THE HIGH COURT

[2015 No. 137 J.R.]

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT (2000) (AS AMENDED)

BETWEEN

E. S. E.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT
JUDGMENT of Ms. Justice Faherty delivered on the 10th day of May. 2017

1. This is an application for judicial review by way of an order of *certiorari* seeking to quash the decision of the respondent dated 23rd February, 2015, refusing to revoke a deportation order made in respect of the applicant. Leave was obtained by Order of MacEochaidh J. on 16th March, 2015.

Background
2. The applicant arrived in the State on 31st October, 2008, stating his country of origin to be Somalia and that he had a mother, sister and two brothers whose whereabouts were unknown. He gave his date of birth as 19th October, 1991. An age assessment interview was carried out by the Office of the Refugee Applications Commissioner (ORAC) on 5th November, 2008 and the applicant was deemed to be an adult. He made his application for refugee status on 31st October, 2008. A Eurodac search was subsequently carried out and a positive "hit" was made with the U.K. authorities. On 7th September, 2009, the U.K. Border Agency advised the respondent's department that the applicant had obtained a student visa to travel to the U.K. from 23rd September, 2008, to 31st October, 2009, under the name the applicant gives in the present proceedings. In his U.K. visa application, the applicant's nationality was listed as Kenyan and the issuing post was given as Nairobi. The applicant's asylum application in this State was made under a different name and date of birth to that which appeared on his UK visa application.

3. The applicant's s. 11 interview took place on 15th October, 2009. The basis of his claim for refugee status was that he was from the Reer Hamar tribe in Somalia. He claimed to be at risk of being killed or injured by dominant clans and by Al Shabaab. He claimed that his father was shot and killed by Ethiopian soldiers and that he himself was forced to work for them for some three months following which he escaped. On his return home after his escape, his family were no longer there so he went to his uncle who arranged for his travel to this State.

4. By the date of the s.11 interview, the Commissioner had the benefit of a Sprakab linguistic analysis report following a language analysis interview with the applicant. The report concluded that the applicant had some knowledge of Afgoye, which may have been due to his having visited the area for some time. The report found that the applicant did not speak the Reer Hamar dialect and that he spoke Somali to the level of a mother tongue speaker and spoke a variety of Somali with certainty found in southern Somalia.

5. On 11th November, 2009, it was recommended on behalf of the Commissioner that the applicant should not be declared a refugee and the applicant was duly informed on 16th November, 2009. The applicant appealed the recommendation to the Refugee Appeals Tribunal who upheld the recommendation of the Commissioner. On 8th March, 2008, the applicant was advised that it was proposed that a deportation order would be made in respect of him. On foot of the options given to the applicant, on 30th March, 2010, he applied for a subsidiary protection and leave to remain in this State. The representations were based on the fact that the applicant was a Somali national and accordingly, should not be returned to Somalia.

6. On 27th April, 2010, the Repatriation Unit of the respondent's department wrote to the applicant and informed him that his fingerprints matched the visa application which had been submitted in the U.K. He was also informed that as he was or had previously been in possession of a Kenyan passport and had provided no documentary evidence to prove that he was a Somali national, the respondent intended to process his application on the basis that he was Kenyan.

7. Representations were lodged on the applicant's behalf by the Refugee Legal Service (RLS) on 18th May, 2010 and it was submitted, based in part on the Sprakab report, that the applicant should be treated as a Somali national. On 12th August, 2010, the applicant was advised that his application for subsidiary protection was refused. His application for leave to remain in the State was also refused and a Deportation Order was made in respect of him on 1st September, 2010, which was communicated to him on 8th September, 2010.

8. It is not disputed that thereafter the applicant evaded deportation.

9. On 25th February, 2011, a take-back request was received from the Swiss authorities as the applicant had applied for asylum in Switzerland on 13th December, 2010, under yet a different name and a different date of birth. The applicant denied to the Swiss authorities that he had been previously in Ireland and stated that he had come to Switzerland from Somalia.

10. On 10th March, 2011, the respondent agreed to the take back request and the applicant was returned to Ireland on 12th May, 2011.

11. On 1st July, 2011, Daly Lynch Crowe and Morris solicitors wrote to the respondent on the applicant's behalf and sought revocation of the Deportation Order pursuant to s. 3 (11) of the Immigration Act 1999 citing the decision of the European Court of Human Rights (EctHR) in the case of *Sufi and Elmi v. United Kingdom* (2012) 54 E.H.R.R. 9 on the basis that the level of violence in Mogadishu was of such intensity that there was a real risk to the applicant of treatment prohibited by Art. 3 of the European Convention on Human Rights (ECHR) and that a returnee with no experience of life in Mogadishu would be at real risk of being subjected to treatment proscribed by Art. 3. On 7th June, 2012, the said solicitors informed the respondent that they were no longer instructed to act on the applicant's behalf.

12. Thereafter, the Irish Refugee Council Independent Law Centre (IRC) took up the applicant's cause. On 14th June, 2012, they advised, *inter alia*, that to return the applicant to a third country where he was at risk of refoulement would breach the State's international obligations, including the ECHR. By email of 6th November, 2012, the IRC requested an expert opinion from Dr. Joseph

Mullen, A UK academic and expert on Somalia, on the basis of the following instructions:

> (a) The consistency and credibility of [the applicant's] account of his claim to be from southern Somalia originating from Afgoye, the issue of dialect and the Sprakab report, and germane issues arising including entitlement to Somali citizenship;
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> (b) The consistency and credibility of [the applicant's] account of growing up without Kenyan citizenship and subsequently attaining citizenship by bribery; including a National Identity Card and a Kenyan passport;
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> (c) Whether [the applicant] is returnable to Kenya and is at risk of persecution or serious harm if returned there and/or at any risk of onward refoulement to Somalia from Kenya and;
>
> (d) Whether the applicant would face persecution or human rights abuses or benefit sufficiency of protection in the event of forcible repatriation to Somalia from Kenya.

13. For the purposes of his report, Dr. Mullen had a "personal statement" from the applicant. Therein the applicant advised, *inter alia*:

> • That he lived in Afgoye until he was eight years old;
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> • That in 1995 he and his family moved to Kenya because of permanent problems in Somalia and that they largely lived in Nairobi;
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> • That he and his family never lived in a refugee camp in Kenya;
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> • That his father had several occupations;
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> • That he obtained a scholarship after primary school and attended secondary school in Nairobi between 2003 and 2006;
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> • That thereafter he worked in his father's business;
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> • That his father's tribe was Dir tribe, as was the applicant;
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> • That on a date in 2007 and in mid 2008 respectively, the applicant was subjected to a dehumanizing treatment and a beating by the Kenyan police;
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> • That sometime in 2007, his parents introduced him to a human trafficker who assisted him in obtaining a Kenyan national identity card;
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> • That in 2008, he was issued with Kenyan passport at the age of 20. That same was acquired through an intermediary (the human trafficker) who paid money to officials and that the passport issued on a false information basis, namely that the applicant was from the Kenyan Garre tribe;
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> • That in July/August 2008, the applicant applied to a south Birmingham college after which he applied for a student visa at the British Embassy in Nairobi;
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> • That in October, 2008 the applicant arrived in the U.K. and attended the college in question for two weeks but found the fees prohibitive;
>
> • That the applicant felt he could not apply for asylum in the U.K. because of a fear that he would be returned with the visa and the passport on which he had arrived and that as a consequence he came to Ireland.

