Neutral Citation: [2016] IEHC 377

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 647 J.R.]

BETWEEN

X.X.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 727 J.R.]

BETWEEN

X.X.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of June, 2016

1. The applicant was born in 1963 and is national of Jordan. He claims that between 1993 and 1995 he was tortured in that country due to his opposition, on religious grounds, to the policy of the Jordanian regime.

2. The applicant states that he left Jordan in 1995 and that between then and 2000 he travelled between Spain, the Netherlands, Germany and the United Kingdom. Separately to this, he stated in his asylum questionnaire that he also travelled to Oman (although he does not appear to have given this information to the SPIRASI organisation when he consulted them).

3. On 17th February, 2000, the applicant arrived in Ireland with his wife and three children. He applied for asylum on arrival. The asylum regime at that point was a non-statutory one, having initially being put in place on 13th December, 1985, by the "von Arnim letter" and subsequently on 16th December, 1997, by the "Hope Hanlon letter", being in each case a letter from the State to the UN High Commissioner for Refugees (UNHCR).

4. The applicant's fourth child was born in Ireland on 24th June, 2000, and is an Irish citizen, due to the constitutional position that obtained at that time.

5. On 5th July, 2000, the applicant applied for residency in the State based on his parentage of an Irish-born child. On 14th August, 2000, he wrote a letter stating that he "*wish[ed] to withdraw*" his asylum claim. There is something of a dispute as to the effect of this letter, which I will address further below.

6. On 15th August, 2000, the asylum division of the Department of Justice, Equality and Law Reform acknowledged his wish to withdraw his asylum claim and acknowledge his application for residency. The letter stated that all future correspondence should be directed to the immigration division.

7. On 20th November, 2000, the Refugee Act 1996 was commenced.

8. On 19th January, 2001, an undated letter was received by the Department in which the applicant referred again to his wish to withdraw his asylum claim.

9. On 25th January, 2001, the Refugee Applications Commissioner wrote a letter stating that the asylum file had already being furnished to the immigration division of the Department.

10. On 23rd February, 2001, the applicant was granted residency in the State by virtue of his parentage of an Irish-born child. There is no specific reference in the letter to s. 17(6) of the 1996 Act which provides for such a permission to be giving to a person who has withdrawn their application for asylum.

11. On 15th September, 2003, the Immigration Act 2003 commenced, insofar as it amended s. 17(1)(a) of the Refugee Act 1996. This introduced a specific provision that where an asylum claim was withdrawn, refugee status would be formally refused.

12. On 24th June, 2009, the applicant was issued with a Jordanian passport valid until 23rd June, 2014.

13. In late 2010, one of the applicant's children was detained in Jordan.

14. On 1st March, 2011, the European Communities (Asylum Procedures) Regulations 2011 came into force.

15. In or about April 2013, the applicant's older son died fighting in Syria. The applicant has not made clear with which protagonist his son was associated, although his counsel was at pains to make clear that it was not being suggested that he was associated with the official opposition.

16. In or about August, 2013, the applicant's wife returned to Jordan with two of the children, and subsequent to that date there was intermittent travel by family members back and forward between Ireland and Jordan.

17. On 14th February, 2013, the European Union (Subsidiary Protection) Regulations 2013 came into force.

18. On 23rd August, 2014, the applicant's residence permission in the State, which had been renewed from time to time, expired. The applicant did not take steps to seek to renew it for a number of months.

19. In the interim, at a time when he had no permission to be in the State, he obtained his current Jordanian passport on 8th December, 2014, valid until 7th December, 2019.

20. On 15th January, 2015, the applicant went to the Garda National Immigration Bureau (G.N.I.B.) to apply for renewal of his permission. His Irish born child had been in Jordan for a period (where the applicant's wife and children and other children also were at this time). The applicant was sent away and told to clarify details regarding his family's situation.

21. In February, 2015, the applicant returned to the G.N.I.B. to renew his permission with his Irish-born child. However, it was not renewed at that point.

22. On 18th February, 2015, solicitors on his behalf wrote to the Minister applying for the renewal.

23. On 13th March, 2015, the applicant received a proposal to deport him. The reasons underlying the proposal stated that he was believed to be an organiser for Islamic State. He says that this was the first notice he had that he was considered to be an Islamist suspect.

24. On 7th April, 2015, the applicant made submissions under s. 3 of the Immigration Act 1999, for leave to remain. He also made an application for residence with reference to the *Zambrano* judgment (Case C-34/09, *Ruiz Zambrano v. Office National de l'Emploi*, Court of Justice of the European Union, 8th March, 2011) based on his youngest child's Irish citizenship.

25. He states that at some stage in 2015, his older surviving son was detained in Jordan, released and detained again.

26. The procedural history of this case now takes a unusual turn in that on 8th April, 2015, the applicant's solicitors wrote to the Refugee Applications Commissioner making a *de novo* application for refugee status, stating that there should be no need to apply for consent under s. 17(7) of the Refugee Act 1996 (an application for the Minister's consent to re-enter the asylum process) because the original application was pre-statutory.

27. The Refugee Applications Commissioner responded to this application on 9th April, 2015, stating that the applicant had withdrawn his asylum claim in 2000. The clear implication of this letter was that the consent of the Minister under s. 17(7) was indeed required.

28. On the 15th April, 2015, following receipt of this letter, the applicant made an application under s. 17(7) of the 1996 Act, which was stated to be without prejudice to his view that the consent of the Minister was not required. He also furnished supplementary material regarding his *Zambrano* claim.

29. On 17th June, 2015, the Minister refused the application for consent under s. 17(7) for the making of a second asylum claim.

30. On 14th July, 2015, the applicant's solicitors wrote to the department and the Refugee Applications Commissioner formally enclosing an application form under s. 8 of the 1996 Act for a *de novo* refugee application and asserting again that s. 17(7) consent was not required.

31. On 30th September, 2015, the Commissioner replied refusing to accept the s. 8 application and stating that this was a matter for the Minister.

32. On 23rd October, 2015, the Minister refused the *Zambrano* application.

33. On 27th October, 2015, the applicant's solicitor wrote again to the Commissioner and the Minister complaining about the decision of 30th September, 2015, and enclosing a report from SPIRASI in relation to the applicant.

34. On 2nd November, 2015, the Minister replied refusing to accept the s. 8 application and essentially stating that it was being treated as a further s. 17(7) application. The applicant was informed that the reasons given for rejecting the first s. 17(7) application (on 17th June, 2015) "*continue to obtain*".

35. On 3rd November, 2015, the applicant made further submissions.

36. On 17th November, 2015 the Commissioner replied stating that the position was as had been set out on 15th July, and 30th September, 2015.

37. The applicant then commenced the first set of judicial review proceedings with which this judgment is concerned. Leave was granted on 23rd November, 2015 by Mac Eochaidh J. to bring those proceedings, in which a declaration was sought essentially that the applicant was entitled to apply under s. 8 of the 1996 Act and requiring that the application be considered.

38. On 27th November, 2015, the applicant was informed that his son had been detained in Jordan again. The Minister does not appear to have been informed of this development by the applicant at that time.

39. On 30th November, 2015, the Minister made a deportation order against the applicant. The order is supported by forty pages of reasoned analysis, which is certainly one of the most detailed and extensive analyses supporting a deportation order that I have seen to date.

40. On 21st December, 2015, leave was granted by Mac Eochaidh J. in the second judicial review proceedings in which certiorari of the deportation order was sought. Mac Eochaidh J. also granted an interim injunction until the return date of 11th January, 2016.

41. Matters then took a further unusual turn in that on Christmas Eve 2015, the respondents brought a motion to discharge the interim injunction.

42. The motion was heard during the Christmas vacation and came before Stewart J. on 28th December, 2015. On that date she heard the motion and made an order discharging the interim injunction. A stay on the discharge of the injunction was refused.

43. The applicant then immediately appealed to the Court of Appeal. He also made an application to the European Court of Human Rights complaining about the fact that the High Court had discharged the injunction and refused a stay. Complaint was made under art. 3 of the ECHR and in relation to the lack of an effective remedy with art. 13 (in conjunction with art. 3). It was submitted that the applicant's remedies were ineffective unless they had an automatic suspensive effect relying on *Conka v. Belgium* (Application no. 51564/99) (2002) 34 E.H.H.R. 54, 5th February, 2002.

44. On 29th December, 2015, the matter came before Peart J. sitting alone in the Court of Appeal, who granted a stay until the following day. The applicant's counsel informed me that the State agreed that s. 5 of the Illegal Immigration (Trafficking) Act 2000, restricting the right of appeal, did not apply to this particular appeal to the Court of Appeal because it dealt only with an interlocutory injunction, and not with any determination as to the validity of the deportation order or an issue arising therefrom. The Court of Appeal then sat on Saturday, 30th December, 2015 to hear the appeal against the refusal of the stay.

45. In the meantime, the applicant had also submitted a rule 39 application to the European Court of Human Rights seeking an interim measure restraining his deportation. The Court of Appeal hearing began at 2:00 pm on 30th December, 2015. During the course of the hearing, the European Court wrote to the Department of Foreign Affairs and Trade stating that it had decided to issue an interim measure until the conclusion of the Strasbourg proceedings to the effect that the applicant should not be deported. This letter was conveyed to counsel for the Minister during the hearing, who thereupon informed the court. The court then rose, and on its return raised the issue of whether a judgment on the injunction issue was still required. This question was not definitively resolved, and the court, as I understand matters, heard the remainder of the argument and reserved judgment. At the end of the hearing the Court of Appeal indicated that the stay would continue until the outcome of the appeal.

46. The matter was listed again before the Court of Appeal on the first day of term (13th January, 2016), and again on 25th February, 2016, when, I am told, the court expressed the view that the case was "*nearly moot*". The court appears to have indicated at that stage that it was not therefore minded to give a judgment, but listed the matter again for mention on 13th April, 2016.

47. On 28th February, 2016, the applicant states that he found out that his son who he said had been detained in Jordan had been released, but was required to continue reporting to the Jordanian authorities.

