THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 774 J.R.]

BETWEEN

Y.Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 7)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 31st day of July, 2018

1. The unusual history of this matter is set out in the eight previous judgments or determinations in these proceedings:

(i) In *Y.Y. v. Minister for Justice (No. 1)* [2017] IEHC 176 [2017] 3 JIC 1306 (Unreported, High Court, 13th March, 2017), I declined to grant *certiorari* of a deportation order and of a decision under s. 3(11) of the Immigration Act 1999.

(ii) In *Y.Y. v. Minister for Justice (No. 2)* [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017), I declined to grant leave to appeal to the Court of Appeal.

(iii) In *Y.Y. v. Minister for Justice (No. 3)* [2017] IEHC 334 [2017] 3 JIC 2409 (Unreported, High Court, 24th March, 2017), I declined to continue a stay in favour of the applicant.

(iv) In *Y.Y. v. Minister for Justice* [2017] IESCDET 38, the Supreme Court gave leave to appeal to that court on limited grounds.

(v) In *Y.Y. v. Minister for Justice* [2017] IESC 61 [2018] 1 I.L.R.M. 109, the Supreme Court quashed the s. 3(11) refusal and remitted the proceedings, insofar as they related to the original deportation order, to this court to be considered in conjunction with a proposed further s. 3(11) application. Subsequently, further submissions under s. 3(11) were made by the applicant on 10th August, 2017, and a new adverse s. 3(11) decision was made on 27th September, 2017.

(vi) In *Y.Y. v Minister for Justice (No. 4)* [2017] IEHC 690 [2017] 10 JIC 1706 (Unreported, High Court, 17th November, 2017), I, *inter alia*, allowed an amendment to the proceedings to challenge the new s. 3(11) decision.

(vii) In *Y.Y. v. Minister for Justice (No. 5)* [2017] IEHC 815 [2017] 12 JIC 1907 (Unreported, High Court, 19th December, 2017), I quashed the second s. 3(11) decision.

(viii) In *Y.Y. v. Minister for Justice (No. 6)* [2017] IEHC 811 [2017] 12 JIC 2111 (Unreported, High Court, 21st December, 2017), I directed that the s. 3(11) matter be remitted back to the Minister for fresh consideration. Following that order, fresh submissions were made and a further adverse determination was made by the Minister on 11th June, 2018. I then allowed a further amendment to deal with the third s. 3(11) refusal and I now deal with that aspect of the case. The challenge to the original deportation order remains adjourned awaiting the outcome of the present aspect of the proceedings.

2. The present ruling should obviously be read in conjunction with the previous judgments in this matter.

Grounds of Challenge

3. I have received helpful submissions from Mr. Michael Lynn S.C. (with Mr. David Leonard B.L.) for the applicant and from Mr. Remy Farrell S.C. (with Ms. Sinead McGrath B.L.) for the respondent. The grounds of challenge essentially resolve under four headings:

(i) alleged lack of reasons;

(ii) alleged irrationality of specific findings and overall conclusion;

(iii) alleged failure to state the correct test; and

(iv) alleged breach of fair procedures.

Context of the applicant's personal situation and an improving country situation

4. The applicant's somewhat legalistic submissions are heavy on self-congratulation as to how specific his lawyers' attention to the applicant's personal case now is. That, however, is probably more of a comment on how weak their earlier submissions were than a demonstration of any unanswerable content in the new submissions. The Strasbourg case law establishes that a decision-maker in the context of art. 3 of the ECHR must assess both the general situation in the country concerned and the personal situation of the applicant.

5. As regards the general situation in the country concerned, it is clear that the Algerian country situation is one of continuing improvement. O'Donnell J. in the Supreme Court judgment in Y.Y., noted at para. 81 that "*this is not a case, however, where it can be said that the Minister was not entitled in any circumstances to come to such a conclusion*" of no art. 3 breach. In *B.B. v. Secretary of State for the Home Department* (SIAC, 8th April, 2016) at para. 35, expert evidence was noted to the effect that, by comparison with the 1990s, according to Dame Anne Pringle "*there are no longer widespread or systematic cases of abuse by the authorities*". Dr. Claire Spencer accepted that "*there had been major change since the end of the civil conflict".* O'Donnell J. noted at

para. 46 that SIAC took the view that "*there could be no doubt that there has been marked improvement in Algeria over the last 20 years*". At para. 48, the judgment notes the SIAC view that "*the situation in Algeria continues to develop and therefore up-to-date information and analysis are particularly important"*. While obviously this was in a context where SIAC considered that the risk in that case had not been dispelled, nonetheless, any reasonable view of the mass of country material concerned, at least insofar as it has been introduced in the present proceedings, would be that this tells a story of ongoing improvement. That is not to determine the issue as to whether the improvement is sufficient but it is to contextualise the discussion.

