THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 26

RECORD NO.: 2015 384

FINLAY GEOGHEGAN J.
PEART J.
IRVINE J.

BETWEEN/

RB

APPLICANT/RESPONDENT

-AND -

THE MINISTER FOR JUSTICE AND LAW REFORM,

ATTORNEY GENERAL AND IRELAND

RESPONDENTS/APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 10TH DAY OF FEBRUARY 2017

1. This is the Minister's appeal against an order of Barr J. dated 9th December 2014 (perfected on the 29th June 2015) quashing the Minister's decision dated 14th December 2010 to affirm a deportation order dated 17th June 2003 in respect of the respondent (hereinafter referred to as RB), an Armenian national who came to this country in the year 2000, and whose application for a declaration of refugee status was refused.

2. According to his affidavit sworn on the 20th December 2010 to ground his application for judicial review in the High Court RB had sought to have the decision to affirm the deportation order quashed on two grounds:

> (a) that the Minister failed to properly consider certain country of origin information which had been submitted by RB which, he submitted, established a likelihood that he would, if refouled to Armenia, be exposed to the risk of assault as a Jehovah's Witness; and
>
> (b) that the Minister failed to have regard to RB's mental health, and in particular to two medical reports of Dr. Brian McCaffrey, Consultant Psychiatrist, dated respectively the 8th June 2005 and 28th July 2005 which noted suicidal ideation resulting from his fear of being returned to Armenia, and which went on to state that RB "is a high risk person for suicide if he is deported".

3. In respect of (a) the trial judge at para. 26 of his judgment concluded as follows:

> *"26. The Court has regard to the fact that there was credible COI [country of origin information] which established that the Jehovah's Witnesses suffered discrimination in Armenia and that attacks upon them would go unpunished. [The Minister] in holding that there was a functioning police force in Armenia, did not have regard to the particular dangers which would face the applicant as a Jehovah's Witness. The applicant is entitled to have the decision of the respondent quashed on this ground."*

4. In respect of (b) the trial judge at paras. 44 and 45 of his judgment concluded as follows:

> *"44. The respondent submitted that the reference to suicidal ideation had been there all along and was not a new or changed circumstance.*
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> *45. The court is of opinion that the medical report submitted on the revocation application* ***constituted new information, which had to be considered on the question of the revocation of the deportation order****. While it is true to say that suicide had been mentioned in Dr. Whelan's reports, it was only referred to in passing in what were very brief reports, whereas the reports from Dr. McCaffrey put the issue of suicide on a much firmer footing. In the light of these reports, there was a credible risk that if deported, the applicant would commit suicide. This had to be taken into account by the decision maker.* ***While the revocation decision makes reference to Dr. McCaffrey's reports, it does not deal with the reports in any explicit way****. The decision maker should have addressed the fact that there was credible evidence that the applicant was a suicide risk. As this was not done, the decision will have to be quashed."*

5. For reasons which I will come to, I consider that the trial judge erred in concluding that the decision of the Minister must be quashed for either of these reasons. But before addressing the parties' submissions and stating my conclusions in more detail, in order to give context to the decision to affirm the deportation order which had been made some seven years previously in June 2003 I feel it would be helpful to set out the background facts relied upon by the applicant.

6. RB is an Armenian national who was born in 1973. Having completed his schooling he gained a third level business qualification. Between 1993 - 1995 he completed his obligatory military service achieving the rank of lieutenant. According to what he stated in his asylum application, it was during the course of this military service while serving on the front line near the border between Armenia and Azerbaijan in 1993 that he witnessed the shooting of a newly recruited young soldier by some members of the Fedayin (a paramilitary group). Earlier in the day these men had attempted to take the young recruit's uniform. The applicant had intervened causing the men to run away. However it appears that they returned later that night and shot the recruit. It appears that RB went to his assistance but was unable to save his life. He remained with the body during the night, and due to the extremely cold weather conditions and the lack of any winter clothing, he lost consciousness. It appears that he was eventually found and taken to hospital

where he remained for some six months due to frostbite. He was eventually discharged from hospital fully fit.

7. Some four years later, in 1997, while walking home, RB says that he came upon a group of policemen who were mistreating a man who was one of a number of demonstrators whom they were trying to arrest. When RB tried to intervene he was told by the police to go away. But he was also asked to produce his own identity papers. As RB was leaving that scene he overheard one of the policemen saying that RB's face looked very familiar. RB then realized that the policeman was one of the men whom he had seen shooting the young recruit four years earlier in 1993.

8. On the following day the police began a search for RB. They went to his father's house. His father told them that he was out, and they left a message that they would meet him the following week. The trial judge notes that RB could not recall where that meeting was to take place, but in any event he did not keep the appointment. The police apparently returned to his father's house and became angry when RB was again not to be found there. They forced his parents to hand over his passport, and demanded that RB attend at the police headquarters on the following day. Again, RB did not do so, but instead went to live at his aunt's house. The police again returned to his parents' house that evening. This time they broke down the front door and demanded to know where RB was. When that information was not forthcoming the police became violent. They smashed up property in the apartment and assaulted RB's mother, breaking her arm in the process. They also caused injury to his father and his brother. It appears that when the police left the house his mother telephoned his aunt to tell RB not to return home.

9. Thereafter the family split up. RB went to live with his aunt where he remained for some months, after which he decided to go and live with the Jehovah's Witnesses. According to his own account, in March 1998 when he and members of his family went to vote in a general election, the same policeman who had recognized him previously in both in 1993 and 1997 recognised him again and assaulted him. He sustained a broken nose and his father and brother took him to hospital where he was treated over the course of seven or eight days. Following his discharge he went again to live with the Jehovah's Witnesses.

