THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 774 J.R.]

BETWEEN

Y.Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 9)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 28th day of January, 2019

1. The procedural history of this matter is set out in *Y.Y. v. Minister for Justice and Equality (No. 8)* [2018] IEHC 537 [2018] 9 JIC 2505 (Unreported, High Court, 25th September, 2018). Where matters rested following that decision was that I quashed the latest decision by the Minister to refuse to revoke a deportation order against the applicant under s. 3(11) of the Immigration Act 1999 and gave certain directions regarding the procedure to be adopted in the reconsideration of the matter by the Minister (see para. 14). Following that decision, the applicant made written submissions dated 9th October, 2018 setting out a "*list of the comparable cases and other important points that would require to be addressed that the applicant contends come within para. 64 of the judgment of O'Donnell J.* in Y.Y. v. Minister for Justice and Equality *[2017] IESC 61 [2018] 1 I.L.R.M. 109*". That set out thirteen issues that the applicant thought should be specifically addressed. He contends that the Minister ultimately dealt with ten of these points but did not give reasons for three of them. The Minister subsequently furnished a schedule of documents being relied on, dated 11th October, 2018. That addressed any fair procedures concerns, and indeed counsel for the applicant now states that no fair procedures issue is being pursued. The Minister, at the request of the applicant, furnished further translated material on 18th October, 2018. The applicant then made further s. 3(11) submissions on 26th October, 2018. Following consideration of those submissions, the Minister refused the s. 3(11) application on 22nd November, 2018 and at this stage of the proceedings, I am dealing with a challenge to that refusal.

2. Attached to this judgment is an appendix setting out a list of the country material that was considered by the Minister in the comprehensive decision that is now challenged. In addition to that material, the Minister also considered a body of caselaw which is set out later in this judgment. Following liberty having been given to amend the proceedings, the applicant filed an amended statement of grounds on 10th December, 2018 and then delivered written legal submissions dated 8th January, 2019. The respondent delivered replying written submissions, dated 9th January, 2019.

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.

ECHR-related caselaw considered in impugned decision

4. The s. 3(11) decision considers a range of ECHR-related caselaw, as follows:

(i) *Vilvrajah v. the United Kingdom* (Application no. 13163/87, European Court of Human Rights, 30th October, 1991)

(ii) *Ýlhan v. Turkey* (Application no. 22277/93, European Court of Human Rights, 27th June, 2000)

(iii) *Katani v. Germany* (Application no. 67679/01, European Court of Human Rights, 31st May, 2001)

(iv) *Müslim v. Turkey* (Application no. 53566/99, European Court of Human Rights, 26th April, 2005)

(v) *Z v. Secretary of State for the Home Department* SC/37/2005, United Kingdom: Special Immigration Appeals Commission (SIAC), 14th May 2007

(vi) *Mamatkulov v. Turkey* (Application no. 46827/99, European Court of Human Rights, 4th February, 2008)

(vii) *Saadi v. Italy* (Application No. 37201/06, European Court of Human Rights, 28th February, 2008)

(viii) *N.A. v. United Kingdom* (Application no. 25904/07, European Court of Human Rights, 6th August, 2008)

(ix) *Daoudi v. France* (Application No. 19576/08, European Court of Human Rights, 3rd December, 2009)

(x) *Q.J. v. Secretary of State for the Home Department* SC/84/2009, United Kingdom: Special Immigration Appeals Commission (SIAC), 14th December, 2009

(xi) *R.C. v. Sweden* (Application no. 41827/07, European Court of Human Rights, 9th June, 2010)

(xii) *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45

(xiii) *H.R. v. France* (Application No. 64780/09, European Court of Human Rights, 22nd September, 2011)

(xiv) *F.G. v. Sweden* (Application no. 43611/11, European Court of Human Rights, 16th January, 2014)

(xv) *B.B. and Others v. Secretary of State for the Home Department* [2015] EWCA Civ 9

(xvi) *J.K. v. Sweden* (Application No. 59166/12, European Court of Human Rights, 23rd August, 2016)

(xvii) *X. v. Switzerland* (Application no. 16744/14, European Court of Human Rights, 26th January, 2017)

(xviii) *Y.Y. v. Minister for Justice and Equality (No. 1)* [2017] IEHC 176 [2017] 3 JIC 1306 (Unreported, High Court, 13th March, 2017)

(xix) *Y.Y. v. Minister for Justice and Equality (No. 2)* [2017] IEHC 185 [2017] 3 JIC 2405 (Unreported, High Court, 24th March, 2017)

(xx) *Y.Y. v. Minister for Justice and Equality (No. 3)* [2017] IEHC 334 [2017] 3 JIC 2409 (Unreported, High Court, 24th March, 2017)

(xxi) *Y.Y. v. Minister for Justice and Equality (No. 4)* [2017] IEHC 690 [2017] 10 JIC 1706 (Unreported, High Court, 17th November, 2017)

(xxii) *Y.Y. v. Minister for Justice and Equality (No. 5)* [2017] IEHC 815 [2017] 12 JIC 1907 (Unreported, High Court, 19th December, 2017)

(xxiii) *Y.Y. v. Minister for Justice and Equality (No. 6)* [2017] IEHC 811 [2017] 12 JIC 2111 (Unreported, High Court, 21st December, 2017)

(xxiv) *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61 [2018] 1 I.L.R..M. 109

(xxv) *Y.Y. v. Minister for Justice and Equality (No. 7)* [2018] IEHC 459 [2018] 7 JIC 3134 (Unreported, High Court, 31st July, 2018)

(xxvi) *Y.Y. v. Minister for Justice and Equality (No. 8)* [2018] IEHC 537 [2018] 9 JIC 2505 (Unreported, High Court, 25th September, 2018)

(xxvii) *X v. Sweden* (Application no. 36417/16, European Court of Human Rights, 9th January, 2018)

(xxviii) *M.A. v. France* (Application no. 9373/15, European Court of Human Rights, 1st February, 2018)

(xxix) *A.S. v. France* (Application no. 46240/15, European Court of Human Rights, 19th April, 2018)

