Neutral Citation: [2015] IEHC 799

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 771 J.R.]

BETWEEN

H. M.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 25th day of August 2015

1. This is a telescoped application for judicial review of the decision of the Minister and in respect of which an order of certiorari is sought quashing the deportation order made against the applicant.

Background

2. The applicant is an Iranian national who claims to have left Iran in 2002. On his account, he travelled to Greece where he claimed asylum which was refused in 2005. He claims that he left Greece in 2006 and travelled to France where he remained for two months. He arrived in this state in June, 2006 and made an application for asylum on 27th June, 2006. He completed a questionnaire which was received by ORAC on 6th July, 2006. An English translation of that document was obtained by ORAC on 21st July, 2006. The applicant did not remain in the state and in August 2006 he entered the UK using a forged Greek passport. He was subsequently arrested at Luton airport attempting to check-in for a flight to Canada. He was duly sentenced in the UK to ten months imprisonment for possession of a false document. He was released on 2nd February, 2007. He attempted to claim asylum in the UK on 19th March, 2007 but was returned to this state on 30th July, 2007.

3. On 2nd August, 2007, the applicant received correspondence from ORAC advising that his application for asylum was deemed withdrawn. Following his request for a "status letter", he was written to on 11th July, 2008 by the Irish Naturalisation and Immigration Service and advised that "[his] application for asylum in the State has been refused" and that "[c]onsideration is being given at present under Section 3 of the Immigration Act, 1999, as to whether [the applicant] should be given Leave to Remain in the State or returned to [his] country of origin."

4. According to an affidavit sworn on 4th September, 2012 by the applicant's present solicitor, at the time the applicant's asylum application was deemed withdrawn, he was issued with a s.3 "proposal to deport" letter, although the file furnished to the applicant's solicitor from the applicant's erstwhile legal representatives, the Refugee Legal Service, did not contain a copy of that letter. In any event, by letter of 14th August, 2009, the applicant's present solicitor made an application on his behalf for subsidiary protection and leave to remain, duly enclosing forms CP/01 Part 1 and 2 as completed and signed by the applicant.

5. Appended to the application was country of origin information, including two reports on the general human rights situation in Iran and two which referred to the risks posed to failed asylum seekers. Extracts from the said information were quoted in the applicant's solicitor's letter of 14th August, 2009.

The case made by the applicant was synopsised in the body of the letter, as follows:-"[We] refer you to the appalling human rights situation in Iran which, it is submitted, constitutes both compelling humanitarian considerations in favour of granting leave to remain and also shows that deportation of our client would be in breach of section 5 of the Refugee Act, 1996."

6. On 5th May, 2011, the applicant withdrew his subsidiary protection application and, through his solicitors, advised that he wished to rely on his application for leave to remain and further advised that the information forwarded with the previous letter of 14th August, 2009 was being relied on for the leave to remain application. Enclosed with the 5th May, 2011 letter were a number of country of origin information reports, an identification document for the applicant, a number of references and educational certificates in support of the leave to remain application and a short medical report from the applicant's general practitioner detailing the medical treatment being afforded to him for depression. The 5th May, 2011 letter referred to the "ongoing pattern of serious human rights violations in Iran" and quoted extracts from the three country of origin information reports furnished with the letter. The letter requested confirmation of the applicant's leave to remain in the state "on stamp 4 terms" and stated that "having regard to the very poor human rights situation in Iran and … the information previously submitted that any deportation of [the applicant] would be in breach of the State's obligations under Section 5 of the Refugee Act 1996 as well as [the applicant's] rights [sic.] the European Convention on Human Rights, in particular Articles 3 and 8 thereof."

7. The Minister signed the deportation order on 2nd August, 2012, following the preparation and submission of an examination of the applicant's file under s.3 of the 1999 Act, completed on 19th July, 2012 by an Executive Officer in the Minister's department which was reviewed on the same date by a Higher Executive Officer. The examination of file recommended a deportation order in respect of the applicant. It recorded that the applicant's case "was considered under Section 3(6) of the Immigration Act, 1999 and Section 5 of the Refugee Act 1996, as amended. Refoulement was not found to be an issue in this case." In addition, no issue was found to arise under s. 4 of the Criminal Justice (UN Convention against Torture) Act, 2000. Consideration was also given to private and family rights under Article 8 of the European Convention on Human Rights.

Grounds of challenge

8. In summary, the grounds of challenge as set out in the statement of grounds are as follows:-

i. With respect to the conclusions contained in the analysis of filed document with regard to s.5 of the Refugee Act, 1996

– that refoulement was not found to be an issue in the applicant's case and that deporting him would not be contrary to s.5, and that the applicant would not be at risk pursuant to s.5 because he was not involved in political parties in Iran, these conclusions are unreasonable and/or irrational and are not supported by the content of the country of origin information reports that were considered by, and extracted from, in the analysis document, nor are they supported by the content of the available country information;

ii. With respect to the conclusions contained in the analysis of the filed document with regard to s.4 of the Criminal Justice (UN Convention against Torture) Act, 2000 – that repatriating the applicant would not be contrary to that section and that no issue arises under s.4 of that Act, such conclusions are unreasonable and/or irrational and are not supported by the content of the country reports that were before, and were considered by, the respondent;

iii. The conclusion reached with respect to risk as a failed asylum seeker in the analysis document pursuant to s.5 of the Refugee Act, 1996, and with respect to torture – that no issue arises in respect of these risks- is unreasonable and irrational and is not supported by the content of the country of origin information and is internally illogical having regard to the conclusion with respect to failed asylum seekers reached elsewhere in the analysis document. The country of origin information before and considered by the respondent with respect to failed asylum seekers supports the view that those having claimed asylum abroad on political grounds and/or on the basis of being opposed to the regime, do face a risk to life and freedom and/or of torture, as acknowledged in the examination file;

iv. With respect to s.3 (6) (h) of the Immigration Act, 1999 and in failing to expressly consider whether humanitarian issues outside of the availability of medical treatment are such as to warrant the granting of leave to remain as against the making of a deportation order, the respondent has acted ultra vires s.3 (6) (h) of the Immigration Act, 1999 and/or has failed to consider directly relevant matters and factors. It is clear that a decision to deport to Iran given the deteriorating and ongoing human rights crisis there involves significant humanitarian issues including issues related to Iran's failure to observe its obligations under international human rights protection instruments and this state's obligation under those same instruments if deporting a non national to a country that engages in gross and endemic human rights abuses and violations. In purporting to adopt in respect of s. 3 (6) (h) of the Immigration Act, 1999 the subsequent findings in the analysis document concerning s.5 of the Refugee Act, 1996 and s.4 of the Criminal Justice (UN Convention against Torture) Act, 2000 (which are absolute prohibitions in respect of repatriation) and in failing to properly or adequately consider in light of the human rights crisis in Iran on a purely humanitarian basis within the terms and meaning of s.3 (6) (h) of the Immigration Act, 1999 whether to exercise discretion to grant leave to remain, the respondent has erred in law, failed to have due and proper regard as required under s.3 (6) (h) for directly relevant humanitarian considerations.

Relevant statutory provisions governing deportation

9. In the context of the nature of the challenges, it is apposite at this juncture to set out the statutory obligations under which the Minister operates in the context of a decision to make a deportation order. Those obligations were summarised by Clarke J. in *Kouaype v. Minister for Justice and others* [2005] IEHC 380; [2011] 2 I.R. 1, as follows:-

> "3.1 The relevant statutory restrictions on the power of the Minister to make a deportation order would appear to be contained in s. 5 of the Refugee Act, 1996 ("the 1996 Act") and s. 3 of the Immigration Act, 1999 ("the 1999 Act").

Section 5(1) of the 1996 Act provides as follows:-

> "5 (1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) Without prejudice to the generality of sub-s. (1), a person's freedom shall be regarded as being threatened if, *inter alia,* in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature).
>
> 3.2 Section 3 of the 1999 Act permits the Minister, subject to the provisions of s. 5 of the 1996 Act, and subject to the other provisions of s. 3 to make a deportation order in a variety of cases including, (and of applicability here) in the case of a person whose application for asylum has been refused by the Minister (see s. 3(2)(f)). However s. 3(6) provides that in determining whether to make a deportation order in relation to, *inter alia,* such a person the Minister shall have regard to a range of factors including the age and family circumstances, length of time in and connection with the State and other humanitarian considerations "so far as they appear or are known to the Minister.
>
> Subsection (3) requires the Minister, where he proposes to make a deportation order, to notify the person concerned of his proposal so that the person so notified can (under subs. 3(b)) make representations in writing to the Minister which the Minister is required, under that subsection, to take into consideration.
>
> 3.3 Thus in general terms there are two statutory prerequisites to the making of a deportation order:-
>
> (1) The Minister is required to be satisfied that none of the conditions set out in s. 5 of the 1996 Act are present; and
>
> (2) The Minister is also required to consider the humanitarian and other factors set out in s. 3(6) of the 1999 Act insofar as they are known to him. In this latter context it obviously follows that the Minister is required, inter alia, to have regard to any representations on those matters which are made by or on behalf of the person concerned."

10. Following notification of a proposal to deport pursuant to s.3 (3) (a) of the 1999 Act, the procedure for the making of representations is dealt with in s.3 (3)(b):-

> "(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall—
>
> …

(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and

(ii) notify the person in writing of his or her decision and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands."

11. Section 3 (6) of the 1999 Act provides that:-

"3 (6) In determining whether to make a deportation order in relation to a person, the Minister shall have regard to—

(a) the age of the person;

(b) the duration of residence in the State of the person;

(c) the family and domestic circumstances of the person;

(d) the nature of the person's connection with the State, if any;

(e) the employment (including self-employment) record of the person;

(f) the employment (including self-employment) prospects of the person;

(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);

(h) humanitarian considerations;

(i) any representations duly made by or on behalf of the person;

(j) the common good; and

(k) considerations of national security and public policy,

so far as they appear or are known to the Minister."