14. Dr. Mullen's report issued in or about late November, 2012. The finding with regard to the applicant's origins was that the applicant :

> "demonstrated a competent level of first hand knowledge of Afgoye, consistent with his overall narrative then this would be a powerful predictor of his actual origins.
>
> …
>
> The generally accurate description of Afgoye town itself, key educational and industrial institutions within it, the names of the resident clans, a feeling for the geography and settlement pattern of the area were all significant pieces of evidence to validate [the applicant's] claim to have lived in Afgoye as a child.
>
> …
>
> The inference of Sprakab that his knowledge could be linked to a visit to the area is plainly unrealistic and untenable in the light of the detailed evidence and linguistic compliance with the South Somalia accent consistent with exposure to all influences of Afgoye.
>
> In relation to entitlement to Somalia citizenship, in the event of him being raised in Afgoye of Somali parents, presumably born there, his primary entitlement to the citizenship would be to Somalia."

15. As to the applicant's account of having attained Kenyan citizenship by bribery, Dr. Mullen stated:

> [The applicant's] account of growing up in Kenya forms part of the wider narrative of Somali boys and girls living as exile migrants in the neighbouring country of Kenya where there are clearly ethnically distinct and in most cases, practising a minority religion. This having been said, nevertheless, there is a large indigenous ethnic Somali population within Kenya, mainly in the North Eastern Province, holding Kenyan citizenship as a result of the haphazard delineation of former colonial borders.

…

> Many Somalis have done well in Kenya, where they have proved to be outstanding entrepreneurs with proven business acumen and have invested heavily in the country. For reasons of human and financial security, they have endeavoured to ensure that members of their family gain Kenyan citizenship. …
>
> The process of naturalisation or attainment of Kenyan citizenship is bureaucratic and has two streams. The first is that of the refugee route, where displaced persons were welcomed into UNHHR refugee camps in Kenya, often aspiring to be processed and taken to third countries … They benefit from a clear paper trial recording their progression from enrolment at a reception centre to the granting of the refugee ID card and eventually, for some, Kenyan citizenship.
>
> Given that there are many 'illegal's or freelance migrants outside the formal refugee system, makes for a large stateless population. Kenya as a State has been criticised to the Human Rights Council of the United Nations for its practice in relation to Kenyan Somalis who 'struggle with statelessness and discriminatory citizenship laws and practises'. These are the second stream.
>
> Somalis in particular are very vulnerable targets for random security checks and stop and search operations by the Kenyan police. They may be interned for a short period if they cannot pay the requested bribe and there are reported physical attacks and sexual violence. There is therefore a culture of gaining official documents through the means of paying incentives, even if the entitlement to the service exists.
>
> The narrative of the payment of bribes to gain identity cards fits into the broader background of Somalis attempting to gain a degree of regularisation of the in-country status through the issuance of identity cards. However, children until the age of 18 are de jure stateless in Kenya as birth certificates are not accepted as proof of citizenship. At the age of 18, children from the ethnic groups or tribes that are indigenous to Kenya are presumed to be citizens while those from ethnic groups non – indigenous to Kenya, such as the Somalis, presumed to be stateless. To cross over from the presumption of statelessness to the presumption of citizenship for non-indigenous people, such as Somalis, there is a vetting process to obtain an identity card and/or passport. The vetting process is carried out by a small local committee who look at the parentage of the applicant and, in particular, their command of Swahili and educational profile… [the applicant] suggests that his parents may have offered incentives to an intermediary … who liaised with this committee to facilitate the granting of identification documents…The degree of this intervention and whether money actually changed hands remain opaque. The outcome was that [the applicant] was granted an identity card and subsequently a passport on the strength of this identity card (which included a false place of birth and ethnic grouping at a Kenyan location). If this intervention was deemed to be illegal, then it is within the power of the Kenyan state under Art. 94 of the Constitution to deprive that person of their required citizenship, making the individual stateless, as the Kenyan state does not permit dual nationality. The passport was subsequently used to gain a student visa to the U.K."

Dr. Mullen went on to state: "It was explained [by the applicant] in the course of interview that this Kenyan passport was destroyed by the holder and was self – denounced to be held illegally by [the applicant] at the Embassy of Kenya in Dublin."

16. Dr. Mullen's conclusions as to the risk of persecution or serious harm and/or at risk of outward refoulement to Somalia from Kenya if the applicant were returned to Kenya were as follows:

> "If, as [the applicant] states, he is now without a Kenyan passport, he can either apply for a replacement duplicate or a form of laissez-passer on a single journey basis. The IOM may facilitate certain logistics of the journey to Nairobi if there are major problems with the Kenyan Embassy in Dublin. However, there is also the option, albeit expensive, of apply for a Somali passport.
>
> It is now a question of whether return to Kenya or to Somalia presents particular risks for [the applicant]… In the case of Kenya assuming [the applicant] will have a travel document valid for entry, it undoubtedly will attract attention from the immigration authorities. There is also the further complication that Kenya is under terrorist attack from the Somali – based Al-Shabaab movement … which is currently leading the Kenyan state to take harsh security measures against the Somali population. On the basis of a photo … [the applicant] displays typical Somali facial features. If he is returned to Kenyan as a failed asylum seeker and a suspect extremist, then he could be interrogated and even detained on arrival. The other option is that he could be put on a plane to Mogadishu by the Kenyan government where there are more than three flights a day from Nairobi. This would constitute refoulement, of which Kenya has been accused before the UN bodies in relation to the closing its borders to humanitarian traffic, both human and material."

17. On the question of the risks to the applicant in the event of a forcible repatriation to Somalia from Kenya, Dr. Mullen opined:

> "…returns to Somalia constitute a major risk to life. This would apply in the case of [the applicant], even irrespective of clanship. It is acknowledged that a **Humanitarian Disaster** has occurred … [The conditions in Somalia] suggest a real threat to human life anywhere in the country which applies also for those who are of Somali origin."

18. By letter of 27th November, 2012 (inadvertently dated 27th November 2011), the IRC requested the respondent to revoke the deportation order and also requested the readmission of the applicant to the asylum process pursuant to s. 17 (7) of the Refugee Act, 1996 (as amended). It was submitted, *inter alia*, that the applicant as a Somali national was vulnerable to and at a dual risk of refoulement if returned either to Somalia or Kenya. It was emphasised that the applicant was not a genuine citizen of Kenya as his Kenyan National Identity Card and passport had been obtained through bribery and on a false premise, namely that he was of a Kenyan tribe. It was further submitted that as the Kenyan authorities were aware of the circumstances of how the passport was obtained, this had significantly contributed to his risk, if returned to Kenya.

19. The applications were based on the applicant's personal statement and Dr. Mullen's report, as well as those parts of the Sprakab language analysis which had indicated that the applicant spoke Somali to the level of a mother tongue speaker.

20. A decision refusing the applicant readmission for the asylum process was made on 31st January, 2013. An independent review of this refusal was sought by the applicant but same was refused by letter of 20th March 2013. These decisions were not challenged by the applicant.

21. The refusal to revoke the deportation order was communicated to the applicant on 5th March, 2013. There was no reference to Dr. Mullen's report in the decision. The refusal was the subject of judicial review proceedings, subsequently compromised on the basis

that the applicant could resubmit updated representations.

22. On 27th January, 2014, the applicant's present solicitors supplemented the representations which had been previously made in the letter of 27th November, 2012 by reference again to Dr. Mullen's report and the applicant's personal statement and by the furnishing of country of origin information on Somalia and Kenya. The country information comprised extracts from 2014 reports compiled by Human Rights Watch on Somalia and Kenya respectively and a 2013 US State Department Report on Kenya.

23. It was submitted to the respondent that arising from "the situation of generalised violence in Somalia" the applicant was at risk of suffering a violation of his rights under Arts. 2 and 3 ECHR and that he faced a threat to his life and freedom.