10. The trial judge summarized subsequent relevant events in Armenia as follows at paras. 11-14 of his judgment:

> *"11. In the spring of 1998, the applicant's father had an appointment with the general prosecutor to try to find out what was going on. However, before that meeting took place, the general prosecutor was assassinated while out walking his dog.*
>
> *12. Between 1998 to 2000, the applicant describes himself as being a refugee in his own country. All his family were affected. He did not see them very often. The applicant lived with the Jehovah's Witnesses and he was trying to prove to them that he was a trustworthy person.* ***He could not become a full member of the group, because he had carried arms whilst in the army****. However, they gave him a chance to become a member and to live as they did. [my emphasis]*
>
> *13. By that time, the Armenian Apostolic Church in cooperation with the government started a new campaign against all religious sects. The Armenian population was getting ready to celebrate 1700 years of the Christian religion being the main religion in Armenia. Some members of the Christian Apostolic Church attacked the Jehovah's Witnesses living in the town of Vardenis. The applicant was knocked unconscious in the attack. He was taken to the same hospital as before. He says that he was detained in hospital for about 40 days.*
>
> *14. During his stay in hospital, the applicant's father contacted a friend and asked him to help get the applicant out of the country. The man took the applicant out of Armenia on 23rd August, 2000, and he arrived in the State on 29th of August, 2000."*

11. On the 30th August 2000 following his arrival in the State the previous day, RB applied for a declaration of refugee status. He completed the usual ASY1 Questionnaire. Even though in his answers he referred to having done his military service between 1993 - 1995 he made no mention of the shooting of the recruit which he witnessed in 1993, nor to what he later said occurred in 1997 and 1998 described above, nor to having had any connection to the Jehovah's Witnesses. While he claimed asylum on the basis of "persecution" he did not specify the nature of the harm that he feared in that regard, and gave no details of any harm which he had already suffered in Armenia.

12. Almost a year later, on the 15th August 2001, he attended for interview in the normal way. It was during the course of this interview, when being asked why he was seeking asylum here, that he gave his account of the events to which I have referred. He referred to his links to the Jehovah's Witnesses stating initially that he kept his beliefs as a member of the Jehovah's Witnesses secret. But he went on to state that because of those beliefs he could not hold weapons, and that for this reason he was offered a job in the military office where he worked from June 1993 to December 1993 after which he was stationed in a place called Goris in the south of Armenia, which is where he witnessed the shooting of the young recruit in 1993. However, later in his interview he was asked precisely when he had joined the Jehovah's Witnesses, and in reply he stated that he had never become a full member because he had carried a gun while he was in the army, and also while employed as a security guard at a bank after he left college. In answer to a couple of later questions during interview he again confirmed that he was never a member of the Jehovah's Witnesses, though he was what he described as "a sympathiser".

13. The interviewer prepared a Report of Authorised Officer on the 4th September 2001 for the purposes of s. 11 (2) of the Refugee Act, 1996 (as amended) ("the 1996 Act"). His application, including this report, was examined under s. 13 of the 1996 Act by the Refugee Applications Commissioner. By letter dated 9th November 2001, RB was informed that his application was not such as to entitle him to a declaration of refugee status, and that a recommendation to that effect was being made. He was informed of his right of appeal to the Refugee Appeals Tribunal within 15 days. He lodged an appeal. Following an oral hearing at which he was legally represented, his appeal was dismissed, and the recommendation that his application for a declaration of refugee status be refused was affirmed.

14. By letter dated 30th October 2002 RB was informed that the Minister had decided to refuse him a declaration of refugee status, that his entitlement to remain temporarily in the State had expired, and that the Minister was proposing to make a deportation order under s. 3 of the Immigration Act, 1999 ("the 1999 Act"). The letter went on to set out the options open to RB in these circumstances, including his right under s. 3 of the 1999 Act to make written representations to the Minister within 15 days setting out reasons why he should be permitted to remain temporarily in the State.

15. RB's solicitor made such written representation by letter dated 14th November 2002. This letter again outlined the factual basis for his application for refugee status, and requested that he be granted leave to remain *"in order for him to begin a new life without fear or anxiety"*. As for his mental health it went on to state that *"he has been besotten with illness for a considerable period of time*

and he is now suicidal at the thought of being sent back to his country". The letter stated also that RB *"feels that he could be in danger if sent back or that he would exterminate his own life if he was sent back"*. This letter enclosed two medical reports from his GP, Dr Helen Whelan dated respectively 23rd September 2002, and 11th October 2002. They are each very brief. The first stated that RB is *"seriously suicidal"*, and urged that his asylum application be granted. The second stated that he *"continues to suffer Post Traumatic Stress and Depression and that he is awaiting treatment in St. Michael's Unit, Mercy Hospital, Cork (the psychiatric unit)"*.

16. These representations were considered under s. 3 of the 1999 Act, but his application for leave to remain was refused. He was informed by letter dated 10th July 2003 that the Minister had decided to make a deportation order, a copy of which was enclosed, and is dated 17th June 2003. He was informed also that the Minister had satisfied himself that the provisions of s. 5 of the 1996 Act (prohibition of refoulement) were complied with in his case.

17. A copy of the examination report under s. 3(6) was enclosed with the Minister's said letter. In relation to the two GP medical reports it was noted that Dr Whelan does not identify herself as being a consultant psychiatrist or clinical psychologist. Secondly, it noted that the reports give no medical context or background information to her diagnosis (of PTSD, depression and suicidal ideation). Thirdly, it stated that it is not clear if RB's suicide ideation is based on the failure of his asylum claim or on his earlier experiences in Armenia. It noted also that no further reports have been received from St. Michael's Unit, Mercy Hospital, Cork to which Dr Whelan had referred in her second brief report, or even to his having been referred there.

18. This examination report under s. 3(6) of the 1999 Act went on to draw attention to some credibility issues that had arisen in his asylum application. In that regard it is stated:

> *"For example, the way the applicant used membership, non-membership and near-membership in the Jehovah's Witnesses community in whatever way he felt would advance his claim. Likewise, it cannot be ruled out that he is threatening suicide to exert pressure on a favourable decision for being granted temporary leave to remain. Without further information forthcoming, this threat cannot be said to be sufficiently credible to amount to a humanitarian consideration in this case."*

19. On the 21st July 2003 a further letter was written to the Minister by RB's solicitor enclosing a further report from Dr Whelan which is somewhat longer than the previous very brief reports, but nevertheless simply repeated that he was subject to suicidal ideation, depression and was on medication which did not appear to be helping his overall situation. His solicitor wrote again on the 28th July 2003, inter alia asking *"has the Minister been made aware that a suicidal man is being deported despite the advice of his G.P"*, and expressed his doubt as to whether any airline would allow such a person to be carried. He asked that these matters be clarified.