12. In the analysis, the factors at s.3(6)(a)-(g) were distilled as being that the applicant was born on 4th March, 1978 and was 34 years old at the date of the analysis. The applicant was single and arrived in Ireland on 27th June, 2006. (The ASY1 Form recorded that he arrived on 16th June 2006) The applicant's connections to the State were those which pertained to the asylum process. The applicant worked as a receptionist whilst he was a student in Iran, having completed 12 years of formal education in Iran and worked for three years in an electrical company in Iran. The applicant was described as having "reasonable English" language skills and that his employment prospects in Ireland were poor. The applicant had not come to the adverse attention on An Garda Síochána, however the applicant did enter the U.K. on a forged Greek passport, for which he received a ten month prison term.

13. "Section 3(6) (h) -Humanitarian Considerations" were addressed as follows:-

"The applicant's solicitors submitted inter alia that '[T]he applicant is opposed to the ruling regime in Iran and to the ruling system of theocracy in that state. It is clear that the applicant will be at real risk of serious harm and/or face a significant threat to his life and/or freedom if returned to Iran. Our client is entitled to express this opposition and cannot reasonably be expected to desist from so doing. We refer you to the significant deterioration with respect to human rights abuses in Iran in recent year'. Extracts from country reports regarding human rights record in Iran are included in the submission.

[The applicant's] fear of returning to Iran will be considered later in this submission"

14. Reference was then made to correspondence received from the applicant's medical practitioner dated 14th September 2009 which advised that the applicant was on Paroxetine as treatment for depression and that no further information in this regard had been furnished since 2009. There followed an overview of the availability of medical treatment and drugs in Iran and a review of its treatment of mental health issues. The s.3(6)(h) analysis concluded: "It is clear from country of origin information that treatment would be available to the applicant for his medical condition in Iran…Having considered the humanitarian information on file in this case, there is nothing to suggest that [the applicant] should not be returned to Iran…" Factors (i)-(k) were distilled variously as noting that a number of representations were on file each of which attested to the applicant's good character which had been read and fully considered, that it was in the interest of the common good to uphold the integrity of the asylum and immigration procedures of the State and that consideration of national security and public policy did not have a bearing on the case.

15. The removal of the applicant from the state was then considered in the context of Article 3 of the ECHR, with an overview of the same country information as had been examined under s.3(6)(h) and reference to case law of the ECtHR, with the author concluding that "[a]s there is nothing to indicate that exceptional circumstances arise in this case, it is not considered that repatriating [the applicant] to Iran… is not contrary to Article 3 of the European Convention on Human Rights, in this instance."

The applicant's submission on the s. 3 (6) (h) challenge

16. The applicant's counsel took issue with the conclusion on the s.3(6)(h) issue for the following reasons: in the first instance, the examination of file authors commenced the s.3 (6) (h) analysis by quoting the portion of the applicant's solicitor's letter of 14th August, 2009 which was more aptly referable to s.5 of the Refugee Act, 1996, and consequently failed to refer to the case made in the letter that the "appalling human rights situation in Iran" constituted, inter alia, "compelling humanitarian considerations in favour of granting leave to remain". Secondly, the entire emphasis by the Minister with regard to humanitarian considerations was on the medical report furnished on the applicant's behalf and the entire consideration pursuant to s.3 (6) (h) related to an overview of the availability of medical treatment for depression available in Iran. The applicant's solicitor had never raised medical issues in the representations made on the applicant's behalf and, while there was no objection to consideration having been given to the medical report, that consideration could not be at the expense of other matters which had been put forward by the applicant's solicitor under s.3 (6), namely the submission on the appalling human rights situation in Iran, as evidenced by the information included in the representations. There was no consideration pursuant to s.3 (6) of the humanitarian situation on the ground in Iran, as documented

by the country of origin information submitted by the applicant, or indeed of the country of origin information on conditions for those who opposed to the ruling regime in Iran consulted by the author of the examination of the file. Thirdly, the authors, by stating under the s.3 (6) (h) heading that the applicant's "fear of returning to Iran [would] be considered later in [the] submission" (i.e. in conjunction with the s.5 refoulement analysis) failed to give full or fair consideration to the applicant's fear of returning to Iran as a humanitarian consideration, as required under s.3 (6) of the 1999 Act.

17. When the Minister ultimately referred to the human rights situation in Iran, he did so only in the context of his consideration pursuant to the s.5 absolute prohibition on refoulement. Notwithstanding the discretion afforded to the Minister under s.3 (6) of the 1999 Act, his assessment was required to be conducted in a full and fair manner, as outlined by the dictum of Hogan J. in *PJ, OAOJ and others v. Minister for Justice* [2011] IEHC 443, and that of Clark J. in her judgement in *Ali v. Minister for Justice* [2009] IEHC 595. It was submitted that, in the instant case, the Minister did not engage in a full and fair assessment of the "humanitarian consideration" in the applicant's case.

The respondent's submissions on the s.3 (6) (h) challenge
18. Counsel contended that there was no authority for the applicant's proposition that the Minister should have considered all of the humanitarian crisis issues pertaining to Iran under s.3(6) and it was contended that the argument raised by the applicant's counsel was settled law, against the applicant. In this regard, counsel relied on the dictum of Hardiman J. in *FP and AL and others v. Minister for Justice* [2002] I.R. 164.

19. In the present case, the applicant made two protection applications in this state and progressed neither. The matters which the applicant alluded to in his asylum questionnaire were not teased out because he broke the law by leaving the state in the wake of making his asylum application, with the result that his application was deemed withdrawn. He himself had withdrawn his subsidiary protection application. All of this was recited in the examination of file analysis under the s.3 (6) consideration. The court could not find any reference in the examination of file to the applicant having withdrawn his subsidiary protection application.

20. Counsel relied on the decision of Clarke J. in *Kouaype v. Minister for Justice* [2005] IEHC 380; [2011] 2 I.R. 1 and argued that what was relevant as per *Kouaype* was that the Minister's obligation was premised on the earlier protection processes and an applicant's involvement therein. In the present case, the applicant was effectively asking the court to condone his behaviour in eschewing the asylum and subsidiary protection processes set up by the state to adjudicate on his alleged fears and purported to criticise the Minister for an alleged absence of consideration of the applicant's fears at the leave to remain stage.

21. While the applicant's counsel referred to a separate and discrete requirement on the Minister to consider the humanitarian situation in Iran as part of the *"humanitarian considerations"* under s.3 (6) (h) of the 1999 Act, the applicant's position was as a person against whom a deportation order was proposed and while the application made by the applicant was referred to in the colloquial terms of "leave to remain", the position was that the applicant was effectively making representations as to why he should not be deported. The human rights situation in Iran was an issue relevant to any protection application or to consideration of refoulement, it was not a factor "notwithstanding ineligibility for asylum" which directly related to the applicant.

22. In any event, contrary to the applicant's counsel's assertion, in the portion of the examination on file dedicated to s.3 (6) of the 1999 Act, the applicant's fears were set out despite those fears not having been tested in the asylum or subsidiary protection processes. Furthermore, albeit not under s.3 (6), the applicant's fear of returning to Iran was considered in the context of the s.5 consideration, as the author of the analysis intimated it would be. Thus, it could not be said that the applicant's fears in the context of s.3 (6) (h) were not considered. Counsel argued that the issue was whether there were matters personal or pertinent to the applicant that should be alluded to under s.3 (6) (h), notwithstanding the proposal to deport. The only significant personal factor in the applicant's submission and representations was his medical condition. That was duly considered by the Minister, it having been expressly notified to him in the course of the representations made. This was also an issue that was considered in the context of the obligations on the Minister pursuant to article 3 of the ECHR.

23. Counsel argued that in the context of the s.3 (6) consideration, all documents and information received from the applicant were considered by the Minister.

The court's consideration of the s.3 (6) (h) challenge
24. The parameters of the analysis the Minister is obliged to conduct pursuant to s.3(6) were described by Hardiman J. in *FP and AL and others v. Minister for Justice* [2002] 1 I.R. 164, 172 in the following terms:-

> "Before considering whether any of these complaints have sufficient merit to ground a grant of leave to apply for judicial review, it is worth restating the status of the applicants at the time they made their representations. They were persons whose applications for asylum had been rejected at first instance and on appeal. They lacked any entitlement to remain in the country save that deriving from the procedures they were operating, i.e. a right to await a decision on a request not to be deported. Both the fact that they had been refused refugee status, and the nature of the decision awaited as it appears from the Act of 2000, emphasise that this was in the nature of an ad misericordiam application. The matters requiring to be considered were the personal circumstances of the applicant, described under seven sub-headings; his representations (which in practice related to the same matters) and "humanitarian considerations". The impersonal matters requiring to be considered were described as "the common good and considerations of national security and public policy". They did not include in any way an obligation to revisit the original decision."

Clarke J. in *Kouaype v. Minister for Justice* [2011] 2 I.R. 1 considered the judgment of Hardiman J. in the following terms:-

> "4.1 In the connected cases of *P. v. The Minister for Justice, Equality and Law Reform*, *L. v. The Minister and B. v. The Minister* (Unreported, Supreme Court, Hardiman J., 30th July, 2001) the Supreme Court considered the legislative framework within which Deportation Orders are made. There are many similarities between the decision taken by the Minister in those cases and the decision challenged in this case. Each of the applicants in P. L. and B. had applied for asylum and had been refused. Each of the applicants applied for what Hardiman J. described as being "often referred to as humanitarian leave to remain" but which, as he points out, is more properly described as the making of representations in writing, pursuant to s. 3(3)(b) of the 1999 Act, to the Minister urging the Minister not to make a deportation order despite the existence of an unchallenged refusal of asylum…
>
> 4.3. Hardiman J. went on, at p. 20, to note that in the circumstances of the cases then before the Supreme Court, "the Minister was bound to have regard to the matters set out in s. 3(6) of the 1999 Act". However, he noted that in that context the Minister was also entitled to take into account the fact that the applicants were in each case failed asylum seekers. In those circumstances he went on to indicate that:-

> "Once it was held that they were not entitled to asylum their position in the State naturally falls to be considered afresh, at the Minister's discretion. There was no other legal basis on which they could be entitled to remain in the State other than as a result of a consideration of s. 3(6). In my view, having regard to the nature of the matters set out at sub-paragraphs (a) to (h) of that subsection the decision could be aptly described as relating to whether there are personal or other factors which, notwithstanding the ineligibility for asylum, would render it unduly harsh or inhumane to proceed to deportation. This must be judged on assessment of the relevant factors as, having considered the representations of the person in question, they appear to the Minister. These factors must be considered in the context of the requirement of the common good, public policy, and where it arises national security".