24. With regard to Kenya, the respondent was advised that the applicant faced a similar violation of his Art. 2 and Art. 3 rights by reason of the frequent subjecting of Somalia refugees to discrimination and reprisals in Kenya arising from militant Islamist attacks in Kenya. These reprisals included a brutal police operation from November 2012 to January 2013 in Nairobi and that the referred to country of origin information pointed to Kenyan Somalis being arbitrarily detained and subjected to severe mistreatment, including torture. It was further submitted the applicant's account in his personal statement of having obtained a Kenyan ID and passport by bribery was corroborated by the country of origin information which outlined the extent of corruption in Kenya.

The impugned decision

25. In the consideration of the file which accompanied the refusal decision dated 23rd February, 2015, the decision-maker's conclusion on the risk posed to the applicant upon a return to Kenya was set out as follows:

> "[I]t is not considered that the applicant would face a violation of his rights under ECHR if returned to Kenya. While it is accepted that there has been some indiscriminate violence in Kenya, it is not accepted that the violence is at such a level that the applicant's life or freedom would be threatened if he returned to Kenya.
>
> As stated below, the Kenyan authorities appear to accept that the applicant is a Kenyan national, having issued him with Kenyan nationality card and a Kenyan passport. Therefore it is not considered that 'as an ethnic Somali the applicant in Kenya would face a threat to his life and freedom and a real risk of suffering treatment in breach of his rights …' as stated in representations made by Conor O'Briain solicitors.
>
> The Kenyan authorities appear to have formally accepted the applicant as a Kenyan citizen, and continue to allow him to claim Kenyan citizenship (despite his alleged disclosure). It seems unlikely that the Kenyan authorities are going to deport a person who they have formally accepted as a Kenyan citizen.
>
> I have considered all the facts of this case. Country of origin information confirms there is a functioning police force in Kenya. Accordingly, I am of the opinion that repatriating [the applicant] is not contrary to Section 5 of the Refugee Act 1996, (as amended), in this instance."

Reference was made to the US State department report on Kenya for 2013 which documented, *inter alia*, that there were eight major ethnic communities in Kenya one of which was the Kenyan Somali group with a population of 2.3 million.

26. The author's consideration of the representations which had been made in respect of Somalia was that "[i]t is not proposed that the applicant should return to Somalia, and as detailed below, it is not considered that the applicant would be repatriated to Somalia. Therefore it is not necessary to analyse country of origin information for Somalia."

27. The decision-maker noted that misleading information had been given by the applicant throughout the protection and leave to remain process and that the applicant had "mislead the Department on a number of occasions", which must be taken into consideration in assessing the application to revoke the deportation order.

28. As to the applicant's identity, the author stated:

> "The applicant now states (from November 2012 onwards) that he was born in Afgoye, Somalia and lived there until he was 8. He states that his family then left Somalia for Kenya in 1995 where they mostly lived in Nairobi Kenya. This will be accepted for the purposes of this report as the INIS has no way of verifying this. However, as above, the fact that the applicant has provided misleading information must be taken into consideration."

29. The decision-maker also accepted the applicant's contention that he obtained a Kenyan National Identity Card and Kenyan passport by bribery. With regard to Dr. Mullen's contention that there were risks for the applicant if he is returned to Kenya on a "travel document", the respondent stated:

> "As stated above the applicant has had (or has) a Kenyan passport and no evidence has been provided to support the suggestion that he would not be able to obtain another one. Therefore it is not proposed that he use a travel document, but that he travels with a Kenyan passport.
>
> Dr. Mullen' report also states that 'if, as [the applicant] states, he is now without a Kenyan passport, he can either apply for a replacement duplicate of a form of lassez-passer a single journey basis'. Therefore Dr. Mullen accepts that he would open to the applicant to apply for a duplicate Kenyan passport if he is without one now."

30. As to whether the applicant would face persecution or human rights abuses if repatriated to Somalia from Kenya as mooted by Dr. Mullen, the respondent's position was that "[i]t is not considered that an individual with a Kenyan passport would be repatriated to Somalia".

31. The decision-maker then continued:

> "The fundamental premise of the applicant's application for revocation of the deportation order is the fact that he is in fact a Somali national who will be subject to serious harm should he be returned to Somalia. He states that if he is removed to Kenya, he is likely to be deported to Somalia by Kenyan authorities. The applicant, in making this case, does not appear to take account of the fact that he holds (or has held) a Kenyan passport (which despite his alleged disclosure to the Kenyan authorities as to the manner of obtaining this, they have failed to take any action). To all intents and purposes the Kenyan authorities appear to accept therefore the applicant is a Kenyan national, having issued him with a Kenyan nationality card and Kenyan passport. The applicant has these Kenyan papers since 2007.

It seems unlikely that the Kenyan authorities are going to deport a person who they have formally accepted as a Kenyan citizen, and continue to allow him to claim Kenyan citizenship (despite his alleged disclosure). The Kenyan authorities would be likely to encounter serious difficulties in deporting a person they accept as a Kenyan national to Somalia. No evidence has been provided to suggest that they would and it is significant that this is a matter that Dr. Mullen does not address properly in his report.

Therefore the applicant has held a valid Kenyan passport, the embassy did not appear to take any action on being informed that it was obtained in an underhand manner and furthermore on the applicant's own evidence the embassy appear to intend to do nothing about it, and it appears to be open to the applicant to obtain a duplicate Kenyan passport.

The fact is that the applicant has (or has had) a Kenyan passport. No evidence has been submitted to indicate the applicant cannot now obtain another Kenyan passport. No evidence has been submitted that the Kenyan authorities would cancel the issuance of a Kenyan passport to the applicant. As stated above, Dr. Mullen's report itself accepts that it would be open to the applicant to apply for a replacement duplicate Kenyan passport. Therefore it is not accepted that the applicant's life would be in danger if he is returned to Kenya or that he would face interrogation, detention or repatriation to Somalia."

The grounds of challenge

32. In summary, the decision is challenged on the grounds that:

(1) the respondent failed to have any or any proper regard to the submissions made by the applicant in respect of the risk of refoulement and/or torture and inhuman and degrading treatment in the event of the applicant's deportation to Kenya;

(2) The respondent erred in law and/or in fact confusing or conflating the distinct concepts of ethnicity and nationality. In confusing or conflating the distinct concepts of ethnicity and nationality the respondent has thus failed to conduct a proper assessment whether there are substantial grounds believing that there is a real risk that the applicant would face torture, inhuman or degrading treatment in the event of his return to Kenya;

(3) The decision of the respondent is unreasonably and/or irrational insofar as the respondent concluded that the fact that the applicant fraudulently obtained a Kenyan passport in the past would offer him protection against refoulement to Somalia in the event of his return to Kenya;

(4) The respondent has failed to have any or any proper regard for the risk of refoulement in the event of the applicant's deportation to Kenya; and

(5) The applicant is at risk of persecution and/or serious harm and/or torture or inhuman and degrading treatment in the event of his return to Somalia. The applicant is at risk of detention and/or deportation to Somalia in the event of his removal to Kenya.

The applicant's submissions

33. Counsel submits that the issue in this application is the respondent's proposal to deport the applicant to Kenya in circumstances where it is accepted that he is a Somali national and where it is accepted that he acquired his Kenyan passport through bribery. As made clear in Dr. Mullen's report, the applicant's primary entitlement is to Somalian citizenship. Furthermore, Dr. Mullen found the applicant's narrative of having obtained the Kenyan passport by corrupt means to be credible and consistent. Therefore, the issue of a return of the applicant to Kenya on such a basis is of paramount consequence. Dr. Mullen's report highlights that assuming the applicant will have a travel document for entry to Kenya "it undoubtedly will attract attention from the Immigration authorities". Moreover, the report highlights that the applicant displays typical Somali facial features and further concludes that if the applicant is returned to Kenya as "a failed asylum seeker or a suspected extremist", he could be interrogated and even detained on arrival in Kenya or returned to Somalia by the Kenyan authorities. It is submitted that country of origin information supports the applicant's fear of being detained in Kenya and that he would be at risk of mistreatment contrary to Art. 3 ECHR.