20. The Minister replied to RB's solicitor by letter dated 30th July 2003 referring to the fact that his application for asylum had been examined and refused, that his application for leave to remain had been fully considered and refused having regard to s. 3 of the 1999 Act, and to s. 5 of the 1996 Act (non-refoulement), and that the decision made had been taken having considered all the representations made on his behalf and that *"in particular, regard was had to the concerns raised by your client's General Practitioner, Dr. Helen Whelan, in relation to the threat of self-harm concerning his return to his homeland"*. It went on to state that *"no new matters have been raised in your letter of 28 July, 2003 which have not already been considered by the Minister and that his decision in this case therefore stands"*.

21. It is not clear from the papers filed in this case precisely what happened with regard to deportation or otherwise after 2003. However, it does appear that at some stage in 2004 RB consulted new solicitors (not his present solicitor). One can glean from an ex tempore decision of Butler J. dated 10th March 2006, on an application for an extension of time to commence judicial review proceedings, that RB had wished to seek a judicial review of the deportation order but was out of time to do so. Butler J. refused to extend time. On that application a report dated 8th June 2005 from Dr Brian McCaffrey, Consultant Psychiatrist, was relied upon. This had been furnished to the Minister who was a party to the application for an extension of time. In his ex tempore remarks Butler J. refers to this report as *"a doubtful report … in ignoring the report of 25th August 2004"* which in turn the judge referred to as one which was "unfavourable" and which had not been relied upon. It appears that the August 2004 report from some other medical person may not have been provided to Dr McCaffrey or indeed to the Minister. Butler J. stated that RB had not found a report upon which he could move until 2005, which was the real cause of delay in commencing any judicial review application at that time.

22. At any rate, it is clear that RB had still not been deported by February 2010, as by letter dated 1st February 2010, almost seven years after the s. 3 leave to remain application had been refused, RB's solicitor (his original solicitor whom he had re-instructed in relation to a subsidiary protection application) wrote again to the Minister stating that RB wished to make an application for subsidiary protection, and enclosed an application form in that regard, as well as some country of origin information.

23. Before dealing with that application, I should note at this point that while it was stated on its face to be an application for subsidiary protection, the applicant was not in fact entitled to make such an application in view of the decision of the Supreme Court in *Izevbekhai v. Minister for Justice, Equality and Law Reform*, unreported, Supreme Court, 9th July 2010 which held that it was not possible for a person in respect of whom a deportation order was made prior to 10th October 2006 to make an application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations (S.I. No. 518 of 2006) ("the Regulations") given the provisions of Articles 3 and 4 of those Regulations. That judgment postdated the lodgment of RB's application for subsidiary protection, but predated the Minister's decision upon it.

24. The Minister's decision on the application in the letter of 1st February 2010 was communicated to RB by letter dated 14th December 2010 which informed him that in view of the Supreme Court's judgment in *Izevbekhai*, his application for subsidiary protection was considered by the Minister under s. 3 (11) of the 1999 Act, namely as an application to revoke the deportation order, but that the decision to make the deportation order remained unchanged. It is that decision which was quashed by the order of Barr J. dated 9th December 2014 now the subject of this appeal. A copy of the Minister's consideration of the deemed revocation application and decision dated 10th December 2010 to affirm the deportation order was enclosed with the Minister's letter.

25. In his application, RB had stated that the basis on which he contended that serious harm would result if he was deported to Armenia, was that he would likely be subjected to "torture or degrading treatment or punishment … in the country of origin". In that regard the form stated the following:

> *"The applicant was formerly a member of the Armenian Apostolic Church, but a follower of the Jehovah Witness faith. He was not a fully fledged member of the Jehovah Witnesses as he was a member of the Armenian Army and carried weapons. This is a prohibition of being a full member of the Jehovah Witnesses and was assaulted while attending a meeting of the Jehovah Witnesses in 2000 and as a consequence was hospitalised for 20 days. The applicant was also in the Armenian army and witness[ed] the murder of a young fellow soldier. The murder was covered up. The applicant*

subsequently worked part-time as an armed security guard in the period from 1995 to 1997 and subsequently came across the perpetrators of the 1993 murder when he intervened in a row they were having with another man. The applicant feels they identified him and there was a pattern of attacks and raids on his home. The applicant's father reported the matter to the General Prosecutor in Armenia, but that the prosecutor was murdered prior to the investigation of the complaint made by his father and since his deportation order, country of origin information has changed for the worse in his country, and according to a Report from Amnesty International of the 16/1/2008 it states the following at page 1: "the Armenian Authorities are ignoring the fact that Jehovah Witnesses are specifically targeted for attacks, including allegedly by representatives of the Armenian Apostolic Church". In other words there is no state protection for attacks against Jehovah Witnesses, and I enclose the latest country of origin information which would suggest Armenia would not be a safe place for the applicant to be returned to, and fears for his life if returned to Armenia."

26. On the application form RB was asked also if he was relying on any documentary evidence already submitted with his asylum claim, and if so, to identify same. In answer he stated *"Yes – all documentation that was previously submitted for her [sic] Asylum claim"*. Finally, RB declared on the form that it contained the full extent of his application for subsidiary protection.

27. A couple of things can be noted from that application. Firstly, it is not being contended that RB was ever a Jehovah Witness as such. This is consistent with his previous statements in that regard to which I have already referred. Secondly, there is no specific reliance on suicidal ideation as a reason for seeking subsidiary protection. That is possibly explained by the fact that arguably suicidal ideation *per se* is not a ground that can be relied upon for seeking subsidiary protection, though counsel for the Minister did posit some circumstances where it might be relied upon as a ground if, say, it was being contended that in the country of origin there was a lack of any medical assistance for persons suffering with suicidal ideation. That was not contended in this case, however.