48. On 13th April, 2016, the Court of Appeal made an order adjourning the appeal with liberty to re-enter and continuing the stay unless discharged by order of the High Court. The issue leading to this order requires some further discussion, set out later in this judgment. On 6th May, 2016, the Court of Appeal administratively amended the order to continue to restrain deportation until that order was discharged by order of the High Court. This amendment involved the strike-through of certain material and the replacement with alternative wording, as follows: *"And on the Court being informed that the European Court of Human Rights has lifted the Rule 39 measure whereby it has been indicated to the Government of Ireland that the Applicant should not be removed from the State for the duration of the Applicant's proceedings under Article 34 of the European Convention on Human Rights ...* IT IS FURTHER ORDERED that *there be a stay on the deportation order made in respect of the Applicant by the Respondent pending further Order of the High Court".*

49. Both judicial reviews were heard together before me. On behalf of the applicant, Mr. Michael Lynn S.C., Mr. Danny Friedman Q.C. and Mr. David Leonard B.L., addressed the court. I also heard from Mr. Remy Farrell S.C. and Mr. Conor Power S.C. (with Ms. Sinéad McGrath B.L.) for the respondent.

Amendment of pleadings

50. During the hearing, Mr. Friedman in the course of his very thorough submission sought liberty to make certain amendments to the statement of grounds in the second judicial review. After some discussion as to the correct form of the amendments, I granted this application, which was not strongly opposed by Mr. Power, and I am grateful to the respondent for taking a practical attitude to this matter. I also gave directions regarding an amended statement of opposition.

Reporting restrictions

51. Reporting of the identity of the applicant is prohibited by virtue of s. 19 of the 1996 Act. However, the court also has an inherent jurisdiction to supplement such statutory measures by means of a formal order see *Rooney v. Garda Commissioner* [2014] IEHC 155 (Unreported, High Court, Gilligan J., 14th March, 2014). In all the circumstances I considered it appropriate to do so, and made that order at the outset of the hearing.

The status of the stay granted by the Court of Appeal

52. The applicant appears to have been labouring under a misconception as to the nature of the proceedings before the Court of Appeal. The matter that had been appealed to the Court of Appeal was the Order of Stewart J. of 28th December, 2015, which discharged the interim injunction and refused to grant a stay on that discharge. However, the interim injunction itself only had a very short shelf-life, as it was due to expire on 11th January, 2016. On the latter date, the applicants' legal advisors appeared to have overlooked the necessity of applying to the judge in charge of the asylum list for an interlocutory injunction. They appeared to have assumed that the order of 30th December, 2015 was an interlocutory order. But it was not. It was merely a stay on an order which itself became spent on 11th January, 2016. The Court of Appeal did not purport to grant an interlocutory injunction pending the determination of the High Court proceedings, and indeed it is not immediately apparent whether such an order would normally have been made in the appeal, since the jurisdiction invoked by the applicant was merely in connection with the very limited order of

Stewart J. While the applicant sought an interlocutory injunction from the Court of Appeal, he had not sought such an injunction from the High Court, and therefore was not refused such an injunction. An appeal seeking such an injunction from the Court of Appeal in the first instance, when such an order had not been sought from the High Court, would normally be viewed as misconceived. All that the applicant had been refused was a stay on the order of Stewart J., and that is all that his appeal could therefore normally deal with.

53. When I pointed these matters out to counsel for the applicant during the hearing, I suggested that the proper course would be to withdraw the moot appeal and I could then make an interlocutory order *sensu stricto* which would not suffer from these difficulties.

54. Despite my having had a fairly detailed discussion with the parties as to the extremely shaky nature of the stay given the confined nature of the existing appeal, both sides presented themselves to the Court of Appeal on 13th April, 2016, but failed to convey to that court the concerns I had mentioned regarding those matters. Instead that court was asked to make an order continuing the stay until further order of the High Court and adjourning the appeal with liberty to re-enter. Given that the appeal concerned a refusal of a stay on an order lifting an injunction, where the underlying injunction was itself time-limited and has long since expired, it is not immediately apparent what the parties thought they were thereby achieving, and indeed why the parties saw to it that the appeal was simply adjourned with liberty to re-enter, as opposed to finally determined, with costs only being adjourned. The parties informed me on 28th April, 2016 that neither of them had informed the Court of Appeal of these matters in general or my concerns about the nature of the stay in particular. It was made clear to me that that court was not specifically addressed on the point that the actual subject matter of the appeal was seemingly moot. The order sought on 13th April, 2016, was on its face not a final order in the appeal; but what precisely that court was to remain seised of was not clear from the order it was asked to make. Mr. Lynn stated that it was purely a matter of costs. That being the case, no-one has explained why the order does not say that.

55. When I pointed out some of these matters to the parties they engaged in correspondence with the Court of Appeal. In response to that correspondence, that court administratively amended the order on 6th May, 2016, to continue the stay until further order of the High Court, as set out above. Mr. Lynn describes this as the exercise of an exceptional and extraordinary jurisdiction for an appellate court to grant an interlocutory order where none was applied for in the court below, but I would have thought that if a court is being asked to exercise an extraordinary jurisdiction then it should be specifically told that that is what is being requested.

56. Overall, I am far from convinced that the position (and the very limited nature of the scope of the appeal) has been fully explained to the Court of Appeal by the parties, or that that court was fully aware that it was being asked to exercise an extraordinary jurisdiction to make an interlocutory order that was not applied for in, and therefore not refused by, the High Court. The original order might be characterised as a "stay" as ordered by the Court of Appeal, but it was a stay on a discharge of an injunction which has itself expired. It is not a stay on the deportation of the applicant. There has been no stay or injunction on the deportation of the applicant since 11th January, 2016, until the "amended" order was produced administratively by the Court of Appeal in May, 2016. In the light of that history it did not seem appropriate or necessary for me to grant an interlocutory stay which I had thought would have been appropriate had the moot appeal simply been withdrawn.

57. On one view, given the applicant's anxiety to obtain relief from Strasbourg, it is striking that he has failed to exhaust domestic remedies by obtaining or even seeking a legally effective stay on his deportation for much of the period since 11th January, 2016. Whatever the explanation, it is certainly not because of ignorance of the position, because I made that position abundantly clear on numerous occasions when this matter was before me.

Issues in the first judicial review

When did the applicant withdraw the asylum claim?
58. One factual issue in particular was disputed between the parties, namely the exact date on which the applicant withdrew his asylum claim. Of particular importance is the fact that while the applicant initially wrote of his "*wish*" to withdraw the asylum claim prior to the commencement of the 1996 Act, he wrote again referring to the fact that "*we hope for to cancel our requirement as asylum seeker*" (*sic*). I infer from this that the withdrawal had not been finalised prior to the commencement of the 1996 Act.

59. In any event, I consider that the withdrawal of an application is not automatically a unilateral act, and in this context, the withdrawal required an acceptance by the Minister of the withdrawal. By way of analogy, a party having made an application to the court cannot simply withdraw unilaterally, and in certain circumstances the court might refuse liberty to withdraw. Another analogy might be parliamentary procedure, where under the standing orders of each House of the Oireachtas, leave of the house is required for a member to withdraw an amendment, once it has been moved. In all of these contexts, and in the context of the 1996 Act, a "wish to withdraw" is not an actual withdrawal. Mr. Leonard relied on *Sandu v. Minister for Justice* [2015] IEHC 683, (Unreported, High Court, Mac Eochaidh J., 31st July 2015), in particular paras. 45 and 46, where withdrawal of an asylum claim in advance of an application for leave to remain was deemed to involve an implied permission to be in the State. That withdrawal was however in the form of the completion of a form supplied by the Commissioner so it was not a unilateral act. In this case I find that the withdrawal was effective from its acceptance by the Minister, that is, on 23rd February, 2001.

60. I find that the applicant is a person to whom the Minister failed to give a declaration under the 1996 Act, by reason of the applicant having withdrawn that application after the commencement of that Act. Section 28 of the 1996 Act preserved the application as continuing for the purposes of the Act until such time as the withdrawal was accepted by the Minister, which was implicit in the issuing of the decision to grant residence on the basis of an Irish born child (because s. 13(6) is predicated on a withdrawal). The fact that s. 13(6) is not specifically mentioned by the Minister in that latter decision is not crucial because I infer that that was the basis for the grant of residency. I should note that the position appears to me to have changed pursuant to the Immigration Act 2003 which amended s. 11(9) of the 1996 Act to allow for unilateral withdrawal by notice to the Commissioner.

Does s. 5 of the Illegal Immigrants (Trafficking) Act 2000 apply to the first judicial review?
61. In the first judicial review application the applicant is essentially seeking a declaration that he is entitled to make a new original asylum application without the permission of the Minister. In a very able argument, Mr. Lynn submits that this relief is not subject to s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

62. Of course superficially one can make the point that declarations of this type are not expressly listed in that section. However, the application of s. 5 must be determined by substance rather than form. The question is whether the grant of relief would have the effect of questioning the validity of any of the types of decision to which the section applies. One of those types of decision is of course a refusal under s. 17(7) of the 1996 Act (see s. 5(1)(i) of the 2000 Act; *E.M.S. v. Minister for Justice, Equality and Law Reform* [2004] 1 I.R. 536). In *Nawaz v. Minister for Justice, Equality and Law Reform* [2013] 1 I.R. 142, Clarke J. stated at p. 160: "*It seems to me to follow from that case law that the question of whether a provision such as that contained in s. 5 of the Act of 2000 is engaged is one to be looked at as a matter of substance rather than as a matter of form. As Kelly J. pointed out in* Goonery v.