34. It is submitted that given the circumstances in which the applicant obtained his Kenyan passport, same will not give him protection in Kenya. Even when he had such a document in Kenya, he faced difficulties, as his evidence attests.

35. The applicant is fully aware of his lack of candour in the past and he has apologised for it on affidavit. The question which arises is whether this should impact the respondent's decision not to revoke the deportation order. It is contended that this must be answered in the negative. It is in this context that Dr. Mullen's report is of relevance as it is an independent report and his report is, in fact, supported by aspects of the Sprakab report.

36. Furthermore, it is clear that the respondent accepts certain key findings of Dr. Mullen, to wit that the applicant was born in Somalia and lived there until aged 8 and that he grew up in Kenya without Kenyan citizenship until he obtained a Kenyan national identity card and a passport by means of bribery.

37. Counsel submits that there is no basis for the respondent's reasoning that the applicant's life and freedom will not be threatened if returned to Kenya. Clearly, if the Kenyan authorities find out that the passport was obtained by bribery, it will be revoked. Additionally, the respondent chose not to deal with the risks for the applicant on a return to Somalia in circumstances where the applicant is at risk of being repatriated to Somalia by the Kenyan authorities.

38. Counsel contends that the respondent's judgment in this matter was clouded by the applicant's past lack of candour. This is not an acceptable approach where Article 3 ECHR is at issue. In this regard, counsel cites *B.M. v. Minister for Justice* [2013] IEHC 324 (at para.36).

39. A crucial aspect in this case is that the respondent accepts the applicant's identity as a Somalian, a factor which should inform the court's decision in this case.

At the core of these proceedings is the respondent's acceptance that the applicant was born in Somalia and that he obtained a

Kenyan passport through bribery.

Yet, the respondent maintains that the applicant, in such circumstances, can nevertheless apply for a replacement Kenyan passport. Counsel queries the logic of such a position given that the respondent has accepted that the applicant obtained the passport fraudulently. It is submitted that the respondent's conclusions in this regard is to contemplate a perpetuation of the applicant's fraud. Effectively, the respondent, by proposing that the applicant would return to Kenya on a Kenyan passport, is stating that the Kenyan authorities should be duped into providing the applicant with a replacement passport. Furthermore, the respondent's position is that someone with a Kenyan passport cannot be repatriated to Somalia. However, this conclusion is in the teeth of the respondent's acceptance that the applicant's passport was obtained by fraudulent means. Counsel submits that it is not necessarily the case that a person who obtains a passport by fraudulent means will be accepted as a Kenyan citizen.

40. As averred to his grounding affidavit (and as previously set out in his personal statement), the applicant went to the Kenyan Embassy in Dublin in October, 2011, to request that they confirm that his passport is not genuine. The applicant states that the Embassy refused to do so. Insofar as the respondent relies on the Kenyan authorities' inaction to date on foot of the applicant's disclosure, it is contended that there is no guarantee that the Kenyan authorities will not take issue with the manner in which the applicant obtained the passport upon his return to Kenya. Thus, the applicant, as a holder of a false/fraudulent passport, will have no protection from that document if returned to Kenya.

41. It is submitted that the respondent is bound by the provisions of Art. 3 ECHR from which no derogation is permissible.

42. Moreover, Article 40.3 of the Constitution also prohibits torture, inhuman or degrading treatment as recognised by jurisprudence of the Irish courts.

It is submitted that the applicant has established substantial grounds in this case, as set out in his evidence, in Dr. Mullen's report and in the country of origin information furnished to the respondent. Accordingly, the applicant satisfies the Art. 3 criteria as enunciated by Fennelly J. in *Minister for Justice v. Rettinger* [2010] 3 I.R. 783.

43. Given the extensive evidence furnished on the applicant's behalf, it falls to the respondent to dispel the substantial grounds of real risk upon which the applicant relies. It is submitted that the respondent has not done that in this case. At best, the respondent has indulged in a leap of faith by stating that if the applicant comes to the Kenyan authorities on his return with the replica/replacement Kenyan passport, he will be allowed to pass through unchallenged. This is an illogical position. In requiring the applicant to obtain a replacement passport, the respondent is acting contrary to domestic and international law, in circumstances where she has accepted that the passport was obtained through bribery.

44. It is submitted that the respondent's decision falls short of showing cogent reasons to dispel the substantial grounds of a real risk to the applicant on a return to Kenya or on a refoulement by the Kenyan authorities of the applicant to Somalia.

45. Over and above the foregoing, it is submitted that the decision flies in the face of reason and commonsense. The respondent accepts that the applicant is a Somalian national and that he obtained a Kenyan national identity card and passport through bribery yet refuses to revoke the deportation order based on the fact that the self same passport will somehow protect the applicant against ill-treatment and/or refoulement in the event of his forced return to Kenya. It is submitted that the respondent's decision is a rare example of the Wednesbury principle as endorsed by the Supreme Court in *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642, and also adopted in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

46. Further, or in the alternative, it is submitted that the respondent's decision is unreasonable within the meaning of the test set out in *Meadows v. Minister for Justice* [2010] 2 I.R. 701, insofar as it fails to protect the applicant's fundamental rights, including the right not to be tortured or subjected to inhuman or degrading treatment.

The respondent's submissions

47. Counsel submits that the first thing to be noted in the present case is the applicant's colourful immigration history. While this history has been pushed into the past in the applicant's submissions, it is a live issue given the applicant's lack of candour in his interaction with this State and other States. The applicant now asserts that he is being truthful and he hangs his case on his alleged confession to the Kenyan Embassy in Dublin in 2011, when he says he informed them that he obtained a Kenyan passport through bribes and that he sought confirmation from the Embassy that he was not a Kenyan citizen. He states that the Embassy staff refused this and indicated that they were not taking any action in respect of his disclosure. As matters stand, the applicant held an apparently valid Kenyan passport and the Kenyan authorities have indicated that they do not intend to take any action in this regard. While the applicant contends that his previous solicitors advised him that he had to do something in order to show that he was not a Kenyan citizen, it is of note that his prior solicitors did not engage in correspondence with the applicant in this regard or indeed with the Kenyan Embassy in Dublin.

48. The factual position is that the applicant has Kenyan citizenship however he obtained it. It is further submitted that against this background, the respondent was entitled to take account of the factual and legal situation, namely that the applicant held Kenyan citizenship, rather than prefer the applicant's story that he did not hold a valid legal passport from Kenya.

49. Furthermore, insofar as the applicant contends that he would not have obtained a Kenyan passport without having told the Kenyan authorities that he was of Kenyan tribal origin, it is not borne out by his own expert Dr. Mullen or by relevant country of origin information. In his report, Dr. Mullen refers to many Somali nationals have done well in Kenya and having acquired citizenship.

50. It is also of note that the applicant did not at any point seek to challenge the Deportation Order, which still stands, even in circumstances whereby the applicant was made aware by the respondent that his leave to remain application would be considered in the context of his holding Kenyan citizenship. The applicant's response following the making of the Deportation Order was to become an "evader" and seeking asylum in Switzerland.