6. As regards the applicant's personal situation in the present case, the position of the applicant's brother is central. He has not been subject to any treatment contrary to art. 3 even though his situation is highly comparable and he has terrorist convictions in France. Obviously, the current applicant also has the feature of terrorist convictions in Algeria but, nonetheless, the brother's situation is a highly pertinent factor personal to the present applicant.

7. Remarkably, the applicant's latest submissions also renew his complaints about adverse publicity. In that regard, a notable feature of the case is that I went to considerable lengths to minimise such publicity in this case by redacting the country name from the original judgment, which apart from anything else was a complex logistical exercise given the length of that judgment. The applicant went out of his way to make submissions to the Supreme Court that his view was that such redaction was unnecessary – he wasn't asked about it, he specifically brought it up - which had the predictable effect that the Supreme Court withdrew the redaction and the country name was published. This significantly contributed to any publicity there has been in the matter. Without the country name the publicity would have been much more general if some of it happened at all. When confronted with this fact, Mr. Lynn uncomfortably affected to disclaim responsibility and unsustainably postulated that his client was neutral in the matter. There is absolutely no doubt that but for the fact that he went out of this way to tell the Supreme Court that this redaction was unnecessary, it would have been maintained to this day. A person is generally taken to intend the natural and probable result of his or her actions. What alternative reality would the applicant have the court believe he anticipated the Supreme Court would enter when told the redaction was unnecessary – say "that's interesting", leave it in place and move on to something else? To tell the court that the applicant's approach was "neutral" is an inversion of truth. Thus it is complete humbug that the applicant continues to complain about publicity where this would have been minimised or avoided altogether had he simply accepted the benefit of the order that I made for his protection. His approach in this regard is not readily reconcilable with his art. 3 fears. It would be a brave lawyer who would predict whether the proceedings will end here or if not what will happen next in this unusual case but if it is conceivable that it ever involves a rule 39 application I reiterate that the applicant's lawyers are under a personal professional obligation to bring the foregoing paragraph prominently to the attention of the Strasbourg court – not buried somewhere in a hundred-page enclosure but up front in the first 2 or 3 pages of the letter of request.

Complaint 1 - Failure to give reasons

8. In this context, as in many other contexts within the immigration and asylum area, it is crucial to keep firmly in mind the first principle that immigration law is a subset of wider administrative law and should not be allowed to develop exotic and demanding Baroque principles in complete isolation from those applying to administrative processes generally.

9. Clarke J., as he then was, in *Rawson v. Minister for Defence* [2012] IESC 26 (Unreported, Supreme Court, 1st May, 2012) at para. 10 referred to the need for a "*reasoned but not discursive ruling*". That is an essential distinction because in general, an applicant is not entitled to a narrative discussion of his or her points. Merely because a particular submission or point made by an applicant is not expressly discussed does not establish that it has not been considered or that no adequate reasons have been given: see *Jahangir v. Minister for Justice and Equality* [2018] IEHC 37 [2018] 2 JIC 0102 (Unreported, High Court, 1st February, 2018), *R.A. v Refugee Appeals Tribunal* [2015] IEHC 830 [2015] 12 JIC 2119 (Unreported, High Court, 21st December, 2015), *I.E. v. Minister for Justice and Equality* [2016] IEHC 85 [2016] 2 JIC 1505 (Unreported, High Court, 15th February, 2016) *C.M. (Zimbabwe) v International Protection Appeals Tribunal* [2018] IEHC 35 [2018] 1 JIC 2304 (Unreported, High Court, 23rd January, 2018), *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646 and *M.A.C. (Pakistan) v. Refugee Appeals Tribunal* [2018] IEHC 298 [2016] 11 JIC 1404 (Unreported, High Court, 25th April, 2018).