Meath County Council *(Unreported, High Court, Kelly J., 15th July, 1999) the reliefs sought in that case (which were declaratory in nature) 'would undoubtedly mean in practical terms that the decision of Meath County Council was invalid'. It seems to me that the approach of Kelly J. in that case was correct. The question to be asked is whether, if the relief is granted, it will amount to a determination to the effect that a particular type of measure specified in the section is invalid or, to use the words of s. 5 itself, has had its validity successfully questioned".* Following from *Nawaz*, Mac Eochaidh J. in *F.O. v. The Minister for Justice and Equality, Ireland and the Attorney General* [2013] IEHC 206 (Unreported, High Court, 9th May, 2013) at para. 33, in assessing the approach of Clarke J. stated that *"... the Supreme Court enquires whether the object or effect of the plenary proceedings questions the validity of a measure which can only be questioned under judicial review".*

63. As I discussed in *K.R.A. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 289 (Unreported, High Court, 12th May, 2016) at para. 58, an applicant cannot, by challenging a later decision, seek in substance to nullify an earlier decision contrary to the system of time limits set out in s. 5 of the 2000 Act: this would be "to permit the first decision to be attacked obliquely, after the time limited for a direct challenge had expired" *(E.M.S. v. Minister for Justice, Equality and Law Reform* at p. 542). Likewise, in *B.M.J.L. v. Minister for Justice and Equality* [2012] IEHC 74 (Unreported, High Court, 14th February, 2012), Cross J. took the view (at para. 3.18) that it was not open to an applicant to attack a deportation order on grounds that *"'collaterally' impugn the validity of the RAT decision"* (see also *Mamyko v. Minister for Justice* (Unreported, High Court, Peart J., 6th November, 2003 as cited in *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603; and *G.O. v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 19).

64. As referred to in *K.R.A.* at para. 60 in *Kinsella v. Dundalk Town Council* [2004] IEHC 373 (Unreported, High Court, 3rd December, 2004), Kelly J. dealt with a subsidiary decision of a council which fell outside the statutory procedures for planning judicial reviews, but which was being challenged in order to attack the substantive planning decision. Kelly J. said in that respect: *"it was quite clear that the whole thrust and ambition of these proceedings was to quash the decision of 3rd August, 2004. As the applicant was quite plainly questioning the validity of the decision to grant planning permission he could not avoid or evade meeting the necessary threshold of proof required under s. 50 of the Planning and Development Act, 2000. Indeed as I pointed out in giving my ruling on this topic, if the applicant were correct in his submission in this regard an absurd result could be achieved which would be entirely contrary to the letter and intent of s. 50".*

65. The fundamental difficulty for the applicant is that if the relief sought in the first judicial review were to be granted, this would have the effect of invalidating in substance the refusal by the Minister of the s. 17(7) application dated 17th June, 2015. The validity of such a refusal simply could not co-exist with the reliefs sought by the applicant by way of a declaration that the applicant is entitled to seek refugee status without the respondent's consent and an order of mandamus requiring the respondent to accept such an application. The existing s. 17(7) refusal is a decision in which s. 5 of the 2000 Act applies. Therefore the first judicial review is an indirect attack on that decision, which for good measure is made on the basis of an application made by the applicant himself.

66. Mr. Lynn submits that the s. 17(7) application is "*irrelevant*", primarily because it was purported to be made without prejudice to the applicant's view that he should not be required to comply with that section. But it is not irrelevant. The applicant's entire argument in the first judicial review is premised upon the notion that the section does not apply to him. That means that the refusal dated 17th June, 2015 is invalid.

67. As the first judicial review has the inescapable consequence that a decision subject to s. 5 of the 2000 Act is invalid, s. 5 must therefore apply to the first judicial review. Any other approach would drive a coach and four through the statutory intention, simply by recasting relief in declaratory terms.

68. Looked at another way, the applicant may have made the application "without prejudice" to his view that it was not necessary, but the application produced a formal decision by the Minister. The policy of the 2000 Act is that such decisions stand unless challenged in accordance with s. 5.

69. Likewise, the applicant submits that s. 17(7) does not apply to the applicant. Therefore, as it is put in supplemental submissions, "*the s. 17(7) application was misconceived in law*" – and this is what the applicant says about his own application. The problem in logic with this objection is that while the applicant now says s. 17(7) does not apply, the Minister said it did. The Minister's decision stands unless challenged in accordance with s. 5. If the applicant wishes to contend that the Minister was wrong, he must do so in accordance with that section.

70. The applicant submits that to apply s. 5 to the application would mean that *"the Applicant is being estopped from relying on the true operation of the relevant legislation by virtue of his having made the invalid s. 17(7) application. That cannot happen as a matter of law—there can be no estoppel as against a statute"* (para. 5(iii) of supplemental submission). I am not sure if it is necessary or helpful to characterise this state of affairs as an estoppel. The applicant made an application, which resulted in a decision that is subject to s. 5. Whether the decision is right or wrong, or was in accordance with law or not, a challenge to that decision must be in accordance with s. 5. The section does not simply collapse into thin air as a result of an assertion that the decision contravenes statutory rights. The case has nothing to do with the alleged principle contended for by the applicant that the court is obliged *"not to construe legislation designed to afford due process in a manner that denies it"* relying on *R v. Home Secretary ex p Saleem* [2001] 1 W.L.R. 443 *per* Roch L.J. (Court of Appeal) at 449 The applicant has not been denied fair procedures; he is simply being required to be subject to particular statutory procedures as set out in s. 5 of the 2000 Act.

71. Mr. Lynn submitted that I should construe s. 5 as not applying to this application, because to do so would restrict the right of access to the courts: *People (Attorney General) v. Conmey* [1975] I.R. 341 at 354 *per* O'Higgins C.J. and at 360 per Walsh J.; *People (D.P.P.) v. O'Shea* [1982] I.R. 384 at p. 403 *per* O'Higgins C.J.; *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321 at p. 403 to 404 *per* O'Higgins C.J.; *E.M.S. v. Minister for Justice, Equality and Law Reform* [2004] 1 I.R. 536.

72. This argument simply lacks substance. The whole purpose of s. 5 of the 2000 Act is to regulate (and therefore in certain circumstances to restrict) the right of access to the court. It cannot be the case that the section must be given a strained and tortuously narrow meaning simply to avoid regulating that right of access. Whether proceedings of this type can be regulated is a matter for the Oireachtas, and in principle, regulation of the type contained in s. 5 is constitutionally permissible (see *In re. Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360). The question then is whether s. 5 applies to a particular challenge, and the Supreme Court has definitively laid down that that question must be determined by reference to substance rather than form.

73. As a final throw of the dice under this heading, the applicant submitted that *"Section 5 of the 2000 Act cannot be invoked to prevent the Applicant relying on the provisions of the 1996 Act that give him a continuing right to apply for asylum at any point because this would give s. 5 the status of constitutional legislation, in the sense that it would bar the operation of the 1996 Act insofar as it applies to the Applicant. It is not within the competence of the Oireachtas to do this. That is why even the European Convention on Human Rights Act 2003 was not enacted in terms such that other legislation that was incompatible with ECHR rights*

would be struck down or disapplied—that would have been unconstitutional. Rather, s. 5 of the ECHR Act 2003 merely permits the Superior Courts to declare legislation incompatible with the State's obligations under the Convention. Such legislation must still be enforced, because to do otherwise would be to frustrate the will of the legislature. If s. 5 of the 2000 Act were held to apply to the Applicant's first judicial review, that would frustrate the operation of the 1996 Act. See again the principle in ex p Saleem".

74. Unfortunately, the foundation on which this impressively elaborate constitutional confection stands erected is unsound. The 1996 Act is not being disapplied to the applicant. He applied for permission under that Act and was refused such permission. The only issue is whether any action which in substance challenges that refusal is subject to s. 5 of the 2000 Act, and it clearly is. That does not "*frustrate*" the operation of the 1996, either unconstitutionally or at all. Indeed far from frustrating the 1996 Act, such a process facilitates the orderly implementation of the 1996 Act.

Is the first judicial review out of time?
75. Mr. Lynn submitted that notwithstanding the foregoing, the first judicial review is not out of time by reference to s. 5; but, if it is, he applied (in a verbal comment during his reply) for an extension of time (although no such extension is sought in the Statement of Grounds or by notice of motion and nor is there any supporting affidavit setting out how O. 84, r. 21 has been complied with).

76. What I propose to do in relation to this aspect of the case is to proceed *de bene esse* by assuming (without deciding) in favour of the applicant that either the application is not out of time or that time should be extended and indeed can properly be extended despite the lack of formal application and supporting affidavit. Whether any further consideration of the issue is necessary will depend on the findings on the issues raised in the first judicial review, to which I now turn.

Is the Minister the appropriate respondent to a claim that an asylum application has not been processed?
77. The first judicial review proceeds upon the incorrect basis that the Minister is a sufficient party to a challenge to a failure to process an asylum application. However the processing of such a claim – its investigation and consideration - is carried out by the Commissioner and not the Minister. The Commissioner is independent in the exercise of his functions (s. 6(2)) and all applications for a declaration are referred by the Minister to him. Section 8(1)(c) of the Act provides that a person in the State seeking the status of a refugee "*may apply to the Minister for a declaration*". But the applicant is reading s. 8(1)(c) of the Act in isolation from s. 8(4). The latter provision states that the application "*shall be addressed to the Commissioner*". Reading the two provisions together it is clear that an asylum claim is *nominally* made to the Minister but *in fact* must be addressed to the Commissioner, who *in substance* processes it on her behalf. The applicant has failed to make the Commissioner a party to the proceedings as would be required if his complaint is of a failure to process an asylum claim. It is therefore not appropriate to grant the applicant the relief sought, the applicant having failed to name the correct respondents. It is not appropriate to grant an order of *mandamus* (or other relief to the same effect) compelling the processing of an application by an officeholder who has allegedly failed to process the application but who has not been named as a party.

Insofar as the first judicial review challenges in substance decisions adverse to the applicant, is declaratory relief the appropriate remedy?
78. As noted above the first judicial review challenges the letter of 9th April, 2015 from the Commissioner and in substance the Minister's decision under s. 17(7) of 17th June, 2015. However no relief by way of *certiorari* is sought in the proceedings. Even if the application was brought within time, and even assuming that the Commissioner did not have to be named in the application, it is still improperly constituted. A challenge to decisions of this type must seek to quash those decisions. An approach that disguises the effect and consequences of the reliefs being sought by clouding those consequences with merely declaratory relief may be acceptable in some contexts, but in the field of immigration and asylum the legislature has intervened firmly to emphasise the importance of clarity as to whether the specific individual decisions are valid or not. An approach which dilutes that clarity by failing to identify the decisions the validity of which is truly in issue is not acceptable. I would decline to grant relief in any event for that reason, because the appropriate relief has simply not been sought. The respondent submits in essence that this was because to expressly do so would highlight the applicant's possible time difficulties: as it is put in supplementary submissions, *"the applicant seeks to bring proceedings that are wholly decoupled from any identifiable event or date that might be used to reckon time for the purpose of section 5 of the 2000 Act"*. That submission appears to me to be correct. The failure to seek certiorari is in my view only explainable by reason of a concern on the part of the applicant directing to avoiding attention to his time issues. But either way, for the court to grant an inappropriate relief because the applicant has, for tactical reasons or otherwise, declined to seek the appropriate relief, would be to collude in a subversion of the scheme set out in s. 5 of the 2000 Act.