51. Furthermore, the applicant's claim that he will be at risk in Kenya because he is Somalian and because he is the holder of a Kenyan passport obtained through bribery is an entirely different claim to the one he presented in his asylum application in Ireland in 2008 when he claimed to be a Somalian national of Deer Hamar ethnicity and who had claimed never to have left Somalia until he travelled to this State. Moreover, he told the asylum authorities in this State that he lived in Kenya for only fifteen days while in transit when he was confronted with information that he had been granted a U.K. visa. The applicant's position at that time was that the obtaining of the visa was the work of an agent he had employed and that he did not travel to the U.K. Yet the story the applicant now presents is that he was living in Kenya since the age of eight until he left for the U.K. on foot of the U.K. visa in early October 2008.

52. The approach the applicant has now taken in view of the reality of his being the holder of a Kenyan passport is to say it was obtained by bribery and that he will be at risk in Kenya if he returned there because he is the holder of a passport obtained by deception. The applicant also asserts that he is at risk as an ethnic Somalian with identifiable Somali facial features.

53. It is submitted that the applicant has not put evidence before the court to substantiate his contentions. The onus is on the applicant to demonstrate that he would be at risk of torture or inhuman or degrading treatment and the court's examination of his contention must be a rigorous one having regard to the applicant's personal circumstances. (*Saadi v. Italy* (2009) 49 E.C.H.R. 30 refers). Given that legally and factually the applicant is a Kenyan citizen there is clearly an onus on him to demonstrate why he would be at risk. It is not sufficient for him to make a bare assertion. While both Dr. Mullen's report and country of origin information referred to Somalis in Kenya being subjected to inhuman and degrading treatment, the applicant does not fall into that category.

54. It is further contended that for the applicant to succeed he must establish that all ethnic Somalis in Kenya are so subjected to inhuman and degrading treatment and discrimination that their treatment merits Art. 3 ECHR protection. There is however no evidence put before the court to this effect.

55. The respondent accepts that the applicant is ethnically Somalian as confirmed by Sprakab and by Dr. Mullen's report. Equally, the respondent does not take issue with Dr. Mullen's contention that it is within the power of the Kenyan authorities, pursuant to their Constitution, to deprive someone of their acquired citizenship, making them stateless, if the acquisition of the citizenship was deemed to have been illegally obtained. However, there was no evidence put before the respondent (or the court) that the Kenyan authorities are going to act on foot of the applicant's alleged confession. In addition, the applicant has failed to demonstrate any basis as to why the Kenyan authorities would believe that he is a "suspect extremist" and would wish to detain him on that basis. Furthermore, based on the country of origin information, the applicant has clearly failed to demonstrate that he is at risk of persecution by the Kenyan authorities simply because he is a failed asylum seeker.

56. Dr. Mullen's report refers to the applicant's Kenyan passport having been destroyed by the applicant because he has self denounced that it had been obtained illegally. This reference in the report is based on what the applicant has reported to Dr. Mullen but, as already observed, the applicant has not provided evidence of the actions he claims to have taken *vis-à-vis* denouncing his Kenyan citizenship.

57. Insofar as the applicant makes the case that he should not have to perpetuate his deception by applying for a duplicate passport, it is submitted that to date the applicant is not being unduly concerned about perpetuating deceptions.

58. It remains the position that the applicant can obtain a duplicate passport which would allay any concern on his part of being repatriated by the Kenyan authorities to Somali and allay any fear the applicant asserts about travelling on a travel document which might identify him as a failed asylum seeker. As stated in the decision, it is not proposed by the respondent that the applicant would travel on a travel document.

59. With regard to the decision not to revoke the Deportation Order, it is submitted that it was an entirely reasonable and rational decision for the respondent to make. In particular, it was reasonable and rationale for the respondent to find that the applicant's life and freedom would not be threatened if he returned to Kenya. The legal and factual position before the respondent was that the applicant is the holder of a Kenyan passport and that the Kenyan authorities have allowed him to hold Kenyan citizenship despite his disclosure to the Kenyan Embassy. While the applicant and Dr. Mullen allude to the possibility of the Kenyan authorities to deport him to Somalia, neither the applicant nor Dr. Mullen have alerted themselves to the unlikelihood of the Kenyan authorities deporting someone who holds a Kenyan passport. Accordingly on that basis and in the light of the fact that the Kenyan Embassy did not appear to take any action on being informed that the applicant's Kenyan passport was obtained in an underhand manner and given the applicant's own evidence that the Embassy intends to do nothing, it was reasonable and rational for the respondent to conclude that it was open to the applicant to obtain a duplicate Kenyan passport. In all those circumstances it was reasonable and rational for the respondent to conclude that "no evidence has been submitted that the Kenyan authorities would cancel the issuance of a Kenyan passport to the applicant".

60. As set out *Rettinger*, the applicant must establish that there is a "real risk" that his Art. 3 rights would be breached by his repatriation to Kenya. While the applicant does not have to establish that he would suffer inhuman or degrading treatment, he must establish reasonable or substantial grounds for believing that there would be a real risk of such treatment. It is submitted however that that test is not met in the present case.

61. Counsel relies on the decision in *O.F. (Burma) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 252 as to what the prohibition in Art. 3 connotes. It is submitted that there are plenty of Somalians in like circumstances to the applicant (holders of Kenyan citizenship) who are not subjected to inhuman and degrading treatment or discrimination.

62. In the present case, the respondent fairly and properly addressed the new information which was provided by the applicant. That information did not merit the invoking of the guarantees in Art. 3 ECHR. The applicant has not met the test for the invoking of Art. 3 as set out in *P.O. v. Minister for Justice, Equality and Law Reform* [2015] IESC 64.

The applicant's response to the respondent's submissions

63. The position in this case is that the respondent wants to deport the applicant. On foot of the approach adopted by the respondent, the applicant will have to apply for a duplicate passport to the Kenyan authorities: in doing so he will commit a fraud on the Kenyan Embassy. If he does so at the behest of the respondent it will involve both the applicant and the respondent in an illegality. If he does not apply for a duplicate passport, then he has to travel on a laissez-passer to Kenya. Whether it is a duplicate passport or a laissez-passer, and even if the applicant can enter Kenya without issue at its borders, there remains the position that he can be identified in Kenya as an ethnic Somalian and accordingly he would be subjected to a real risk for the purposes of Art. 3 ECHR. Dr. Mullen asserts that there is such a risk if the applicant is deported. The respondent in her decision makes no reference to the fact that the Kenyan authorities may revoke the passport on the basis that it is obtained by fraud. Furthermore, it is not the test under *Rettinger* that in fact all Somalis have to be at risk. Moreover, contrary to the respondent's submission, the risk averted to by the applicant is not simply in relation to discrimination, as is clear from Dr. Mullen's report and country of origin information.

64. It is submitted that counsel for the respondent makes great issue of the fact that there is no documentary evidence of the applicant going to the Kenyan Embassy and in this regard she invites the court to disregard the applicant's evidence. However, the respondent cannot have it both ways as in the impugned decision the respondent clearly accepts that the applicant did go to the Kenyan Embassy and self-denounce. Moreover it is this very factor upon which the respondent relies in order to arrive at the conclusion that since the Kenyan authorities have not acted to date on foot of the applicant's disclosure there is no reason why the applicant would not be entitled to apply for a duplicate passport.