10. Two important general points in relation to the duty to give reasons can be noted:

> (i). First of all, reasons can in certain circumstances be short: see the incomparable textbook in this area, Fordham, *Judicial Review* (6th Ed.) p. 669 and case law referred to therein: see *R. (Savva) v. Kensington and Chelsea Royal London Borough Council* [2010] EWCA Civ 1209 [2011] PTSR 761 at para. 21, *Stefan v. General Medical Council* [1999] 1 WLR 1293, *R. (Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 [2003] 2 A.C. 295 at para. 170, *Save Britain's Heritage v. Number 1 Poultry Ltd.* [1991] 1 W.L.R. 153). However, that does not, of course, mean that short reasons are always adequate. This depends on the context: see *e.g. RPS Consulting Engineers v. Kildare County Council* [2016] IEHC 113 [2017] 3 I.R. 61 [2016] 2 JIC 1518.
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> (ii). Secondly, reasons must relate to the principal important controversial issues or the main issues in dispute: see Fordham, p. 667 and *Bolton Metropolitan Borough Council v. Secretary of State for the Environment* [1995] 3 P.L.R. 37, *City of Edinburgh Council v. Secretary of State for Scotland* [1997] 1 W.L.R. 1447, *Westminster City Council v. Great Portland Estates Plc* [1985] A.C. 661, *R. (Wheeler) v. Assistant Commissioner of the Metropolitan Police* [2008] EWHC 439 (Admin).

11. To understand this issue, it would be important to give some examples. For instance in an asylum or international protection context, the principal issues might be (a) whether the applicant is generally credible, (b) whether his fear of persecution or serious harm is well founded, and (c) whether there is an internal relocation or State protection option. The main issues would not extend to a duty to give reasons to each of the applicant's individual sub-points under any of those headings. The decision-maker has to give a reason for the decision on each of the main issues, but that is entirely distinct from an obligation to narratively discuss each and every one of an applicant's arguments, submissions or pieces of evidence under each heading. That is, at best, a counsel of perfection; the High Court certainly does not do that when resolving litigation. It would be hypocritical and inappropriate to impose a greater duty on administrative decision-makers than the court is prepared to accept for itself.

12. Turning to the present context of making or affirming a deportation order, the main issues could be along the following lines:

> (i) resolving any critical factual conflict;
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> (ii) whether deportation would infringe the applicant's constitutional rights, or those of his or her family, if that is an issue, noting, of course, that the right not to be tortured or to be subjected to inhuman or degrading treatment also arises under the Constitution: see *State (C.) v. Frawley* [1976] 1 I.R. 365 and *O.O. v. Minister for Justice, Equality and Law Reform* [2004] IEHC 426 [2004] 4 I.R. 426 at 432 *per* Gilligan J.;

(iii) whether the non-*refoulement* provisions of s. 50 of the International Protection Act 2015 would be breached, if that is an issue, or any other relevant statutory rights of the applicant or his or her family;

(iv) whether deportation would infringe the applicant's rights or those of his family under arts. 3 or 8 or any other provision of the ECHR (as applied by the ECHR Act 2003) if that is an issue;

(v) if deportation is not unlawful on any ground as above, whether issues raised under s. 3(1) or (11), as the case may be, of the 1999 Act, favour the grant of discretionary permission to remain in the State.

13. Having identified the major issues for the purposes of the Minister's consideration it also follows that the foregoing matters constitute the main issues for the purposes of the case law relating to reasons. Apart from anything else, it would be an unworkable test for a decision-maker to have to go into the micro sub-arguments under each heading and to give reasons for the overall reasons.

14. An approach that required such micro-sub-reasons would open up a significant, unprincipled and irrational distinction between immigration cases and normal administrative law. In the context of judicial decision-making, I drew attention in *Walsh v. Walsh (No. 1)* [2017] IEHC 181 [2017] 2 JIC 0207 (Unreported, High Court, 2nd February, 2017) to the caselaw indicating that it was the reasons that seems important *to the judge* rather than those urged by the parties that had to be addressed: see *Eagle Trust Company Limited v. Pigott-Brown* [1985] 3 All E.R. 119, where Griffiths L.J. at 122 stated: "*there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted*." Munby L.J. in *In re A. and L. (Children)* [2011] EWCA Civ. 1611, (referred to a para. 12 of *Walsh v. Walsh*), said at para. 43: *"The fact that [the judge] did not deal in his judgment with every matter to which [counsel] draws attention does not of itself invalidate either his reasoning or his conclusions."*