79. It is simply not an answer to this problem to say that declarations can be granted when it is just and convenient to do so (*Heaney v. Garda Commissioner* [2007] 2 I.R. 69 *per* Quirke J. at 76). The applicant has not explained why it is more just and convenient to seek declaratory relief only. The notion that *"declaratory relief is more appropriate in the circumstances*" as submitted by the applicant does not hold water. Declaratory relief is in fact a much less appropriate remedy in the circumstances. The applicant submits that *"This is not a case in which the Applicant made an application under a particular section that has resulted in a decision under that section that would be an appropriate target for* certiorari. *The Minister has refused to consider a s. 8 application, but the Minister does not have jurisdiction to make any decision under s. 8 of the 1996 Act; rather, the Minister's decision on an asylum application is made only under s. 17 … The substance of the dispute between the parties concerns the correct interpretation of s. 17 rather than a particular decision"* (supplementary submissions para. 16); but this extraordinary submission simply bears no relationship to the reality of what happened in this case. The applicant did, contrary to the alternative universe suggested in this submission, *"ma[ke] an application under a particular section that has resulted in a decision under that section that would be an appropriate target for* certiorari". That is precisely what produced both the refusal by the Commissioner to process the purported s. 8 application, and the rejection by the Minister of the s. 17(7) application.

80. In supplementary submissions, after the hearing concluded, the applicant suggests, as a fall-back, that the court should grant certiorari even though it was not sought. The applicant sought and was granted leave to amend the pleadings, as noted above, during the hearing. No amendment was sought to deal with additional reliefs of the kind now floated. Such a suggestion was not signalled in any way during the hearing, but even if it had not been launched in such a throwaway manner after the hearing was over, it would involve a cavalier approach to the strictures of O. 84 in general and the 2000 Act in particular to allow a judicial review to be reprogrammed in this manner without formal application by the moving party. Which decisions precisely should be quashed? How exactly should the new reliefs be phrased and on what grounds? What time issues if any would these new reliefs raise? The applicant has not even begun to address these questions. Judicial review cannot functionally operate on a back-of-an-envelope basis of this kind.

Is the Minister's finding that the applicant is caught by s. 17(7) of the 1996 Act incorrect?
81. If I am wrong about the foregoing, the question presented on the merits by the first judicial review is whether s. 17(7) does in fact apply to the applicant as contended for by the Minister. That provision requires that a person to whom the Minister has refused a declaration of refugee status, cannot make a second or subsequent declaration without the consent of the Minister.

82. Section 17(7) implements art. 32 of the asylum procedures directive (2005/85/EC) which allows for subsequent applications on the basis of "*new elements*". Article 40 of the recast asylum procedures directive (2013/32/EU) (not applicable to Ireland) is even more explicit on the need for new elements to be identified before substantive examination (see Hailbronner and Thym, *EU Immigration and Asylum Law* (2nd edition, 2016) at pp. 1367 to 1369). Article 32(1) refers only to "*a person who has applied for asylum in a member state*" and does not distinguish between statutory and pre-statutory applicants, or applicants under EU law or pre-directives.

83. Is the applicant a person to whom the Minister has refused a declaration? On a literal interpretation the answer is clearly no. The applicant withdrew his application. It was not refused. Mr. Farrell submitted that the 2003 Act created a form of deemed refusal, but I see no basis in the Act for that artificial approach. A deeming provision would almost inevitably have to be expressly provided for.

84. It seems to me that the operative provision here is s. 5 of the Interpretation Act 2005. It is the clear legislative intention that persons who withdraw their asylum claims should be in the same category as those who have been refused asylum after going through the process (as set out in s. 7 of the Immigration Act 2003). A literal interpretation of s. 17(7) does not give effective and clear statutory intention. It is therefore necessary to depart from the literal interpretation and to read s. 17(7) as referable to a person to whom the Minister advised "failed or" refused to give a declaration, failure in that sense being referable to a withdrawal of an application not giving rise to a formal refusal, and a "declaration" being referable to a declaration as a refugee whether statutory or pre-statutory.

85. Such an interpretation conforms to the clear legislative intention as set out in s. 7 of the Immigration Act 2003. To adopt a purely literal interpretation as urged by the applicant would mean that anyone who withdrew an asylum application between 1985 (when the von Arnim letter procedure was adopted) and 2003 could now make a fresh application without the consent of the Minister. Admittedly there is no evidence that anyone apart from this applicant has sought to do so but the possibility of this occurring could reasonably be described as either an absurdity or contrary to the legislative intention or both.

86. I have had regard to the caselaw on s. 5 of the Interpretation Act 2004 including *Cosma v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 133 (McCracken J. (Kearns and Macken JJ. concurring)). Clarke J. (MacMenamin J. concurring) in *Kadri v. Governor of Wheatfield Prison* [2012] 2 I.L.R.M. 392 at para. 3.4 emphasised that the court can "*engage in construction or interpretation rather than rewriting*" and that in particular therefore that "*it not only is necessary that it be obvious that there was a mistake in the sense that a literal reading of the legislation would give rise to an absurdity or would be contrary to the obvious intention of the legislation in question, but also that the true legislative intention can be ascertained. There may well be cases where it may be obvious enough that the legislature has made a mistake but it may not be at all so easy to ascertain what the legislature might have done in the event that the mistake had not occurred"* (para. 3.6). The court cannot therefore "*use (or perhaps abuse) a section which mandates a sensible or purposive construction to, in effect, rewrite the legislation by inserting a series of detailed measures to which the Oireachtas did not address its mind"* (para. 3.10).

87. But this is not a case where extensive provisions need to be read into the statute of the type about which Clarke J. was concerned in that case.

88. Even if a purposive interpretation was not mandated by s. 5 of the 2005 Act, the fact that the provisions of s. 17 on re-application for asylum give effect to EU law in the form of art. 32 of the 2005 procedures directive is an independent reason to adopt a purposive approach, as mandated in the EU law context. Indeed, the concerns of Clarke J. in *Smith & Ors. v. Minister for Justice and Equality* [2013] IESC 4 (Unreported, Supreme Court, 1st February, 2013) at para. 5.4 regarding the orderly operation of the immigration process are equally relevant to supporting a purposive interpretation of s. 17(7).

89. It is impossible to see how the potential revival of an unquantified number of stale and antique claims for asylum could in any way be reconciled with the intention of the Oireachtas as set out in the 1996 Act as amended, most particularly by the 2003 Act. A system whereby stale claims dating from a particular eighteen year period between 1985 and 2003 can be revived at will, but withdrawn claims from 2003 to date require consent before they can be reactivated, makes no sense at any level. On a purposive interpretation, the applicant is caught by s. 17(7), as interpreted in the manner I have set out.

90. Mr. Lynn submitted that the section should not be read in a purposive manner because to do so would enlarge the field of application of s. 5 of the 2000 Act. That is not a reason for not applying s. 5 of the 2005 Act or for not applying a purposive interpretation in accordance with EU law. But even if it was, the point made is not decisive. The question is what s. 17(7) means. If s. 5 of the 2000 Act had never been enacted, that question would still exist. The only way it can be answered without fundamentally subverting the legislative intention is by interpreting the section in the manner I have outlined.

91. It needs to be emphasised again (as I did in *K.R.A. (No. 1)*) that the deployment of s. 5 of the Interpretation Act 2005 is not a cause for celebration. It is, if nothing else, an indication that a significant failure in drafting has occurred. The drafting of a statute or statutory instrument is intended to ensure and almost always does ensure that the will of the law-maker is correctly reflected in the literal meaning of the Act or instrument in question. Where s. 5 has to be deployed, there is necessarily a breakdown in the process, and I suggest it is not only appropriate but perhaps even necessary that the Oireachtas should be invited to amend any provision to which s. 5 has been applied in order to ensure that the intention and literal meaning are brought into harmony, not least to avoid any future readers who may be unaware of the case law being misled in this respect.

Issues arising in the second judicial review

The respondent's supplementary affidavit of 4th March, 2016

92. An issue arose at the hearing as to the test applied by the Minister in assessing the risk to which the applicant would be exposed if returned to Jordan. The respondent sought to file a supplementary affidavit of 4th March, 2016, sworn by Mr. Ryan and clarifying his earlier affidavit. This was objected to by Mr. Leonard in a very able submission on behalf of the applicant on a number of grounds. Firstly, it was said that this is a legal issue, not a factual issue. That is incorrect. A person's state of mind is a question of fact (*Edgington v. Fitzmaurice* (1885) 29 Ch. D. 459 per Bowen L.J. at 483). The question of what test the Minister thought she was applying is a proper subject for affidavit evidence.

93. Secondly, it was objected to on the basis that the respondents cannot "*supplement the material before the decision maker*". Firstly, I would not accept the suggestion that the material before the decision maker can never be supplemented. For example, in the context of inadequate reasons, the courts have received further material in the course of judicial review (see my decision in *RPS Consulting Engineers v. Kildare Co. Council* [2016] IEHC 113 at para. 110, citing *English v. Emery Reimbold & Strick Ltd*. [2002] EWCA Civ 605). But more fundamentally, this issue is not one of what material is before the decision maker. It is one of whether the Minister applied the incorrect test as alleged. Mr. Ryan's evidence is relevant to that issue.

94. Thirdly, it is alleged that Mr. Ryan's affidavit is hearsay because he was not the "*final decision maker*". Mr. Noel Waters is stated by the applicant to have been the final decision maker, and Mr. Ryan's contribution is characterised as being one of merely making a recommendation to a higher official.