25. Clarke J. went on to state that the Minister's obligation in the context of his consideration under s.3 (6) was:-

> "4.16 …to afford the person concerned an opportunity to make submissions and, provided that the submissions are made in accordance with the Act, to consider them or, if no submissions be made, to consider the matters set out in s. 3(6) "so far as they appear or are known to the Minister". The weighing of the various matters which might legitimately be taken into account under the section and which have been loosely described as "humanitarian grounds" is, in accordance with those authorities, entirely a matter for the Minister. In the absence of evidence that the Minister did not give the person concerned an opportunity to make submissions in accordance with the statute or did not consider those submissions, it does not seem to me that that aspect of the Minister's decision is reviewable by the courts."

26. In *PJ, OAOJ v. Minister for Justice* [2011] IEHC 443, Hogan J. described the required approach in the context of a s.3(6) consideration as follows:-

> "43. At the same time, it is plain that the file assessment of the specific statutory considerations set out in s.3 of the 1999 Act must be full and fair. As Clark J. put it in her judgment in *Ali v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595, [2010] 4 I.R. 45, 63:-
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> "Such a deportation will be lawful once the Minister has considered all relevant factors and has identified a substantial reason for the deportation. It is not the law that the Minister can only deport the father of a citizen child in exceptional circumstances. The law is that notwithstanding the very important status of citizenship, the Minister can deport such a father in pursuit of an orderly and fair restrictive immigration policy in the common good provided that a full and fair assessment of the particular child and particular family situation has been balanced against the State's interests and the decision is not disproportionate in the circumstances."
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> 44. While it is true that no question of citizenship or the rights of families under Article 41 arises in the present case, the basic principle articulated by Clarke J. in Ali nonetheless holds true. Section 3(6)(h) of the 1999 Act provides that:- "In determining whether to make a deportation order in relation to a person, the Minister shall have regard to -...
>
> (h) humanitarian considerations."
>
> 45. This statutory requirement pre-supposes that all relevant considerations - including humanitarian considerations - will be fairly examined prior to the making of a deportation order. The applicants will doubtless contend at the leave hearing that this did not occur in the present case and I cannot say at this juncture that this case is therefore unsustainable in law or that the applicants have no realistic prospect of surpassing the substantial grounds test on this very point."

27. The first thing to be noted is that the case made by the applicant for humanitarian consideration alluded to "the appalling human rights situation in Iran". This constituted a representation to which the decision-maker was obliged to have regard, as provided for by s.3 (6) (i) of the 1999 Act.

28. While the Minister enjoyed a wide discretion (in the absence of any threat to life or serious assault, where there is an absolute prohibition on refoulement) in the context of the weighing exercise he has to engage in pursuant to s.3 (6) of the 1999 Act, and while, as stated by Hogan J. in *T.K. v Minister for Justice, Equality and Law Reform* [2011] IEHC 99 "the Minister would not be required to give any detailed reasons for his decision for the reasons given by both Hardiman J. in FP and by Keane C.J. in *Baby O*", he was nevertheless obliged in the context of "humanitarian considerations" to consider the representations made by the applicant with regard to the denial of basic freedoms which were underpinned by the country of origin information furnished by the applicant with the letter of 14th August, 2009. Indeed, it was clear from the country of origin information consulted by the author of the examination file that there was a humanitarian crisis in Iran; irrespective of whether it gave rise to a threat to life or freedom for a Convention reason or to serious harm.

29. Iran was engaging in breaches of fundamental human rights. A case had been made in the applicant's solicitor's representations on the basis of humanitarian considerations in the context of the situation on the ground in Iran. The representations mandated the Minister at least to examine, pursuant to s.3 (6) (h), the humanitarian argument made on the applicant's behalf in a full and fair manner. Of course the weight to be given to such representation was entirely a matter for the Minister and it is not for this court to speculate on the weight that might have been given to the applicant's representation in the context of a s.3 (6) consideration. Had the Minister considered the situation on the ground in Iran from a humanitarian perspective, it remained open to him to decide against the applicant's humanitarian representations given the wide discretion afforded to him under s.3 of the 1999 Act. The Minister was not required to be discursive in his analysis, given the discretion afforded to him, but his assessment had to be full and fair assessment in the manner contemplated by Ali v. Minister for Justice, as endorsed by Hogan J. in *PJ,OAOJ v. Minister for Justice.*

30. I do not accept the argument made by the respondent's counsel that it was sufficient that the applicant's fears regarding the situation on the ground in Iran were considered in the context of s.5, in the absence of any reference in the section of the examination of file analysis on the s.5 issue to the human rights situation in Iran having been considered on a humanitarian basis, as opposed to the consideration under the s.5 refoulement criteria. In circumstances where a humanitarian representation of the nature described had been made by the applicant, the substantive response (whatever it might be) to that representation was thus required to be set out in the analysis, whether under the s.3(6) analysis or the s.5 analysis, as part of the full and fair assessment to which the applicant was entitled. Thus, because of the potential, no matter how it might be assessed in light of the wide discretion afforded to the Minister under s.3 (6), for the applicant's fears of returning to Iran (if accepted) to weigh in his favour as a humanitarian consideration in the overall s.3(6) consideration, the court cannot accept the respondent's argument that the s.5 refoulement analysis, as it stands, addressed the particular submission made under s3(6)(h).

31. Insofar as counsel for the respondent suggested that the "humanitarian considerations" to which the Minister was obliged to have regard had to be "personal" to the applicant in the sense of being immediately connected to the applicant, the first thing to be

observed is that I do not find any legal authority for that proposition in the case law relied on by counsel for the respondent. Insofar as Hardiman J. in *F.P. and A.L. and others v. Minister for Justice* [2002] 1 I.R. 164 categorized the first seven subheadings of s.3(6) of the 1999 Act as the *"personal circumstances"* of an applicant requiring consideration, and the provisions of s.3(6)(j)-(k) as "impersonal matters", he does not appear to categorize "humanitarian considerations" as either personal or impersonal considerations. Later in the judgment, Hardiman J. described the provisions of s.3(6)(a)-(h) as "personal or other factors" which "notwithstanding the ineligibility for asylum" would render it "unduly harsh or inhumane to proceed to deportation". I also note Murray C.J.'s reference in *Meadows v. Minister for Justice and Law Reform* [2010] IESC 3; [2010] 2 I.R. 701, 732, that "humanitarian grounds…include the personal circumstances of the persons concerned such as their duration of residence, family and employment history and humanitarian considerations generally as well as the common good and considerations of national security and public policy" (emphasis added). "Humanitarian considerations" by their very nature are concerned with the promotion of human welfare. It was, no doubt, in that context that the author of the examination file considered, under s.3(6)(h), the availability and quality of the medical treatment for the applicant in Iran were he to be deported. Thus, it seems to me that in circumstances where the situation on the ground in Iran was raised by the applicant in the context of meriting "humanitarian" consideration, that representation merited an analysis in like vein to that afforded to the applicant's medical condition.

32. I am thus satisfied that the applicant's challenge on this ground has been made out.

The Minister's consideration pursuant to s.5 of the Refugee Act, 1996 (as amended) and s.4 of the Criminal Justice (UN Convention against Torture) Act, 2000
33. With regard to s.5 of the 1996 Act, the examination of file analysis commenced by quoting from the applicant's representations, as follows:-

> "The applicant is opposed to the ruling regime in Iran and to the ruling system of the theocracy in that state. It is clear that the applicant will be at real risk of serious harm and/or face, a significant threat to his life and/or freedom if returned to Iran. Our client is entitled to express this opposition and cannot reasonably be expected to desist from so doing. We refer you to the significant deterioration with respect to human rights abuses in Iran in recent year' Extracts from country reports regarding human rights record in Iran, are included in the submissions."

34. The analysis continued:-

> "According to the following country of origin information, the government's poor human rights record degenerated following the disputed 12 June 2009 elections. The government has limited citizens' rights to peacefully change their government through free and fair elections."

35. The above conclusion was arrived at having regard to the contents of country of origin information quoted in the analysis and derived from a UK Home Office Report on Iran dated 28th June, 2012.

36. An overview of freedom of political expression and freedom of association and assembly in Iran, as derived from the UK Home Office Report, led to the authors concluding that "…the constitution of Iran provides for the establishment of political parties provided that they do not violate the principles of 'freedom, sovereignty, and national unity or question the Islamic basis of the republic'. The government does limit the freedom of association in practice".

37. Freedom of speech and media in Iran was similarly considered through the prism of the UK Home Office Report and that overview led the author of the examination file to conclude that:-

> "…the constitution of Iran provides for the provision for freedom of expression and of the press although in practice the government restricted this. The same applies for freedom on assembly and association – the constitution provides for them, although in practice the government restricted this. "

38. The overview led the authors to ultimately conclude:-

> "While it is noted that the above country of origin information indicates that members of political parties may face mistreatment by the Iranian authorities, the applicant was not involved in any political parties in Iran."

39. The focus then turned to the applicant's submission on the risks to him of suffering serious harm if he was returned to Iran as a failed asylum seeker.

This consideration commenced by the authors stating:-

> "[A]ccording to the following country of origin information the constitution provides for freedom of movement within Iran, foreign travel, emigration and repatriation. It also indicates failed asylum seekers who were/are activists may encounter problems upon returning to Iran."