Considerations
65. Art. 3 ECHR provides:

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

66. The absolute nature of the protections set out in of Art. 3 is recognised by the EctHR in *Chahal v. UK* (1996) 23 E.H.R.R. 413:

> *"80. The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion (see the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103). In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees."*

67. The decision of the European Court of Human Rights in *Saadi v. Italy* sets out the obligations on a Contracting State where Art. 3 ECHR arises:

> *"128. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained proprio motu (see H.L.R. v. France, cited above, § 37, and Hilal v. the United Kingdom, no. 45276/99, § 60, ECHR 2001-II). In cases such as the present the Court's examination of the existence of a real risk must necessarily be a rigorous one (see Chahal, cited above, § 96).*
>
> *129. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see N. v. Finland, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.*
>
> *130. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see Vilvarajah and Others, cited above, § 108 in fine)."*

68. In *Rettinger*, Fennelly J. addressed the Art. 3 question as follows:

> *"[68] The Convention and Strasbourg case law recognise the legitimacy of extradition and deportation provisions in national law (article 5(1)(f) of the Convention and Soering v. United Kingdom (App No. 14038/88) (1989) 11 E.H.R.R. 439, at para. 85). Nonetheless, a state's responsibility under the Convention may be engaged when it is deciding to deport or to extradite a person to another country where the person's Convention rights are at risk. In Soering v. United Kingdom, the court expressed the matter as follows, at para. 91:-*
>
> *'… the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 …, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'."*

He went on to state (at para.74):

> *"It is equally clear that it is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a 'real risk'."*

69. At the heart of the representations made on the applicant's behalf in November, 2012 in aid of the application to revoke the Deportation Order is his fear that if deported to Kenya, he will face refoulement to Somalia by the Kenyan authorities, contrary to Art. 3 ECHR, and/or that he will be at real risk of mistreatment by the Kenyan authorities in Kenya, contrary to Art. 3.

70. As the refusal decision makes clear, the respondent is not proposing to deport the applicant to Somalia. In essence, the respondent found that the applicant was not at real risk of a violation of his ECHR rights in Kenya as the level of violence there was not such as to engage Art. 3 and that as the applicant held a Kenyan passport, there was no merit to the applicant's representation that as an "*ethnic Somali*" he faced a real risk of a breach of his ECHR rights. The respondent also concluded that the risk of refoulement to Somalia was not established by reason of the fact that the applicant holds (or has held) a Kenyan passport, which indicated that he was not at risk of deportation by the Kenyan authorities to Somalia.

71. The respondent reached the latter conclusion even while accepting that the applicant no longer retains his Kenyan passport as it is the respondent's view that he will be able to obtain a duplicate passport. I will deal in due course with the applicant's specific arguments as to why he will be at risk of refoulement to Somalia if returned to Kenya on the Kenyan passport which he holds or has held. I propose first to deal with the general argument advanced by counsel for the applicant as to the Art. 3 risk for him as someone of Somali ethnicity in Kenya.

72. Counsel for the applicant submits that the impugned decision does not properly address the risk which the applicant will face as a Somali if returned to Kenya. This risk, it is submitted, is highlighted in Dr. Mullen's report and in country of origin information. Counsel points to the fact that, as set out in the expert report, the applicant "displays typical Somali features". Part of the representations made on the applicant's behalf in November, 2012, reads as follows:

> "Having regard to [country of origin information] and the Expert Report of Dr. Mullen it is submitted that simply as an ethnic Somali the Applicant in Kenya face a threat in life and freedom and the real risk of suffering treatment in breach of his rights under Article 3 ECHR. It is further submitted that the Applicant if deported to Kenya would be particularly vulnerable having regard to his status as a young man of fighting age from Somali origin to being perceived by the Kenyan authorities as linked to Islamist terrorism. Anyone so perceived in Kenya is at real risk suffering torture and/or inhuman or degrading treatment."

73. The applicant points to Dr. Mullen's opinion that any "travel document valid for entry" which the applicant will have on a return to

Kenya will "undoubtedly… attract attention from the immigration authorities". Dr. Mullen also alludes to "the further complication that Kenya is under terrorist attack from the Somali-based Al Shabab movement…which is currently leading the Kenyan state to take harsh security measures against the Somali population." He goes on to state that, based on the applicant's typical Somali facial features "if he is returned to Kenya as a failed asylum seeker and a suspect extremist, then he could be interrogated and even detained on arrival" or "put on a plane to Mogadishu".

74. In response to the foregoing arguments, counsel for the respondent makes the case that the applicant's claim that simply by being Somali in Kenya he is at risk, is belied by the fact that many Somalis obtain Kenyan citizenship and that there are very many successful Somali business people in Kenya and by the applicant's own evidence in relation to what he now says were his and his family's circumstances in Kenya until his departure. It is submitted that the applicant's circumstances in fact actually accord with Dr. Mullen's report where it alludes to there being many successful Somalis in Kenya. Counsel also relies on country of origin information which refers to approximately 2.3 million Somalis living in Kenya. It is further contended that the respondent does not propose to return the applicant on a "travel document". The case is also made there was no country of origin information put before the decision maker indicating that ethnic Somalis who hold Kenyan citizenship and passports are at risk of deportation to Somali or persecution in Kenya. The respondent points to the applicant's own evidence which makes it clear that while living in Kenya he was never in a refugee camp. It is submitted that this distinguishes him from other Somalis who live in camps in Kenya.

75. In *O.F. (Burma),* the absolute prohibition of torture and inhuman or degrading treatment was defined as treatment that:

> *"connotes primarily direct and deliberate personal mistreatment or humiliation of the individual. It does not, in the view of the Court, extend to encompass general conditions of discrimination of a social group as a whole at least in the absence of evidence of the concerted or systematic mistreatment of the members of the group generally and that a level of severity in its consequences for individuals." (at para. 15)*

76. In *P.O.*, Charleton J. states (at para. 39):

> *"… particular, and quite extreme, circumstances will be required before the prohibition against torture and inhuman and degrading treatment as guaranteed by Article 3 of the Convention can be invoked. Here the very general and very long letter in support of revocation of the deportation order under section 3(11) of the Act of 1999, touched on many aspects of Nigerian society applicable to every person from that country. Included in those wide ranging arguments on this appeal were, in addition to claims about education and health care in Nigeria, particular criticisms of the Nigerian police force. The applicants/appellants could perhaps be arrested; though this threat remained unspecific and the reasons for it baffling. This is not a case where Article 3 of the Convention, concerning the prohibition of torture or inhuman or degrading treatment or punishment, would be engaged".*

The respondent relies, in particular, on the decision in *P.O.*

77. Insofar as the case is being made that the applicant as someone of Somali ethnicity and with typical Somali features per se is at risk of harm in Kenya such that the protection under Art. 3 ECHR is engaged, I am satisfied the respondent erred in failing to properly consider the likelihood of a real risk for the applicant, as a Somali (including as a Kenyan Somali), of being subject to treatment in Kenya contrary to Art. 3.

78. I agree with counsel for the applicant that, in rejecting the likelihood of a real risk for the applicant, the decision-maker has conflated the concepts of ethnicity and nationality/citizenship. In emphasising the fact that the applicant holds or has held a Kenyan passport, the respondent overlooked the potential relevance of country of origin information, in particular the 2012 Human Rights Watch reports on Kenya, the 2013 Amnesty International report on Kenya and portions of the 2013 US State Department report on Kenya. To my mind, there is an absence of a due consideration of this material, not least the descriptions of arbitrary arrests of "*large numbers of ethnic Somali Kenyans and Somali refugees and subjecting them in some cases to severe mistreatment*", as documented in the 2012 Human Rights Watch report. Moreover, the 2013 Amnesty International report on Kenya documents the arrests of Somali refugees and asylum-seekers as well as Kenyan Somalis and their ill treatment during arrest and detention. The US State Department report documents, *inter alia*, that "*[p]olice reportedly used torture and violence frequently during interrogations and as punishment of pretrial detainees and convicted prisoners*". The same report stated that "*[h]uman rights organizations, churches, and the press reported numerous cases of torture and indiscriminate police beatings*" and that "*torture, degrading and inhuman treatment, unsantinary conditions, and extreme overcrowding were endemic in prisons. Prison staff routinely beat and assaulted prisoners… Prisoners sometimes were kept in solitary confinement for longer than the legal maximum of 90 days*."