95. In my view, the affidavit is not hearsay. Mr. Ryan was part of the decision making process. If I am wrong about that, I consider that the applicant is estopped from objecting to any hearsay, because he did not object to the original affidavit of Mr. Ryan on hearsay grounds, and only Mr. Ryan can properly clarify what he meant in his earlier affidavit.

96. I therefore allowed the respondents to file the supplemental affidavit.

Should the applicant have challenged the proposal to deport?
97. Mr. Power submits that the proposal to deport (otherwise referred to as the s. 3 letter) could have been challenged and was not challenged, and that this failure limits the scope of arguments that the applicant can now make on the deportation issue.

98. However, I previously held in *Leng v. Minister for Justice and Equality* [2015] IEHC 681 (Unreported, High Court, 6th November, 2015) that it was generally not appropriate to seek judicial review of a mere proposal to deport, although that could be done if the proposal is made without jurisdiction. Alternative remedies are crucial in judicial review, even at the leave stage (see *G. v. D.P.P.* [1994] I.R. 374 at 378). There is an alternative and much more satisfactory remedy in respect of any infirmity in such a letter, namely to make submissions to the Minister. To that extent, the applicant's legal advisers are to be commended for not launching a challenge to the s. 3 letter (even if they could have done by reference to the alleged jurisdictional defect). The applicant is not in any way to be curtailed in the challenge to the deportation order by reason of having not challenged the proposal to deport, even if that challenge is one based on a lack of jurisdiction.

Was the deportation order made without jurisdiction?
99. Mr. Friedman submits that the deportation order was made without jurisdiction because the applicant had a valid asylum claim pending, and therefore had a right to remain by virtue of s. 9 of the 1996 Act. As I have determined above that there was no valid asylum claim pending, this challenge to the deportation order fails.

Is the deportation order invalid because the Minister failed to take due account of the allegation that section 17(7) did not apply?
100. For similar reasons, the challenge that the deportation order is invalid because the Minister failed to take into account what are alleged to be relevant considerations insofar as those included the proposition that s. 17(7) did not apply is also lacking in substance. That proposition is a false premise because s. 17(7) did apply to the application. Accordingly there was no invalidity in the Minister's failing to have regard to it, if she did so fail.

Is the deportation order invalid by reason of a failure to take due account of the grant of leave in the first judicial review?
101. The applicant contends that the grant of leave in the first set of judicial review proceedings was a relevant factor to which the Minister failed to have due regard, and that the deportation order is invalid as a result.

102. This would give an almost magical effect to orders granting leave. A development such as this is not remotely in the ballpark of relevant factors to which the Minister is obliged to have regard, still less the more limited category of essential items, failure to consider which could go to the question of validity. The original decision stood at all material times. The order granting leave did not constitute a development to which the Minister could meaningfully have had regard in any event. At most it opened up the possibility that at some future point that original decision could be reviewed, but that contingency was not a consideration which the Minister was legally obliged to have regard to in deciding to make a deportation order.

103. The applicant submits (in supplementary submissions) that the Minister "*must take into account all relevant considerations. Otherwise the resulting decision is invalid*". This is a significant oversimplification of the legal position. The Minister must take into account all considerations that she is legally required to take into account. That is a considerably narrower category of matters than the category of all considerations that the applicant thinks are relevant. The grant of leave is not a consideration that she is obliged to consider. To fail to have regard to the grant of leave is not a disregard of the rule of law as effectively suggested by the applicant (supplemental submissions para. 25). As Lord Bingham put it in *R. (Corner House Research) v. Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 A.C. 756 at para. 40, "*A discretionary decision is not … vitiated by a failure to take into account a consideration which the decision-maker is not obliged by the law or the facts to take into account, even if he may properly do so*".

Did the applicant have a right to remain by virtue of having made a purported asylum application?
104. It is submitted that a right to remain arises under s. 8 of the Act by the making of a purported application, whether or not it is legally valid. It is true that the applicant made a purported asylum application under s. 8 of the 1996 Act, which the Minister refused to accept as being valid. The right to remain in the State under s. 9(2) only applies to a person who has been given leave under s. 8(1) or a "*person referred to in s. 8(1)(iii)*". This means a person who has made a lawful and valid application for asylum, not merely a purported application. In the case of a second or subsequent application, this means an application with the Minister's consent. The applicant's argument would amount to saying that by making a misconceived and invalid application which reported to be under s. 8, an applicant could by a boot-strapping process create an immunity from deportation. This is a flawed and incorrect proposition. Only a valid application confers a right to remain.

Did the Minister wrongly fail to take into account the fact that the withdrawal of the asylum claim was in the context of the residency application?
105. It is submitted that the deportation order is invalid because the Minister placed reliance on the fact that the asylum claim had been withdrawn, but in doing so failed to take into account the fact that that withdrawal was in the context of a claim for residency based on an Irish-born child.

106. However this again confuses a lack of narrative discussion with the failure to take matters into account. While it is perhaps true that the Minister did not put the matter in the light most favourable to the applicant, she was under no obligation to do so. It was her duty and indeed responsibility to form a view as to what factors could be taken into account in determining the level of risk posed to the applicant if returned to Jordan. To decide to take into account the withdrawal of the asylum claim was well within her discretion and well within the range of decisions that it would have been reasonable for her to make. The decisions indicate extensive consideration of the history of the applicant in the State, including the withdrawal of the claim and the grant of residency.

107. In *D.D.A. (Nigeria) v. Minister for Justice and Equality* [2012] IEHC 308 (Unreported, High Court, Cooke J., 18th July, 2012) at paras. 13 to 14, the point was made that the grant of leave to remain does not render a refugee claim devoid of purpose. The applicant had been under no obligation to withdraw his asylum claim, and if it had been well-founded, it would have given him more

extensive rights than those available following residency. The fact that he nonetheless withdrew the claim is therefore a legitimate matter for the Minister to have taken into account, and her doing so was not unreasonable either in the legal sense so as to warrant a quashing of the deportation order or indeed at all.

Is the finding of a lack of past ill-treatment flawed by reason of a disregard of the SPIRASI report?
108. Mr. Friedman maintained that the deportation order was invalid by reason of the Minister having disregarded the findings of the report from the SPIRASI organisation or, as it was elliptically put in oral submissions, *"in failing to express them in definite terms in circumstances where they were expressed in probable terms and were part of a complex of mutually corroborating medical findings"*. It seems that this is intended to suggest that the report should not be criticised for not being more definite. It is also suggested that for example, because the applicant was uncomfortable about an intimate examination, or even about discussion of such an examination, this corroborated his story of past torture.

109. It was also alleged that the deportation order was invalid because there was no narrative discussion of certain elements of the claim. Taking this point first, there is no obligation on the Minister to engage in a narrative discussion in general. Narrative discussion is not to be equated with taking matters into consideration. The Minister clearly did take the SPIRASI report into consideration. She may not have discussed it in a way that suited the applicant, but one cannot transfer the dynamic of shaping a decision from the statutory decision-maker to the applicant or indeed to the court itself. There is no substance to the contention that the Minister was obliged to engage in any particular narrative discussion, or that the discussion she did engage in was in some way flawed because it did not run along the lines proposed by the applicant.

110. As regards the claim that the Minister disregarded the report or failed to express it in terms favourable to the applicant, it is important to recall the statement of Birmingham J. in *M.E. v. Minister for Justice Equality and Law Reform* (Unreported, High Court, 27th June, 2008) para. 27: *"The assessment of whether a particular piece of evidence is of probate value, or the extent to which it is of probate value, is quintessentially a matter for the Tribunal member"*, and *mutatis mutandis* for any decision-maker.

111. I was presented by Mr. Friedman, by way of job-lot, with a list of High Court decisions, where relief had been granted to an applicant in the context of a favourable SPIRASI report. But merely listing cases does not amount to establishing a proposition of law. The fact that other applicants obtained relief on the basis of a failure to agree with SPIRASI reports does not establish any principle that a decision which does not accept such a report must be unreasonable. To even remotely go down that road would be to abdicate the function of the court and the Minister in favour of a private organisation.

112. A closer examination of some of these decisions (*Khazadi v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Gilligan J. 19th April, 2007); *T.M.A.A. v. Refugee Appeals Tribunal* [2009] IEHC 23 (Unreported, High Court, Cooke J., 15th January, 2009); *R.M.K. (D.R.C.) v. Refugee Appeals Tribuna*l [2010] IEHC 367 (Unreported, High Court, Clarke J., 28th September, 2010); *A.M.N. v. Refugee Appeals Tribunal* [2012] IEHC 393 (Unreported, High Court, McDermott J., 3rd August, 2012); *M.M. v. RAT* [2015] IEHC 158 (Unreported, High Court, Faherty J., 10th March, 2015); *I.M. (Niger) v. Minister for Justice Equality* [2015] IEHC 826 (Unreported, High Court, Eager J., 17th December, 2015)) will show that relief was granted on a variety of grounds including irrationality and failure to give reasons, in a wide variety of circumstances. They do not establish any general principle that avails the present applicant. No invalidity in the Minister's assessment of the SPIRASI report has been demonstrated.

113. The report was prepared in July, 2015, some two decades after he left Jordan in 1995. His asylum claim did not outline any ill-treatment or torture in Jordan. No basis for suggesting that the Minister failed to understand the report, or improperly disregarded it, has been made out. The Minister considered the report but in effect did not find that it sufficiently supported the applicant's case. That finding was within the range of decisions reasonably open to her.

Did the Minister wrongly fail to state the correct standard of proof regarding future ill-treatment?
114. Mr. Leonard submitted that in *B.M. (Eritrea) v. Minister for Justice and Equality* [2014] 2 I.L.R.M. 519 (McDermott J.) at para. 40, failure to expressly state the correct test in the decision was viewed with concern.

115. Of course it is preferable if any appropriate legal tests are stated correctly and in full in the analysis underlying any particular decision. But again this is a matter of substance versus form. As long as the test was in substance correctly considered, any infelicity in the wording, or failure to state the test expressly, is not fatal. I consider below the separate question of whether the correct test was in fact considered.