Reference was made, *inter alia*, to a number of case studies on returned asylum seekers in Iran, gleaned from the UK Home Office Report of 28th June, 2012. These in turn referred, *inter alia,* to the arrest, detention and/or disappearance of named asylum seekers following their return to Iran.

40. The analysis then turned to the applicant's circumstances and set out details of his asylum history (including reference to the contents of his asylum questionnaire) and travels. The s.5 consideration concluded with the opinion that repatriating the applicant would not be contrary to s.5. This matter is discussed later in this judgment.

41. The Minister's decision under s. 4 of the Criminal Justice (UN Convention Against Torture) Act, 2000 was expressed as follows:-

> "Having considered the country of origin information above, I am of the opinion that repatriating [the applicant] to Iran…is not contrary to [S]ection 4 of the Criminal Justice (UN Convention against Torture) Act, 2000."

The applicant's submissions on the s. 5 ground
42. Counsel submitted that the dicta of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 made it clear that where an applicant has raised, at the deportation decision making stage, issues directly relevant to the absolute prohibition pursuant to s. 5 of the Refugee Act, 1996, a decision to proceed with deportation and to conclude that

deportation would not be contrary to s. 5, must have a clear rationale and that the rationale must be patent and evident from the content of the decision. The reasoning cannot be ambiguous and must disclose the basis on which an applicant's fears within the terms and meaning of s. 5 of the Act have been rejected. The reasons and rationale supporting a conclusion that a deportation would not be contrary to s. 5 must be properly supported by adequate and cogent reasons, they must not be unreasonable or irrational and must be proportionate having regard to the fundamental rights at stake. Such a conclusion must be logically and rationally connected to the objective and must not be arbitrary and unfair and must flow from the premises on which it is based. Counsel argued that it was clear from the dicta in Meadows and subsequent case law that it was not sufficient, in order to pass the reasonableness/rationality test, for a deportation decision maker to simply extract from country reports and then reach a bald conclusion that deportation would not be contrary to s. 5.

43. In this regard, counsel referred to the decisions of Hogan J. in *T.K. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 99 and *Efe & Ors v. Minister for Justice, Equality and Law Reform* [2012] IEHC 573; [2011] 2 I.R. 798. Moreover, conclusions reached in an administrative decision affecting fundamental rights (where the absolute prohibition pursuant to s. 5 of the Refugee Act, 1996, or in relation to risk of serious harm are being considered) must be fairly and rationally supported by the country of origin information considered. In this regard, counsel relied on the dictum of Charleton J. in *Ali v. Minister for Justice, Equality and Law Reform* (Unreported judgment, High Court, 12th February, 2009) and *FR. N. UYO. E. & Ors v. Minister for Justice, Equality and Law Reform* [2008] IEHC 107; [2009] 1 I.R. 88. The conclusion arrived at in the analysis that repatriating the applicant to Iran would not be contrary to s. 5 fell foul of the reasonableness and rationality criteria set down in Meadows. Moreover, the conclusion was fundamentally at variance with and not supported by the content of the country of origin information and was in conflict with it and was arbitrary and unfair and could be said to be at variance with common-sense.

44. In particular, the two passages in the examination of file analysis relating to the applicant's asylum applications and his travels, being merely statements of the factual situation, could not reasonably or logically be said to constitute the rationale for the finding that repatriating the applicant to Iran would not be contrary to s. 5 of the 1996 Act. Had the Minister wished to draw an adverse inference or finding based on the applicant's asylum application having been deemed withdrawn or his travels, in the context of the absolute prohibition under s.5 he was required to state that he was doing so and give reasons. That absolute prohibition could not be negated by the applicant's asylum and travel history, if there was a basis not to deport the applicant under s.5, as was submitted on his behalf. Indeed, counsel argued that it could not even be said that the Minister relied on that history as a basis to make the deportation order. Had he done so, the applicant would be arguing a different case. Thus, all one was left with in the examination of file analysis was the bald statement that repatriation would not be contrary to s. 5, an approach which fell foul of *Meadows*.

45. Furthermore, insofar as reliance for the conclusion on repatriation was based on the applicant not being involved in any political parties in Iran, such reliance was illogical and unreasonable and flew in the face of commonsense and was an unfair assessment in the context of the country of origin information which was before the Minister. It was not a reasonable reaction by the Minister to say that mistreatment in Iran was confined to those in political parties, as the country of origin information made it clear that others who opposed the regime were at risk of serious harm and torture.

46. In like terms, based on the country of origin reports relied on by the Minister, together with the information furnished by the applicant's solicitor, it was not reasonable or rational for the Minister to conclude that the applicant would not be at risk as a failed asylum seeker; the country of origin information stated otherwise. Moreover, no cogent reasons were given for the conclusion in this regard. Insofar as the Minister's conclusion on the s.5 issue was based on the country information concerning failed asylum seekers, it was not credible, reasonable or tenable in light of that information. Thus, the Minister's approach fell foul of the reasonableness test.

47. Counsel referred to the dictum of Charleton J. in *Ali v. Minister for Justice, Equality and Law Reform* (Unreported judgment, *Ex Tempore*, High Court, 12th February, 2009), as follows:-

> "It seems to me that the test is…has a reasonable view been taken on the country of origin information, a view that a reasonable Minister could hold. It is not required of the Minister to justify why that view is held through reasoning that one report or one passage from a report is held to be more correct in favour over another passage that at the end of the day the view has to be reasonable."

48. In light of the above benchmark, the Minister's view that ill treatment was confined to those in political parties was irrational and unreasonable and verged on the ridiculous. While, as acknowledged in *Ali v. Minister for Justice*, the Minister was entitled to choose one report over another and was not required to argue out his choice in the decision, he was nonetheless "obliged to fairly assess the country of origin information and not to make a decision which is manifestly in error in the sense of being unreasonable"

49. Reference was also made to the decision of Charleton J. in *FR. N. UYO.E & Ors. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 107; [2009] 1 I.R. 88 as support for the submission that the conclusion that the applicant was not involved in any political parties in Iran could not be said to be a fair or rational assessment of the applicant's circumstances given the contents of the available country of origin information.

50. In summary, counsel argued that the bald statement that repatriation of the applicant would not be contrary to s. 5 had to be quashed on Meadows principles (absence of rationale) and, even if one were to adopt, as a conclusion on the s. 5 issue, the Minister's position that the applicant was not a member of a political party, that conclusion was, again, unreasonable and irrational on *Meadows* principles, since it could not be regarded as a reasonable interpretation of country of origin information, applying the approach of Charleton J. in FR. N. UYO. E. and Ali.

51. Counsel also made the case that if the court accepted the submissions made with regard to the content of the country of origin information that was before the Minister, his decision under s.4 of the 2000 Act must also fall.

The respondent's submissions on the s. 5 ground

52. Counsel for the respondent submitted the test to be met by the applicant was that set out in *Kouaype v. Minister for Justice, Equality and Law Reform* [2005] IEHC 380; [2011] 2 I.R. 1, as follows:-

> "4.8 However it is clear that all of the above materials are concerned with the process that leads to the formal determination of the entitlement of a person to refugee status with all the consequences that flow therefrom. It does not seem to me that similar considerations apply in the case of a failed asylum seeker in circumstances where the Minister is entitled, as was pointed out in F.P. v. Minister for Justice [2002] 1 I.R. 164, to have regard to that failure in considering whether to make a deportation order. If the Minister is considering whether s. 5 of the 1996 Act applies so as to debar an entitlement to deport he is, in substance, considering whether the person concerned is entitled to refugee status for the terms in which the prohibition under s. 5 are set out are the same as the terms upon which a person qualifies for refugee

status. Given that statutory regime it would be surprising if the Minister were not entitled to place a heavy emphasis indeed on the fact that the person concerned had, as a result of going through the asylum process, every opportunity to make out a case for that status and thus had every opportunity to make out a case which in substance would mean that s. 5 prohibited their deportation. Having failed to establish that status in the refugee process it is difficult to see how, in the absence of special or changed circumstances, the Minister could be under any heavy obligation to review that aspect of the matter further. The Minister is, of course, also required to consider the matters set out in s. 3(6) of the 1999 Act."

53. Against the factual backdrop that pertained to the applicant, he had to show changed or special circumstances, as referred to in *Kuoaype*, in the context of a s. 5 consideration, but the applicant had not done so either before the Minister or before this court. Counsel referred to the following dictum of Clarke J. in *Kuoaype*:-

> "4.4 While, therefore, it does not appear that specific representations were made to the effect that an order should not be made deporting the applicants in P. L. and B. on the grounds that so to do would be in breach of s. 5 of the 1996 Act, it seems clear that the Supreme Court was of the view that the Minister was entitled to take the fact that the applicants had already been through the statutory asylum process and had failed to establish their entitlement to asylum status, as an important factor to be taken into account in considering whether a deportation order was to be made. Indeed it would be strange if it were otherwise."

54. In the context where the applicant was a failed asylum seeker, it was difficult to see how the Minister's decision on the s. 5 ground (or the s. 3(6)(h) ground) would be irrational. Based on the dictum of Clarke J. in Kouaype, the applicant faced a difficult test to establish that the Minister's decision was irrational. Moreover, the very concept of the applicant being a failed asylum seeker (a fact known to himself) was a clear and unequivocal reason why s. 5 would not be an issue in his case.

55. Insofar as the applicant sought to rely on *Meadows*, in circumstances where the applicant was a failed asylum seeker and failed to secure subsidiary protection, a decision that s. 5 did not apply could not be said to fly in the face of reason or common-sense.

56. Counsel contended that *Meadows* was authority for the proposition that there did not have to be an express setting out of reasons or that the reasons had to be discursive, inference was sufficient. As long as the court can discern the rationale from the decision in the applicant's case, either expressly or inferentially, that was all that Meadows requires. In the present case, the Minister's decision was expressly and inferentially clear: firstly, one unequivocal decision was that the applicant came before the Minister as a failed asylum seeker; that of itself was sufficient to ground a finding that s. 5 did not apply, absent any special or changed circumstances as set out in Kouaype. Secondly, the Minister did consider the position in Iran at the time of his decision.