15. In *Baby O. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 169, Keane C.J. said at p. 183: "*I am satisfied that there is no obligation on the first respondent to enter into correspondence with a person in the position of the second applicant setting out detailed reasons as to why* refoulement *does not arise. The first respondent's obligation was to consider the representations made on her behalf and notify her of his decision: that was done and, accordingly, this ground was not made out".*

16. Similarly, in *C.R.A. v. Minister for Justice, Equality and Law Reform* [2007] 3 I.R. 603, MacMenamin J. at para. 82 stated that: "*Section 3 is not an interactive process. The requirements of natural justice and the statutory requirements are satisfied once the prospective deportee has been afforded an opportunity to make submissions and these submissions have been considered by the Minister, particularly in the consideration of whether the principle of non-refoulement under s. 5 of the Act of 1996 has been satisfied."*

17. In a pivotal authority in the immigration context, Hardiman J. in *G.K. v. Minister for Justice and Equality* [2002] 2 I.R. 418 held that where the decision-maker states that all matters have been considered, there is an onus on the applicant to prove otherwise. Such an operation necessarily means that there can be no duty to individually, narratively, refer to each and every one of an applicant's specific points.

18. That is sufficient to dispose of the applicant's complaint that the lack of visitation opportunities by international organisations and NGOs to Algerian detention centres contributed to there being an art. 3 risk. There is no evidence that this point was not considered. The Minister is not obliged to narratively list all points in favour of an applicant.

19. There are however, some situations where there is an enhanced duty to give reasons. One such situation is where a particular decision-maker comes to a conclusion that is different to that of an earlier decision-maker. Fordham at p. 553 sets out a number of cases where this has given rise to an enhanced right to reasons: see *e.g. R. (M.) v. Lambeth London Borough Council* [2008] EWHC 1364 (Admin), *R. (N.) v. Barking and Dagenham London Borough Council Independent Appeal Panel* [2009] EWCA Civ 108.

20. A second exceptional situation where there is an enhanced duty to give specific reasons was adverted to by O'Donnell J. at para. 64 of the Supreme Court judgment in *Y.Y.,* where he refers to the Minister's failure to give reasons for differing from comparable assessments by other courts, specifically the Strasbourg Court and the SIAC. That was in a context where such comparable decisions are specifically and expressly relied upon by an applicant. It therefore seems appropriate in the absolute rights context of art. 3 of the ECHR to acknowledge an enhanced duty to give reasons for differing from the approach taken in such comparable case law. In doing so of course it would be important not to treat Strasbourg judgments as if that court operated a common law system of precedent: see *D.E. v. Minister for Justice and Equality* [2018] IESC 16 (Unreported, Supreme Court, 8th March, 2018), per O'Donnell J., who also emphasised at para. 80 that: "*a court should be astute to avoid the type of over-refined scrutiny which seeks to hold civil servants preparing decisions to the more exacting standards sometimes, although not always, achieved by judgments of the Superior Courts. All that is necessary is that a party, and in due course a reviewing court, can genuinely understand the reasoning process*".

21. I noted in *Y.Y. (No. 5)* at para. 20 that the administrative Court of Appeal of Paris recently summarily rejected an argument that the return of a terrorist suspect to Algeria was in breach of art. 3 (*Bouhabila* Case No. 15PA02906 7th March, 2016, para. 19) and that Irish decision-makers, and indeed courts, seem to agonise over a micro-level of detail in situations where other European countries take a more big-picture view.

22. It is also worth bearing in mind that it is a central point in the workability of the executive branch of government that the situations where enhanced requirements for reasons, in particular defined contexts, are not generalised into an obligation that a decision-maker has to engage in narrative discussion of points raised by an applicant, still less of lists of caselaw supplied by an applicant. The duty is to give the reasons that are important to *the decision-maker themselves*; otherwise the court would open up a fundamental change to the approach to administrative decision-making that would unquestionably spawn endless litigation.

