THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 774 J.R.]

BETWEEN

Y.Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 12)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 1st day of April, 2019

1. The history of this matter is set out in the previous judgments or determinations in the proceedings, of which the present one is the twelfth at High Court level and the fourteenth overall. Those decisions are as follows:

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

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

(iii). In *Y.Y. v. Minister for Justice and Equality (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 and Equality* [2017] IESCDET 38 the Supreme Court granted leave to appeal to that court on certain limited grounds.

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

(vi). In *Y.Y. v. Minister for Justice and Equality (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 second s. 3(11) decision.

(vii). In *Y.Y. v. Minister for Justice and Equality (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 and Equality (No. 6)* [2017] IEHC 811 [2017] 12 JIC 2111 (Unreported, High Court, 21st December, 2017), I directed that the issue of revocation be remitted back to the Minister for fresh consideration. Following that order, fresh submissions were made and a third adverse s. 3(11) decision was made by the Minister on 11th June, 2018. Following that, I allowed a further amendment of the proceedings to encompass a challenge to that decision.

(ix). In *Y.Y. v. Minister for Justice and Equality (No. 7)* [2018] IEHC 459 [2018] 7 JIC 3134 (Unreported, High Court, 31st July, 2018), I decided that in principle there would be an order of *certiorari* against the third s. 3(11) decision and adjourned the matter for further submissions in respect of the appropriate relief.

(x). In *Y.Y. v. Minister for Justice and Equality (No. 8)* [2018] IEHC 537 [2018] 9 JIC 2505 (Unreported, High Court, 25th September, 2018), I quashed the third s. 3(11) decision and gave certain directions regarding the procedure to be adopted in the reconsideration of the matter by the Minister. Following that decision, the applicant made further submissions. The Minister furnished a schedule of documents being relied on and at the request of the applicant furnished further translated material on 18th October, 2018. This was followed by further submissions from the applicant on 26th October, 2018. The Minister then made a fourth decision under s. 3(11) on 22nd November, 2018 refusing to revoke the deportation order. On 10th December, 2018, I allowed the applicant to amend the proceedings to challenge the new decision.

(xi). In *Y.Y. v. Minister for Justice and Equality (No. 9)* [2019] IEHC 27 [2019] 1 JIC 2808 (Unreported, High Court, 28th January, 2019), I dismissed the challenge, as it then stood, to the fourth s. 3(11) decision, and indicated that I would give the applicant an opportunity to consider whether to seek a further amendment to the proceedings regarding the issue of secret detention in Algeria.

(xii). In *Y.Y. v. Minister for Justice and Equality (No. 10)* [2019] IEHC 77 (Unreported, High Court, 11th February, 2019). I gave the applicant liberty to amend the proceedings to challenge the fourth decision under s. 3(11) on the grounds of treatment by the Minister of the issue of secret or incommunicado detention in Algeria. Following that order, an amended statement of opposition was delivered dated 22nd February, 2019.

(xiii). In *Y.Y. v. Minister for Justice and Equality (No. 11)* [2019] IEHC 122 (Unreported, High Court, 25th February, 2019), I ordered that the finalisation of the challenge to that fourth s. 3(11) decision be adjourned pending ministerial consideration of further submissions by the applicant on the issue of secret or incommunicado detention. Following that, further submissions were made and a fifth s. 3(11) decision averse to the applicant was made dated 15th March, 2019. The proceedings were then amended to allow the applicant to challenge that decision.

2. What is before the court in the present phase of the proceedings is the residual challenge to the fourth s. 3(11) decision of 22nd

November, 2018 (the first three s. 3(11) decisions having already been quashed, the first by the Supreme Court and the second and third by me), and secondly the challenge to the fifth s. 3(11) decision of 15th May, 2019. In that regard 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.

Ground of challenge

3. The ground on which the fifth s. 3(11) decision is challenged is set out in the amended statement of grounds as follows: "*Taking the concession now made by the Respondent that secret detention centres exist in Algeria (p. 21 of the decision) together with all other relevant circumstances, the conclusion that deportation would not expose the Applicant to a risk of torture or inhuman or degrading treatment or punishment in breach of Article 3 ECHR is unreasonable and/or irrational, and/or the contested decision fails to dispel all doubts as required by Article 3 and breaches Article 40.3 of the Constitution and/or s. 3(1) of the European Convention on Human Rights Act 2003".*

4. The ground as pleaded involves three elements:

> (i). an allegation that the respondent has made a concession;
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> (ii). an allegation that the conclusion is unreasonable or irrational; and
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> (iii). an allegation that the decision fails to dispel doubts as to the risk to the applicant.