57. It was argued that the approach adopted in *Kouaype* was endorsed by the decision of Cooke J. in *J.E. v. Minister for Justice, Equality and Law Reform* [2011] 1 I.R. 574, where it was stated:-

> "[8] The memorandum entitled 'Examination of File under s. 3 of the Immigration Act, 1999, as amended' ('the file note'), which supplements the statement of the Minister's reasons for making the deportation order given in the letter of notification dated the 16th April, 2008, deals at its very outset with the prohibition of refoulement in s. 5 of the Act of 1996. It does so primarily by reference to the background to the asylum claim and to the more obvious threats to the applicant's life and well being in the context of the account he originally gave in his asylum claim arising out of the alleged violence experienced by Christians at the hands of Muslims and his fear of Sharia courts and their punishments. Significantly, however, within the section devoted to consideration of the prohibition of refoulement in s. 5, the memorandum contains some five pages devoted to the consultation of information on attitudes to and the treatments available for HIV/Aids sufferers in Nigeria. The overall effect of this information coincides with that in the material quoted in the representations. It confirms, for example, the existence of evidence as to discrimination against people with Aids and the difficulties they experience in obtaining access to basic prevention, care, support and treatment services. At the end of the section the author states: 'Having considered all the facts of this case, I am of the opinion that repatriating Mr. E. to Nigeria is not contrary to s. 5 of the Refugee Act, 1996, as amended, in this instance'. Clearly, this conclusion covers all of the facts dealt with in the preceding fifteen pages of the memorandum, including the material relating to the conditions faced by HIV/Aids sufferers in Nigeria. It cannot therefore be argued that there has been a failure as such to address that material, as required by s. 3(6)(i) of the Act of 1999, nor to do so by reference to the prohibition in s. 5 or the protection afforded by article 3. Although no express invocation of s. 5 was made in the representations of the 3rd July, 2007, it is in that context that the material has been covered in the file note.
>
> …
>
> [10] As indicated by the court when granting leave, there is at least a superficial similarity between the approach adopted in the present file note in expressing a conclusion and that which was before the Supreme Court in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701. It is clear from the judgments in that case that the applicant had made representations to the Minister in accordance with s. 3(3)(b) of the Act of 1999 which brought into play the possible application of the prohibition on refoulement on the basis that she claimed to the risk of being subjected to female genital mutilation ('FGM'), if repatriated. In other words, information was put before the Minister raising a possible implication of torture or serious assault in the sense of s. 5.
>
> ……
>
> [14] Notwithstanding these apparent similarities of approach, however, the court does not consider that this is an instance in which it would be justifiable to quash the deportation order for a failure to state an adequate reason. In the first place, the court is not satisfied that there has been a material failure to give a reason for considering the prohibition in s. 5 to be inapplicable. Secondly, even if there could be said to be doubt as to the adequacy of the explanation for rejecting the basis upon which article 3 (and by implication, s. 5) had been invoked, the remedy of certiorari is at the discretion of the court in a case of this nature and the court is satisfied that the information which the Minister was required to consider could not in any event have constituted a basis for an opinion that the prohibition on refoulement was applicable or that article 3 would be infringed.
>
> [15] As regards the first of these considerations, it is to be noted that quite apart from the conclusion to the file note (see para. 10 above) and the content of the letter of the 16th April, 2008, a direct conclusion in relation to all of the matters covered under the heading of s. 5 is given at the top of its p. 16: - 'Having considered all the facts of this case, I am of the opinion that repatriating Mr. E. to Nigeria is not contrary to section 5, etc.'. (It is not apparent from the judgments in *Meadows v. Minister for Justice* [2010] IESC 3; [2010] 2 I.R. 701 whether any similar comment on the s. 5

analysis was contained in the file note in that case.)

> [16] Section 5(1) of the Act of 1996 prohibits the return of a person where 'the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion'. Subsection (2) provides that a person's freedom 'should be regarded as being threatened if, *inter alia*, in the opinion of the Minister, the person is likely to be subjected to a serious assault (including a serious assault of a sexual nature)'.
>
> [17] The conclusion given at the top of p. 16 of the file note can only be construed, in the view of the court, as the expression of an opinion that repatriation of the applicant to Nigeria would not expose him to any threat to his life or freedom (including serious assault) on the basis that, as a sufferer from HIV/Aids, he is a member of a particular social group. To the extent that the representations made on the 3rd July, 2007, were treated in the memorandum as invoking both the protection of article 3 and s. 5, the conclusion can only be interpreted as a rejection of that claim on that basis. It is to be noted that *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701 was concerned with an application for leave to seek judicial review, and the claim of exposure to a risk of female genital mutilation appears to have been addressed differently by the Minister under s. 3 of the Act as compared with the reason given for rejecting it by the Refugee Appeals Tribunal (see the judgment of Fennelly J. at para. 17). In those circumstances and because the 'refoulement is not an issue' conclusion was open to at least three possible interpretations, the rationale of the decision to deport was not apparent."

58. It was further submitted that in the present case even if the applicant were to establish substantial grounds (which test was not met), he could not clear the test for *certiorari* and in this regard counsel cited Cooke J. in *J.E. v. Minister for Justice* [2011] 1 I.R. 574, as follows:-

> [18] "… in the present case, the obligation of the Minister was to consider whether the prohibition on refoulement under s. 5 (and/or a possible infringement of the protection accorded by article 3 of the Convention) arose both generally by reference to information available to him as to conditions at the deportation destination, and, particularly, in the light of the information put before him when that protection was invoked. While it is possibly desirable that the author of a file note might go further by way of explanation, the court is satisfied that it is sufficiently clear from a reading of this file note as a whole that the opinion had been formed that, notwithstanding the effect of the information as to conditions faced by HIV/Aids sufferers in Nigeria, the return of this applicant to that country would not bring about a threat to his life or freedom or expose him to torture or inhuman or degrading treatment for the purposes of article 3.
>
> [19] The second reason for refusing relief is that even if (*quod non*) some criticism could be made of the absence of a more detailed explanation in the file note so far as concerns the s. 5 conclusion, the court is satisfied that it would be an inappropriate exercise of discretion to quash the deportation order by certiorari. This is because the information put before the Minister in the representations together with that consulted and recorded by the author of the file note, could not in any event constitute a basis for an opinion that the repatriation of the applicant to Nigeria would violate the prohibition on refoulement or the protection afforded by article 3".

59. Counsel argued that the approach adopted by Cooke J. in *J.E.*, confirmed that the approach of the Minister in the present case was lawful. The conclusion could not be said to fly in the face of reason or fundamental commonsense. The applicant was not politically active or in a political party, as found by the Minister. While the applicant's counsel made the case that the applicant had never stated he was in a political party, it would be inappropriate for the court to rely on facts as set out by the applicant, as they had never been tested in the statutory process set up to adjudicate on protection applications, since the applicant was deemed a failed asylum seeker and since he had withdrawn from the subsidiary protection process. Even if the court were to look at the factual circumstances, the applicant was not politically active. The examination of file analysis showed that the Minister was alert to the applicant's factual circumstances. Moreover, while the applicant did not present any changed circumstances, the Minister nevertheless had recourse to up-to-date country of origin information (a UK Home Office Report of June 2012) which was more recent that the country of origin information forwarded by the applicant himself. The information related overwhelmingly to human rights issues pertaining to the activities of individuals such as journalists, women activists and lawyers, as evidenced, in particular, by an Amnesty International report quoted in the UK report. The Minister had acknowledged Iran's poor human rights records in the examination of file analysis and had not closed his eyes to the objective situation in that country. He nevertheless concluded that no refoulement issue arose with regard to the applicant. The only issue the applicant advanced was his political opinion but the Minister, after a review of the country of origin information, concluded that only members of political parties might face ill treatment in this regard. That was, counsel submitted, an unequivocal decision by the Minister and a clear reason to why the s.5 requirement was not fulfilled. Equally, the Minister addressed the issue of the applicant returning to Iran as a failed asylum seeker. The issue of alleged persecution by virtue of being a returned asylum seeker was addressed by Irvine J. in *F.V. v. RAT* [2009] IEHC 268 and in a decision of Cross J. in *MTTK v. RAT* [2012] IEHC 155, both of which made reference to the requirement for cogent, authoritative and objective evidence to substantiate a fear of returning to an applicant's country of origin as a failed asylum seeker. Counsel submitted that there was no evidence that the applicant would suffer mistreatment if deported; he was not a member of a political party and there was no evidence that the authorities in Iran were aware of his existence or alleged views. Moreover, it was open to the applicant to leave the State voluntarily.

The applicant's response to the respondent's submissions on the s.5 issue

60. Counsel submitted that the approach of the respondent in this case was to corral the court to adopt a view that because the applicant's asylum application was deemed withdrawn and because he had withdrawn from the subsidiary protection process, the court should commence its review of the Minister's decision on that basis and thus imply reasons for the decision into the examination of file analysis that were not there.

61. It was for the Minister to take issue in the analysis with the applicant's actions in the asylum and subsidiary protection processes and to draw conclusions, but the Minister did not do that. It was not for the respondent to read such conclusions into the examination of file analysis. In order for the court to infer from the examination of file analysis the reason for the decision, there had to be something in the analysis from which an inference could be drawn, i.e. some observation on the part of the Minister. However, in the context of the refoulement issue, the Minister's analysis commenced with an extract from the applicant's representations; nowhere did the Minister state that he did not believe that the applicant was opposed to the Iranian regime, nor did he make any negative observation regarding the applicant's prior asylum or subsidiary protection history.