23. Applying these principles to the present case, the applicant's submissions relied on the judgment of the Strasbourg Court in *M.A. v. France* (*Application no. 9373/15,* European Court of Human Rights, 1st February, 2018), which related to a comparable situation of expulsion to Algeria. This decision is not addressed by way of reasons in the Minister's analysis and in the exceptional context of a significant art. 3 issue being raised (as opposed to being made on a *pro forma* or insubstantial basis), where (as here) the applicant has expressly relied on a comparable decision going the other way, the Minister has not complied with the requirement to give reasons for arriving at a differing conclusion.

24. If that were the only problem with the decision one could consider whether it could be addressed by an order requiring the Minister to give such reasons rather than by an order of *certiorari*. However, the former option does not really arise given my conclusions on the applicant's other grounds.

Complaint 2 - Irrationality
25. The applicant complains about a number of aspects of the decision which he says are irrational. He also complains that the ultimate conclusion on the art. 3 issue is also irrational. A number of these complaints are best considered under other headings, such as the question of the correct test, and when one subtracts the points best addressed under such other headings, an independent point under the heading of irrationality has not been made out. It is well-established that the weight to be attributed to the various factors is primarily a matter for the decision-maker: see *E.E. v. Refugee Appeals Tribunal* [2010] IEHC 135 (Unreported, High Court, 24th March, 2010), per Cooke J.*; M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 (Unreported, High Court, 27th June, 2008) per Birmingham J. at para. 27.

26. Insofar as the applicant complains that the Minister has misinterpreted country reports the applicant has rather selectively interpreted the reports in the manner most favourable to him. It is not for the applicant to make the decision in question. The Minister's finding that some of the language in earlier reports is not replicated in later reports has not been shown to be a misunderstanding.

27. On the overall conclusion, assuming the correct test was applied, the weighing of factors is generally a matter for the decision-maker absent any other unlawfulness being shown. Overall, the Minister was entitled to determine whether the specific complaints or the general *portmanteau* complaint did or did not amount to a sufficient basis for the conclusion that the applicant was a serious risk under art. 3, leaving aside for the moment the points raised under the applicant's other headings of challenge. Inconclusive material or even individual abuses do not automatically lead to a conclusion of likely torture or inhuman or degrading treatment in relation to any particular applicant. The Minister is entitled to take all circumstances into account and form his own view within legal constraints. Obviously the decision here was not necessarily the most favourable one from the applicant's point of view, but irrationality as an independent ground of challenge has not been established.

Complaint 3 - Failure to utilise the correct test
28. In *Y.Y. (No. 1)* at para. 185, I adverted to the evidential process by which the ultimate test of a real risk is to be examined. An applicant must first show a *prima facie* risk under art. 3. In such a situation, the onus then falls on the Minister to dispel the doubts raised by examining the general situation in the country and the personal circumstances of the individual. It is clear from para. 185 that I proceeded on the basis that the applicant had overcome that initial *prima facie* threshold.

29. I am not permitting the applicant to argue any points that were definitively rejected at previous stages of these proceedings, and nor would it be procedurally appropriate to do so. A similar approach has to apply as against the respondent. A strange feature of the present case is that the respondent is now saying that the applicant has not overcome the initial threshold of showing a *prima facie* case. Such a submission is not procedurally appropriate, and in any event that *volte face* does not inspire confidence that the correct approach is being applied. But if I am wrong in considering that the Minister is not entitled to reopen this question, any conclusion that the applicant had not overcome the *prima facie* hurdle would either misunderstand what the test means or be totally irrational.

30. The first question in such a situation is whether the applicant has overcome the initial burden to adduce evidence capable of proving that there are substantial grounds for believing that if he or she were returned to the requesting country, he or she would be exposed to be a real risk of being subjected to treatment contrary to art. 3. This involves looking at the applicant's account before looking at whether it can be contradicted. Contradicting it is part of the "*dispelling doubts*" phase.

31. That does not mean that all an applicant has to do is to tell an art. 3 tale. The Strasbourg case law refers to adducing "*evidence*" capable of proving substantial grounds for an art. 3 risk. This is to be distinguished from mere assertion. In particular, an applicant's credibility is a factor in this type of context. An applicant whose credibility has been rejected and who advances an account, the validity of which is dependent on such credibility, will not overcome the initial threshold.