5. The first element is that the applicant presupposes that a concession has been made by the respondent in a manner that materially changes matters as they stood following the fourth s. 3(11) decision. The fifth s. 3(11) refusal, insofar as it deals with the issue of secret detention, should not be read as a concession. Rather it is simply a statement that the reference made in the UN Human Rights Committee material to secret or incommunicado detention, which as it happens is very skeletal and unparticularised, should be read in a manner favourable to the applicant. However, that does not materially change the decision as set out in the previous s. 3(11) refusal to the effect that there have been isolated instances or reports of ill-treatment or punishment contrary to art. 3 of the ECHR in Algeria but that this does not amount to a widespread practice. There is nothing in the latest decision to suggest an acceptance by the Minister of a relevant increase in the level of risk to this applicant. Thus the decision should not be read as a concession. I would under those circumstances uphold the plea in paras. 141 and 142 of the statement of opposition to the effect that the respondent considered all of the materials put before him, and that while acknowledging concerns in the UN Human Rights Committee concluding observations, and while construing such information in favour of the applicant, considered that "*this information must be considered in the wider context of all of the reports relating to whether there is a general and systematic practice of torture and ill treatment in detention in Algeria".* In those circumstances the respondent's plea is well founded insofar as it suggests that the "*concession*" as contended for "*is selectively pleaded and artificially divorced from the wider context of the respondent's assessment on the issue of secret detention centres" and that "the applicant has wholly failed to engage with this wider context specifically outlined by the respondent".*

6. The second element of the complaint made against the fifth s. 3(11) decision is the allegation that it is unreasonable or irrational. However, it is not unreasonable or irrational having regard to the huge number of factors supporting the Minister's conclusion, both in assessing the personal and individual circumstances of the applicant, and the overall country situation which has been one of continuous improvement taking a broad view over a period of recent years. I would consequently uphold the pleas in this regard in paras. 143 to 145 of the statement of opposition to the effect that the applicant has failed to engage with the respondent's assessment of whether there is a general and systematic practice of torture and ill-treatment in Algeria and to examine the question of secret detention centres in that context, or to establish that the question of secret detention centres outweighs the 89 factors identified in the No. 9 judgment that entitled the respondent to lawfully conclude that doubts have been dispelled for the purposes of art. 3, and overall the plea that "*the respondent carried out a lawful and comprehensive examination of the applicant's submissions in respect of secret detention centres in Algeria and outlined extensive reasons why the applicant could be lawfully deported to Algeria".*

7. As far as the overall narrative of gradually improving circumstances in Algeria from a democracy and human rights point of view is concerned, it would be incomplete not to advert here to a matter touched on in argument, namely the very well-publicised fact of changes in circumstances in Algeria since the latest decision was made in this case. However, neither side has pleaded any point under that heading. Any such changes, whether they be regarded as improvements or otherwise, may become relevant in another forum if hypothetically any future *ex nunc* examination were to take place of the applicant's situation.

8. The third allegation in the ground of challenge against the fifth s. 3(11) decision is that it fails to dispel doubts for the purposes of art. 3 or corresponding constitutional rights. However, that plea misunderstands the process involved. The court is not determining itself whether doubts can be dispelled. Rather, as put by Clarke J. as he then was in *E.D. (Education) v. Refugee Appeals Tribunal* [2016] IESC 77 [2017] 1 I.R. 325 [2017] 1 I.L.RM. 151 at para. 6.3, "*So far as the facts are concerned a court's function is to determine whether the facts, as found by the administrative body, can be sustained on judicial review principles."* Here, the allegation that the Minister's decision fails to dispel doubts is not a ground for judicial review as such, but insofar as it can be read as an allegation that the Minister's decision that doubts have been dispelled is unreasonable, that does not add anything to the plea of irrationality I have dealt with above.

Order

9. Accordingly, the order will be as follows:

> (i). the proceedings insofar as they involve a challenge to the fourth s. 3 (11) decision of 22nd November, 2018 (the challenge to which is logically dependant on that to the fifth decision), and to the fifth s. 3(11) decision of 15th March, 2019, are dismissed; and
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> (ii). the remaining substantive issue, namely the question of the validity of the underlying order, will be listed for hearing on a date to be fixed.

Postscript – challenge to deportation order

10. Shortly after delivery of the foregoing judgment Mr. Lynn asked for a brief period of time to consider whether he had further submissions to make on the validity of the original deportation order, separate and distinct from those already made in the context of the s. 3(11) decisions, and, having been afforded such time, indicated that he did not. Because that was the only remaining live piece

of substantive relief sought, I then simply dismissed the proceedings *in toto* and listed the matter for submissions on costs. It would be an omission if I failed to note that such an approach by the applicant, involving a decision to immediately finalise the challenge rather than raise further issues with the deportation order despite having had the recent changes in Algeria drawn to his attention, does not appear self-evidently consistent with a view that those changes intensify any risks to the applicant if returned. No doubt it would be unduly sceptical to momentarily be tempted to wonder whether the applicant's wish to summarily pull the shutters down on the proceedings at High Court level is in case things get any better in Algeria in terms of democratic change; and thereby in case things get any worse, in forensic terms, from his point of view.