Neutral Citation: [2017] IEHC 185

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 774 JR]

BETWEEN

Y.Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of March, 2017

1. In *Y.Y. v. Minister for Justice & Equality (No. 1)* (Unreported, High Court, 13th March 2017) I dismissed the applicant's challenge to a deportation order against him and to a decision refusing to revoke the order. The applicant now applies for leave to appeal pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act, 2000.

2. I noted in the substantive decision that the applicant had advanced no less than sixteen complex and technical grounds for the challenge, not counting sub-grounds. That pattern continues in the present application, the written submissions for which contain the record-breaking contention that there are no less than fifteen points of law of exceptional public importance arising from my decision. That submission, as with the applicant's approach to the substantive hearing, appears to seek to make up in quantity for what the applicant's case may lack in quality. As with the mammoth lists of grounds considered in *Babington v. Minister for Justice* [2012] IESC 65 and *O'Mahony Developments v. An Bord Pleanála* [2015] IEHC 757, para. 51, the idea seems to be to overwhelm the court into submission by the multiplication of legal complexity.

3. I have considered the law in relation to leave to appeal as set out in *Glancré Teo. v. An Bord Pleanála* [2006] IEHC 250 and *S.A. v. Minister for Justice & Equality (No. 2)* [2016] IEHC 646.

Whether a point of law of exceptional public importance arises

Point A

4. The applicant's first point is "*where the Refugee Appeals Tribunal determines that there is a substantial risk of serious harm to an applicant for subsidiary protection but that the applicant is otherwise excluded from subsidiary protection status, is any subsequent deportation decision subject to the provision on* refoulement *under Article 21 (1) of Council Directive 2004/83/EC*".

5. There is unfortunately no substance whatsoever to the point being made here, which, as I said in the substantive judgment, borders on the unstateable. Deportation is generally not a matter of EU law, as I discussed in S.A. v. Minister for Justice & Equality (No. 1) [2016] IEHC 462.

6. Mr. Michael Lynn S.C. for the applicant submits that this is an important issue, not decided upon by the CJEU. He also asks how the court can rely on EU legislation which is not binding on Ireland in order to determine the extent of binding obligations under EU law. The short answer is very easily, but the broader point is that taking the full series of directives into account simply reinforces the conclusion I would have arrived at any way on the words of the binding directive alone. As previously explained in the No. 1 judgment, my analysis of the directive is in line with European academic commentary as set out in Hailbronner and Thym, EU *Immigration and Asylum Law* (2nd Ed.), (München, C.H. Beck, 2016) at p. 1257.

7. The point being advanced simply fails to reach a bare minimum level of credibility which would warrant consideration being given to a reference to the CJEU or to leave to appeal. As Mr. Remy Farrell S.C. for the respondent validly puts it in oral submissions "*it is not sufficient to raise an issue with startling consequences and say, there you go, there's a point of exceptional public importance*".

8. That this was essentially the applicant's approach was underlined by Mr. Lynn's advancing the argument that the CJEU has produced surprising decisions in the past such as Case C-34/09 *Ruiz Zambrano v. Office national de l'emploi* (8th March, 2011), and that one cannot predict what might happen if this question was referred. That submission is perilously close to, perhaps functionally indistinguishable from, suggesting that Luxembourg is a bit of a lottery and that the more startling the ramifications of a point that can be dressed up in EU law terms are, the better.

9. For reasons already explained at some length in S.A. and in the No. 1 judgment, the point is bordering on, if not actually, unstateable. I would have refused leave to advance the point even on an arguability basis. In EU law terms, it is *acte clair*.

Point B

10. The applicant's second proposed question of law of exceptional public importance is: "*Where the Refugee Appeals Tribunal determines that there is a substantial risk of torture or inhuman or degrading treatment of (sic) punishment to a person if returned to their country of origin, but that person is excluded from subsidiary protection status on the basis of previous criminal convictions, is the Minister under a duty to follow the Tribunal's determination unless there is a change of circumstances in the person's country of origin of such a significant and non-temporary nature that the person no longer faces a real risk of serious harm*?"

11. As the convoluted nature of this formulation makes clear, this is not a question of exceptional public importance transcending the facts of these proceedings. Rather it is tailored to the very specific and unusual facts of the present case.