32. However, if the applicant adduces the necessary evidence in circumstances where that is not dependent on his or her credibility, or where that credibility is accepted, then they will have overcome the initial burden and one then turns to whether the Minister can dispel the doubts raised.

33. It is clear nonetheless that the initial threshold is a significant one and goes well beyond merely telling a story. Set at that low bar, that would be every applicant; which would make a nonsense of the test.

34. The assessment of the initial *prima facie* question does not involve examining the full range of country material or other contextual or rebutting information. It focuses on the evidence put forward by the individual applicant and whether that evidence is sufficiently weighty that if uncontradicted it would give rise to substantial grounds for the relevant risk.

35. In general terms, it is procedurally necessary for the decision-maker to ask themselves the correct questions; see *Rawson v. Minister for Defence*, *per* Clarke J., as he then was. The Minister here did state correctly the basic test which was established in *Soering v. the United Kingdom* [1989] 11 E.H.R.R. 439 and was referred to by O'Donnell J. in Y.Y. at para. 31: "*whether there were substantial grounds for believing that there was a real risk of torture or inhuman or degrading treatment*". This was reinforced in *Saadi v. Italy* [GC] (Application No. 37201/06, European Court of Human Rights, 28th February, 2008).

36. However, the Minister did not state, let alone apply the test regarding the evidential process by which this ultimate question of risk is to be assessed. As set out in *J.K. v. Sweden* (Application no. 59166/12, European Court of Human Rights, 23rd August, 2016) at para. 91 "*it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3; and that where such evidence is adduced, it is for the Government to dispel any doubts about it*" (citing *F.G. v. Sweden* (Application no. 43611/11, European Court of Human Rights, 23rd March, 2016) para. 120, *Saadi v. Italy* (Application no. 43611/11, European Court of Human Rights, 28th February, 2008) para. 129, *N.A. v. the United Kingdom* (Application no. 25904/07, European Court of Human Rights, 17th July, 2008) para. 111; and *R.C. v. Sweden* (Application no. 41827/07, European Court of Human Rights, 9th March, 2010) para. 50). This test was also referred to in *Minister for Justice, Equality and Law Reform v. Rattinger* [2010] IESC 45 [2010] 3 I.R. 783 [2011] 1 I.L.R.M. 157 in the slightly different context of the European Arrest Warrant: see per Fennelly J. at para. 31 and 32 and *per* Denham J., as she then was, at para. 27.

37. Mr. Farrell accepts that this two-stage process applies. His submissions essentially boil down to two propositions. The first was that the applicant has not overcome the *prima facie* hurdle so this issue is not a problem. I have already taken the view otherwise in the *(No. 1)* judgment and I do not think it would be permissible for the respondent to reopen that issue now. However, if I am wrong about that, this applicant has clearly overcome the *prima facie* hurdle given that that question must be assessed in terms of the evidence presented by the applicant himself or herself rather than viewing it in the context of replying and additional material being relied on by the Minister.

38. Mr. Farrell's second submission was that the Minister would be obliged to apply the two-stage test in the original deportation decision under s. 3(1) of the 1999 Act but is not so obliged at the revocation stage under s. 3(11) when the only issue is consideration of an applicant's submissions and whether new information has come to light that changes the result. There may be some validity to this submission in the vast majority of cases but the problem for the Minister here is the very unusual procedural context of the present case where the flaw identified by the Supreme Court in its judgment potentially applies not only to the first revocation decision but also to the original order. In those circumstances it seems essential that a revocation decision would expressly consider and apply the test in full. The Minister needs to bear in mind that it is not a normal revocation situation where he is dealing with an unchallenged and valid original deportation order.

39. Complaint was made by the applicant that the Minister posed the question as to whether alleged human rights violations in Algeria were clearly established and systemic. However, these are appropriate and legitimate questions once one moves to the second stage of the process as to whether doubts raised by an applicant can be dispelled. In that context, the Minister considers both the applicant's personal situation and the overall country situation. The latter must include the question about how widespread, systemic and well-established is the use of torture or inhuman or degrading treatment.

40. I note that at para. 104 of the respondent's amended statement of opposition it is pleaded that "*compelling justification is required before it can be shown that the deportation of a non-national person with a serious and extensive criminal record is unlawful"*. In the light of the judgment of the Strasbourg court in *Chahal v. the United Kingdom* (Application no. 22414/93, European Court of Human Rights, 15th November, 1996) paras. 80 and 81, this is not an argument that I can accept and I assume that it has been inserted simply to preserve the Minister's position to argue the point in some other forum should that arise.