28. The three medical reports from Dr Whelan already referred to had not been submitted in support of his asylum claim but rather in support of his s. 3 application for leave to remain after his asylum application was refused. After June 2005 the Minister's file will also have contained at least one of the two reports from Dr Brian McCaffrey because that of 8th June 2005 was referred to by Butler J. on the unsuccessful application to extend the time for a judicial review application. One way or another, however, when it came to a consideration in 2010 of what was deemed by the Minister to be an application to revoke the deportation order, the material on the Minister's file included the three reports from Dr Whelan from 2003, as well as both reports from Dr McCaffrey.

29. The Minister's case is that Dr McCaffrey's reports were considered as part of what was before him on the deemed application to revoke the deportation order under s. 3(11), but were considered not to raise any new issue that had not already been considered by the Minister when making a decision on the s. 3 application for leave to remain back in 2003. In other words, the question of suicidal ideation referred to by Dr McCaffrey was not a new issue, since it had already been raised in 2003 and had been considered in the light of the three reports from Dr. Whelan in 2003.

30. As I have said, the Minister treated the application as being one for revocation of the deportation order under s. 3(11) of the 1999 Act, and had rejected it. RB was sent a copy of the consideration given to his application which sets out the basis for the ultimate recommendation to the Minister that the deportation order should not be revoked. I will refer to that document as 'the consideration document'. It contains a brief description of the history of the application for asylum, its rejection and the refusal of leave to remain following receipt of the written representations from RB's solicitor to which I have referred. It refers to the making of the deportation order, and the late attempt by RB to seek a judicial review of same, noting that an extension of time was refused by Butler J. on 10th March 2006. It also refers to an appeal to the Supreme Court against that refusal having been filed, but that having changed his solicitor no further correspondence was received. There is nothing to indicate that the appeal to the Supreme Court ever proceeded beyond that filing of a notice of appeal.

31. The consideration document then refers to the information received by the Minister with the s. 3 application for leave to remain dated 21st July 2003 namely the reports of his GP, Dr Whelan, which referred to his mental state. It goes on to refer to the 2005 reports from Dr McCaffrey referring to depression and to his being a high suicide risk if he were to be deported. The consideration then referred to the Minister's letter dated 30th July 2003 refusing the s. 3 leave to remain application in which specific reference was made to his having had regard to the concerns raised by Dr Whelan in relation to the threat of self-harm.

32. The consideration document then states:

> *"Although psychiatric reports from Brian McCaffrey, Consultant Psychiatrist, have been submitted since the response from this department issued on 15/9/2003, it is considered that there is nothing contained in these representations which would warrant the revocation of the deportation order in respect of [RB]."*

33. The consideration document then made brief reference to the country of origin information that had been provided to the Minister with the subsidiary protection application, and stated that this had been fully considered.

34. The document then proceeded to examine the application under s. 5 of the 1996 Act (prohibition of refoulement), noting that while RB had been a follower of the Jehovah's Witness faith, he was not a fully fledged member of the Jehovah Witnesses as he had been a member of the Armenian army and had carried weapons. It then goes on to refer to RB having witnessed the shooting of the young recruit in 1993, and the trouble that ensued from that. Having referred to RB's solicitor's submission that country of origin information showed that things had changed for the worse in Armenia in the intervening years since RB had left, the consideration document then refers to other relevant country of origin information. Some of that information related to discrimination against Jehovah's Witness members who refuse to do their military service and who are serving terms of imprisonment for their refusal. It is then noted that not only was RB not a fully fledged member of the Jehovah Witnesses, but that he had in fact completed his military service. This information also referred to there being a functioning security force in Armenia, and that civilian authorities generally maintained effective control of the security forces, meaning that state protection was available. A conclusion was then reached that having considered all the facts of RB's case the repatriation of RB to Armenia would not be contrary to s. 5 of the 1996 Act. The Minister has submitted on this appeal that this was a perfectly reasonable conclusion based on the country of origin information referred to.

35. The document went on to set out a consideration of issues that might arise under Article 3 ECHR. No issue on this appeal relates to that question. Article 8 rights under the ECHR were discussed in the document also, particularly RB's private life in the context of his mental health. The document refers to the so-called *Razgar* test *(R (Razgar) v. Home Secretary [2004] 2 A.C. 368)*. The appellant has some criticisms as to how the second question in that test was applied in this case, and these are set forth at paras. 11-21 of the notice of appeal. However, in his respondent's notice filed on this appeal, RB accepts that in the light of this Court's judgments in *Dos Santos & ors v. Minister for Justice* [2015] IECA 210 and in *C.I & ors v. Minister for Justice* [2015] IECA 192, the trial judge was

wrong to conclude, as he did, that the Minister erred in his consideration and treatment of RB's Article 8 rights.

36. As far as his integration into Irish society is concerned, it is noted therein that while it had been submitted on his behalf that he had integrated well into society here, it was nevertheless the case that Dr McCaffrey in his report of 28th July 2005 had stated that RB *"has just one friend in Ireland … has no social life and avoids contact with people in Cork"*. It noted also the submission made that RB is at a high risk of self-harm.

37. The document then went on to refer to country of origin information in relation to mental health treatment and facilities available in Armenia, and states that from the information referred to *"there is a functioning mental health care system in Armenia"*. Having referred to certain case law on the subject, including that of *Agbonlahor v. Minister for Justice, Equality and Law Reform* [2006] IEHC 56, the document then reached the following conclusions in relation to the effect of deportation on RB's private life:

> *"The Court [in Agbonlahor] was satisfied that the Minister is entitled to have regard to the effect on the State's medical services of allowing persons who are not legally entitled to be in the State to remain for the purposes of availing of those services. Having considered all of these facts, it is not accepted that the fact that the conditions and treatment available to him in Armenia would be less favourable than those available to him in Ireland, would have consequences of such gravity as potentially to engage the operation of Article 8.*
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> *In addressing the second question [of the Razgar test] and having weighed [and] considered all of the above factors, it is not accepted that there are any exceptional circumstances in this case such that there is a sufficiently real risk that deporting [RB] to Armenia would be a breach of Article 8. The fact that the circumstances of the applicant in Armenia may be less favourable than those enjoyed by the applicant in Ireland does not in itself exist as exceptional circumstances. As a result, it is not accepted that any potential interference will have consequences of such gravity as potentially to engage the operation of Article 8."*

Dr McCaffrey's report dated 8th June 2005

38. Since the two reports of Dr McCaffrey are so central to this appeal, I should give some detail of their contents. It will be recalled that the trial judge reached his conclusion that the decision to affirm the deportation should be quashed because, inter alia, these reports *"constituted new information, which had to be considered on the question of the revocation of the deportation order"* and that *"[w]hile the revocation decision makes reference to Dr. McCaffrey's reports, it does not deal with the reports in any explicit way"*.

