclusion that this applicant is not at real risk of treatment contrary to art. 3 was lawfully open to the Minister, particularly having regard to the more recent country material and to the personal circumstances of the applicant, having regard to his general lack of credibility, and also the fact that his brother, also a convicted terrorist, is not being subjected to torture in Algeria. The notable features of the case include the following:

(i). the relevant Strasbourg caselaw was before the Minister and was considered;

(ii). the Minister considered 35 separate pieces of country information, set out below, in the overall course of her assessment of the general situation in the country;

(iii). that information shows continued improvement over time in the general situation in the country concerned;

(iv). the Minister considered the individual circumstances of the applicant including his general lack of credibility and the fact that his brother, also a convicted terrorist, is not being subject to treatment contrary to art. 3 in the country concerned;

(v). the applicant's credibility is seriously impaired by his multiple identities, fraudulent previous asylum application, history of incorrect representations, criminal history in multiple jurisdictions and disregard of the immigration systems of multiple jurisdictions;

(vi). those incorrect representations included false representations to the Minister as recently as November, 2016, in which he sought to incorrectly assert that his brother G.Y. had no terrorist convictions, thereby seeking to explain why he had a fear of ill-treatment even though the brother had not been subject to treatment contrary to art. 3;

(vii). the Minister applied the correct test as laid down in the Strasbourg jurisprudence and found an absence of substantial grounds to apprehend a real risk of treatment contrary to art. 3 of the ECHR in the case of this applicant;

(viii). after the present proceedings were initiated, and in order to ensure that all matters were fully considered, I adjourned the proceedings to allow the applicant the option of making a further submission to the Minister, by way of application to revoke the deportation order, thereby affording the applicant every opportunity to make his case in this regard;

(ix). in determining the present judicial review I have also fully considered the relevant Strasbourg jurisprudence as set out in this judgment;

(x). the applicant has expressly abandoned any contention that the Minister should have, of her own motion, considered all or a representative sample of up-to-date core human rights reports on the country concerned;

(xi). such a withdrawal is not consistent with any argument that an up-to-date assessment of all, or a representative sample of, core human rights reports would have been supportive of a real risk of treatment contrary to art. 3 in this case;

(xii). the applicant also failed to pursue the option of seeking an order that further and better reasons should be provided, if there was any inadequacy in the reasoning of the Minister;

(xiii). such a withdrawal, and such a failure, constitutes a failure to exhaust domestic remedies because domestic law requires any challenge to the deportation order and affirmation decision to be made in the context of the present proceedings, being the only proceedings instituted within 28 days of the notification of such decisions;

(xiv). there is no evidence that a consideration of the latest such additional core human rights reports would have produced a fundamentally different conclusion from that drawn from the latest Amnesty and U.S. State Department reports, which were considered by the Minister;

(xv). contemporary judicial review, which has been made available to the applicant, provides a searching and exacting independent remedy for a determination by the Minister in respect of whether a risk of treatment contrary to art. 3 arises; and

(xvi). on such review I find that the Minister's conclusion, that there are not substantial grounds for considering that there is a real risk of treatment contrary to art. 3 in the event of the deportation of the applicant, was lawful.

194. Accordingly, I will order:

(i). that the application be dismissed;

(ii). that the matter be adjourned to a date to be fixed to permit any application for leave to appeal;

(iii). that the stay on actual removal of the applicant from the State (which does not restrain the detention of the applicant on foot of the deportation order or the enforcement otherwise of the order) do continue pending the determination of any such application or further order in the meantime;

(iv). that the restriction on the publication of material tending to identify the applicant do continue on a permanent basis;

(v). that the restriction on reporting the country of origin of the applicant do continue until further order; and

(vi). in the event of the lifting of that restriction, a revised version of this judgment may be prepared to remove redaction of the country name.

Postscript

195. The original version of this judgment was redacted so as to refer to Algeria as Country X, given the possible need to safeguard the applicant's identity in the context of his claim of risk of torture. However the applicant did not seek to maintain this redaction subsequently and accordingly by agreement I directed that the present version of the judgment be circulated with the country name unredacted.

ANNEX TO JUDGMENT

LIST OF COUNTRY MATERIAL CONSIDERED BY MINISTER

No.	Document	Date Published	Material introduced by	Exhibit or reference
1	Algeria:- The Charter for Peace and National Reconciliation and the evolution of the violence in Algeria- Immigration and Refugee Board of Canada	24/10/2006	Applicant, section 3 (11)	Exhibit 'GB1' of the Affidavit of Gavin Booth p.16
2	HS (Terrorist suspect-risk) Algeria CG [2008] UKIAT 00048	19/05/2008	Applicant, section 3(11)	[2008] UKIAT 00048
3	Evidence on whether the Algerian authorities are at present persecuting suspected members of terrorists groups/ Al-Qaeda – prepared by the Refugee Documentation Centre	2/4/2009	Applicant, subsidiary protection application	Exhibit B to the Affidavit of applicant , p. 57
4	AF (Terrorist Suspect-HS Algeria confirmed) Algeria CG [2009] UKIAT 00023	22/06/2009	Applicant, section 3(11)	[2009] UKIAT 00023