41. If and when in any individual case one gets to the second leg of the process and the question of dispelling doubts, the recent decision in *X. v. Netherlands* (Application no. 14319/17, European Court of Human Rights, 10th July, 2018) is instructive. At para. 76 the court noted that "*the issue before it is not whether upon his return the applicant risks being monitored, arrested and/or questioned, or even convicted of crimes, by the Moroccan authorities since this would not, in itself, be contrary to the Convention*". The issue was rather the question of real risk under art. 3. At para. 77 the court noted the improving human rights situation in Morocco and that even though "*ill-treatment and torture by the police and the security forces still occur, particularly in the case of persons suspected of terrorism or of endangering State security. Nevertheless, in the Court's opinion, a general and systematic practice of torture and ill-treatment during questioning and detention has not been established."* That is perhaps not an exact analogy to the present case because conditions of detention may or may not be comparable, but it is relevant nonetheless.

42. Also relevant is the decision in *A.S. v. France* (Application no. 46240/15, European Court of Human Rights, 19th April, 2018) where by contrast with the situation in *X. v. Switzerland* (Application no. 16744/14, European Court of Human Rights, 26th January, 2017) the court noted at para. 62 that the applicant had not shown that persons presented as his accomplices that were prosecuted in the country in question were victims of violations of art. 3. Even the fact that the applicant "*disappeared*" upon his arrival was not sufficient to establish the merits of the complaint.

43. The separate opinion of Judge O'Leary is of huge practical importance. She said at paras. 4 and 5 of her opinion that "*4. Il est à noter que, dans un arrêt du 1er février dernier, la chambre est arrivée à la conclusion inverse s'agissant de l'expulsion vers l'Algérie d'un ressortissant algérien qui avait été également condamné en France pour des actes de terrorisme…. Deux éléments sont avancés au § 62 de l'arrêt A.S. pour expliquer la prétendue distinction entre les deux affaires : le Maroc, à la différence de l'Algérie, avait entrepris des mesures concrètes afin de prévenir le risque de torture en détention, et le requérant dans M.A. était toujours détenu, de sorte qu'il ne pouvait porter à la connaissance de la Cour des renseignements ultérieurs à l'appui de ses prétentions. En revanche, M. A.S. pouvait faire parvenir de tels renseignements et ceux-ci confirmaient que le risque dont il se prévalait ne s'est effectivement pas réalisé. 5. Si le premier élément pourrait effectivement être pertinent…, il n'en reste pas moins que la vraie différence entre les affaires M.A. et A.S. réside dans l'analyse détaillée et individualisée du prétendu risque opéré dans la présente affaire conformément à la jurisprudence de la Cour, à la différence de l'analyse généralisée et in abstracto, sans examen individuel, effectuée dans l'affaire M.A.… De même, si, en l'espèce, la Cour accepte l'appréciation du risque effectué par l'OFPRA, dans l'affaire antérieure elle s'écarte de l'analyse faite par cette autorité, sans en réalité expliquer pourquoi. Les éléments d'analyse figurant au § 62 de l'arrêt A.S. faisaient défaut dans l'arrêt antérieur M.A., malgré le fait que les antécédents à l'expulsion et les circonstances de détention des deux requérants lors du retour dans leurs pays respectifs étaient très similaires : tous deux ont été arrêtés par les forces de l'ordre lors de l'atterrissage des avions en provenance de la France, mis en garde à vue pendant une période comprise entre 8 à 10 jours…, présentés ensuite à un juge et assistés depuis lors par un avocet... S'il est vrai que le requérant dans A.S. avait été libéré au moment où la chambre a statué, c'est uniquement parce qu'il avait été emprisonné au Maroc pour les mêmes faits pour lesquels il avait déjà purgé sa peine en France... Il est erroné de prétendre que, à la différence de M. A.S., le requérant dans l'affaire M.A., qui était représenté par des avocats français et algérien, ne pouvait pas faire connaître à la Cour des renseignements ultérieurs à l'appui de ses prétentions. Non seulement les deux requérants pouvaient le faire valoir, mais ils l'ont fait".*