39. It should first be noted that Dr McCaffrey is not RB's treating psychiatrist. It would appear that the applicant was referred to him by his then solicitor. This first report was prepared following an interview with RB lasting over two hours. It is four and a half pages in length. The first page recounts what Dr McCaffrey was told of RB's family history. The second, third and half of the fourth page is taken up with setting out a summary of what Dr McCaffrey was told about the 1993 incident involving him witnessing the shooting of the recruit, and the effect that this incident had on his mental health. These pages also contain details of the 1997 incident and the trouble that ensued for his family when he could not be found at his home. It recounts his attempt to join the Jehovah's Witnesses and the incident in 1998 when he was assaulted again and sustained a broken nose.

40. A single paragraph of six lines at the end of page 4 mentions his mental health as follows:

> *"He has suffered from recurrent bouts of depression while in Ireland and is under the care of his General Practitioner Doctor Helen Whelan of 116 Sunday's Well Road, Cork who prescribes anti-depressants for him under the guidance of the staff of the Psychiatric Unit of the Mercy Hospital, Cork for the past six months. He attends this clinic every four weeks but does not know the name of the psychiatrist in charge. Evidently he is seen by a different doctor at the clinic every time he visits they are and in all probability they do not know him that well."*

41. That paragraph is then followed by three paragraphs under the heading 'Opinion as follows:

> *"My impression following the interview I had with them is that [RB] is a genuine, honest person who has a history of having had horrific experiences in his home country, Armenia and if he were deported back there he is convinced that he will be killed by the government authorities who were in fact members of a paramilitary group – the Fedayins - after he witnessed some of their members murder a young Army soldier in 1993 and because of their attempt to find him he fled the country in 2000.*
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> *He talked in a calm manner about how he would kill himself by suicide before he would allow anyone to deporting back to Armenia. He went into detail in giving me a reason why suicide is his only option and talked about how he saw this action in the eyes of a God he believes in. He is in my opinion a high suicide risk person if he is deported.*
>
> *On the other hand he convinced me that he is not an economic migrant but has a genuine claim for asylum – in the true sense – Ireland for him could be a safe place to live in. If he is sent home he is convinced he will face execution."*

Dr. McCaffrey's report dated 28th July 2005

42. This report is shorter than the first report as it does not contain any background history. I will set out the contents of this report in full:

> *"Following my initial interview with [R] on 8 June 2005, I once again saw him today for a review of his progress since then. He seemed much more distressed today and spoke in a more forceful manner about his life and his experiences. He said that he is currently having difficulty in sleeping and because he is not eating properly he has been losing weight. He said that he has 'no joy or taste for food'. He is clearly depressed. He spoke about how nightmares continue. In response to my specific questions he spoke as follows:*
>
> > *"If I go back to Armenia I shall suicide. When I go back I will have to phone my parents and when I do I will be met by them (them is the government that used to be ordinary, they are officers now, the power is in their hands). They want to destroy me and take me out from the game. They have been hunting me for years. In Armenia there is no law or anything. They call it a Democratic Country but it is not. The corruption in Armenia has reached*

the top of the country".

He repeated to me that he will kill himself before he will allow himself to be "tortured and massacred by the Real Barbers". They are not human.

Regarding suicide risk factors, there is no family history of suicide as far as he knows. But on the negative scale there is evidently a high rate of suicide in Eastern Europe and in Armenia.

He has attempted to harm himself in the past on at least two or three occasions since coming to Cork by taking overdoses of tablets. He has a lot of faith in his G. P. Dr Helen Whelan. He told me about how he went to a priest in Cork a number of years ago and said he wanted to thank the Irish people for what they did for him and then wanted to say goodbye. The priest thought he was going away but when he realised that [R] was contemplating suicide, alarm bells rang and the priest talked about how God would view this act. These suicidal thoughts were a direct result of his fears of being deported back to Armenia.

[R] has just one friend in Ireland. He has no social life and avoids contact with people in Cork. He is angry and told me that he no longer has any concern about what effect his death by suicide will have on his family back home.

His anger is obvious. I repeat he is a high-risk person for suicide if he is deported."

43. These two reports are what the trial judge considered to be new information that the Minister ought to have, but did not, properly consider as part of the deemed revocation application, even though there had been reference made to them.

The Minister's submissions

Scope of review on s. 3(11) revocation applications

44. Denise Brett SC for the Minister has submitted that it must be borne in mind that the deemed application to revoke the deportation order comes about at the end of a lengthy process during which the facts giving rise to his claim for asylum and his application for leave to remain, have been thoroughly examined at every stage of the process on the basis of materials submitted and representations made to the Minister. She emphasizes that no challenge was made to how that process was conducted. She submits that it follows that the scope of review appropriate to an application under s. 3(11) of the 1999 Act is more confined than in a judicial review of the decision of the Refugee Appeals Tribunal, or a refusal of a s. 3 leave to remain application, or indeed the making of the deportation order itself.