(xxx) *X. v. the Netherlands* (Application no. 14319/17, European Court of Human Rights, 10th July, 2018)

5. This was certainly not a case where the Minister has failed to inform himself of, or to appropriately consider, the Strasbourg jurisprudence. I should emphasise that while the right not to be tortured also arises under Article 40.3 of the Constitution, my consideration of that issue can be taken as having being made in conjunction with the issues under art. 3 of the ECHR, as applied by the European Convention on Human Rights Act 2003. I am of course aware of the view that the primary vehicle for the protection of human rights in Ireland should be *via* the Constitution rather than the ECHR (*Gorry v. Minister for Justice and Equality* [2017] IECA 282), but here the applicant's submissions were in effect wholly focused on the ECHR, with it being understood that identical considerations would apply to an argument based on the Constitution. To use the term of the applicant at para. 6 of his written submissions, reference to art. 3 is "*shorthand*".

6. In addition to the art. 3-related caselaw expressly referred to in the decision, I have also had regard to the ECHR-related caselaw that has featured in the previous judgments in these proceedings, specifically as follows:

(i) *Council of Civil Services Unions v. Minister for the Civil Service* [1985] A.C. 374

(ii) *Soering v. United Kingdom* (Application no. 14038/88, European Court of Human Rights, 7th July, 1989) (1989) 11 E.H.R.R. 439

(iii) *Cruz Varas v. Sweden* (Application no. 15576/89, European Court of Human Rights, 20th March, 1991)

(iv) *R. v. Secretary of State for the Home Department ex parte Cheblak* [1991] 2 All E.R. 319

(v) *Klaas v. Germany* (Application no. 15473/89, European Court of Human Rights, 22nd September, 1993)

(vi) *Chahal v. United Kingdom* (Application no. 22414/93, European Court of Human Rights, 15th November, 1996)

(vii) *H.L.R. v. France* (Application no. 24573/94, European Court of Human Rights, 29th April, 1997)

(viii) *Jabari v Turkey* (Application no. 40035/98, European Court of Human Rights, 11th July, 2000)

(ix) *Fatgan Katani v. Germany* (Application no. 67679/01, European Court of Human Rights, 31st May, 2001)

(x) *Èonka v. Belgium* (Application no. 51564/99, European Court of Human Rights, 5th February, 2002)

(xi) *Thampibillai v. the Netherlands* (Application no. 61350/00, European Court of Human Rights, 14th February, 2004)

(xii) *Shamayev and Others v. Georgia and Russia* (Application no. 36378/02, European Court of Human Rights, 12th April, 2005)

(xiii) *N. v. Finland* (Application no. 3885/02, European Court of Human Rights, 26th July, 2005) (2006) 43 E.H.R.R. 12.

(xiv) *Salah Sheekh v. Netherlands* (Application no. 1948/04, European Court of Human Rights, 11th January, 2007)

(xv) *Gebremedhin v. France* (Application no. 25389/05, European Court of Human Rights, 26th April, 2007)

(xvi) *Ramzy v. the Netherlands* (Application no. 25424/05, European Court of Human Rights, 27th May, 2008)

(xvii) *D.V.T.S. v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 476

(xviii) *Nnyanzi v. the United Kingdom* (Application no. 21878/06, European Court of Human Rights, 8th April, 2008)

(xix) *R.B. v. Secretary of State for the Home Department* [2009] UKHL 10

(xx) *F.H. v. Sweden* (Application no. 32621/06, European Court of Human Rights, 20th January, 2009)

(xxi) *Abdolkhani and Karimina v. Turkey* (Application no. 30471/08, European Court of Human Rights, 22nd September, 2009)

(xxii) *Sihali v. Secretary of State for the Home Department*, SC/38/2005, Special Immigration Appeals Commission (26th March, 2010)

(xxiii) *A v. the Netherlands* (Application no. 4900/06, European Court of Human Rights, 20th July, 2010)

(xxiv) *M.S.S. v. Belgium and Greece* (Application no. 30696/09, European Court of Human Rights, 21st January, 2011)

(xxv) *Al Hanchi v. Bosnia and Herzegovina* (Application no. 48205/09, European Court of Human Rights, 15th November, 2011)

(xxvi) *Othman v. United Kingdom* (Application no. 8139/09, European Court of Human Rights, 9th May, 2012) (2012) 55 E.H.R.R. 1

(xxvii) *P.Z. v. Sweden* (Application no. 68194/10, European Court of Human Rights, 29th May, 2012)

(xxiii) *B.M. (Eritrea) v. Minister for Justice Equality and Law Reform* [2013] IEHC 324 (Unreported, McDermott J., 16th July, 2013)

(xxix) *M.X. v. France* (Application no. 21580/10, European Court of Human Rights, 1st July, 2014)

(xxx) *M.K. v. France* (Application no. 76100/13, European Court of Human Rights, 24th September, 2015)

(xxxi) *Nabid Abdullayev v. Russia* (Application no. 8474/14, European Court of Human Rights, 15th October, 2015)

(xxxii) *R. (Evans) v Attorney General* [2015] UKSC 21

(xxxiii) *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 (Unreported, High Court, 24th June, 2016)

(xxxiv) *S.A. v. Minister for Justice and Equality* [2016] IEHC 462 (Unreported, High Court, 29th July, 2016)

(xxxv) *M.Y. v. Minister for Justice and Equality* [2016] IEHC 515 (Unreported, High Court, Faherty J., 6th September, 2016)

(xxxvi) *Bouhabila*, Case No. 15PA02906, Cour Administrative d'Appel de Paris, 7th March, 2016

(xxxvii) *D.E. v. Minister for Justice and Equality* [2018] IESC 16 (Unreported, Supreme Court, 8th March, 2018)

Alleged error of law

7. Ground 34 alleges that the Minister made an error of law in the test to be applied for the existence or otherwise of an art. 3 risk. In the decision, the Minister states "*in assessing a risk under Article 3, regard must be had both to statements and/or reports from organisations or experts in respect of the individual applicant, as well as to objective country of origin information. In doing so, the following must be considered:*

> • *In relation to any statements and/or reports submitted in respect of the individual applicant, is detailed and express information provided about the specific risk arising in respect of the applicant or individuals in a comparable situation?*
>
> • *In relation to the material considered:*
>
> o *Does this refer to specific and frequent examples of treatment prohibited under Article 3 and is it reported that such allegations are disregarded by the authorities?*
>
> o *What is the authority and reputation of the authors of the reports on the seriousness of the investigations carried out for the purpose of their compilation?*
>
> o *Are the conclusions reached consistent with each other and are the conclusions corroborated in substance by numerous other sources?*
>
> o *Is there any evidence or are there any reports which rebut the assertions made and the sources relied on by the applicant?*
>
> o *Is the* "evidence of likely treatment", "clear, consistent and strong"?"