44. Those are comments that decision-makers, and indeed national courts, should very much bear in mind in this context.

45. Applying the foregoing to the facts of the present case, the Minister failed to state or apply the correct evidential two-part test that I have referred to. If counsel's submissions are to be relied on as an interpretation of what was in the Minister's mind, he incorrectly took the view that the applicant did not overcome the *prima facie* case stage. That issue has already been decided in the proceedings but if I am wrong about that, the Minister's assessment of this question seems to be contaminated by consideration of the full suite of country material rather than focusing on the question of whether the applicant has presented evidence which could overcome that *prima facie* hurdle. Had that test been applied properly, any conclusion that the first hurdle had not been overcome would be irrational. The decision is thus significantly flawed on a core issue.

Complaint 4 - Failure to put unusual material to the applicant

46. The law in relation to the duty to put material to an applicant in an immigration context is very clear. Mainstream country material does not need to be specifically notified. Unusual material does. At p. 18 of the decision here the Minister relied on two newspaper reports. These certainly constitute unusual material. Where there is a failure to put material there is an evidential onus on an applicant to show that he or she would have something to say in response and this has been discharged in the affidavit of Gavin Booth on 28th June, 2018 at paras. 6 and 7.

47. In the case law, the limited category of material that needs to be notified has been referred to as material that *"would otherwise take the applicant by surprise": Moyosola v. Refugee Applications Commissioner* [2005] IEHC 218 *per* Clarke J., as he then was, (Unreported, High Court, 23rd June, 2005) at pp. 11 to 13; or "*obscure material that is going to materially change the picture appearing from the basic and universal material*", *Y.Y. (No. 1)* at para. 98. That also raises an important point that even unusual, obscure and surprising material does not create a legal problem simply because it is not put. The material must add something to the mix that is different from, or changes the picture appearing from, the material that the applicant *does* have access to. O'Donnell J.

referred to the type of material that needs to be notified as that is "*in some respect unusual"* (para. 60). At a later stage in the judgment he referred to the lack of an obligation to notify material that was "*of the same nature as that submitted by the applicant"*. In that regard, I have noted the variety of terminology in judgments which are certainly not to be read as statutes. What O'Donnell J. is referring to there is that where mainstream country reports are relied on by an applicant, the Minister is entitled to rely on similar reports even without notifying an applicant; and indeed the Minister can rely on mainstream information whether the applicant submits it or not. But if an applicant submits one unusual document that does not give the Minister *carte blanche* to rely on some other unusual document, like a newspaper report, without notifying the applicant.

48. I specifically addressed this in *Y.Y. (No. 5)* at para. 24 to the effect that: "*the Menas report is quite different from regular annual country reports issued by the likes of the U.S. State Department, Amnesty or Human Rights Watch, for example, and is unusual material which should be put on conventional principles; and that therefore the failure to put the applicant specifically on notice of the report is a breach of fair procedures. It cannot be said to be immaterial to the result. Certainly the next time case workers dig up such material going beyond normal country reports that is intended to be relied on that should be shared with an applicant, and the opportunity to make submissions should be given."* The need to give notice of unusual material arises because it is unusual and relevant and not simply because an applicant has engaged an expert or requested notice of extra materials: see *Y.Y. (No. 5)* at para. 7.

49. Thus there was a breach of fair procedures here. It cannot be said that the newspaper reports were immaterial. Nor is it a happy situation that the informal directions I gave about "*the next time*" were either misunderstood or more likely simply ignored. This certainly raises a question about appropriate next steps. If I may be permitted to borrow from Oscar Wilde: to lose one application may regarded as a misfortune; to lose a second on the same grounds looks like carelessness.

Order

50. In light of the foregoing, I will, in principle, make an order of *certiorari* removing for the purpose of being quashed the third s. 3(11) decision of 11th June, 2018, but I will first hear further submissions from the parties on:

(i) whether the decision should be quashed in full or in part;

(ii) whether the matter should be remitted back to the Minister in full or in part;

(iii) if it is so remitted back, whether I should give formal directions as to the procedures by which that reconsideration should take place, given that the previous informal direction outlined in *Y.Y. (No. 5)* at para. 24 was not followed;

(iv) if the matter is not remitted back, what are the consequences for the original deportation order.