45. It is submitted that the trial judge erred by entering into a consideration of the merits or weight of the reports of Dr McCaffrey, and the COI that was referred to in relation to the Jehovah's Witness issue. In support of her submission in this regard, Ms. Brett referred this Court to a number of decisions which address the scope of the review of such decisions, namely *O(O) v. Minister for Justice* [2008] IEHC 325 (Hedigan J.) where the scope for such a review was described as being *"significantly more restricted than .. in the asylum phase"* and as being *"very narrow indeed"*, *Kouyape v. Minister for Justice* [2011] 2 IR 1 (Clarke J.), where it was stated that having been unsuccessfully through the asylum process itself *"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"*, *and P.O. v. Minister for Justice* [2015] IESC 64 where the Minister's obligation on a s.3 (11) revocation application was described in the following terms by McMenamin J. at para. 16 of his judgment (echoing similar remarks of Cooke J. in M.A. v. Minister for Justice, Equality and Law Reform, unreported, High Court, 17th December 2009):

"… As has been pointed out in a number of High Court authorities, the Minister, in considering an application under s. 3(11) … has two duties. She must consider carefully and fairly the reasons put forward for revocation. She must also verify that there has been no change in circumstances since the making of the deportation order, either in so far as concerns the applicants, or the situation in the country of origin, which would bring into play any of the statutory prohibitions for the return of a failed asylum seeker to the country of origin. There is no obligation to embark on a new investigation or enquiry, or to enter into an exchange of observations or replies with the applicant."

46. I note also what Charleton J. stated in his judgment in *P.O.* at para. 30:

" … firstly, it is not necessary for a decision maker to initiate any new investigation or enquiry where the substance of an application to revoke a deportation order is that which has already been made and has been rejected in the context of a representation that a person should not be deported. Section 3 (11), confers a broad discretion on the respondent Minister. Essentially, it is part of the statutory scheme to enable those whose country of origin situation has changed to make a plea, from the time of a refugee application or a plea against deportation, that, as a matter of discretion, the Minister should revoke a deportation order. In genuinely exceptional circumstances, it may be as well that a change in personal circumstances might also be part of such a reconsideration".

47. Counsel submitted that the consideration given by the Minister to this deemed revocation application fully satisfies these requirements. It is urged that the decision expressly states that all information and documentation submitted has been fully considered, and that it is clear that this includes the reports on file from Dr McCaffrey since they have been specifically referred to. It is submitted that the trial judge was in error when stating that they had to be addressed in a more specific way than they were in what I have described as the consideration document. In any event, it is submitted that these reports did not constitute "new information" and certainly did not raise any new issue, but were merely a reiteration of the suicidal ideation to which Dr Whelan had previously referred to in her reports in 2003 and which had been considered on the s. 3 leave to remain application. It is submitted that having considered the reports the Minister, in his discretion on such applications, was entitled to form the view that there was no new issue or change in the circumstances of RB in relation to suicidal ideation that should lead to a revocation of the decision to deport him.

48. I should add that Ms. Brett also drew attention to the fact that the reports of Dr. McCaffrey were already more than five years old by the time the Minister was considering the deemed revocation application, and should not therefore be considered to constitute new information in the sense of being up to date new information. In addition, she points to the fact that the application form for subsidiary protection which had been completed RB had made no mention of any risk that he would commit suicide or had suicidal thoughts. I have mentioned that this might be because the circumstances in which suicidal ideation could constitute a ground for seeking subsidiary protection are very limited indeed. Nevertheless, it is clearly the case that the focus of that application was on non-refoulement due to what was contended to be a worsening of the situation in Armenia as far as attacks upon and discrimination

generally against persons who are members of the Jehovah's Witness faith.

49. In relation to the trial judge's conclusion *that [The Minister] in holding that there was a functioning police force in Armenia, did not have regard to the particular dangers which would face the applicant as a Jehovah's Witness"* my emphasis), and that the decision should be quashed on that ground also, it is submitted that the trial judge fell into error. Counsel points to the fact that the trial judge has not indicated in his judgment what part of the COI considered by the Minister indicates that RB would not be capable of accessing protection from the police in Armenia. She submits that in fact the COI differs little from the COI that was already before the Minister in 2003 when the s. 3 leave to remain application was refused prior to the making of the deportation.

50. But, more fundamentally, and aside altogether from the submission that the limited scope of review on a s. 3(11) revocation application was overlooked by the trial judge, Counsel submits that the trial judge erred in fact, because contrary to what was admitted by RB himself throughout the process, the trial judge proceeded on the basis that RB was in fact a Jehovah's Witness, whereas it is clear that he never became a member, and therefore his conclusion that the Minister did not have regard to *"the particular dangers which would face the applicant as a Jehovah's Witness"* is based upon a fundamental error of fact which flies in the face of the uncontroverted evidence, and indeed his own stated position in submissions. In other words, it is accepted that he was never a member, and could not be, since he had borne arms not just while in the army during his military service but also as a bank security guard.

51. Quite apart from the fact that this error of fact fatally undermines the conclusions of the trial judge, it is submitted also that the consideration of the s. 3(11) application must be seen as taking place against a background of a failed asylum application where the Jehovah's Witness issue was already fully considered already and rejected, and that no fresh COI indicated any materially different situation in Armenia in this regard than had already been submitted earlier to the Minister, notwithstanding that he had never been a Jehovah's Witness, which is accepted.

The respondent's submissions

52. Mark de Blacam SC for the respondent submitted at the outset of his submissions that the issue in this case and on this appeal is in truth a refoulement issue, and that just as the Minister must consider s. 5 of the 1996 Act when considering whether or not to deport a person whose asylum application has failed, he/she must equally consider s. 5 when considering whether or not to revoke a deportation order already made. He submits that the question that arises is whether if RB is returned to Armenia there is a threat to his life for a Convention reason. It is worth noting the non-refoulement provisions of s. 5 which provide:

> *"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, member of a particular social group or political opinion.*** *(my emphasis)*
>
> *(2) Without prejudice to the generality of subsection (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)."*

53. It was submitted that the Minister's decision proceeded on the basis that there was no risk of such refoulement because the Minister was satisfied from the COI which was available that there was state protection available to RB when deported, in the form of a functioning police force and because the civilian authorities generally maintained effective control of the security forces. Counsel emphasises that the Minister's consideration of s. 5 in the consideration document makes clear that in fact the Minister accepts RB's account of what happened to him in the past in 1993, 1997 and 1998, and that no credibility issue was raised in this regard, but that the error made in that document in the Minister's consideration of s. 5 is that he fails to refer to the fact that the perpetrators of the assaults and violence against RB were in fact the police. The perpetrators are simply referred to as "they" without any reference to these persons being members of the police force. In such circumstances, it is submitted, the trial judge was correct to conclude that the Minister has not considered the COI that was available, and therefore the question of the availability of state protection against the risk of non-refoulement. Counsel referred to passages from the COI referred to in the consideration document that confirmed that "the security forces continued to commit human rights abuses", albeit that it goes on to refer to a functioning and effectively controlled security force.