12. In any event, the question does not arise because I held that the Minister was entitled to form the view that there had been a change of circumstances in the country of origin. Furthermore, I was of the view that the reflection of that change in reputable country reports indicated that it was indeed significant and non-temporary. Thus the factual premise for the question does not arise here.

13. It was submitted that by analogy with *D.V.T.S. v. Minister for Justice Equality and Law Reform* [2008] 3 I.R. 476, the Minister cannot take a diametrically opposed decision to that of another agency of the State performing EU law functions without express reasons. However, in this case there are express reasons. This point simply does not arise.

Point C
14. The next question is "can the court impugn a decision of the Refugee Appeals Tribunal as lacking in adequate reasoning where

> (i) the decision has not been impugned by any other person or body and/or
>
> (ii) the Refugee Appeals Tribunal is not a party to the proceedings before the court and so is deprived of the opportunity to defend its decision".

15. This point unfortunately substitutes drama for substance. I did not "impugn" a decision of the Refugee Appeals Tribunal in some sort of irregular manner. I commented that the decision lacked reasons. The applicant has not put forward any basis for disputing that comment, and has failed to point to reasons as set out in the tribunal decision, or even to attempt to do so. By contrast with the approach to the tribunal decision, Mr. Lynn has advanced a litany of complaint against the Minister's lengthy reasoning, and indeed has submitted that a point of law of exceptional public importance arises from the alleged lack of reasons advanced on her behalf. However, Mr. Lynn passes over the absence of reasoning from the tribunal in absolute silence. The approach seems to be that the Minister can have as many reasons as she likes for finding against the applicant, but they will be inadequate; whereas the tribunal does not have to have any reasons for finding in his favour, but if the court points this out, it is committing an error which amounts to a point of law of exceptional public importance.

16. Apart from the fact that this question misunderstands the substantive decision, and therefore does not arise, it also fails the test set out in *S.A. (No. 2)* in that it is not a point on which the decision turns. The applicant would still have lost the case even if the tribunal had provided reasons, and therefore even if I was incorrect to point out that there were no such reasons.

17. This point comes nowhere near being a point of law of exceptional public importance. It is not open to a losing party to scour judgments for *obiter* or minor observations that might be disagreed with, and then to dramatically inflate the significance of the issues involved. No amount of forensic air pumped into a question can turn an *obiter* observation, or a decision on a point on which the actual outcome does not turn, into a point of law of exceptional public importance.

Point D
18. The next question is "*whether judicial review of a Minister's decision to depart from a finding by the Refugee Appeals Tribunal that a person is at risk of serious harm is an effective remedy in accordance with the State's duty to ensure an independent assessment of the said risk, and particularly where a statutory independent body (i.e. the Refugee Appeals Tribunal) has reached a contrary conclusion*".

19. Again, as the question makes clear, it is tailored to the highly exceptional circumstances of the present case. It is well established that for leave to appeal to be granted, the point must transcend the factual situation of the proceedings, which this question does not.

20. In any event, the status of judicial review as an effective remedy is not a question that can be regarded as being in any doubt, in line *with Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC 3, *I.S.O.F. v. Minister for Justice Equality and Law Reform* [2010] IEHC 457, *Efe v. Minister for Justice Equality and Law Reform* [2010] IEHC 214, and the recent decision of the Court of Appeal in *N.M. (D.R.C.) v. Minister for Justice and Equality* [2016] IECA 217.

21. Mr. Lynn seeks to re-characterise my decision as a threat to the right to an independent assessment of risk because he submits, in effect, that a remedy is only effective if it defers to the prior independent assessment by the Refugee Appeals Tribunal. But there is no reason why that should be so. Judicial review remains independent even if it results in a decision that the applicant does not like, or that the Minister was entitled to differ from the tribunal. The argument to the contrary stands only on assertion rather than logic and is not a point on which doubt could arise.

22. Mr. Lynn suggested that I afforded no deference to the tribunal decision and that the respondent failed to plead that the decision was unreasoned. That is a fundamental misunderstanding of the No. 1 judgment. I did not hold that the tribunal decision was invalid. Therefore, the question of pleading never arose. The independence of the judicial review process that has been afforded to the applicant has not been compromised by virtue of my view that the tribunal decision was unreasoned. Again, it is hard to get away from the academic nature of this point. One needs to remind oneself that the applicant has not contended at any stage that the tribunal did provide reasons, still less adequate reasons.