62. Counsel observed that the respondent's counsel sought to have the court infer from the fact that the Minister referred to and acknowledged Iran's poor human rights record as meaning that the Minister gave a full and fair consideration to the country of origin information. The reality was, however, that the extracts referred to by the Minister had made clear the real and palpable risks to those who opposed the Iranian regime. While the respondent urged the court to accept that the threat demonstrated by the country

of origin information was confined to "activists", that was not a reason given by the Minister in his decision.

63. Even if the statement by the Minister that the applicant was not involved in political parties was referable only to an analysis of the applicant's circumstances in the context of freedom of speech and media in Iran (as contended for by the respondent), the very fact that this was a possible interpretation of the Minister's conclusion only lent weight to the applicant's argument that the reasons as to why refoulement was rejected were not clearly discernable from the decision, as required by *Meadows*.

64. With regard to the Minister's assessment of the applicant's circumstances as a failed asylum seeker, counsel contended that nowhere in the examination of file analysis did the Minister state why the risk as a failed asylum seeker would not arise for the applicant on refoulement. What the respondent requests of the court was for it to state that because the applicant eschewed the Irish asylum process and withdrew his subsidiary protection application and because of the prior asylum history in Greece and the UK, the Minister had inferred that the applicant was someone to whom a risk would not apply. However, the Minister made no observations on that factual matrix from which inferences could be drawn by this court.

65. Counsel argued that the respondent's reliance on the decision in *F.V.* was misplaced since the court in that case had regard to the Refugee Appeals Tribunal's rejection of the applicant's credibility. Moreover, counsel submitted that the respondent could not derive support from the decision of Ryan J. in *Okito v Refugee Appeals Tribunal* (Unreported judgment, High Court, Ryan J., 16th July, 2010) since the court, in that case, found that the country of origin information in issue lacked repute. With regard to the respondent's reliance on the decision of Cross J. in *MTTK v RAT* [2012] IEHC 155, counsel pointed to the observations made by Cross J. in that case, as follows:-

> "36. I too am not readily impressed with the contents of this material. In my opinion they appear one-sided but of a more worrying nature, unsubstantiated.
>
> 37. However, amongst the applicant's country of origin information was an article dated 24th August, 2006 which contained a UNHCR response to the credibility of a BBC report that had alleged a risk to failed asylum seekers returning to the DRC. This document stated that while they did not have evidence to suggest that there was systemic abuse of failed asylum seekers on being returned to Kinshasa Airport, it did advise against the forced returned to Kinshasa of persons of 'Banyamulenge ethnic origin'. Therefore, while it could not categorically be stated that all failed asylum seekers are at risk upon return to DRC, a category of them by virtue of their ethnicity are potentially at risk according to the UNHCR.
>
> 38. This [C]ourt does not know and does not speculate as to whether the applicant's ethnicity/Rwandan affiliation has any relationship to persons of 'Banyamulenge ethnic origin' but strongly suspects that it does not. That, I feel, is not the point. In this case, the applicant in addition to the Observer and Institute of Race Relation articles, which of themselves, might not be sufficient had authoritative documentation which indicated that there was a risk to certain persons on return to the DRC by reason of their ethnicity/nationality. As the ethnicity/Rwandan affiliation of the applicant has not been yet adjudicated upon, the error by the RAT in declining to examine the consequences to the applicant of being forced to return to the DRC as a failed asylum seeker, was of such a nature of itself to warrant setting aside the decision in this case."

66. Counsel refuted the respondent's contention that the *Meadows* test had not altered the approach of Clarke J. in *Kouaype*. In the first instance, the *Meadows* approach manifestly created a more flexible approach than the *O'Keeffe* and *Keegan* tests, as articulated by Hogan J. in *T.K. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 99 and *Efe v. Minister for Justice & Ors* [2011] IEHC 214.

Furthermore, in *Kouaype*, the applicant did not argue irrationality and unreasonableness, unlike the applicant in Meadows and the applicant in the present case.

67. Insofar as the respondent sought to rely on the decision in *J.E. v. Minister for Justice* [2011] 1 I.R. 574, such reliance was misplaced as in the present case the applicant was not attempting to demonstrate a s. 5 threat by reference to a medical complaint, an issue which exercised the court in *F.E.* [2014] IEHC 62.

The court's consideration of the s.5 challenge

68. The reviewability of a deportation order on the s. 5 ground (and the s. 3(6) ground) was summarised by Clarke J. in *Kouaype v. Minister for Justice* [2005] IEHC 380 as follows:-

> "5.1 For all of the above reasons it seems to me that the grounds upon which a decision by the Minister to make a deportation order in the case of a failed asylum seeker can be challenged are necessarily limited. Without being exhaustive it seems to me that it would require very special circumstances for such a review to be possible unless it can be shown that:-
>
> (a) the Minister did not consider whether the provisions of s. 5 applied. Where the Minister says that he did so consider and in the absence of any evidence to the contrary this will be established;
>
> (b) the Minister could not reasonably have come to the view which he did. It is unlikely that such circumstances could arise in practice in most cases of failed asylum seekers given that there will already be a determination after a quasi judicial process which will in substance amount to a finding that the prohibition contained in s. 5 does not arise. However, it should be noted that it is incumbent on the Minister to consider any matters which have come to his attention (whether by way of submissions or representations on behalf of the applicant or otherwise) which would tend to show a change in circumstance from the position which obtained at the time the original decision to refuse refugee status was made;
>
> (c) the Minister did not afford the applicant a statutory entitlement to make representations on the so called 'humanitarian grounds'; or
>
> (d) the Minister did not consider any such representations made within the terms of the statute, or the factors set out in s. 3(6) of the 1999 Act, or (possibly) the Minister could not reasonably have come to the conclusion which he did in relation to those factors."

Earlier in his judgment, Clarke J. elaborated on the nature of the reasonableness test referred to at (b) above, as follows:-

> " 4.11 Having regard to all of the above it seems to me that the role of the court in reviewing that aspect of the decision

of the Minister to make a deportation order which requires the Minister to be satisfied that the provisions of s. 5 of the Act of 1996 do not apply to the case under consideration is, in all cases, but in particular in cases where the applicant concerned has already been the subject of a decision to refuse a declaration of refugee status, necessarily significantly more than the limited role of the court in considering the determination of the statutory bodies in respect of the refugee process itself.

4.12 In the absence of unusual, special or changed circumstances or in the absence of there being evidence that the Minister did not consider the matters specified by s. 5 in coming to his opinion, it seems to me that it is not open to the court to go behind the Minister's reasoning…

4.13 …Given that amongst the materials that will be before the Minister in the case of a failed asylum seeker will be materials which have led to an unchallenged determination by the appropriate statutory body that the person concerned does not qualify for refugee status and did not, therefore, at least as of the time of that decision, come within the scope of s. 5 of the 1996 Act, it would require special circumstances before it could be said that the Minister had an obligation to engage in any significant reconsideration of that aspect of the matter of deportation.

4.14 Clearly one such possibility may arise where it may be contended that there has been a significant change in material circumstances so that it could be argued that notwithstanding the view taken, at the time of its decision, by either the RAC or the RAT, the situation had changed to a sufficiently significant extent as to arguably lead to a different conclusion."

69. In the context of the test set out at para. 5.1 (a) of *Kuoaype*, no argument was put forward that the Minister had not considered whether s. 5 applied. The necessary review therefore is whether the decision was reasonably or rationally arrived at. Before considering the manner of the Minister's consideration of the refoulement issue, it is apposite to refer to the decision of the Supreme Court in *Meadows v. Minister for Justice* [2010] 2 I.R. 701. At paragraphs 79 and 80 of his judgment, Murray C.J., opined as follows:-

"[79] …before making a deportation order the first respondent is required to consider in the circumstances of each particular case whether there are grounds under s. 5 which prevent him making a deportation order. In cases where there is no claim or factual material put forward to suggest that a deportation order would expose the deportee to any of the risks referred to in s. 5 then no issue as regards refoulement arises and the decision of the first respondent with regard to s. 5 considerations is a mere formality and the rationale of the decision will be self-evident.

[80] On the other hand, if such material has been presented to him by or on behalf of the proposed deportee, as the case here, the first respondent must specifically address that issue and form an opinion."

70. Murray C.J. also stated at para. 87:-

"…the Minister when making a decision in relation to s. 5 on non-refoulement is not bound, absent special circumstances at least, to enter into correspondence with the person concerned setting out the detailed reasons as to why refoulement does not arise. If the criteria for judicial review set out in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 are to be effectively deployed, even in circumstances where the application of the principle of proportionality does not arise, at the very least the rationale underlying the decision must be discernible expressly or inferentially."

71. Later in his judgment, Murray C.J. stated:-

"[93] An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context. Unless that is so then the constitutional right of access to the [C]ourts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective. In my view, the decision of the Minister in the terms couched is so vague and, indeed, opaque that its underlying rationale cannot be properly or reasonably deduced…

[96] The recommendation with which the memorandum submitted to the first respondent with the file is not helpful and adds to the opaqueness of the decision. That states that 'refoulement was not found to be an issue in this case'.

[97] This decision is open to multiple interpretations which would include: one that refoulement was not an issue and therefore it did not require any discretionary consideration. On the other hand it may well be that the Minister did consider refoulement an issue and that there was evidence of the applicant in this case being subject to some risk of being exposed to female genital mutilation but a risk that was so remote that being subject to female genital mutilation was unlikely: alternatively he may have considered that while there was evidence put forward to suggest that the applicant might be subjected to female genital mutilation, that evidence could be rejected as not being of sufficient weight or credibility to establish that there was any risk.

[98] The fact remains that it is not possible to properly discern from the first respondent's decision the actual rationale on foot of which he decided that s. 5 of the Act had been 'complied with'. Accordingly, in my view, there was a fundamental defect in the conclusion of the first respondent on this issue."

72. In the course of his judgment in *Meadows*, Fennelly J. addressed how a court should consider any challenge to an administrative decision, in the following terms:-

"I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word "substantive", to distinguish from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision maker. This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J… [T]he applicant must discharge that burden by producing relevant and cogent evidence…."