116. Mr. Leonard submits that the decision is flawed because while the Minister contends that the applicant failed to make out a *prima facie* case of risk of ill-treatment warranting an onus on the State to discharge it, the complaint of failure to make out a *prima facie* case is not set out in the impugned decision. Again this complaint is essentially one of the drafting and form of the decision rather than its substance. It is not for the applicant to seek to recast the decision in a manner determined by him.

117. Nor is it for the applicant to seek to reprogramme a decision in order to put the most favourable construction on it from his point of view. For example, Mr. Leonard submits that the references in the decision to operational and structural shortcomings, a functioning police force and the availability of state protection imply that there is a risk of detention of the applicant. This submission is unsustainable. No such implication can be read into the minister's decision.

Did the Minister fail to apply the correct standard of proof regarding future ill-treatment?
118. It is alleged that the Minister failed to apply the correct standard of proof as to the level of risk to the applicant that would be involved in his return to Jordan (contrary to s. 5 of the 1996 Act, s. 4 of the Criminal Justice (United Nations Convention Against Torture Act) 2000 and s. 3 of the European Convention on Human Rights Act 2003).

119. However, in the light of the evidence of Mr. Ryan, and in particular his supplemental affidavit, it is clear that this challenge is without substance. The test applied by the Minister, as set out in Mr. Ryan's affidavit, is that urged on me by the applicant as being the correct one.

120. The fact that the precise wording of the test applied does not appear on the face of the "considerations" document is, as I have said, completely irrelevant. The crucial question is whether the Minister satisfied herself that a risk of *refoulement* did not arise, and whether that conclusion was arrived at by a lawful process on the basis of the correct test. On the basis of the uncontradicted evidence of Mr. Ryan, I find that it was.

121. Mr. Friedman repeatedly emphasised that the correct test was forward looking, and as he elliptically put it "*dangerousness is not a basis to disapply protection*" by which I gather he meant that the fact that a person may be viewed as a danger to the public interest does not diminish his or her entitlement to protection against ill-treatment.

122. There is no dispute about these propositions and the Minister's reasoning does not take issue with them. It cannot therefore be challenged on the basis that its states the wrong test in that respect.

123. In *Saadi v. Italy* (Application no. 37201/06) (2009) 48 E.H.R.R. 730, the Grand Chamber of the European Court of Human Rights rejected the argument that where a threat to national security existed, stronger evidence had to be adduced regarding a risk of ill-treatment (para. 140). The U.K. submitted that in such a situation, a risk of ill-treatment should only be found where it was "*more likely than not*". However, the European Court of Human Rights upheld the established test that "*substantial grounds…have been shown for believing that there is a real risk*" of treatment contrary to art. 3.

124. One can detect in the submission of the U.K. Government a certain anxiety about the difficulties faced by it as a result of judgments of the Strasbourg court in the sensitive area. By contrast with other major national or regional courts, such as the U.S. Supreme Court or the Court of Justice of the EU, there are no legislative checks and balances to moderate the effect of any particular Strasbourg decision. To that extent, the European Court of Human Rights must have one of the highest ratios of power to accountability of any major judicial organ. The parliamentary assembly of the Council of Europe is an essentially advisory body. Theoretically, the member states could amend the Convention to recalibrate and limit substantive rights, but this has never been done. The only amendments have been to extend the list of rights protected, and to deal with procedural matters. Perhaps the Council of Ministers when carrying out the function of supervising the execution of a judgment could set the bar relatively low in terms of what was felt to be required, although there seems to be little evidence of this happening.

125. Of course, many Strasbourg decisions do leave some room for manoeuvre to national parliaments and governments, such as where it is decided that a particular measure has a legitimate aim but lacks the clarity and certainty required to enable any impact upon rights thereby affected to be regarded as being "*prescribed by law*" in the Strasbourg sense. But where the court is dealing with a matter where such checks and balances are absent, one might hope that a finding of a violation would arise only where the breach was clearly established. And indeed it is clear from the Strasbourg case law that the court does apply a rigorous and careful approach before concluding that deporting an individual would be a violation of art. 3.

126. Article 3 was considered by the Supreme Court in the extradition context in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783. In that case, Fennelly J. said at p. 817, para. 80, that the burden rested upon the individual claiming a risk to show that there were substantial grounds to show a real risk of a breach of art. 3 (citing *Saadi and Soering v. United Kingdom* (Application no. 14038/88) (1989) 11 E.H.R.R. 439). Fennelly J. said that the relevant time to consider conditions in the requesting State was at the time of the hearing in the High Court (relying on *Saadi,* para. 133). In the deportation context, however, the distinction must be noted that whereas the High Court in extradition or European arrest warrant contexts forms its own view as the level of risk, that is not so in a deportation judicial review. The relevant time to consider conditions in the State to which a person is proposed to be deported is therefore, it seems to me, at the time of the consideration of the matter by the Minister.

127. The onus is on the applicant in the first instance to adduce evidence to show a real risk (*Saadi,* para. 129). If he succeeds in doing so then it is for the government to dispel that risk. It is clear from the Strasbourg case law that the evidence must normally show a connection between the country of origin information and the applicant's personal circumstances, save where the applicant is a member of a group that is exposed to systematic ill-treatment.

128. There is nothing to support the proposition that the Jordanian authorities currently know anything at all about this applicant. There is a fundamental evidential gap at the heart of the application. There is no evidence to show any risk personal to him.

129. In this regard it is also relevant that the applicant has put only very limited information before the Minister or indeed the court. There are many aspects of detail of the claim of torture that could legitimately have been expected to be put before the Minister, which were not. Even in terms of material before the court, the applicant's affidavit is relatively skeletal if not threadbare. In his grounding affidavit of 17th September, 2015 at para. 58 he says: *"I am deeply afraid of facing persecution, including torture, if I am returned to Jordan"*. The detailed basis for this is not set out.

130. It is clear that the decision-maker must consider both the general situation in the country concerned and the personal circumstances of the applicant (*Saadi,* para. 130). The mere possibility of ill-treatment on the grounds of an unsettled situation does not give rise to a breach of art. 3 (see *Saadi,* para. 131; *Vilvarajah v. United Kingdom* (Application nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87) (1992) 14 E.H.R.R. 248 at para. 111; *Fatgan Katani v. Germany* (Application No. 67679/01, European Court of Human Rights, 31st May, 2001)).

131. Where sources describe a general situation, the applicant's specific allegations require corroboration by other evidence (see *Mamatkulov v. Turkey* (Application nos. 46827/99 and 46951/99) (2005) 41 E.H.R.R. 25 at para. 73; *Müslim v. Turkey* (Application no. 53566/99) (2006) 42 E.H.R.R. 16 at para. 68).

132. There is no evidence that the applicant is known to the Jordanian authorities. The applicant's contention that the Minister would have made the Jordanians specifically aware of him in this context is totally speculative and highly unlikely. Furthermore the applicant has not established that returned failed asylum seekers, as opposed to those accused of criminality as such, are ill-treated. A mere possibility of ill-treatment is insufficient; not least because a mere possibility cannot be disproved. The necessary corroboration has not been demonstrated.

Did the Minister fail to have regard to the general situation in the country to which the applicant was to be deported?

133. Mr. Friedman submits that country of origin information supports the possibility of torture in Jordan, and he makes reference to material submitted with the applicant's submission of 15th April, 2015.

134. Of course the question to be applied by the court is not whether there was any country of origin information supportive of the applicant's position. It is whether the applicant has discharged the onus of proof to show that there was a risk of ill-treatment such that the decision made fell outside the range of decisions that were reasonably open to the Minister. This has not been established. The fact that some country of origin information was supportive of the applicant is insufficient if the Minister had other information which could have reasonably and lawfully led to a different conclusion, as I find was the case here. Country of origin reports on Jordan provide a mixed bag of concerns together with evidence of progress towards dealing with human rights issues. Progress in addressing such concerns is a matter which the Strasbourg court has had regard in assessing art. 3 claims: see e.g. *F.H. v Sweden* (Application no. 32621/06, European Court of Human Rights, 20th January, 2009) at para. 91. How best to assess these matters is a matter for the Minister and nothing has been put forward to demonstrate that her attempt to do so failed to utilise the correct test or was unreasonable. The applicant's suggestion in supplemental submissions that a host of international bodies (listed without any real particulars being given) have made damning findings against Jordan, and any view of the Minister to the contrary is perverse, unfortunately does not hold water. Jordan is very far from the international pariah that the applicant would have the court believe;

the material before the Minister showed concerns but also positive points. How these are to be weighed is a matter, subject to law, for her.

Did the Minister wrongly fail to consider personal factors demonstrated by the applicant as creating a likelihood of future ill-treatment?
135. Mr. Leonard submits that the applicant has pointed to two personal factors which the Minister has failed to have due regard to, namely the allegation of Islamist involvement itself and the detention of his sons.

136. In response to the point that the applicant has failed to demonstrate that he is known to the Jordanian authorities at the present time, Mr. Leonard submits that *"the applicant cannot know of bilateral discussions"* and that *"it is highly likely that the Irish authorities could tell the Jordanian authorities of his alleged activities"*. Again this is pure speculation by counsel. If the applicant wanted to know what the Jordanians had been told about him, for the purposes of these proceedings, there are established mechanisms to have enabled that issue to be explored. None of these were availed of. In any event it seems to me extremely unlikely that the Irish authorities would have volunteered information about the applicant's alleged involvement in Islamism to the Jordanians. To do so would be counterproductive in terms of both coming to an agreement to repatriate the applicant and indeed avoiding any ill-treatment being visited upon the applicant.

137. A claim of risk of ill-treatment cannot be "*purely speculative*" (*Ramzy v. the Netherlands* (Application no. 25434/05, European Court of Human Rights, 27th May, 2008). This applicant was found by the Minister not in fact to be in fear of the Jordanian authorities, having for example interacted with them for the purpose of applying for a passport on two occasions.