23. The somewhat convoluted submission on behalf of the applicant under this heading simply does not stand up. The applicant has had an independent and effective remedy in relation to the Minister's decisions. That remedy has been searching, a matter to which I will return. The applicant has not been successful, but the right to an effective remedy is not a right to win your case (*Walsh v. Walsh (No.2)* (Unreported, High Court, 2nd February 2017) para. 17).

Point E
24. The next alleged question of exceptional public importance is "*if permitted, where the Minister intends to depart from an assessment by the Refugee Appeals Tribunal that a person is at risk of serious harm, is the Minister obliged to put an applicant on notice of that departure prior to the Minister issuing a decision*".

25. Again, this question is confined to the very unusual facts of the present case, where the Minister departed from a tribunal opinion, and does not transcend those facts. It is thus not capable of being a point of law of exceptional public importance.

26. Mr. Lynn says that "*this point hasn't been determined because a case like this hasn't been examined at appellate level*". But that can be said about any point that arises in any case that is, on any argument, distinguishable from previous appellate decisions. Such an argument does not give rise to a point of law of exceptional public importance.

27. More fundamentally, this question does not arise on the facts. The applicant was on notice of his possible deportation. He made submissions to the effect that breach of art. 3 would arise. In terms of fair procedures, no actual prejudice was occasioned to the applicant because he did actually deal with the issue. Mr. Farrell asked rhetorically what the applicant would have done differently if he was expressly told that art. 3 was "*up for grabs*". Nothing has been pointed to in that regard.

28. Furthermore, the argument that the Minister does not have to interact with an applicant at the deportation stage is already well settled, as set out for example in the Supreme Court decision in *Baby O. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 169, at 183, per Keane C.J., and in *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603, per, MacMenamin J.

Point F

29. The next point is "*is the court obliged to defer to the Executive on the basis of the separation of powers when examining a decision by the Minister on whether there are substantial grounds for believing that a person is at risk of torture, inhuman or degrading treatment or punishment if deported*".

30. The implication of the question is that the No. 1 judgment was unduly deferential to the executive in relation to the issue or assessment of the risk of ill-treatment. However that suggestion is not one that is easy to recognise from the judgment, or the following in particular:

> (i). The No. 1 judgment considered the full suite of Strasbourg jurisprudence, even when not specifically relied on by the applicant.
>
> (ii). In the course of the hearing, I identified decisions of the UK Special Immigration Appeals Commission which the applicant had not been aware of, and brought these to his attention.
>
> (iii). The No. 1 judgment holds that the applicant was entitled to rely on decisions which were available at the time of submissions on the deportation order, but which he failed to place any reliance on at the appropriate time.
>
> (iv). It upholds the applicant's excuses for not having introduced those decisions earlier.
>
> (v). To ensure that the applicant's case was fully considered, I adjourned the hearing to allow the making of a s. 3(11) application.
>
> (vi). The No. 1 judgment rejects the respondent's submission that this was an abuse of process.
>
> (vii). I also discussed with the applicant the possibility of advancing points regarding the need to engage in a holistic analysis of all country of origin material, or to seek further and better reasons, suggestions that Mr. Lynn chose not to take up.
>
> (viii). Overall, the intent of the No. 1 judgment was that the decisions of the Minister were held up to close scrutiny with particular attention to all of the Strasbourg caselaw.

31. The written submissions do not of course dwell on these matters but rather seize on two passing references in the judgment to the separation of powers. On that rather flimsy foundation, the applicant has sought to construct an allegation that my view was that the court was "*obliged to defer to the Executive*" on whether there was a risk of ill-treatment. That is unfortunately just not an accurate representation of the thrust of the judgment.

32. The first of these references was in relation to the decision in *B.B. v. Secretary of State for the Home Department* [2016] UKSIAC SC/39/2005 (18th April, 2016), a decision which, as it happens, I identified and brought to the attention of the applicant. In relation to that decision, I said that the second-guessing of the executive by the judicial branch in that case was pitched at a level that was far too high to be compatible with the separation of powers. That case is not directly in point because it dealt with systems of verification such as diplomatic assurances, which are firmly in the heartland of executive discretion. No such considerations arise in the present case. Even if my view of *B.B.* is incorrect, that does not change the approach I adopted to review of the Minister's decisions here, so the point is not decisive to the outcome of this case.