The aforesaid country of origin information is dealt with as follows in the decision: "It was submitted that if the applicant were deported to Kenya he would face a violation of his rights under ECHR. 'The Human Rights Watch: World Report 2014-Kenya' was referred to. Other country of origin information was also referred to with regard to Kenya."

79. The decision-maker quotes large extracts from the 2013 US State Department report on Kenya, in the context of the role of the Kenyan police and security apparatus in that State; freedom of movement of displaced persons, protection of refugees and stateless persons; and governmental attitudes to nongovernmental investigation of human rights violations. In that report, as quoted in the decision, reference is made to Somali refugees in Nairobi and in north-eastern Kenya, in particular, experiencing "*frequent harassment*" and "abuse" and that "*refugees found residing in urban areas*" were subjected to "*increased harassment, extortion, arbitrary arrest, and detention*" and were often subjected to "*bribes*". There is however no considered analysis of the contents of the contents of the Human Rights Watch reports or the 2013 Amnesty International report, which refer to Kenyan Somalis, as well as Somali refugees and asylum seekers, being subjected in some cases to "*severe mistreatment*", or to the frequent use of torture in Kenyan prisons, as documented in the 2013 US State Department report. In my view, there is no clarity in the decision as to why the decision-maker arrived at the conclusion that violence towards Somalis (including Kenyan Somalis) was not at such a level that that the applicant's life or freedom would not be at risk if returned to Kenya. A more thorough analysis of the country of origin information was required for a proper consideration of the Art. 3 risk, particularly when it was accepted by the decision-maker that the applicant was of Somali ethnicity and in circumstances where, as per *Saadi v. Italy*, as summarised by Denham J. in *Rettinger* (at para. 16), "*it is for the Government to dispel*" any doubt that there are substantial grounds for believing that the applicant would be exposed to the risk prohibited by Art.3. The fact that the applicant was a holder of a Kenyan passport (howsoever acquired) did not relieve the decision-maker of this obligation, given the clear evidence that Kenyan Somalis are targeted by the police and security forces in Kenya and that if arrested or detained they were at risk of being subjected to inhuman and degrading treatment. A rigorous analysis must be applied in assessing whether there was a risk to the applicant's right to life or freedom under ECHR, as set out by McDermott J. in *B.M. (Eritrea) v. Minister for Justice and Equality* [2013] IEHC 324.

80. For the reasons set out above, and given that there was material before the decision-maker capable of supporting the applicant's

contention that there were substantial grounds for believing that there was a "real risk" that Somalis, including Kenyan Somalis, could be subject to treatment prohibited by Art.3 ECHR, the court is not satisfied that the respondent could reasonably or rationally conclude that the applicant would not be at risk as a Kenyan Somali in Kenya.

81. My conclusion in the regard is not meant to suggest that all Somali nationals, including those with Kenyan citizenship, who suffer great harassment or mistreatment in Kenya necessarily achieve the Art. 3 threshold, as defined by the jurisprudence of the EctHR; it is well established that discriminatory practices of themselves are not sufficient to engage the Convention. (*P.O.* refers) In the present case however, there was substantial material to suggest that the Art. 3 threshold could potentially be met. As to whether the threshold was met is of course always a matter for the decision-maker to assess, and not the court.

82. Counsel for the respondent advanced the argument that the applicant has not adduced evidence that he is likely to be perceived as an extremist on his return to Kenya. This concern is alluded to in Dr. Mullen's report. While it is the case that there is no evidence that the applicant may be perceived as an extremist on his return to Kenya, I do not regard this as in any way relieving the decision-maker of the requirement to properly analyse and weigh the material that was before her, particularly in circumstances where the country of origin information does not specifically state that it is only Somalis/Kenyan Somalis in Kenya suspected of being extremists or terrorists who are the subject of arbitrary arrest or detention, or that it is only Somali refugees or asylum seekers and not Kenyan Somalis who are subject to arbitrary detention or mistreatment, as is clear from the Amnesty International Report and the 2012 Human Rights Watch report.

83. For the reasons I have set out, the question of whether there was a real risk to the applicant as a Somali/Kenyan Somali *per se* if returned to Kenya was not properly assessed by the decision-maker and I am satisfied that grounds 1 and 2 of the statement of grounds are made out.

84. I turn now to the other argument made on the applicant's behalf in support of the challenge to the manner in which the claimed Art. 3 risk was considered by the respondent, namely that the applicant is at risk of detention and/or deportation to Somalia in the event of his removal to Kenya because of certain information the applicant has disclosed to the Kenyan Embassy in Dublin concerning the acquisition of his Kenyan passport.

85. In the course of the hearing, a difference of opinion arose between counsel for the applicant and respondent respectively as to what is meant by the reference to a "travel document" in Dr. Mullen's report. Counsel for the applicant contends that the reference must be read as encompassing either a passport or a *laissez passer* whereas the respondent contends that it must be taken to refer only to the latter. I am of the view that the issue is not so clear cut as the respondent makes out. However, that being said, a logical reading of Dr. Mullen's report as a whole could suggest that the applicant, as a Somalian, would be more likely to become the focus of attention from the Kenyan immigration authorities if he were returned on a travel document other than a Kenyan passport. However, the respondent has stated unambiguously that it is not proposed to deport the applicant with a document other than a Kenyan passport, so no question arises of the applicant being returned to Kenya by the respondent on a document other than a Kenyan passport. Accordingly, as the respondent does not propose to deport the applicant on a *laissez passer*, a scenario which might require the respondent to consider the implications for the applicant, it is not for the court to find fault with the respondent for not embarking on such a consideration. The clear intent of the respondent is to effect the deportation using the applicant's Kenyan passport.

86. Counsel for the applicant contends that given what the applicant states is the Kenyan authorities' knowledge of the manner in which he obtained his passport, the applicant will be at risk of detention in Kenya or refoulement to Somalia by presenting as an ethnic Somali at the Kenyan frontiers in light of the manner in which the applicant obtained his Kenyan passport and the Kenyan authorities' knowledge of how it was obtained.

87. It is of note that for the purposes of her decision on the revocation application, the respondent has expressly accepted (albeit on the basis that INIS could not verify) that the applicant is Somalian and that he lived in Kenya from the age of eight to twenty and that along the way he duly acquired his Kenyan citizenship through bribery. It also seems to be implicitly accepted that the applicant has informed the Kenyan Embassy in Dublin as to the manner in which he says he obtained his passport. The decision does not suggest that the applicant's assertion of having apprised the Kenyan Embassy of how he acquired the passport is disbelieved. Rather, the respondent appears to take the assertion made by the applicant in this regard at face value but holds the view that in the absence of the Kenyan authorities having taken any action adverse to the applicant on foot of his admissions, he will be able to obtain a duplicate Kenyan passport.

88. In the course of her submissions, counsel for the respondent contended that it is noticeable that the applicant had not adduced any evidence such as correspondence between him (or his former legal representatives) and the Kenyan authorities in relation to his alleged disclosure. It is further contended that it is significant that there is no correspondence from the applicant's present solicitors to the Embassy. Counsel asserts that in those circumstances, and given the applicant's background and past lack of candour, his present assertion that he is now being truthful has to be weighed by the Court against his past history. It is submitted that to find for the applicant, the Court has to be believe that he went to the Kenyan Embassy and that he tried to revoke his citizenship and that as a consequence there is a danger for him as a result of this revelation if he is returned to Kenya. It is submitted that the Court's weighing exercise should take account of the lack of any documentary corroboration of the applicant's present contentions.