138. As regards the suggestion that one of the applicant's sons was threatened with ill-treatment Mr. Leonard relies on *Gäfgen v. Germany* (Application no. 22978/05, European Court of Human Rights, 1st June, 2010), which establishes that the threat of inhuman treatment can itself amount to inhuman treatment in particular circumstances. That may well be so (and of course a mere threat does not necessarily amount to ill-treatment depending on the circumstances) but there is still an onus on the applicant to show a real risk of ill-treatment of himself personally, or likely to arise by membership of a group systematically ill-treated. The Minister did not consider that the applicant had done so, and it has not been shown that that finding was unreasonable or unlawful, the onus being on the applicant in judicial review proceedings to so demonstrate.

139. These points are conflated in supplemental submissions with the statement that *"The Applicant's known status as a suspect in Jordan is proven, at the very least, by the uncontested evidence that his sons have been detained in recent times".* But that is not the case. In the Minister's view, which has not been shown to be unreasonable, the applicant does not have a known status in Jordan as a suspect. And the detention of his sons does not logically prove that he does.

Did the Minister wrongly fail to consider the personal risk to the applicant arising from the fact of an allegation of extremism having been made?
140. The applicant in submissions states that, given the allegations made against him contained in the "s. 3 letter", he is a person within a category of individuals that were at real risk, namely Islamists or Islamist suspects.

141. Insofar as this issue was raised by the applicant in his submissions to the Minister, it is clear that those submissions were considered. He cannot complain that his submissions were not taken into account, and indeed they are referred to in the Minister's analysis from p. 16 onwards.

142. Mr. Friedman on behalf of the applicant was quite reluctant to admit any conceptual difference between a failure to take something into account and unreasonably consideration of that issue, and at times sought to use the two phrases interchangeably. But there is a distinction. Failure to take a matter into account involves a finding by the court that at a basic level, the Minister failed to apply her mind in any way to a truly essential matter. Insofar as there is a claim that the Minister failed to consider any matters raised in submissions, this claim fails because the Minister states that she considered the submissions and there is nothing to displace that very clear statement. A claim that submissions were not considered, where the decision states that they were, requires an applicant to discharge an onus to displace the decision-maker's statement, which the applicant has failed to do.

143. By contrast, an unreasonable decision is one where the Minister has taken into account relevant matters but drawn a conclusion from them that could not be supported and could not fall within the range of reasonable decisions that were open to her on that material.

144. It is clear that a particular error in terms of the reasoning process that arises under these headings must be primarily one or the other, that is, either a failure to take something into account or drawing an unreasonable conclusion from it. Mr. Friedman appeared to believe that it improved his case to describe precisely the same aspect of the Minister's reasoning as simultaneously contravening both requirements. It does not; to do so adds only conceptual confusion.

145. In this case there was no failure to take the submissions into account. They are referred to by the Minister (see *G.K. v. Minister for Justice* [2002] 2 I.R. 418 and my decision in *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 (Unreported, High Court, 15th February, 2016)).

Did the Minister wrongly fail to consider a risk arising from the applicant's membership of a group systematically exposed to ill-treatment?
146. Mr. Leonard relies on para. 132 of *Saadi* which he says establishes that a risk arising from personal circumstances is not required where an applicant is a member of a group that is systematically exposed to ill-treatment. When asked what group the applicant is a member of, he submitted that it was "*persons suspected of Islamic extremism*". He says that any group may qualify for the purposes of this test, even a group that would not be protected under the Refugee Convention. The notion of vulnerable groups is also referred to in *Rettinger* at para. 16 (vii), p. 791 and at para. 30, p. 800.

147. Closely related to this argument is Mr. Leonard's submission that under s. 4 (2) of the Criminal Justice (United Nations Convention against Torture) Act 2000, the Minister must take into account a consistent pattern of gross, flagrant and mass violations of rights.

148. Despite having given the applicant every opportunity to amend his statement of grounds, including in the course of the hearing itself, the allegation that the decision is invalid because of a failure to consider a risk attaching to the applicant by reason of his membership of a definite group which is systematically exposed to ill-treatment is not specifically pleaded. This seems to me to be a somewhat different allegation to that pleaded at ground (v)(g), which is a risk arising from the security allegations themselves.

149. No application to amend the statement of grounds was made, despite there having been a pleading objection to Mr. Leonard

making this point.

150. Even assuming (without deciding) in ease of the applicant that this complaint is properly before the Court, this does not appear to be a case that the applicant made in his initial submissions to the Minister, and he is in a weak position in seeking to challenge the Minister's decision on judicial review on the basis of failure to deal with an argument that at best was advanced as an afterthought, at least in the case of an argument of this kind.

151. If the matter can be argued and if applicant is entitled to make this case "despite it being subsidiary at best in his submissions" to the Minister, which I do not accept (a case which in any event only made its first appearance in the case in the course of Mr. Leonard's reply) I do not consider that this objection has been made out.

152. It is clear that for a decision-maker to find for an applicant under this heading, the applicant must "*establi[sh] that there are serious reasons to believe the existence of that practice [of ill-treatment of a group] and his or her membership of the group concerned" (Abdolkhani v. Turkey* (Application no. 30471/08, European Court of Human Rights, 22nd September, 2009) at para. 75). If persons suspected of Islamic extremism are currently systematically subjected to ill-treatment by Jordan, that needs to be established before this doctrine can apply. That proposition was accepted by the Strasbourg court in 2012 (*Othman v. United Kingdom* (Application no. 8139/09) (2012) 55 E.H.R.R. 1 para. 192) but a finding in a particular case does not hold good for all time. But even assuming for the sake of argument, in ease of the applicant, that suspected extremists are systematically ill-treated at the present time in Jordan, it has not been established that the applicant would be perceived as falling into that group in the absence of some basis for concluding that his alleged extremism is known to the Jordanians. The applicant's situation is distinct from that of for example the applicant in *A. v. The Netherlands* (Application no. 4900/06, European Court of Human Rights, 20th July, 2010), where the applicant's identity as a suspected extremist was well known. *Ramzy v. the Netherlands* (Application no. 25424/05, European Court of Human Rights, 27th May, 2008) provides little support for the applicant in that the question of whether the applicant was in fact known to the Algerian authorities was not substantively determined. The factual foundation for the applicant to rely on cases such as *Daoudi v. France* (Application no. 19576/08, European Court of Human Rights, 3rd December, 2012) simply has not been established. As distinct from cases such as *Nabid Abdullayev v Russia* (Application no. 8474/14, European Court of Human Rights, 15th October, 2015) and indeed *Othman*, the applicant has not been charged with any offence.

Is the Minister's decision on the risk of ill-treatment unreasonable?

153. In *Othman*, the European Court of Human Rights held that the deportation of the applicant Mr. Othman (otherwise known as Abu Qatada) to Jordan would not be a breach of art. 3, but would be a breach of art. 6 of the ECHR because of the use of certain evidence at his proposed trial. It appears that, but for a memorandum of understanding between the U.K. and Jordanian governments, there would have been real risk of ill-treatment of the applicant (paras. 1.9.1 to 1.9.3). The proposed deportation of the applicant was supported by a memorandum of understanding signed on 10th August, 2015 setting out a series of assurances (see para. 23).

154. Mr. Friedman submitted that a need for a memorandum of understanding arose *"where reputable country of origin information or reputable bodies indicated that there was a systematic problem of torture"* (relying on *Chahal v. U.K.* (Application no. 22414/93) (1997) 23 E.H.R.R. 413; *Mamatkulov and Askarov v. Turkey* (Application nos. 46827/99 and 4695/99) (2005) 41 E.H.R.R. 25). Reliance can be placed on assurances, it is submitted, but the weight of those assurances depends on the circumstances. In the *Othman* case, the U.K. government did not contest the thrust of material submitted adverse to Jordan's human rights record (para. 32). The applicant relies on *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, *Kennedy v. Information Commissioner* [2014] 2 W.L.R. 808; and *Pham v. Secretary of State for Home Department* [2015] 1 W.L.R. 1591.

155. One phrase which bobbed up repetitively in Mr. Friedman's interesting submission on this matter was that "*the writing is on the wall*" for the Government in the present case. The logic of that proposition, which was never fully spelled out, appeared to be that the applicant considers that this is a case he cannot lose, because Mr. Othman found himself in a position in 2012 where the Strasbourg court considered that there was a real risk of ill-treatment in the absence of specific assurances which do not exist in this case. The fact that I am being impliedly told of the applicant's belief that he is going to succeed in Strasbourg suggests to me that Mr. Friedman thinks that this anticipated victory should be a feature of my own consideration of this matter.

156. However there are a number of difficulties with such an approach. First of all what happens ultimately in any other forum is not a matter that I can really be concerned with. Secondly, it is agreed between the parties that my function is not to form my own view on the level of risk to the applicant if any or whether it would require specific assurances. My role and function is to determine whether a Minister's assessment of that issue was unlawful. Further, and most importantly, Mr. Othman was in a completely different category to the applicant and potentially at a much greater risk than the applicant. The fact that he was ultimately acquitted in Jordan can only provide significant support for the Minister's decision.

157. Furthermore, as far as the "*writing is on the wall*" argument goes, the Jordanian country of origin information considered in *Othman* dated from 2005 to 2010 (see (2012) 55 E.H.R.R. 1 at pp. 34 to 41, paras. 106 to 124). The fact that a particular conclusion as to the need for assurances was arrived at for a very high-profile Islamist suspect on the basis of information that is now up to eleven years out of date does not provide any guarantee that this particular applicant is also going to benefit from a similar finding.

158. The conclusions to be drawn from material that is legitimately before the decision-maker are a matter for the decision maker to assess. For example insofar as the Minister relied on the outcome of the Abu Qatada proceedings, which resulted in the defendant's acquittal by the Jordanian legal system, Mr. Friedman was dismissive of that case as demonstrating that the rule of law was alive and well in Jordan. He said that the end result of the case, where a notorious Islamist suspect was freed, was only "*one aspect of the Abu Qatada case*".

159. That may be the applicant's analysis, but is it not for the applicant to reprogramme the Minister's decision or dictate to her what view she must take of the relevant material. It was clearly open to the Minister to take considerable comfort from the Abu Qatada case as it showed the capacity of the Jordanian legal system to deal fairly even with very high profile Islamist suspects.