33. The second reference to separation of powers in the judgment was in a context where the Minister had referred to the judicial review test in the analysis under discussion. The applicant sought out to artificially read into that reference some sort of fundamental misunderstanding of the law on the part of the Minister. I took the view that the separation of powers militated in favour of assuming, where possible, that the Minister had not fundamentally misunderstood the law.

34. The applicant does not, of course, argue that there is no doctrine of separation of powers, or even that it cannot be relevant to this case. Separation of powers is a fundamental doctrine in Irish constitutional law, and indeed in that of any democracy; albeit that the different branches must recognise each other's roles and that no division of powers is absolute and watertight.

35. My comment in relation to the Minister's decision was no more than a corollary of the presumption of legality that is the counterpart, at administrative law level, of the definitively-settled presumption of constitutionality that applies to any post-1937 statute. Mr. Lynn suggests that instead the court should "*err on the side of caution to quash the decision in an Article 3 case*". But that was not a point that he made at the hearing, nor was it a point that he pleaded. It is to advance a sort of spurious presumption of illegality in relation to the Minister's decision.

36. Mr. Lynn says that a preference for an interpretation that the decision maker is not making an error of law is "*a disposition to find in favour of the decision maker*" which is "*a matter of fundamental importance and certainly a matter that justifies certification*". Again the approach being adopted is to dress the point up in academic terms and side-step the question of what the issue is actually about. This whole argument is constructed on the basis of a short reference in the lengthy written analysis to the test applying to judicial review. The argument, shorn of rhetorical camouflage, is that because the Minister referred narratively to the test to be applied by the court on judicial review as well as that to be applied by her, the decision is invalid on the basis of a fundamental error of law and must be quashed on judicial review; and because the court was not prepared to favour the assumption that the Minister had made such a fundamental error, the court was labouring under a disposition to favour the decision-maker and committing an error by way of a point of law of exceptional public importance.

37. However, in this case, the applicant accepted that the analysis of relevant matters was for the Minister (see para. 66 of the substantive judgment). As Mr. Farrell points out in written submissions, "*the question posed and … various corollaries are little more than an implied argument to the effect that the Executive ought not be allowed to make such determinations and that they should be made (substantively) by the courts. As submitted … this is not capable of being reduced to a question of law – rather it is a political question*" (p. 12 of submissions). Furthermore, it is not an argument that the applicant advanced at the hearing.

38. My comments in relation to separation of powers are in line with established law, including *Meadows*, and do not give rise to any

point on which doubt arises such that it is appropriate to grant leave to appeal.

Point G
39. The next point is "*where a decision-maker refers to a decision as being ad misericordiam in nature, can that be disregarded by the court on the basis that the court regards it as a 'boiler plate' statement*".

40. Again, this point arises from the applicant's technique of seizing upon isolated phases and comments in the judgment and wrenching them out of context. A review of the judgment as a whole indicates that I found that, taken the full text of the Minister's analysis into account, the correct test was actually applied by the Minister. Thus, I found that the reference to *ad misericordiam* decisions was not in fact the basis on which the Minister analysed the risk of harm to the applicant. My comment about boilerplate language was simply as to why this phrase might have been included in the wording of the analysis.

41. On the facts, the decision was not made on the basis that the application was treated as *ad misericordiam*. Therefore the factual premise for this question does not exist and the question does not arise. In any event, I did not "disregard" the reference to the decision being *ad misericordiam*. Rather, I construed that reference in the context of the decision as a whole.

Point H
42. The next question is "*where subsequent or other materials that were not before the Minister making a decision to issue a deportation order under s. 3(1) of the Immigration Act 1999 are put to the Minister in the context of a s. 3(11) decision and raise Article 3 ECHR issues, is it correct that the court has an 'extremely limited role' in judicial review of that decision; and, if it does, does that provide an applicant with an effective remedy within the meaning of Article 40.3 of the Constitution and Article 13 read together with Article 3 of the European Convention on Human Rights*".