8. A somewhat convoluted point is made by the applicant under this heading, phrased in submissions as follows: "*Did the respondent err in law by extrapolating a legal test or set of principles from dicta in the judgment of Y.Y. v. Minister for Justice and Equality [2017] IESC 61 that were comments made on the evidence and facts at issue in Saadi v. Italy [GC], App. No. 37201/06, ECtHR 2008, rather than the formulation by the Supreme Court of a legal test or statements of principle to be applied generally and/or by relying on a dissenting judgment of the European Court of Human Rights and mistakenly regarding it as having been later affirmed by the Grand Chamber?".*

9. The short answer to that question is that the respondent did not err in law. If there was some infelicity in the reference to the Grand Chamber or a possible lack of clarity and distinguishing between the judgment of Judge O'Leary and the court, that was not material. The Minister did not adopt an incorrect test on a fair reading of the decision overall, having regard in particular to the wealth of Strasbourg caselaw considered. The questions raised by the Minister in the passage from the decision quoted above are valid questions in assessing the country material and the applicant's personal situation, subject of course to the overall application of the *Saadi v. Italy* test. The applicant reads the Minister's comments under this heading as an "*evidential threshold*" or a "*purported legal test"*, and says that the decision is invalid on that basis. However, these comments do not purport to state such a threshold or test but rather a set of legitimate questions that the decision-maker is entitled to ask in assessing the overall test as set out in Strasbourg caselaw.

Alleged failure to give reasons

10. As noted in *Y.Y. v. Minister for Justice and Equality (No. 7)* [2018] IEHC 459 at para. 10, reasons must relate to the "*principal important controversial issues or the main issues in dispute*": see Michael Fordham, *Judicial Review Handbook* 6th ed (Oxford, 2012) p. 667, *Bolton Metropolitan Borough Council v. Secretary of State to the Environment* [1995] 3 PLR 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* [1995] AC 661, *Wheeler (R.) v. Assistant Commissioner of the Metropolitan Police* [2008] EWHC 439 (Admin). Reasons are to be understood in the context of the "*broad issues*", *per* Finlay C J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at 76, or the "*broad gist*" of the basis of the decision, *Faulkner v. Minister for Industry and Commerce* (Unreported, Supreme Court, 10th December, 1996) *per* Flaherty J., applied by Birmingham J. in *P. N. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 215 (Unreported, High Court, 3rd July, 2008). A decision-maker does not need to engage in micro-specific analysis: *K.R. v. Refugee Appeals Tribunal* [2014] IEHC 625 (Unreported, McDermott J., 2nd December, 2014), *M.S. (Albania) v. Refugee Appeals Tribunal* [2018] IEHC 395 [2018] 5 JIC 3005 (Unreported, High Court, 30th May, 2018) (para. 9). Nor is there a need for a "*micro specific format"*, *per* Denham J., as she then was, in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25 [2008] 3 I.R. 795 at 819, cited in *Seredych v. Minister for Justice and Equality* [2018] IEHC 187 (Unreported, High Court, 22nd March, 2018); see also the judgment of Clarke C.J. in *Connelly v. An Bord Pleanála* [2018] IESC 31 [2018] 2 I.L.R.M. 453, at para. 10.15. As O'Donnell J. said in *Murphy v. Ireland* [2014] IESC 19 [2014] 1 I.R. 198 [2014] 1 I.L.R.M. 457, at para. 41: "*The obligation to give reasons is, as has been observed, dependent upon and a reflection of, the reviewability of the decision and the scope of that review."*

11. Thus the extent of reasons is context-specific, and as I noted at para. 19 of *Y.Y. No. 7,* there are some situations where there can be an enhanced duty to give reasons. Indeed, conversely, there are some situations (such as that in *Murphy v. Ireland*) where there is a reduced (or even non-existent) requirement to give reasons. The fact that the Minister is in the present case engaged in an exercise of dispelling doubts as to an art. 3 risk raised by the applicant does not in itself have the consequence that the Minister must set out micro sub-reasons for the main considerations. The principal criterion is that set out at para. 80 of the judgment of O'Donnell J. in the Supreme Court judgment in *Y. Y.*, namely "*that the decision sets out a clear reasoned path, and moreover one that was not flawed or incorrectly constrained by unjustifiable limitations or irrelevant legal considerations*". The word "*path*" is important in this passage. Thus, it is not simply a question of asserting a reason but providing a reason that makes sufficiently clear the logical path by which the Minister arrived at that conclusion (see para. 70 of his judgment as to why such a path was missing from the original decision).

12. The exercise in dispelling doubts is, however, a matter for the Minister as the decision-maker, albeit that the Strasbourg court engages in an *ex nunc* review of this decision in cases coming for adjudication before that court. The function of the domestic courts is to consider the lawfulness of the decision, and under this heading whether there is a sufficiently clear path of reasoning for the conclusion that doubts regarding an art. 3 risk have been dispelled and if so whether the Minister's view that doubts have been dispelled is reasonably open to him. The court is not itself deciding whether all doubts have been dispelled in its own *de novo* view: see my judgment in *X.X. v. Minister for Justice and Equality* [2016] IEHC 377 [2016] 6 JIC 2409 (Unreported, High Court, 24th June, 2016), at para. 134, which was cited with approval in this regard by O'Donnell J. at para. 70 of the Supreme Court judgment in *Y.Y. v. Minister for Justice and Equality*. Thus merely because we are dealing here with an exercise in dispelling doubts does not detract from the principle that the main reasons or the principal considerations are what needs to be stated by way of reasons, rather than sub-issues.