160. Mr. Friedman suggested that Mr. Qatada was only acquitted because he was a high-profile individual, the eyes of the world being upon him. He suggested that a more low-profile suspect such as the present applicant might not be treated as fairly. This is of course a "heads I win, tails you lose" argument. If Mr. Qatada had been convicted, I have little doubt that Mr. Friedman's argument would have been as to how this irrefutably demonstrated the irremediable shortcomings of the Jordanian system. In my view it was clearly within the range of reasonable decisions open to the Minister to regard that case as supportive of the proposition that the rule of law prevails in Jordan. In any event the present applicant is in a much better position than Mr. Qatada because he has not been charged with anything. He is proposed to be returned to Jordan as a free man, with family living in the country, and without any evidence that a cloud of suspicion will accompany him.

161. The Minister's conclusion was that despite "*operational and structural shortcomings*" there was a "*functioning police force and judicial system*". Mr. Friedman's submits by contrast that "*no sensible reputable analysis of Jordan would say that detention in Jordan is safe*". That may be the applicant's analysis but he has no legal right to have it adopted by the court unless the Minister's view is clearly unreasonable, which it is not.

162. Mr. Power submits, and I accept, that much of the applicant's argument in relation to s. 3 is "*a headings issue*" in relation to the format of the Minister's decision. As Mr. Power correctly submits, "*we have to look at the substance*".

163. Looking at the Minister's decision as a whole it is clear that there were a number of separate and mutually-reinforcing reasons for the Minister concluding that the deportation of the applicant to Jordan would not expose him to a real risk of ill-treatment contrary to art. 3.

164. The reasons appearing from the decision which support the Minister's conclusions are, as follows:

(i) The applicant's family members have travelled back and forth between Jordan and Ireland;

(ii) The applicant's family are currently in Jordan (albeit that his son claims difficulties with the regime);

(iii) Contradictory information was provided as to these travel arrangements. It was said that his wife went to Jordan to be with her son A. in August, 2013. However, it is also said that A. died in April, 2013;

(iv) Mr. Abu Qatada was acquitted at his trial, an important development which demonstrates that the Jordanian legal system is capable of providing justice for Islamist suspects;

(v) The applicant's asylum application gave the impression that he came "*more or less directly*" to Ireland. Question 63 of the Questionnaire stated that the date of leaving his home country was 17th February, 2000. This was not true;

(vi) The applicant stated on his asylum questionnaire that he had been through Oman. This information was not given in the account of his movements which he gave to SPIRASI. His counsel suggested that perhaps Oman was a misprint for Amman. This is absolute speculation by counsel without any evidential foundation. If the applicant had made the case of a mistranslation on affidavit that might be one thing but he did not do so;

(vii) The claim of torture "*uses vague language*". That was a reasonable and indeed perfectly valid conclusion;

(viii) The applicant failed to obtain or seek to obtain supporting documentation from the International Committee for the Red Cross despite a claim that his son was similarly treated and despite visiting the Red Cross premises;

(ix) There is no reference to torture or ill-treatment in the asylum Questionnaire;

(x) The SPIRASI report was supportive of the view that the applicant's cardiac difficulties were multi-factorial;

(xi) The SPIRASI report did not entirely rule out the possibility of other causes for the applicant's medical difficulties;

(xii) In dealing with SPIRASI, the applicant failed to recall the cause of a scar to his left arm;

(xiii) The applicant withdrew his asylum application. This was a voluntary act which he was under no obligation to do;

(xiv) The applicant, having withdrawn his application, did not seek to re-enter the asylum process for a period of fifteen years;

(xv) The applicant gave no account of his activities in the five-year period between leaving Jordan and coming to Ireland;

(xvi) The applicant claimed that the Palestinians in Jordan were excluded from protection, but he holds Jordanian citizenship;

(xvii) The applicant obtained a Jordanian passport in 2009 after the alleged torture;

(xviii) The applicant renewed his Jordanian passport in 2014; and

(xix) There is a functioning police force and judicial system in Jordan.

165. What is of significant importance is that very few of these findings are specifically challenged as unreasonable or unlawful. The analysis of the SPIRASI report is so challenged, but very few of the other grounds of the Minister's decision are specifically attacked in the statement of grounds. It seems to me that the decision is entirely justified by the unchallenged grounds, even if any basis of challenge were made out on the issues pleaded by the applicant, which is not the case. On the basis of the foregoing nineteen matters it appears to me that the Minister's decision in this case is reasonable and lawful.

166. It appears to me that the present applicant falls firmly within the category of claimant under art. 3 of the ECHR who has failed to make out substantial grounds for believing that his deportation would result in a real risk of ill-treatment, whether by reason of lack of credibility, or a failure to show that the applicant was of special interest to the authorities (*Nnyanzi v U.K.* (Application no. 21878/06, European Court of Human Rights, 8th April, 2008)), or where the applicant has so failed in the context of positive features in the situation within Jordan, or the other factors considered by the Minister: *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).

Summary of principles discussed

167. Before concluding I will endeavour to summarise the main principles discussed in this judgment as follows:

(i) withdrawal of an asylum claim prior to the amendment to s. 11(9) of the 1996 Act effected by the Immigration Act 2003 required acceptance or agreement to the withdrawal by or on behalf of the Minister;

(ii) section 5 of the Illegal Immigrants (Trafficking) Act 2000 applies to any proceedings which in substance have the effect that a decision to which that section applies is invalid, even if the proceedings do not seek *certiorari*; even if the decision which is indirectly challenged was one which an applicant sought on a "without prejudice" basis; and even if the applicant subsequently contends that the decision concerned is one made without a legal basis;

(iii) while asylum claims are nominally made to the Minister, the Refugee Applications Commissioner in substance processes an asylum claim and is a necessary respondent to any claim alleging a failure in such processing;

(iv) where proceedings in substance attack the validity of a decision to which s. 5 of the 2000 Act applies, the application should expressly seek *certiorari* rather than disguise the effect of the relief sought by merely seeking declaratory relief or *mandamus*;

(v) Section 17(7) of the Refugee Act 1996, interpreted purposively and in the light of s. 5 of the Interpretation Act 2005 and EU law, requires ministerial consent for an asylum re-application by a person to whom the Minister has refused or failed to give a declaration; such failure being referable to a withdrawal of an application not giving rise to a formal refusal, and a "declaration" being referable to a declaration as a refugee whether statutory or pre-statutory;

(vi) An official who is part of the decision-making process is entitled to swear an affidavit as to the fact of the state of the Minister's mind in the course of considering an application;

(vii) An applicant is not curtailed in a challenge to a deportation order by reason of not having challenged a proposal to deport that applicant; even if it is ultimately alleged in the proceedings that the proposal was without jurisdiction;

(viii) A decision is not invalidated by a failure to take into account a matter which the decision maker is not obliged by the law or the facts to take into account, even if he or she may do so on a discretionary basis; such factors include, in the absence of a stay, the grant of leave to challenge an earlier step of the process;

(ix) A right to remain in the State following the making of an asylum claim only arises if the asylum claim is valid, and in particular in the case of a second or subsequent claim, only if it has the Minister's prior consent;

(x) The Minster is not obliged to put matters in the light most favourable to the applicant; it was within her discretion to take account of the withdrawal of the asylum claim;

(xi) The Minister is not obliged to narratively consider matters in a way favourable to an applicant; the weight to be attached to evidence is quintessentially a matter for the decision maker;

(xii) The finding to the effect that the SPIRASI report did not sufficiently support the applicant's case was within the range of findings reasonably open to the Minister;

(xiii) A failure by a decision-maker to state the appropriate legal test expressly, or infelicity in its statement, is not fatal to a decision as long as the correct test was in substance correctly considered;

(xiv) In the present case, the Minister did not fail to apply to the correct legal test in assessing a risk of a breach of art. 3 of the ECHR;

(xv) The Minister's assessment of country of origin information regarding the general situation in Jordan, and of the applicant's personal situation, was not unreasonable or unlawful;

(xvi) A claim that submissions were not considered, where the decision states that they were, requires an applicant to discharge an onus to displace the decision-maker's statement, which the applicant has failed to do;

(xvii) Even assuming that suspected extremists are currently systematically ill-treated in Jordan contrary to art. 3 of the ECHR, the applicant has not established that he is likely to be perceived as coming within that category;

(xviii) The Minister's decision that the applicant did not face a real risk of ill-treatment in Jordan contrary to art. 3 was not unreasonable having regard to the multiple factors supporting that conclusion and set out in this judgment.

Order

168. This is not a case where a person who has experienced past torture in Jordan is being deported to face future torture. It is the case where the applicant has failed to persuade the Minister either of the veracity of his account of previous ill-treatment or of a real risk of future ill-treatment. Under those circumstances he has not demonstrated a real risk of ill-treatment arising from his personal circumstances (including but not limited to his account of past events); nor has he established that he is likely to be seen as a member of a group that is subject to systematic ill-treatment. It is primarily a matter for the Minister to weigh these matters, and she has done so. The applicant has failed to show that her decision was unreasonable, or that she failed to consider or apply the correct test, or failed to have regard to relevant matters, or that she erred in any other manner. On the facts of the present case, the applicant has failed to demonstrate any illegality in her assessment. On the contrary, multiple features of the applicant's case are supportive of the conclusion arrived at by the Minister. For the reasons set out in this judgment I will therefore make orders as follows.

169. In the first judicial review I will order:

(a) that the order pursuant to the inherent jurisdiction of the court restraining the publication of material identifying the applicant will be permanent;

(b) that the application be dismissed; and

(c) as s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies to the application, that the matter be adjourned to enable the applicant to make any consequential application, and that if he intends to make an application for leave to appeal he should furnish a draft question in writing together with supporting written submissions, within a period to be

fixed.

170. In the second judicial review I will order:

(a) that the order pursuant to the inherent jurisdiction of the court restraining the publication of material identifying the applicant will be permanent;

(b) that the application be dismissed;

(c) as s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies to the application, that the matter be adjourned to enable the applicant to make any consequential application, and that if he intends to make an application for leave to appeal he should furnish a draft question in writing together with supporting written submissions, within a period to be fixed; and

(d) that the interlocutory stay imposed by the Court of Appeal continue until the date fixed for the hearing of any application for leave to appeal, and shall then stand discharged unless continued by further order of this court.