43. This proposed question may well be valid, interesting and important, but for the purposes of an appeal by the applicant it does not arise out of my substantive decision in this case. That is because it is a question I answered in favour of the applicant by saying that the court does not have an "extremely limited role" in reviewing art. 3 findings; and I did not approach this case on the basis that my role was so limited. Thus the premise of the question does not arise.

44. Written submissions by Mr. Lynn denied that the question of whether the court could receive new materials not before the Minister was an abandoned submission (para. 66 of the No. 1 judgment). However, we are now firmly into semantics. During the substantive hearing, he indicated that he was contemplating making a submission that the court could receive and evaluate such new materials, but then decided not to. That is what I would call an abandoned submission. One could alternatively phrase it as a contemplated submission that was not pursued, but it comes to the same thing.

45. No conflict of authority arises rendering this question a point of law of acceptable public importance. The general principle has been clearly established that in the s. 3(11) context, the court has an extremely limited role as set out in *Dada v. Minister for Justice, Equality and Law Reform* [2006] IEHC 140, *Baby O. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 129, *Irfan v. Minister for Justice, Equality and Law Reform* [2010] IEHC 422,, and *M.A. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 17th December, 2009).

46. I held that the jurisprudence on the extremely limited role of the court should be modified to acknowledge the absolute nature of the prohibition in art. 3. That was a point in favour of the applicant. Mr. Lynn is therefore reduced to submitting that this question "*should be examined and if appropriate confirmed by an appellate court, or they might come up with a slightly different approach*". A party is not entitled to seek leave to appeal in relation to a point in favour of that party. This question simply does not arise; indeed, the formulation of the question comes close to implying that I decided the opposite of what the substantive decision actually says.

Point I
47. The next question is "*whether subsequent or other materials that were not before the Minister making a decision to issue a deportation order under s. 3(1) of the Immigration Act 1999 can, in exceptional cases, be considered by a court hearing an application for judicial review of a decision to issue a deportation order under s. 3(1) of the Immigration Act 1999 in order to assess the reasonableness or proportionality of said decision*".

48. There are many insuperable difficulties with this question, the first one being that the applicant did not contend for the proposition that is raised in the question. As noted above, Mr. Lynn abandoned the approach of seeking to question the decision of Feeney J. in *Izevbekhai v. Minister for Justice, Equality and Law Reform* [2008] IEHC 23, as subsequently considered in *Efe v. Minister for Justice and Equality* [2011] IEHC 214, *B.M. (Eritrea) v. Minister for Justice and Equality* [2013] IEHC 324, and *M.Y. v. Minister for Justice and Equality* [2016] IEHC 515.

49. Furthermore, in this case, the materials were all ultimately considered by the Minister, and therefore would not have to be considered at first instance by the court even if that were the appropriate approach. Thus the factual premise does not exist and the question simply does not arise.

Point J
50. The next question is "*where the applicant raises an arguable breach of an absolute right, is the range of reasonable findings open to the decision maker necessarily more limited than in cases where an arguable breach of an absolute right is not so raised and, if so, is the standard of judicial review applied by the courts more exacting in cases where an arguable breach of an absolute right is raised*".

51. It will be apparent from Mr. Lynn's reliance on the judgment of Lord Sumption in *R. (Lord Carlile of Berriew QC) v. Secretary of State for the Home Department* [2015] AC 945, at para. 34, which refers to heightened or anxious scrutiny, that this point is an attempt to rerun the Meadows case, notwithstanding that the Supreme Court has definitively resolved this matter.

52. Mr. Lynn did not argue at the hearing that a different standard of judicial review applied to an art. 3 case. A party cannot use the leave to appeal process to introduce a new point which they did not advance at the hearing, and only thought up on reading the judgment.

53. In any event, a very exacting level of scrutiny has been applied to the Minister's decision in this case, as set out earlier in this judgment.

54. Having regard to the foregoing, no basis has been put forward for suggesting that I adopted anything other than an exacting

approach as to whether there was a breach of art. 3. Apart from implausibly suggesting that I should not have referred in any way to the separation of powers, Mr. Lynn has not set out what his proposed new test would look like or how it would differ from the approach I adopted, other than presumably that it would embody a right for his client to win the case. The point simply does not arise.