13. As regards the specific matters which are claimed to be unreasoned, the situation is as follows:

> (i) Ground 31 alleges a lack of reasons in relation to an absence of inspection facilities. I previously rejected that point in *Y.Y. No. 7* at paras. 17 and 18. The extensive discussion by the Minister does refer to material in relation to the issue of monitoring, so it cannot be said that the matter was not addressed. There is clearly country information regarding some monitoring by domestic bodies and by the International Committee of the Red Cross (ICRC), and that is acknowledged to some extent in the applicant's own reports.
>
> (ii) Ground 32 alleges that there was a lack of reasons for rejecting the applicant's submissions regarding a general violation of the Algerian constitution and human rights standards, and the related point that there were no effective mechanisms to protect the applicant in practice and that the rule of law did not operate in Algeria. In that regard it is common case that there has been some improvement in the Algerian

situation. Insofar as the Minister's analysis sets out overall conclusions on the country material, that must be taken to provide reasons for differing from the applicant's views under this heading, having regard to the extent and nature of the improvements overall, a matter to which I will return later.

(iii) Ground 33 alleges that no reasons were provided for not accepting the applicant's arguments based on a submission dated July, 2017 from the Collectif des Familles de disparus en Algérie and EuroMed Rights to the UN Human Rights Committee and the expert reports of Prof. Joffé regarding a general and systematic practice of torture and inhuman and degrading treatment, enclosed with the applicant's submissions of 9th February, 2018. These points were considered by the Minister and arise in substance from the extensive discussion regarding the country situation. The reason for differing from the applicant on this point and the two previous points is also impliedly clear if not expressed, namely that the Minister preferred a view of the country situation that was different to that urged on him by the applicant. The Minister was entitled to take a view on the country material in principle, a matter to which I will return under the heading of irrationality.

9. In the light of the foregoing, the decision articulates adequate reasons that make clear why the Minister reached the conclusion he did.

Alleged unreasonableness and irrationality

10. Judicial review applicants often lead with the chin by alleging unreasonableness, but that ground is perhaps best thought of as a fall-back if more traditional grounds of review of the process adopted are unsuccessful. Unreasonableness as such is normally something of a last-ditch argument insofar as it involves the court engaging in a review to at least a limited extent of the merits of the decision. As noted by O'Donnell J. at para. 81 of the Supreme Court judgment in *Y.Y. v. Minister for Justice and Equality*, this was not a case where it could be said on the basis of the material before the court at that point that the Minister was not entitled in any circumstances to come to the conclusion that there was no real risk to the applicant. That does not conclusively prevent the applicant from revisiting such a conclusion based on further material but it does contextualise any such argument.

11. The applicant's claim of irrationality is based on four specific items which are pleaded at grounds 35 to 38 and then the contention that the overall conclusion is unreasonable, at grounds 39 and 40. In relation to the matters specifically pleaded, the position is as follows:

(i) Regarding ground 35, the Minister's finding of a lack of general and systemic use of torture and inhuman or degrading treatment or punishment was not unreasonable, notwithstanding possible deficits in inspection possibilities, having regard to the country material overall.

(ii) As regards ground 36, the finding of improvement in the country situation in Algeria was not unreasonable on the material before the Minister. Such a finding based on an improved legal landscape is something that can rationally be arrived at on the material before him.

(iii) As regards ground 37, again the finding of similarity with the applicant's brother's case was not unreasonable. It was certainly open to the Minister to regard the brother as sufficiently similar given that the brother also has foreign terror convictions.

(iv) As regards ground 38, the finding that the applicant's expert reports do not provide an in-depth examination of the applicant's individual situation is again not unreasonable. Those reports generally focus on the overall and general situation in Algeria and the Minister's analysis of them is perfectly legitimate.

12. As regards the omnibus allegation of unreasonableness at grounds 39 to 40, overall there are a range of factors referred to at various points in the decision that provided material that would entitle the Minister to come to the conclusion that doubts in relation to a risk for the applicant had been dispelled for the purposes of art. 3 of the ECHR. The factors specifically identified in the decision appear to be as follows:

(i) The applicant's expert, Prof. Joffé, confirmed that there had been changes in the Algerian situation in the past nine months (p. 6).

(ii) Dr. Sedden's report does not provide any information or evidence on the risk of the imposition of the death penalty in general, or in relation to the applicant specifically (p. 6).

(iii) The Supreme Court noted country material indicating that Algeria was regarded as being in practice abolitionist (p. 7).

(iv) The UN Human Rights Committee's concluding observations on the Fourth Periodic Report of Algeria noted a *de facto* moratorium on the death penalty since 1993 (p. 7).

(v) Imprisonment following a fair trial would not constitute serious harm (p. 8).

(vi) The U.S. State Department country report, 2016 states that prison conditions generally met international standards (p. 8).

(vii) A presidential decree of 20th January dissolved the DRS and reorganised the intelligence services (p. 8).

(viii) A July, 2015 amendment of the penal code prohibits prison officers from detaining suspects in any facilities not designated for that purpose and declared to the local prosecutor, who has the right to visit such facilities at any time (p. 8).

(ix) Convicted terrorists have the same rights as other inmates (p. 8).

(x) Prisoners may submit uncensored complaints to penitentiary administration doctors and their judge (p. 8).

(xi) Authorities permitted family members to visit prisoners in standard facilities weekly and to provide detainees with food and clothing (p. 9).

(xii) The government has allowed the ICRC and local human rights observers to visit regular prisons and detention centres (p. 9).

(xiii) The ICRC provided the government confidential feedback when applicable to help authorities improve detainee treatment and living conditions, reinforce respect for judicial protection and expand access to healthcare (p. 9).