54. In answer to these submissions, Ms. Brett for the Minister submitted that RB on this appeal was seeking to expand the basis for his fear that if returned to Armenia he would be exposed to the risk of assault and violence at the hands of the police based on selective extracts from COI. She submitted that the respondent failed to bring his own personal situation within the COI and show a real risk that he, because of his association with the Jehovah's Witnesses, would face such threats for the purposes of s. 5, and again pointed to the fact that RB accepts that in fact he has never been a Jehovah's Witness. In so far as some of the available COI noted that attacks were directed at Jehovah's Witness members and were being ignored by the authorities, the Minister again points to the fact that on RB's own case he was never a member of that faith.

55. In relation to the reports of Dr McCaffrey, Mr de Blacam accepts that the question to be addressed on this appeal is whether the trial judge was correct to conclude that they constituted new information/evidence that had to be considered in greater detail than was done by the Minister, and whether it constituted a change in circumstances since the deportation order was made seven years previously.

56. While it is accepted that Dr Whelan's reports in 2003 had referred to RB being "seriously suicidal" and that therefore this issue was considered by the Minister for the purposes of the s. 3 application for leave to remain, it is nevertheless contended that Dr McCaffrey's reports raised the issue to a new level and brought new elements for consideration. These are set forth in his submissions as follows:

> (a) Dr McCaffrey is a psychiatrist, whereas Dr Whelan is a GP;
>
> (b) Dr McCaffrey's report is a "comprehensive" report running to 5 pages and was compiled following an interview with the applicant;
>
> (c) Dr McCaffrey reported actual incidents when the applicant had attempted to harm himself;
>
> (d) Dr McCaffrey expressed the opinion that the applicant was "a high suicide risk if deported"; in other words, he related the risk to deportation itself.

57. It is submitted on behalf of the respondent that the Minister's approach is incorrectly based upon a view that the requirement for

"new" evidence or submissions is too hard and fast a rule to be applied in every case. It is submitted that on that sort of approach no issue can be considered to be a change in circumstances since the making of a deportation order where it was the subject of a previous consideration by the Minister. In relation to the reports of Dr McCaffrey, it is submitted that the trial judge was correct to regard what he stated in his reports regarding RB's high risk of suicide and his recounting of actual attempts made by RB to commit suicide as bringing something new into the case and which needed to be specifically considered, notwithstanding that the risk of suicide had arisen for consideration in relation to the s. 3 application for leave to remain in 2003.

58. For the sake of completeness, I should add that counsel confirmed before this Court that RB was no longer placing any reliance upon delay in the sense of the lengthy period of time that he has resided in this State since August 2000. This Court therefore does not need to address that ground in so far as it is raised by the appellant in paragraphs 22 – 24 of the notice of appeal.

Conclusions
59. In this case, some seven years after the making of the deportation in June 2003 order RB submitted an application for subsidiary protection on the 1st October 2010 under the Regulations. The Minister, for the reasons already identified, treated that application as being made under s. 3(11) of the 1999 Act for revocation of the deportation order. Arguably he would have been entitled to simply reject the application for subsidiary protection on the basis that RB was not entitled to make such an application for subsidiary protection given that the deportation order predated the commencement of those Regulations. Instead, however, it was dealt with under s. 3(11). In so doing the Minister necessarily had to have regard to matters which he may not have had to consider if it was being dealt with as an application for subsidiary protection, such as the issue of suicidal ideation. In fact the question of there being a risk of suicide is not even mentioned in the application for subsidiary protection. No objection has been raised by RB to his application being dealt with under s. 3(11) of the 1999 Act.

60. Even though there was no mention in the application itself to any risk of suicide if RB was deported, the Minister's file by 2010 contained the three reports from Dr Helen Whelan which had already been considered in 2003 as part of the s. 3 leave to remain application, and also the two reports of June 2005 and July 2005 from Dr McCaffrey which it appears may have been furnished around the time of RB's application for an extension of time to seek a judicial review of the deportation order which was refused by Butler J. But at any rate they constituted part of the materials which were in the possession of the Minister by the time he came to consider the latest application under s. 3(11) of the Act, and which he had to consider in the context of a revocation application even though those reports were over five years old by this time. The extent of the Minister's duties when considering a s. 3(11) application is clear from the authorities to which Ms, Brett referred as stated in para. 43 - 44 above. Essentially the Minister must be satisfied that there has been, in the words of McMenamin J. in P.O. *"no change in circumstances since the making of the deportation order, either in so far as concerns the applicants, or the situation in the country of origin, which would bring into play any of the statutory prohibitions for the return of a failed asylum seeker to the country of origin"*.

61. In the present case, therefore, the Minister was required to consider not only the COI that accompanied the application form completed for subsidiary protection, in order to see if it revealed a change in the situation in Armenia which merited a revocation of the deportation order, but also the medical reports of Dr McCaffrey to see if any new issue arose that had not been previously considered, and which merited a revocation of the deportation order. In other words, the Minister had to consider whether, if the same up to date information had been available when the Minister was considering the s. 3 leave to remain application, it would have led to the granting of temporary leave to remain under s. 3 (1) rather than to the making of the deportation order.

The Jehovah Witness issue
62. In relation to the COI submitted by RB in 2010 the trial judge concluded:

> *"26. The Court has regard to the fact that there was credible COI [country of origin information] which established that the Jehovah's Witnesses suffered discrimination in Armenia and that attacks upon them would go unpunished. [The Minister] in holding that there was a functioning police force in Armenia, did not have regard to the particular dangers which would face the applicant as a Jehovah's Witness. The applicant is entitled to have the decision of the respondent quashed on this ground."*

63. In so concluding he fell into error. Firstly in my view he failed to apply the lower test appropriate to a review of a decision not to revoke a deportation order. He failed to take account of the fact that such an application comes at the end of a very lengthy process of examination of the basis upon which the applicant sought refugee status both on the asylum application itself, an appeal to the Refugee Appeals Tribunal, as well as the consideration of the s. 3 leave to remain application made after the Minister has indicated an intention to make a deportation order. By the time the Minister came to deal with RB's application as a revocation application his claim for asylum based on his association with the Jehovah's Witnesses and the risk of persecution thereby claimed to arise, had already been considered at the various stages of the process and rejected. I agree with the submissions made by Ms. Brett that the trial judge erred in failing to appreciate the limited scope of the review required in respect of a revocation decision, as explained in the authorities to which she referred this Court.