Point K
55. The next question is "*whether, in a case where a person provides country of origin information and case law which support the proposition that s/he is at risk of serious harm if deported, it is sufficient for the decision-maker to say that s/he has considered that information or is a reasoned explanation with specific reference and assessment of that information and case law required*".

56. This is an attempt at a rerun, for the umpteenth time, of the argument that points made by an applicant require a narrative discussion, in the absence of which the decision is invalid. This has already been dealt with by Hardiman J. in G.K. v. Minister for Justice Equality and Law Reform [2002] 2 I.R. 418. It is worth emphasising that *G.K.* was a deportation decision, which therefore involved refoulement, also an absolute prohibition.

57. Mr. Lynn's submission that "*it is important to have guidance at appellate level as to the level of reasons required*" is illustrative of the legal merry-go-round that seems to apply uniquely in asylum and immigration law. It at times appears that no point is ever accepted as being finally determined; that in every case there is inevitably some distinguishing feature which is said to call out for reconsideration and in particular for appellate clarification.

58. Mr. Lynn says that in an art. 3 case, it is not enough for the Minister to say that she has considered material, and that "*this wouldn't satisfy the Strasbourg court*". Given that I was confidently told in *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 that that decision would not satisfy the Strasbourg court either (para. 155), such declamations possibly illustrate Scalia J.'s reminder (dissenting) in *Obergefell v. Hodges* 576 U.S. __ (2015) (slip op. p.9) that "*pride, we know, goeth before a fall*". It is sufficient to note that the Minister's analysis here was reasoned in some detail, even if it did not offer narrative discussion of every piece of evidence raised by the applicant. No jurisprudential basis has been made out for saying that the detailed decision here would not satisfy Strasbourg, is otherwise invalid, or raises a point of law of exceptional public importance that requires further appellate clarification above and beyond the existing Supreme Court decision in *G.K.*

Point L
59. The next point is "*where the European Court of Human Rights has held that the deportation of particular and specific categories of person to a particular country will violate Article 3 of the European Convention on Human Rights at a certain point in time, is the Minister under a duty to address the relevant decision(s) of that court and give express reasons why she considers the deportation of a person who falls within such a particular and specific category to the particular country no longer amounts to a violation of Article 3 of the European Convention in Human Rights*".

60. This question fundamentally misunderstands the Strasbourg process. It is not the role of the Strasbourg court to identify "*particular and specific categories of person*" who cannot be deported to a particular country. Rather, the court deals with individual allegations of violations, on the application of individual applicants. It is not the case that a Strasbourg decision creates an ongoing situation of violation such that the Minister must come up with reasons why deportation to a particular country "*no longer amounts to a violation*".

61. Apart from this fundamental misunderstanding of the Strasbourg process, the difficulties in relation to point K also apply to this question.

Point M
62. The next question is "*whether the High Court should address for itself the issue of whether the applicant has 'exhausted domestic remedies*' and, *in particular, where this has not been put in issue by the parties*".

63. The applicant's failure to exhaust domestic remedies arose because he did not pursue certain arguments at the hearing. That is not a matter that requires to be "*put in issue*" by the parties; it was something that happened in the course of the hearing.

64. More fundamentally, I am not determining this issue, but rather simply noting that the applicant has not pursued certain issues. The applicant is not bound by my view if he chooses to apply to Strasbourg and of course he is free in that forum to contend that my view is incorrect. As set out in *S.A. (No. 2),* to form the basis of an application for leave to appeal on the grounds of having identified a point of exceptional public importance, the point of law must be decisive in terms of the outcome. *Obiter* remarks do not qualify. In this case the opposite approach was taken and it feels as if no stone was left unturned in scouring the judgment for stray or incidental *obiter* references, each one of which is then inflated into a point of law of exceptional public importance.

65. As Mr. Farrell correctly submits, the applicant is now essentially seeking an advisory opinion as to whether, if the applicant had pursued certain other points, that would have amounted to an effective remedy. That is not a basis for leave to appeal.

Point N
66. The next question is "*whether a request that the Minister provide further reasons to justify her decision to deport a person who has been held by the Refugee Appeals Tribunal to be at risk of serious harm could possibly constitute an effective remedy*".