(xiv) The ICRC hosts training sessions on human rights for judicial police and national gendarmeries and judges (p. 9).

(xv) Authorities improved prison conditions to meet international standards and opened new centres (p. 9).

(xvi) Intelligent camera systems were installed in some pre-trial detention facilities to allow monitoring of conditions of detention (p. 9).

(xvii) The U.S. State Department country report, 2015 also states that prison and detention centre conditions generally met international standards (p. 9).

(xviii) This was a change from the 2013 report which states that prison conditions generally did not meet international standards (p. 9).

(xix) The applicant's expert, Prof. Joffé, acknowledged that civil prisons are inspected by the ICRC (p. 9).

(xx) He also acknowledged that local human rights organisations are allowed to inspect such facilities, including the Commission nationale consultative pour la protection et promotion des droits de l'homme (p. 9).

(xxi) Dr. Pargeter's report of 29th January, 2018 says that there has been an improvement in prison conditions thanks in part to the ICRC (p. 10).

(xxii) Neither Prof. Joffé, Dr. Sedden nor the UN Human Rights Committee Report of 17th August, 2018 provide further details in relation to life sentences and prison conditions (p. 10).

(xxiii) Country material favoured by the Minister, in particular the US State Department Report, contains detailed information on physical prison conditions, including access to healthcare, and chart a change in status from not meeting international standards in 2013 to meeting such standards in 2014 onwards (p. 10).

(xxiv) Country material indicates an improved human rights landscape in Algeria (p. 15).

(xxv) The UN Human Rights Council Report of the working group on the Universal Periodic Review – Algeria, 18th July, 2017, noted the establishment of the National Human Rights Council. The Council had constitutional status and the Paris principles regarding the status of national institutions for the promotion and protection of human rights were fully respected (p. 15).

(xxvi) A new Constitution was adopted on 7th February, 2016 (p. 15).

(xxvii) Amendments to the criminal code and the code of criminal procedure and the launch of a modernisation plan aimed at providing more humane conditions of detention had taken place (p. 15).

(xxviii) The Minister for Foreign Affairs and International Cooperation confirmed that there were no places of detention in Algeria that were outside the law (p. 15).

(xxix) The Amnesty International Report, 2016 on Algeria, 22nd February, 2017, outlined that in January, 2016 the government dissolved the Department for Information and Security (DRS), the main security agency previously associated with torture and other ill treatment of detainees (p. 15).

(xxx) In January, 2016, changes to the code of criminal procedure came into effect including amendments allowing suspects to contact their lawyers immediately when taken into custody (p. 15).

(xxxi) By contrast with the 2016 report, the 2014 Amnesty report published in February, 2015 stated that the DRS still had significant powers to arrest and imprison including incommunicado detention of suspected terrorists (p. 16).

(xxxii) Concerns about the risk to suspected terrorists of being held incommunicado by the DSS are not contained in the 2017 report (p. 16).

(xxxiii) Dr. Pargeter's 2018 report stated that there is clearly a desire by the presidency to reign in and revamp the intelligence services as well as to overhaul some of the worst practices during previous decades (p. 16).

(xxxiv) Dr. Pargeter's report contained no information regarding treatment contrary to art. 3 in respect of Wahid Bouabdullah in July, 2016, and it was noted that he was not detained but was released after three hours (p. 17).

(xxxv) Insofar as the death of Mohammed Tamalt is concerned, it is noted that he went on hunger strike (p. 17).

(xxxvi) No specific allegations of mistreatment of Mr. Tamalt are contained in the Amnesty International report (p. 17).

(xxxvii) Media reports did not contain any specific allegations of mistreatment of Mr. Tamalt (p. 17).

(xxxviii) No information was presented that Said Chitour was treated contrary to art. 3 in detention (p. 18).

(xxxix) No information was submitted that Rafak Belamrania was treated contrary to art. 3 (p. 18).

(xl) Conflicting evidence in relation to the death of Hamza Hadjouti, who was not a terrorist suspect but was arrested in relation to specific political issues, was presented, and it is unclear as to who was responsible (p. 18).

(xli) The US State Department report, 2016 noted that Algeria's law prohibits torture (p. 20).

(xlii) While NGOs allege that the government "*sometimes*" employs torture and abusive treatment to obtain confessions, the government denied these charges (p. 20).

(xliii) Human Rights Watch - Algeria in the 2017 report noted that the EU and Algeria adopted shared partnership priorities for 2017 to 2020 at the Association Council of 13th March, 2017 (p. 20).

(xliv) Strong emphasis was placed by the Association Council on the implementation of Algeria's new Constitution (p. 20).

(xlv) The EU pledged to assist Algeria in the areas of governance, democracy protection and promotion of fundamental rights, including the judiciary (p. 20).

(xlvi) This was considered to be an example of the moves by Algeria towards greater human rights protections and norms, evident both by internal changes as well as openness to availing of external assistance (p. 20).

(xlvii) The 2016 US State Department country report identified the three most significant ongoing human rights problems in Algeria, which did not include treatment contrary to art. 3 (p. 20).

(xlviii) This is consistent with the most recent 2017 Amnesty report (p. 20).

(xlix) In concluding observations on the fourth periodic report of Algeria of 17th August, 2018, the UN Human Rights Committee took note of Algeria's assertion that the use of torture would be only a residual problem (p. 20).

(l) There have been improvements in the Algerian situation since the decision in *B.B. v. Secretary of State for the Home Department* (p. 21).

(li) Instances of torture adduced by the applicant were found to be isolated and sporadic, and that the general situation was not of such a nature as to, on its own, be such that there would be a breach of art. 3 in the event of the return of the applicant (p. 22).

(lii) The four reports of Prof. Joffé are almost entirely in relation to the general situation and not the applicant's personal circumstances (p. 23).

(liii) There is little by way of individual analysis of the applicant's situation in Dr. Seddon's two reports (p. 23).

(liv) Dr. Pargeter's report deals with the general situation, although there is some analysis of the applicant's situation (p. 23).

(lv) Dr. Pargeter does not elaborate on why the applicant would be of significant interest to the Algerian authorities or provide detailed reasons (p. 24).