73. In the context of this judicial review, the court is also aided by the decision in *FR. N. UYO. E. & Ors v. Minister for Justice, Equality and Law Reform* [2008] IEHC 107; [2009] 1 I.R. 88. In his judgment, Charleton J. described the parameters of the Minister's obligation under s.5 in the following terms:-

> "22. … the Minister is specifically prohibited by what is sometimes called the non-refoulement principle from expelling non-citizens whose rights to life and bodily integrity would thereby be threatened. This is not discretionary and never was…
>
> 23. In contrast to the discretion on humanitarian grounds vested in the respondent Minister under s. 3 of the Immigration Act, 1999, s. 5 of the Refugee Act, 1996, declares a right in favour of non-citizens. The analysis required thereby is more than the consideration of a discretion as to whether or not a privilege should be granted. Rather, it prohibits expulsion from the State in terms which uphold the life and freedom of non-citizens not to be subjected to the threat of serious assault. The definition of a refugee, as contained in s. 2 of the Refugee Act, 1996, overlaps to a major degree with the non-refoulement principle as stated in s. 5 of the Act. A difference arises through the definition of a refugee under s. 2 of the 1996 Act, requiring that an applicant should fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion; whereas the Minster is forbidden for expelling a non-citizen from the State where, under s. 5 of the 1999 Act, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. It would be fair to assume that the reference to persecution in s. 2 in the 1996 Act is replaced in s. 5 of the 1999 Act by a reasonable risk that a threat to the life or freedom of a person being considered for deportation would arise on that same ground.
>
> 24. However, in addition, s. 5(2) declares that a threat can exist where a person is likely to be subjected to serious sexual, or non-sexual, violence. Persecution can arise by virtue of the action of a State, or a group within a State, against an identified group who are hated by reasons of false justifications on the basis of race, religion, nationality, membership of a particular social group or particular political opinion. Section 5 is, because of its somewhat broader definition, arguably not necessarily concerned solely with persecution but with the likelihood of a serious infringement of a non-citizen's bodily integrity. This will very often occur by reason of persecution, which may be described as impersonal hatred arising from attributes projected onto groups within a society and which leads to violence, but it can also arguably occur due to chaos, lawlessness and the breakdown of State institutions. There is arguably a statutory right vested in non-citizens, not to be returned, by any means, to a place where they are likely to be persecuted and arguably, even absent active persecution, subjected to serious assault. I read the legislation as covering persecution and possibly as covering the risk of serious assault by reason of the state of chaos within a country. The legislation requires the respondent Minister to consider how a proposed deportee may be affected as to this right. Though proposed deportees are not given a statutory opportunity under the legislation to make submissions as to this right on the state of affairs within their country of origin, it is, nonetheless, a right that is declared by the section. In addition to the right declared by s. 5 of the Refugee Act, 1996, there is also the right vested in non-citizens by legislation not to be returned to a country which will subject a non-citizen to torture; the Criminal Justice (United Nations Convention against Torture) Act, 2000. This is undoubtedly a right declared in favour of non-citizens and once a person qualifies for the right, no discretion to override that right is vested in the respondent Minister…
>
> 45. It follows…that where an additional right is claimed to those which entitle an applicant to refugee status under s. 2 of the Refugee Act, 1996, that the Minister, prior to deporting such an applicant, must first consider whether the claim made is the same in substance as that which has already been contended for and has failed before the Refugee Applications Commissioner and the Refugee Appeals Tribunal. If the matter is the assertion of a new right based on substantially new facts, then the Minister must consider it fairly. The issue before the Minister is settled if the right asserted is an absolute one, such as the right arising from the prohibition on refoulement or the right not to be tortured. If it is a right that needs to be balanced as against the entitlement of the State to have and implement an immigration policy, then that right may be less or more important than the State's entitlement…
>
> 56. …An applicant will, no doubt, make the best possible case that is available on the basis of country of origin information. That case may assist the Minister, it may be real in terms of what it puts forward, or it may be exaggerated. Any submission may be checked against what the Minister already has available to him and supplemented by any reliable additional reports. The receipt of submissions may assist in the process, but it does not relieve the Minister of his responsibility to make a fair decision.
>
> 57. The reality of the multiplicity of written decisions on judicial review on refugee matters emanating from the High Court displays strong evidence for the proposition that judges, in considering the actions of the statutory bodies under the Refugee Act, 1996, exercise a heightened level of scrutiny when compared to other forms of judicial review that concerns administrative decision makers. I do not think that it would be fair to the principle of the primary importance of human rights merely to apply in judicial review applications of a determination by the Minister a test as to whether his determination as to the situation in the country of origin of the applicant, and as to whether protection was reasonably available within that territory, by asking whether that decision flew in the face of fundamental reason and common-sense; the ordinary test for overturning decisions of fact in judicial review of administrative or quasi-judicial tribunals. Rather, it seems to me, that a decision on the country of origin of an applicant and the availability of protection within its territory should be scrutinized if a judicial review is taken and the decision should only stand if it be a rational one that is fairly supported by the country of origin information..."

74. I regard the above decision (and the decision in *Ali v Minister for Justice, Equality and Law Reform* (Unreported judgment, Ex Tempore, High Court, Charleton J., 12th February 2009) as authority for the proposition that with regard to the absolute right guaranteed by s.5 of the 1996 Act, country of origin information must be considered in a fair manner.

The application of the foregoing judicial principles to the present case

75. The issue for determination by this court is whether a substantial case has been made out that there was a "fundamental defect" in the Minister's decision; the essential question is whether the Minister could reasonably and rationally have formed the opinion that repatriating the applicant would not be contrary to s.5 of the 1996 Act.

76. It is apparent from the analysis that the representations made by the applicant with regard to s.5 are recorded therein, and that the Minister was alert to Iran's poor human rights record, as documented in the quoted extracts from the country of origin information.

77. The author of the analysis made a factual finding that the applicant was not a member of any political party in Iran and it can

thus be inferred that when reference is made to "the facts" of the case having been considered, that that fact was among those considered. However, the applicant's counsel contended that reliance on the fact that the applicant was not a member of a political party as a basis for the opinion that the repatriation of the applicant would not be contrary to s.5 was illogical and unreasonable, and an unfair assessment of the available country of origin information, given that that information did not limit the threat to life and serious harm to members of political parties. This court agrees with that submission. The Minister's assessment that "members of political parties" may face mistreatment in Iran was not indicative of a "fair" assessment of the country of origin information before the Minister, as required by the dicta of Charleton J. in *Ali and FR.N. OYE*, since it is apparent that mistreatment was not confined to that category. The respondent's counsel argued that it was not for the applicant at this juncture to make the case to the court that he never claimed to be a member of a political party. While there is merit in counsel's argument, that is not the point; a factor which informed the Minister's opinion that the applicant could be repatriated without breaching s.5 was arrived at on the basis of a flawed, and, therefore unfair, analysis of country of origin information, when a rational and reasonable reading of the relevant material would suggest that mistreatment was not confined to members of political parties. Having said that, it is not for this court to determine whether the applicant's claimed position as someone "opposed to the ruling regime in Iran and to the ruling system of theocracy in that State" was believable or otherwise, or whether his circumstances might reasonably or rationally fall within the category of persons referred to in the country of origin information: that determination was the preserve of the Minister. Such a determination is however not apparent on the face of the record and, save for the finding on membership of a political party (and by implication that returning the applicant as a failed asylum seeker would not breach s.5), there is no indication in the examination of file analysis of the Minister's rationale for his conclusion that repatriating the applicant would not be contrary to the absolute prohibition on refoulement. Thus, insofar as the Minister's opinion that repatriating the applicant was premised on the basis of his not being a member of a political party, that conclusion was irrational for the reasons stated.

78. In response to the representations made by the applicant that he feared "serious harm" if returned to Iran as a failed asylum seeker, the examination of file analysis documented extracts from the available country of origin information on this issue, as contained in the 2012 UK Home Office Report under the headings "Freedom of Movement" and "Failed Asylum Seekers", and the analysis went on to acknowledge that "failed asylum seekers who were/are activists may encounter problems upon returning to Iran."

Following the quoted extracts from the country of origin information on failed asylum seekers, the analysis stated as follows:-

> "Furthermore, it should be noted that the applicant made an asylum application on 23/09/2006. The applicant submitted his asylum questionnaire, in which he states that 'I was threatened and chased by some forces, which are known as the superior government forces…i was arrested with one of my friends…who was a literature student…We were arrested due to having interest and participating in literature discussions that sometimes ended up in political discussions'. It is noted that the applicant stated on his asylum questionnaire that he himself did not belong to any political party or organisation and that apart from '[A] group of my friends who are literature students wanted to establish an organisation, and without being given a second option, I became a member'. He also stated in his questionnaire that the group was never established. The applicant did not attend for interview and his application was deemed to be withdrawn, as provided for in s. 11(10) of the Refugee Act, and a recommendation was made that the applicant should not be declared to be a refugee.
>
> It is noted that the applicant left Iran in 2002. He claims that he travelled to Greece where he claimed asylum. The applicant claims that his asylum claim was refused in 2005. He claims he left Greece in 2006, according to information on file he then went to France and remained there for 2 months. He then arrived in the State on 23/06/2006. According to information on file the applicant entered the UK using a forged Greek passport in August 2006. He was arrested at Luton Airport, London, attempting to check-in for a flight to Canada. He was then sentenced to 10 months for possession of a false instrument and was released on 02/02/2007. He then absconded and came to light again on 19/03/2007 when he attempted to claim asylum at Asylum screening Unit at Croydon."

79. The analysis then stated:-

> "I have considered all the facts of this case and accordingly, I am of the opinion that repatriating [the applicant] to Iran… is not contrary to Section 5 of the Refugee Act, 1996, as amended, in this instance."