67. Passing over the scoffing tone of the question ("*could possibly constitute*"), one can note at the outset that this question is mired in the specific unusual facts of the present case, and as formulated, does not significantly, or at all, transcend those facts.

68. Mr. Lynn submitted that this issue "*hasn't been determined at appellate level*", a sort of mantra that figured repetitively in his request for leave to appeal. However it is not a mantra that suffices to meet the statutory test.

69. More fundamentally, this is not an issue that arises on the facts because the applicant did not seek to make the case that the Minister should provide further reasons. Comment on the question of whether the applicant has exhausted domestic remedies was *obiter*. If the applicant disagrees with me he can argue the point in Strasbourg. In the meantime he must regard my remarks on this subject as a comment. Again, as Mr. Farrell submits, the applicant is effectively seeking simply an advisory opinion as to whether, if something that did not happen had actually happened, it would have been an effective remedy.

Point O
70. The final alleged question of law of exceptional public importance is "*whether the standard of review applied by the High Court is adequate to provide an effective remedy in a case challenging an administrative decision that arguably breaches the right to be free*

from torture or inhuman or degrading treatment or punishment".

71. Mr. Lynn helpfully submits that this "*may not be different to J.*" and indeed I do not see any particular difference; but if there is such a difference, I reject this ground as a basis for leave to appeal for the same reasons as point J.

Conclusion on the issue of whether points of law of exceptional public importance arise
72. The present application provides something of a masterclass in the process of applying for leave to appeal. Admirable powers of invention and creativity have been brought to bear on the problem by lawyers on behalf of the applicant. It may be instructive to summarise how the points raised measure up against key requirements of the process for determining a point of law of exceptional public importance, which I have endeavoured to draw together as they emerge from the present case and from relevant caselaw including *Glancré, S.A. (No. 2),* and *Kenny v. An Bord Pleanala* [2002] 1 I.L.R.M. 68:

(i). the application should be made promptly and ideally within normal appeal periods: that is not an issue here;

(ii). where the application relates to refusal of leave, the test for leave to appeal will be satisfied only in rare circumstances: that is not an issue here;

(iii). the point raised must significantly transcend the facts of the present case in such a way as to be likely to resolve other cases: in this case points B, D, E and N fail that test;

(iv). the factual or legal premise for the question must exist: here points B to J, L, M and O fail this test;

(v). the point must be, or arise from, an argument actually made by the applicant for leave at the hearing, rather than one that first occurs to that party following the judgment: here points F, I, J, N and O fail the test;

(vi). the point must arise out of the judgment rather than merely from discussion at the hearing;

(vii). the question must not relate to *obiter* comments or to other points which are not decisive to the result: here points C, E and M fail this test;

(viii). the question must be phrased with precision in such a way as to indicate how the answer would make a difference to the outcome, rather than by way of inviting a discursive, roving, essay-type response;

(ix). the question must not be in relation to a point decided in favour of the party seeking leave to appeal: here point H fails this test;

(x). the question must not be one already settled by jurisprudence of the Court of Appeal or Supreme Court; here points J to L fail the test;

(xi). if the question is already pending before an appellate court, consideration may need to be given as to whether, in all the circumstances, including the interests of justice and the forum of the pre-existing proceedings, certifying the point for further appellate consideration by the Court of Appeal would provide the added value or affirmative public benefit that is required for certification: that is not an issue here;

(xii). if the question meets all of the foregoing tests, it must be one on which real doubt arises (for example due to conflict of authorities) such that the state of the law is uncertain, thereby rendering appellate clarification desirable.

(xiii). even if there is a point of law of exceptional public importance, the question of public interest is a separate requirement which must also be satisfied: I will deal with this issue separately below.

73. In relation to the test of whether real doubt arises, it is important to emphasise that no conflict between authorities has arisen in this case which might make the matter suitable for leave to appeal. That is quite unlike the situation in numerous cases where I previously granted leave to appeal with a view to assisting in the resolution of conflicts between competing decisions, namely *R.A. v. Refugee Appeals Tribunal* [2015] IEHC 686, *B.W. v. Refugee Appeals Tribunal* [2015] IEHC 759, *Balchand v. Minister for Justice and Equality* [2016] IEHC 132, *A.B.M. v Minister for Justice and Equality* [2016] IEHC 489 and *K.R.A. v. Minister for Justice and Equality* [2016] IEHC 421.