5	Freedom House, Freedom in the World 2009 – Algeria	14/01/2009	Respondent, section 3 analysis	Affidavit of Andrew Munro
6	Daoudi v. France	03/12/2009	Applicant, section 3(11)	No 19576/08
7	United Kingdom: Home Office 2011, Country of Origin Information Report – Algeria	14/03/2011	Respondent, section 3 analysis	Affidavit of Andrew Munro
8	Sihali v. Home Secretary	26/03/2010	Applicant, section 3(11)	SC/38/2005
9	HR v. France	22/09/2011	Applicant, section 3(11)	No. 64780/09
10	Economist Intelligence Unit, Algeria: risk assessment	10/01/2012	Applicant, section 3 representations	Affidavit of Andrew Munro
11	Human Rights Watch World Report 2012	22/01/2012	Applicant, subsidiary protection application	Exhibit B to the Affidavit of applicant, p. 72
12	Labsi v. Slovakia	15/05/2012	Applicant, subsidiary protection application	Exhibit B to the Affidavit of applicant , p. 14
13	Amnesty International Annual Report 2012	24/05/2012	Applicant, subsidiary protection application	Exhibit B to the Affidavit of applicant , p. 55
14	US State Department Report 2011	24/05/2012	Applicant, section 3 Submissions	Affidavit of Andrew Munro
15	UK Border Agency Country Report 2013	17/01/2013	Respondent, section 3 analysis	Affidavit of James Boyle Exhibit 'JB1'
16	United States Congressional Research Service, *Algeria: Current Issues*	18/01/2013	Applicant, subsidiary protection application	Affidavit of Andrew Munro
17	Amnesty International, *Death sentences and executions in 2013*	27/03/2014	Applicant, subsidiary protection application	Affidavit of Andrew Munro
18	AH (Article 1F(b) - serious) Algeria [2013] UKUT 00382 (IAC)	25/07/2013	Applicant, section 3(11)	[2013] UKUT 00382 (IAC)
19	Human Rights Watch, World Report 2014 – Algeria	21/01/2014	Applicant, subsidiary protection application	Exhibit B to the Affidavit of applicant, p. 77
20	US State Department Report- Algeria 2013	27/02/2014	Applicant, subsidiary protection application	Affidavit of Andrew Munro
21	US State Department Country Reports on Terrorism 2013	30/04/2014	Applicant, subsidiary protection application	Exhibit B to the Affidavit of applicant, p. 50
22	M.X. v. France	01/07/2014	Applicant, section 3(11)	No. 21580/10
23	Algeria - Treatment of failed refugee claimants returned to Algeria; whether low ranking police officers or members of the security forces would be subject to any reprisals from state authorities (2007-July 2014) - Immigration and Refugee Board of Canada	11/08/2014	Applicant, subsidiary protection application	Exhibit B to the Affidavit of applicant, p. 63

24	Freedom House Report – Freedom in the World 2014	25/07/2014	Applicant, subsidiary protection application	Exhibit B to the Affidavit of applicant, p. 67
25	Human Rights Watch World Report 2015 Algeria	29/01/2015	Applicant, section 3 Submissions	Affidavit of Andrew Munro
26	Human Rights Act has helped 28 terrorists to stay in UK, *The Telegraph*	31/01/2015	Applicant, subsidiary protection application	Exhibit B to the Affidavit of applicant, p. 88
27	Amnesty International Report 2014/15 – Algeria	25/02/2015	Applicant, subsidiary protection application	Exhibit B to the Affidavit of applicant, p. 82
28	US State Department Human Rights Report 2014	25/06/2015	Respondent, section 3 analysis	Affidavit of James Boyle Exhibit 'JB1'
29	Press Release President of Algeria in a message to mark the 10th anniversary of the adoption of the Charter for Peace and National Reconciliation	28/09/2015	Respondent, section 3 (11) analysis	Affidavit of Andrew Munro
30	UK Border Agency Information Pack for British Prisoners in Algeria 2015	2015	Respondent, section 3 analysis	Affidavit of Andrew Munro
31	Alkarama, Algeria: Torture and Arbitrary Detention of Member of the Algeria League for the Defence of Human Rights for Over 8 Months	*12/10/2015*	*Applicant,* *section 3 Representations*	*Affidavit of Andrew Munro*
32	*ECtHR Press Unit factsheet – Terrorism and the European Convention on Human Rights*	*November 2015*	*Applicant,* *subsidiary protection application*	*Exhibit B to the Affidavit of applicant, p. 16*
33	*Amnesty International Report 2015/2016- The State of the World's Human Rights – Algeria*	*24/02/2016*	*Respondent,* *section 3 analysis*	*Affidavit of James Boyle* *Exhibit 'JB1'*
34	*US State Department Human Rights Report 2015*	*13/04/2016*	*Respondent,* *section 3 analysis* *Applicant,* *section 3 (11)* *Respondent,* *section 3 (11) analysis*	*Affidavit of James Boyle* *Exhibit 'JB1'*
35	*B.B. v. The Home Secretary*	*18/04/2016*	*Applicant,* *section 3(11)*	*Case Law*