(lvi) The letter from Amnesty International of 19th October, 2017 in this case is significantly different from one submitted on behalf of Nassim Saadi in relation to Tunisia (p. 24).

(lvii) That letter does not set out in detail the treatment of individuals considered to be comparable (p. 24).

(lviii) Evidence in the letter is in general terms, the purpose being to clarify the position of Amnesty, and it is brief (p. 25).

(lix) The letter of 19th October, 2017 submitted by Amnesty does not contain information focussed on the particular applicant or detailed and express information about the specific risk arising to the applicant or individuals in a comparable situation (p. 25).

(lx) The country of origin information demonstrates that the state of emergency which was in place for nineteen years was lifted in 2011: see US State Department report, 2011 (p. 25).

(lxi) This brought to an end the unlimited involvement of the military in domestic matters (p. 25).

(lxii) The country information demonstrates the conditions in Algeria are markedly different to those which pertained in the 1990s: see *B.B. v. Secretary of State for the Home Department* (p. 25).

(lxiii) The applicant's expert, Prof. Joffé, notes that the widespread violence that pertained in the 1990s ended long ago, surviving only in a few small bands located mainly in Kabylia (p. 25).

(lxiv) While the applicant alleges that he was a sympathiser of the Front Islamique du Salut (FIS), Prof. Joffé states that the overt political infrastructure of the FIS has long since disappeared in Algeria (p. 25).

(lxv) There were no reports that the Algerian government or its agents committed arbitrary or unlawful killings and no reports of politically motivated disappearances in 2016: see US State Department report, 2016 (p. 25).

(lxvi) The existence of the Charter for National Reconciliation and Peace is indicative of a change in treatment by the Algerian authorities towards those involved in violence in the 1990s (p. 25).

(lxvii) The applicant failed to bring the alleged torture that he now claims to have been inflicted on him when he says he was arrested in Algeria in the 1990s to the attention of the Minister at an earlier stage, either in making his first asylum claim in 1997 or his application to be readmitted to the asylum process in 2014 or his application for subsidiary protection in 2016 (p. 25).

(lxviii) There was an absence of any report which would support the allegation of prior torture (p. 25).

(lxix) Thus it was not accepted as credible that the applicant was previously subjected to torture in detention by the Algerian authorities (p. 25).

(lxx) No mention was made of the allegation of a prior instance of torture in the report of Prof. Joffé of 8th August, 2017, which was regarded as a striking omission (p. 26).

(lxxi) The applicant's brother was also convicted of terrorist related offences in France in 2006, a matter on which the applicant, through his lawyers, made false assertions on a previous application to revoke the deportation order, it having being falsely claimed that the brother was not convicted of terrorism related offences in France and that this was the reason he was released following interrogation for two or three days on return to Algeria (p. 26).

(lxxii) Given the previous inconsistent accounts of the brother's position, the distinction attempted to be drawn by the applicant between him and the brother could not be independently identified (p. 26).

(lxxiii) No information was submitted on behalf of the applicant to demonstrate that an individual convicted of terrorism related offences in another state is at increased risk of facing torture or ill-treatment in detention in Algeria. (p. 26)

(lxxiv) The most significant indicative factor in the case of the applicant is the situation of his brother, given that both were tried and convicted in relation to matters arising out of the same allegations. Any information the Algerian authorities may wish to obtain in that respect will likely have been obtained at the time of detention of the brother (p. 26).

(lxxv) By the applicant's own admission, the brother was released following two or three days' detention and was living "*ok*" in Algeria now (p. 26).

(lxxvi) The applicant did not make any claim that the brother was mistreated while in detention and therefore it is considered reasonable to assume, in the absence of substantial grounds to the contrary, that the applicant will be treated similarly (p. 26).

(lxxvii) The situation has changed in Algeria since the Refugee Appeals Tribunal decision in 2016 (p. 27).

(lxxviii) The applicant's reports relate in a generalised manner to risk in Algeria but do not provide any in-depth and necessary examination of the individual situation of the applicant *per* ECHR caselaw (p. 29).

(lxxix) While Prof. Joffé and Dr. Pargeter in their initial reports do, in a somewhat perfunctory manner, attempt to apply the general situation to the applicant, there is little provided in the way of evidence that would suggest that there is a real risk of this (p. 29).

(lxxx) This is corroborated by the marked difference between the letter of Amnesty International in relation to the applicant and that in *Saadi*, as noted by the Supreme Court (p. 29).

(lxxxi) Likewise, there is a contrast with *X. v. Switzerland*, where the applicant demonstrated that a third person who had been in a comparable position had actually suffered treatment contrary to art. 3. Here a third person in a comparable situation, the applicant's brother, has not suffered treatment contrary to art. 3 (p. 29).

(lxxxii) Given the changes to the legal landscape in Algeria, it is clear that Algeria is now taking concrete steps to address the relevant issues (p. 30).

(lxxxiii) While the applicant has had ample opportunity to provide evidence, very little in the way of individual evidence regarding his real risk of treatment contrary to art. 3 has been furnished (p. 30).

(lxxxiv) There is a marked difference between country information relied on in *M.A. v. France* and subsequent changes that have occurred since. While *M. A.* was heard in February, 2018, the court relied on country information from pre-2016 (p. 30).

(lxxxv) As regards allegations made in a television programme, it is not accepted that the Prime Time programme would have access to information not already within the knowledge of the international intelligence at issue in the case (p. 30).

(lxxxvi) Insofar as reliance is placed on the situation of Ali Attar, that situation arose at a time when the authority to detain individuals by the DRS had been reinstated (p. 31).

(lxxxvii) The decision in *Daoudi v. France* was based *inter alia* on a US State Department report, 2009, and the situation has changed considerably since (p. 32).

(lxxxviii) The decision in *H.R. v. France* was based inter alia on the US State Department report, 2011, and again the situation has changed since (pp. 32 to 33).

(lxxxix) A new law has been adopted prohibiting the use of incommunicado detention by the police and there exists a right of access to a solicitor while in detention following arrest (p. 33).