74. The only point in the case that does not fail on one of the threshold tests at (i) to (xi) above, and that is therefore even capable in principle of being considered, is Point A. However point A fails the test of being a point on which real doubt arises, because it is a virtually unstateable proposition for reasons already outlined. It is a point that is clearly totally lacking in legal and logical merit and is therefore one on which no doubt arises that would have rendered appellate clarification either necessary or desirable.

75. Before concluding on the question of the existence or otherwise of points of law of exceptional public importance, one cannot get away from the indiscriminate nature of the grounds advanced. It is hardly credible that fifteen points of law of exceptional public importance arise in this case, especially, where as noted at para. 1 of the substantive judgment, the case arises on unusual facts. Having given careful consideration to each of the applicant's points, in my view none of them meet the required statutory test.

Whether an appeal is in the public interest
76. Separately from the foregoing, it is not in the public interest that a person who has fundamentally abused the asylum and immigration system should be permitted to proceed further with a process to perpetuate his unlawful presence in the State. That is of course an independent test from the lack of a point of law of exceptional public importance. Under this heading I have regard to the applicant's multiple identities, his fraudulent previous asylum application, his history of false representations right up to his incorrect representations to the Minister during the currency of these proceedings, his disregard of the immigration systems of multiple jurisdictions, and the fact that he abused the hospitality of the European Union to commit criminal and terrorist offences and immigration violations affecting multiple jurisdictions. Even disregarding his offending conduct, there is a battery of reasons as to why this applicant's continued prosecution of the matter is not a matter of public importance.

77. I also have regard to the fact that, on the plus side, any appeal almost by definition has the potential to provide clarification of issues; but that is a point of very limited weight because it arises in virtually every case. It is also a point of limited weight when measured against the conduct of the applicant.

78. Also on the plus side, there is the public interest element to any appeal, in the sense that the public interest is served generally by litigants having a review of decisions at first instance. However that also applies in every case; and the statutory test would be meaningless unless there was something going well beyond the inherent public interest in allowing a particular individual or party to appeal.

79. Mr. Lynn submits that because this is an art. 3 case, the conduct of the applicant is of limited relevance, and as far as the merits of the claim of ill-treatment are concerned, I agree. An applicant's conduct is not a reason to dismiss an art. 3 claim on grounds of discretion, although it may be relevant to credibility. In this case I did not dismiss the applicant's challenge on discretionary grounds but gave it full consideration on its merits. In the assessment of his art. 3 claim, he has not, by reason of his involvement in terrorism, been treated differently from any other claimant of ill-treatment. The applicant has now had an effective remedy on those merits, but having had the benefit of that process, his conduct is not to be treated as irrelevant for all purposes thereafter.

80. Overall, it is not in the public interest that an applicant who has from the outset abused the immigration system of the State should be granted a further mechanism to perpetuate a presence in the country that was achieved by fraud, and that has been used as a springboard to carry out offending behaviour and abuse of the immigration systems of this jurisdiction and other EU states.

Ancillary matters
81. As the refusal of the application for leave to appeal ends the proceedings in this court, the existing stay on removal, pending determination of that application, thereby comes to an end in accordance with its terms. The reporting restriction on identifying the country of origin will continue for a reasonable period, which I will identify as 2 months, from the date when the applicant is either deported or, if applicable, when the Minister decides not to deport him, once one or other conclusion is arrived at. For this to be workable, counsel for the Minister will have to inform me in open court of the date of such event if and when it arises. As previously indicated, if the reporting restriction is lifted I will consider approving a version of the No. 1 judgment without redaction of the country name.

Order
82. In summary, the application fails under both legs of the statutory test. No point of law of exceptional public importance arises. Furthermore, it is not in the public interest that the applicant be permitted to appeal to the Court of Appeal. Accordingly I will order as follows:

(i). that leave to appeal to the Court of Appeal be refused;

(ii). that the stay on deportation be discharged forthwith; and

(iii). that the reporting restriction on the country of origin of the applicant will continue pending removal of the applicant and for a period of two months after such removal, or until (if it be the case) that it is decided not to remove the applicant; and in the event of such removal or decision, that the respondent be directed to inform the court forthwith and in open court of the date of such removal or decision not to remove.