64. But, secondly, the trial judge's conclusion is premised factually upon RB being a Jehovah's Witness. Even on his own case he never was a member. In so far as the COI furnished with the application referred to discriminatory acts against Jehovah's Witnesses, these matters had already been considered and rejected as a basis for granting a declaration of refugee status, and for rejecting RB's leave to remain application. In my view the trial judge erred in deciding that the decision not to revoke the deportation must be quashed because the Minister *"did not have regard to the particular dangers which would face the applicant as a Jehovah's Witness"*. He clearly considered the COI in this regard, and that was the extent of his duty. Not only was that risk already considered and rejected during the asylum process, but it was reasonable for the Minister to conclude that even if there were such dangers disclosed in the COI, RB himself was not a person at such risk as he was not a Jehovah's Witness even on his own case.

65. In addition, it was open to the Minister to conclude that the COI did not indicate such a change of circumstances or change in the situation in Armenia that required that the deportation order should be revoked. At worst the COI indicated that the situation had worsened since RB had left. But it is also the case that much of the focus of the COI was on the consequences for Jehovah's Witnesses who as a matter of conscience refuse to do their military service and carry arms, and many were imprisoned as a result. That of course is not a risk to which RB is exposed as it is clear that he completed his military service and did not refuse to carry arms. In any event these matters had previously been considered by the Minister, and he was entitled to conclude that the more up to date COI did not indicate such a change in the situation in Armenia that the deportation order should be revoked. In my view the Minister considered the application appropriately, and in the exercise of his discretion was entitled to conclude as he did.

The suicidal ideation issue
66. At the heart of the appeal under this heading is the trial judge's conclusion that the revocation decision must be quashed because while it made reference to Dr. McCaffrey's reports it did not do so *"in any explicit way"* and that *"the decision maker should have*

addressed the fact that there was credible evidence that the applicant was a suicide risk". He was of the view that Dr McCaffrey's reports *"constituted new information, which had to be considered on the question of the revocation of the deportation order."*

67. The Minister's duty on this application being dealt with under s. 3(11) was to consider all the medical evidence in his possession, and in particular the two reports from Dr McCaffrey which had not been available to him when he considered the s. 3 leave to remain application, and to form a view whether any new issue was raised in Dr McCaffrey's two reports in 2005 which justified a revocation of the 2003 deportation order in 2010 or whether something of an exceptional nature arose in relation to RB's personal circumstances that would merit a revocation.

68. In one sense the trial judge was correct when he stated that the reports from Dr McCaffrey *"constituted new information"*. It was new in the strict sense that the Minister had not had to consider their contents previously. But the Minister did consider them. He refers specifically to them on page 2 of the consideration document and concludes that *"there is nothing contained in these representations which would warrant the revocation of the deportation order in respect of [RB]"*. The trial judge has fallen into error in reaching a conclusion as to the weight that should be given to the reports by describing them as "credible evidence" which ought to have been considered. There is no suggestion that the Minister failed to consider the reports. That is what he was obliged to do under s. 3(11), and he did so. Thereafter it is a matter for the Minister to decide what weight should be given to them and/or whether they raised some new issue of such gravity as to warrant a revocation of the deportation order.

69. The Minister in 2003 had had to consider Dr Whelan's reports which, though brief, had referred to RB being "seriously suicidal", being "subject to suicidal tendencies" as well as suffering from PTSD and depression. Following the refusal of the s. 3 leave to remain application RB's solicitor wrote in very emphatic terms on the 28th July 2003 pointing out that the Minister was deporting "a suicidal man despite the advice of his GP". The Minister was therefore already fully aware of the opinion of Dr Whelan that RB was at risk of committing suicide if deported, but nevertheless concluded that leave to remain should not be granted. The Minister's letter dated 30th July 2003 to RB's solicitor makes in explicitly clear that consideration has been given to the concerns raised by Dr Whelan in her three reports.

70. The question then arises whether the reports of Dr. McCaffrey in 2005 either raise any new issue not previously considered, or whether they raise the existing issue of suicidal ideation to such a new level that the Minister is required to consider it again.

71. In my view the question whether the reports of Dr McCaffrey constituted credible evidence that RB was a suicide risk was not the correct question for the trial judge to consider. The correct question was whether those reports raised some new issue in 2010 for the Minister's consideration which had not been previously considered when the deportation order was made.

72. I have set out sufficient extracts from the first of Dr McCaffrey's reports and the entirety of the second to give an accurate account of what is contained in them. Even though each report is longer than those of Dr Whelan, most of the content comprises RB's own narrative of what occurred in Armenia. Very little speaks to the risk of suicide. In so far as the second report states that RB had attempted suicide on two occasions, it must be borne in mind that the contents of that report derive from what RB had told Dr McCaffrey since Dr McCaffrey was not his treating doctor. It must also be borne in mind that no more up to date medical reports were provided to the Minister than those of 2005. That clearly speaks to what weight the Minister was obliged to give them when considering if they raised any new issue in 2010, and whether there was such a change in the personal circumstances of RB as to exceptionally warrant the revocation of the deportation order.

73. I am satisfied that the trial judge erred in determining that these reports had to be considered in a more specific way than was done by the Minister because they constituted new evidence of suicide risk. I am also satisfied that he erred in quashing the Minister's decision by reason of his conclusion that they constituted new information. That was not the relevant question, but rather whether they raised a **new issue** that had not previously been considered and which in 2010 could justify the revocation of the deportation order.

74. For these reasons, I would allow the Minister's appeal. It follows that the High Court Order must be vacated and the application for judicial review dismissed.