13. Subject to one issue, which I will come to now, it was more than open to the Minister rationally to conclude in the light of the above 89 factors individually and cumulatively that they were such as to dispel doubts in relation to the risk of treatment to the applicant contrary to art. 3 of the ECHR.

The issue of secret detention

14. In the concluding section of the Minister's analysis relating to distinguishing the previous caselaw of *Daoudi v. France*, *H.R. v. France* and *B.B. v. Secretary of State for the Home Department,* the discussion states as follows: *"Since the decisions in Dauodi and H.R. and B.B. and others there has been significant changes in detention security and intelligence operations. In particular, as set out previously the DRS has been dissolved (removing from the remit of the Department of Defence all police and security matters), there are no reports on the use of incommunicado detention with a new law prohibiting the use of same by the police, there now exists a right in law of access to a solicitor while in detention following arrest …"*

15. As regards the statement that there are no reports of incommunicado detention since the decisions referred to, the latest of those was *B.B.* which was decided on 18th April, 2016. Prof. Joffé's reports cited the UN Human Rights Committee 4th Periodic Report on Algeria - meeting report of 5th July, 2018, which refers to "*continued reports of places of secret detention"*. The concluding observations of the UN Human Rights Committee (CCPR/C/DZA/CO/4 of 17th August, 2018) state at para. 35 that: "*While noting the delegation's assertion that there are no secret detention sites in the territory of the State party, the Committee is concerned by reports documenting the existence of such centres."*

16. Mr. Farrell's response to the apparent contradiction between the material before the Minister and the finding or statement that there are no reports of incommunicado detentions since April, 2016 is that this is a terminological issue and that incommunicado detention is not necessarily secret or *vice versa*. However, places of secret detention are by definition places of incommunicado detention so that argument does not stack up. Secondly, he submitted that the Minister has actually considered all of the material so that the extent of the error was minimal. In that regard it may very well be that the Minister's conclusion that a general and systematic practice of torture and ill-treatment in detention did not exist would still be valid given the 89 factors supporting that conclusion and listed above, or some or any of them, even acknowledging the reports that are referred to by the UN Human Rights Committee. However, it is not clear that the Minister has factored in that material when stating that there are such reports.

17. Admittedly, it should also be acknowledged that it is not necessarily clear as to what date the reports referred to by the UN Human Rights Committee related, and nor indeed has the applicant thought it necessary to exhibit the full text of either the meeting report or the concluding observations of the Committee, still less the text of the material evidencing the "*reports*" referred to. But given that the Committee's deliberations did occur somewhat after the decision in *B.B.*, it appears questionable at a minimum to say baldly that since that decision there have been no further such reports. Thus, the words *"there are no reports on the use of incommunicado detention"* are problematic.

18. Mr. Farrell also submits that the point raised by the applicant under this heading is not pleaded, and in that respect he is on somewhat firmer ground. Order 84 r. 20(3) requires applicants to set out the precise grounds concerned; and while a number of grounds of alleged unreasonableness are included, and indeed while there was a challenge in previous iterations of the proceedings to findings in relation to secret detention, no such specific pleading is contained in the applicant's proceedings as they presently stand. Despite the pleading objection having been made repeatedly on behalf of the respondent, no application to amend was made on behalf of the applicant. Having regard to the foregoing, I am of the view that there is at least a *prima facie* problem here (whether error, misunderstanding or unreasonableness, however one wishes to characterise it). While in principle that could warrant the grant of some form of relief to the applicant the problem for him is that this precise point is not expressly particularised in the applicant's pleadings, which mostly are otherwise properly specific as to the alleged problems with the decision. While it is open to the court to apply the normal procedural rules such as the necessity for specific pleadings even in an art. 3 context (see by analogy *Sow v. Belgium* (Application no. 27081/13, European Court of Human Rights, 19th January, 2016)), with some hesitation and subject to hearing counsel, in fairness to the applicant, I might be prepared *motu proprio* to give the applicant the opportunity if he wants it to seek to amend the proceedings to include a challenge on this specific point despite the very late stage in the day in which it arises. However, any such amendment if sought and granted, that would give rise, as the logic of the position suggests, to some substantive relief requiring further ministerial consideration as to whether the overall conclusion is being maintained in the light of the various factors referred to above in this judgment that dispel doubts regarding a risk to the applicant notwithstanding an acknowledgment that there are some reports of secret detention that post-date the decision in *B.B.*, would need to be on very strict terms, particularly that any further submissions would be focused on the sole issue of secret or incommunicado detention. Such terms would appear to be appropriate given in particular:

(i) the fact that this error is less than half a sentence in an intelligent, closely reasoned, dense and impressive 34-page analysis.

(ii) the way in which the matter has arisen, and particularly the fact that as it was not properly pleaded, any opportunity for further amendment would be a special concession to the applicant.

(iii) the stage at which the point has arisen, namely after the dismissal of all other points raised by the applicant in the s. 3(11) challenge; and

(iv) the level of opportunity already afforded to the applicant for multiple previous submissions and reviews.

19. It would not seem necessary or proportionate in that context to allow an eleventh-hour-and-fifty-ninth-minute amendment that would open up for renegotiation, without substantial basis, all other issues already decided on by the Minister against the applicant and unsuccessfully challenged in the proceedings.

Order

20. Accordingly, the order will be as follows:

(i) that the proceedings be dismissed insofar as they challenge the latest s. 3(11) decision on the grounds as currently pleaded; and

(ii) that the proceedings be adjourned to allow the applicant an opportunity if he wishes to seek an amendment to the pleadings regarding the issue of reports of incommunicado detention as referred to in the judgment.