89. In my view, it is not the Court's function to comment on the credibility of the applicant's account of self-denouncing to the Kenyan Embassy since the respondent's conclusion that he would not be at risk in Kenya does not appear to be predicated on the credibility or otherwise of his assertions as to the manner of the acquisition of his passport or his assertion that he has apprised the Kenyan Embassy that it was obtained by bribery. Rather, the respondent's conclusion is predicated on the assumption that the applicant self-denounced to the Embassy but that no action adverse to him has been taken by the Kenyan authorities in cancelling or revoking the his Kenyan passport. It is in this context that the respondent contemplates that there is no bar to the applicant obtaining a duplicate passport and that it is intended that the applicant will travel with a Kenyan passport.

90. Counsel for the applicant makes the case that the respondent has not factored into her considerations the possibility that even if the applicant is returned on a Kenyan passport, that subsequent to his return he is at risk of being stripped of his Kenyan citizenship because of the manner in which it was obtained. It is submitted that the applicant is at risk of refoulement to Somalia in circumstances where he has volunteered to the Kenyan authorities that he obtained his passport by bribery. It is contended that it is not sufficient for the respondent to accept that the passport was obtained by means of bribery without making an assessment of the risk to the applicant if it is revoked by the Kenyan authorities. It is submitted that on that basis alone, the decision must be quashed.

91. Contrary to the applicant's submissions in this regard, the respondent does address the question of the likelihood of the Kenyan authorities deporting the applicant to Somalia but she concludes that in the absence of any action having been taken by the Kenyan

State to date on foot of the applicant's disclosure, it was unlikely that he would be deported to Somalia from Kenya.

92. Thus, the question to be determined is whether the respondent's conclusion that it was unlikely that the Kenyan authorities would deport the applicant to Somalia given that they "appear to have formally accepted the applicant as a Kenyan citizen, and continue to allow him to claim Kenyan citizenship (despite his alleged disclosure)" is reasonable and rational.

93. The respondent's conclusion was based, in part, on the applicant's personal statement as furnished to the respondent.

> "In late October 2011, I went to the Kenyan Embassy. The woman there said to me: you used a Kenyan passport to travel and you want us to say its not legitimate, how do you think this makes us look? We're going to take a neutral position. They gave me nothing but they are on notice of the fact that I am saying that I am not a genuine citizen of their country."

94. Overall, I am not satisfied that the decision-maker erred in finding, effectively, that the applicant had not established substantial grounds that he is at risk of refoulement to Somalia from Kenya because of his confession to the Kenyan Embassy. While Dr. Mullen's report refers to an option that the applicant could "be put on a plane to Mogadishu by the Kenyan government" there was, in essence, no material put before the respondent that the Kenyan authorities are going to take action against the applicant by stripping him of his Kenyan citizenship. The applicant himself admits to the Kenyan Embassy's intention to take a neutral stance on the issue of the acquisition of his passport. In these circumstances, I am not persuaded that the applicant has made out the grounds 3 or 4 of the statement of grounds.

95. I would however make the following observation. It is proposed by the respondent to deport the applicant on foot of his Kenyan passport or, more precisely, a duplicate thereof. In the course of the hearing, the court posed the question as to how the duplicate passport was to be procured. Counsel for the respondent did not have an answer to the question. The lack of any instructions in this regard is not of course the salient issue in these proceedings. The court's function is to review the decision as it stands. However, if and when an application is made for a duplicate passport the Kenyan Embassy were to reject the applicant's entitlement to a Kenyan passport, then that may well constitute a new fact or circumstance upon which the respondent, either of her own volition or on the application of the applicant, would have to deliberate. This is because if the application for a duplicate passport were to be rejected, the respondent may be faced with deporting the applicant (a Somali national) on a document other than a Kenyan passport and where the likely consequences for the applicant of being deported to Kenya on a travel document other than a Kenyan passport were not engaged with in the revocation application, on the basis that it was not the respondent's intention to deport the applicant on a travel document other than his Kenyan passport.

96. In summary, therefore, the court is satisfied that grounds 1 and 2 of the applicant's statement of grounds have been made out. The question which now arises is whether there is any basis upon which to deny the applicant the relief claimed.

97. It is contended by the respondent that the applicant's past conduct has been such as to prevent the court exercising its discretion to grant relief to him. The respondent submits that the applicant is asking the court to overlook his past behaviour and exercise its discretion in his favour, without his having proffered any proper explanation for his past conduct. In this regard, counsel for the respondent relies *on A.S. v. Minister for Justice, Equality and Law Reform* [2015] IEHC 417, where Stewart J. states:

> *"26. The applicant, it seems to me, is asking the Court to look at that date in isolation, removed from the reality of his conduct to date and his repeated lack of candour throughout the asylum process. It is noteworthy that his period of time spent in the UK only came to light as a result of information provided by the UK Border Agency and at no stage was disclosed by the applicant."*

98. Reliance is also placed by the respondent *on S.A. v. Refugee Appeals Tribunal* [2015] IEHC 625 where Eagar J. noted the decision of Dunne J. in *Elukanlo v. Minister for Justice, Equality and Law Reform* [2006] IEHC 211, as follows: "*I am satisfied that an applicant for judicial review may be disentitled to relief by reason of a lack of candour during the asylum process*." Equally, Eagar J. noted the position adopted by Cooke J. in *S.P. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 18, where Cooke J. opines:

> *"the court is entitled to refuse to entertain an application for judicial review where it is satisfied that the proceeding is tainted by a lack of candour or by bad faith but that it otherwise involves an abuse of process or an misuse of the administrative procedure concerned – in this case the asylum process".*

In S.A., Eagar J. went on to state that there was:

> *"the obligation on the applicant to take part in the asylum claim in a manner in which would entitle her to discretionary relief. It appears to this Court that that has not been the approach of the applicant."*

It is also submitted that similar sentiments were expressed by Clark J. in *R.C. v. Refugee Appeals Tribunal* [2010] IEHC 490.

99. Counsel for the applicant agrees that the applicant is guilty of a lack of candour throughout the asylum process. It is contended however that in these judicial review proceedings the applicant has put all of his circumstances, including his prior lack of candour, before the court, and, accordingly, the court should not exercise its discretion by holding against the applicant on the basis of lack of candour. In any event, counsel submits that for Art. 3 purposes, if substantial grounds have been established that a real risk to applicant's life or freedom exists, then the applicant's prior conduct cannot be a bar to his obtaining relief.

100. Clearly the applicant is guilty of repeated untruths throughout the asylum and immigration process, both in this State or elsewhere. I find however that this cannot, in the circumstances of this case, be a bar to relief. In this regard, the court relies on the decision of the EctHR in *Chalal v United Kingdom*:

> *"whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State the responsibility of the Contracting State to safeguard him or her in engaged in the event of expulsion …In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."* (at para. 80)

In *Ahmed v. Austria* [1996] ECHR 63, the Court put it as follows (at para. 40):

> *"art.3 makes no provision for exceptions and no derogations from it is permissible under art.15…".*

As the court has found that the decision-maker has not properly addressed the applicant's substantial grounds argument, it would not be appropriate for the Court to exercise its discretion otherwise than to grant the applicant relief.

Summary
For the reasons set out in this judgment, the court will grant an order of *certiorari* of the decision of the respondent dated 23rd February, 2015.