I am persuaded by the applicant's counsel's submissions that the above conclusion does not yield any intimation as to whether the Minister believed or disbelieved the applicant's representations that based on his opposition to the regime in Iran, he will be "at real risk of serious harm and/or face a significant threat to life and/or freedom if returned to Iran." I also agree with the applicant's submission that insofar as the conclusion was that repatriating the applicant as a failed asylum seeker would not be contrary to s.5, that was illogical in circumstances where the analysis accepted that failed asylum seekers who are /were activists may encounter problems upon return and noted the applicant's contention that he was arrested prior to his leaving Iran for being involved in literature discussions that sometimes ended up in political discussions. This illogicality arises in circumstances where no determination was made in the analysis on this aspect of the applicant's claimed history in Iran.

80. At the end of the day, the applicant's claimed fears of returning to Iran by virtue of his claimed opposition to the political regime potentially engaged s.5 (as acknowledged by the Minister given the consideration of refoulement in the analysis). Given the content of the country of origin information consulted by the Minister regarding the treatment of those who hold opposing views to the Iranian regime and the applicant's claim of opposition to that regime (and in the context of the applicants assertions as recorded in the analysis), the Minister was required to state why he concluded that repatriating the applicant would not breach s.5. This was the approach adopted by Hogan J. in *T.K. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 99 with which I concur. As stated by Hogan J. in T.K.,

> "Just as with Meadows, this reasoning is - at best - ambiguous. It does not disclose the basis on which the appellant's complaint regarding a fear of persecution in Togo was rejected. Adapting the language of Fennelly J. in the latter case, the Minister does not disclose whether he believes or disbelieves the applicant's account or what his views are regarding the extent or the existence of the risk of such ill-treatment or whether or not he believes the applicant is subject to the risk, or, if not, why not. Given the country of origin information regarding Togo and the applicant's account of his necessity to flee that country in 2005 (albeit one which was not accepted by either the Commissioner or the Tribunal), the Minister was obliged to state why the conclusion was reached that repatriation to Togo would not infringe s. 5 of the 1996 Act. Without this information, the applicant was in no realistic position to challenge the Minister's decision by way of judicial review and the failure to apply such reasons meant that, in the words of Murray C.J. in *Meadows*, the applicant's "constitutional right of access to the [C]ourts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.'"

81. Furthermore, the Minister did not have the benefit of any prior substantive protection decision with regard to the applicant from which he could have drawn inferences in terms of the fears expressed by the applicant, in the process of reaching his own decision (the court emphasising however that the existence of such decision or decisions would not absolve the Minister of his own duty to adjudicate, given the absolute prohibition on refoulement).

82. The Minister did have the factual matrix, as set out in the analysis, with regard to the applicant's asylum history (including the assertions set out in the questionnaire and the circumstances which led to the refusal of asylum) and his travels. However, the court does not accept that this factual matrix constitutes a sufficient basis from which to infer the rationale for the decision on the s.5 question, absent any observation within the analysis that the Minister disbelieved or otherwise rejected the case made by the applicant in the course of his representations and absent any comment or observation in the analysis document of that factual matrix (including that the applicant was a failed asylum seeker) which could be linked to the ultimate conclusion on the refoulement issue, thus allowing the court to infer the rationale for the decision. Save the recital of various factual matters some of which were "noted" by the author, the examination of file analysis does not expressly state what view, if any, was adopted with regard to the applicant's asylum and travel history. In my view a mere recital of factual matters followed by a conclusion cannot be said to satisfy the test laid down by *Meadows*. Moreover, as already referred to, the analysis noted the applicant's claim of having been previously arrested in Iran for participation in literature discussions, without commenting further on this assertion, in terms of accepting it or otherwise. The fact of the asylum claim having been deemed withdrawn, and thus rejected, cannot absolve the Minister of the requirement to say why he was of the opinion that the applicant's repatriation would not be contrary to s.5, given the absolute prohibition on refoulement. In this regard I rely on the dictum of Hogan J. in T.K. at para. 26:

> "…it is irrelevant that both the Commissioner and the Tribunal rejected the applicant's account on credibility grounds, since this was also true of the applicant in Meadows. Next, it is relevant that the applicant's account of what happened to him in Togo engages or potentially engages the prohibition on s. 5 of the 1996 Act, since if it were otherwise, then the applicant's submissions on the s. 3 issue could be treated as largely humanitarian in character and the Minister would not be required to give any detailed reasons for his decision for the reasons given by both Hardiman J. in F.P. and by Keane C.J. in *Baby O."*

83. In accordance with *Meadows*, a court may infer the rationale for a particular decision. However, in the instant case, I do not find in the analysis a sufficient thread of logic or rational connectivity between the purely factual recitals and the ultimate conclusion, from which to infer the basis upon which the applicant's fear, based on his claimed opposition to the Iranian regime of being returned to Iran, was found not to be contrary to the absolute prohibition on refoulement contained in s.5. It seems to me that were I to accept the arguments canvassed by the respondent, the court would effectively be stepping into the shoes of the decision-maker, a role not in accordance with the court's function on judicial review.

84. I also agree with the applicant's counsel's contention that insofar as it can be said that there was a conclusion on the representation made by the applicant as to his fear of being returned as a failed asylum seeker subsumed within the Minister's opinion that repatriating the applicant would not be contrary to s.5, that decision cannot be said to conform to the test of reasonableness, in view of what was documented in the country of origin information consulted by the author with regard to the treatment of failed asylum seekers in Iran and in the absence of any rationale therefore in the decision either expressed or capable of being inferred. While the analysis noted that failed asylum seekers "who are/were activists may encounter problems upon return to Iran", there is no determination, expressly stated or otherwise discernible in the analysis as to whether the applicant's contention that he was previously arrested was rejected on the basis that he did not qualify as an "activist" or indeed, as I have already stated, there is no view proffered as to whether the factual matrix surrounding the applicant's asylum process played a role in the Minister's conclusion that repatriating the applicant as a failed asylum seeker would not infringe the s.5 prohibition on refoulement.

85. The respondent's counsel urged the court that the Minister's decision was lawful as it accorded with the approach of Cooke J. in *J.E. v. Minister for Justice* [2011] 1 I.R. 574 which was a substantive decision rendered post the decision in Meadows.

86. Having considered the judgment of Cooke J. in J.E., portion of which is referred to earlier in this judgment, I am not persuaded that the present case is on all fours with the decision in *J.E.* I note, in particular, that Cooke J. found that the country information put before the Minister in that case, together with the material consulted by the author of the file note, could not conceivably be a basis for an opinion that repatriation would violate the prohibition on refoulement. To my mind, it cannot be said that the information in the present case, be that the material submitted by the applicant or that consulted by the author of the file document, demonstrated otherwise but that persons who were opposed to the regime in Iran were at risk of serious harm or even death.

87. Furthermore, insofar as counsel for the respondent argued that the applicant's case fell squarely within the parameters of the test set out by Clarke J. in *Kuoaype v Minister for Justice* [2005] IEHC 380, I cannot accept that argument in light of this court's findings of irrationality and unreasonableness, as set out above. While I note the dictum of Clarke J., at para. 4.17, that "[i]n most circumstances the existence of a recommendation against conferring refugee status by the statutory bodies would make it difficult to suggest that a decision by the Minister that s. 5 of the 1996 Act did not apply was irrational", it has to be borne in mind that a substantive RAT decision rejecting the applicant's credibility was amongst the material considered by the Minister in Kuoaype, in the context of the decision made on the prohibition on refoulement. That was not the position in the present case. It seems to me therefore, that Clarke J.'s reference to the requirement for "unusual, special or changed circumstances", before a court could go behind the Minister's reasoning, has to be modified, to some extent, in the present context.

88. Counsel for the respondent made much play of the applicant's status as someone whose asylum application was rejected and of the actual circumstances in which that rejection came about. Counsel argued that insofar as the applicant maintained that the State did not consider his asylum application, that state of affairs was brought about by the applicant's own actions and furthermore, without explanation, the applicant withdrew his subsidiary protection application in circumstances where he had the benefit of experienced legal representation. Therefore, the Minister's reliance on the applicant's actions could not be criticised. The applicant's counsel argued that the respondent was effectively asking the court to re-write the Minister's decision by placing reliance on the letter which issued to the applicant on 10th August, 2012, wherein the following, *inter alia*, was stated:-

> "In reaching this decision the Minister has satisfied himself that the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996 (as amended) are complied with in your case. The reasons for the Minister's decision are that you are a person whose application for a declaration as a refugee has been refused. Having had regard to the facts as set out in section 3(6) of the Immigration Act, 1999 (as amended), including the representations received on your behalf, the Minister is satisfied that the interest of the public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might to tend to support your being granted leave to remain in this State."

89. While the respondent's counsel made the case that one equivocal decision of Minister as a reason for finding that s.5 would not be infringed was the issue of the applicant as a failed asylum seeker (an argument I have addressed in this judgment), she did not refer specifically to the letter of 10 August 2012. However, I agree (for the reasons set out earlier in this judgment) with the applicant's counsel's arguments that the reason expressed therein (that the applicant was a failed asylum seeker) as constituting the rationale for the opinion that repatriating the applicant would not breach s.5, did not appear (expressly or sufficiently inferentially) in the examination of file analysis conducted on 19th July, 2012, and in respect of which a deportation order was signed on 2nd August, 2012. As such, its inclusion in 10th August, 2012 letter cannot be relied on by the respondent in these proceedings in circumstances where the deportation order was signed by the Minister some eight days prior to that letter. In so finding, I rely on the dictum of Finlay-Geoghegan J. in *Oguekwe v. Minister for Justice* [2006] IEHC 345.

90. In all the circumstances, I find that substantial grounds for the granting of leave have been made out on that aspect of the Minister's decision which dealt with the applicant's claim under s.5 of the 1996 Act.

Conclusion
95. This being a telescoped application, by reason of the findings expressed in this judgment with regard to the applicant's challenges on the s.3 (6)(h) ground and on the s.5 ground, I am satisfied to exercise the discretion vested in the court and to quash the decision of the Minister of 2nd August, 2012.