Appendix

Schedule of country-related material considered by the respondent

(i) United States Department of State, 2016 Country Reports on Human Rights Practices - Algeria, 3 March 2017, available at: http://www.refworld.org/docid/58ec8a7d3.html

(ii) United States Department of State, 2014 Country Reports on Human Rights Practices - Algeria, 25 June 2015, available at: http://www.refworld.org/docid/559bd5863e.html

(iii) United States Department of State, 2015 Country Reports on Human Rights Practices - Algeria, 13 April 2016, available at:

http://www.refworld.org/docid/571612a913.html

(iv) United States Department of State, 2013 Country Reports on Human Rights Practices - Algeria, 27 February 2014, available at: http://www.refworld.org/docid/53284b6ab.html

(v) United States Department of State, 2011 Country Reports on Human Rights Practices - Algeria, 24 May 2012, available at: http://www.refworld.org/docid/4fc75ac128.html

(vi) United States Department of State, 2009 Country Reports on Human Rights Practices - Algeria, 11 March 2010, available at: http://www.refworld.org/docid/4b9e53195f.html

(vii) Reuters, Algeria's Bouteflika dissolves DRS spy unit, creates new agency, 25 January 2016, available at: https://www.reuters.com/article/us-algeria-security/algerias-bouteflika-dissolves-drs-spy-unit-creates-new-agency-sources-idUSKCN0V31PU

(viii) Amnesty International, Amnesty International Report 2017/18 - Algeria, 22 February 2018, available at: http://www.refworld.org/docid/5a993959a.html

(ix) Amnesty International, Amnesty International Report 2016/17 - Algeria, 22 February 2017, available at: http://www.refworld.org/docid/5a993959a.html

(x) Amnesty International, Amnesty International Report 2014/15 - Algeria, 25 February 2015, available at: http://www.refworld.org/docid/54f07e214.html

(xi) The Guardian, British-Algerian journalist dies after hunger strike, 11 December 2016, available at: https://www.theguardian.com/media/2016/dec/11/mohamed-tamalt-british-algerian-journalist-dies-hunger-strike

(xii) Al Jazeera, Jailed journalist Mohamed Tamalt dies in coma, 12 December 2016, available at: https://www.aljazeera.com/news/2016/12/algeria-journalist-dies-prison-161212063308885.html

(xiii) Front Line Defenders, Algeria: Solidarity with the family of Mohamed Tamalt, 16 December 2016, available at: https://www.frontlinedefenders.org/en/statement-report/algeria-solidarity-family-mohamed-tamalt

(xiv) Algeriepatriotique, Exclusif – Le gendre du commandant Azzedine Hamza Hadjouti s'est suicide, 26 November 2017, available at: https://www.algeriepatriotique.com/2017/11/26/gendre-commandant-azzedine-hamza-hadjouti-sest-suicide/

(xv) Translation of Algeriepatriotique, Exclusif – Le gendre du commandant Azzedine Hamza Hadjouti s'est suicide article dated 26 November 2017, by translation.ie

(xvi) Le Matin D'Algerie, Mort suspecte de son gendre, affaires financières...Le commandant Azzedine parle, 30 November 2017, available at: http://www.lematindalgerie.com/le-commandant-azzedine-parle

(xvii) United States Department of State, 2015 Country Reports on Human Rights Practices - Algeria, 13 April 2016, available at: http://www.refworld.org/docid/571612a913.html

(xviii) UN Human Rights Council, Report of the Working Group on the Universal Periodic Review : Algeria, 5 July 2012, available at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=506d80942&skip=0&query=working%20group%20on%20the%20universal%20report&coi=DZA

(xix) UN Human Rights Council, Report of the Working Group on the Universal Periodic Review : Algeria, 19 July 2017, available at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=59ba947f4&skip=0&query=working%20group%20on%20the%20universal%20report&coi=DZA&searchin=fulltext&sort=date

(xx) Human Rights Watch, World Report 2018 - Algeria, 18 January 2018, available at: http://www.refworld.org/docid/5a61eeaa4.html

(xxi) Press Release issued by the Registrar of the European Court of Human Rights: Daoudi v France (application No. 19576/08), Deportation to Algeria of a man convicted of terrorist acts would expose him to inhuman or degrading treatment, 3 December 2009, available at: http://www.statewatch.org/news/2009/dec/echr-judgment-daoudi.pdf

(xxii) Press Release issued by the Registrar of the European Court of Human Rights: HR v France (Application No. 64780/09), Removal to Algeria still entails a risk of ill treatment by the Algerian authorities, 22 September 2011, available at: file:///H:/Downloads/ECHR_%20H.R.%20v.%20France%2022.09.11_en%20(4).pdf

(xxiii) The International Committee of the Red Cross ("ICRC") Annual Report for 2016, published June 2017 http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&docid=59490d5d0&skip=0&coi=DZA&querysi=ICRC&searchin=fulltext&sort=date

Documentation submitted by the applicant

(xxiv) Report of Professor Joffé dated 11 January 2018

(xxv) Report of Professor Joffé dated 18 October 2017

(xxvi) Report of Professor Joffé dated 8 August 2017

(xxvii) Report of Professor David Seddon dated 21 January 2018

(xxviii) Report of Dr. Alison Pargeter dated 29 January 2018

(xxix) Letter from Amnesty International North Africa Office dated 19 October 2017

(xxx) Webpage of Algerian League for the Defence of Human Rights re: Mohamed Tamalt

(xxxi) Amnesty International's submission to the UN Human Rights Committee, published in September 2016, available at: https://www.amnesty.org/download/Documents/MDE2854682016ENGLISH.pdf

(xxxii) Joint submission by the CFDA and Euro Med Rights, in July 2017, to the UN Human Rights Committee, available at: http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/DZA/INT_CCPR_ICO_DZA_28267_F.pdf

(xxxiii) Alkarama summary submission to the UN in September 2016, regarding Algeria's universal periodic review, available at: https://www.upr-info.org/sites/default/files/document/algeria/session_27_-_may_2017/alkarama_upr27_dza_e_main.pdf

(xxxiv) List of Questions submitted by Alkarama in July 2017 for the Algerian government during the UN Human Rights Committee periodic review, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FICO%2FDZA%2F29074&Lang=en

(xxxv) Report by Al Jazeera Centre for Studies, dated 12th February 2017, available at: http://studies.aljazeera.net/en/reports/2017/02/170212111608848.html