

## THE HIGH COURT

## JUDICIAL REVIEW

[2016 No. 774 J.R.]

BETWEEN

Y.Y.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 11)

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of February, 2019**

1. The procedural history of this matter is apparent from the previous judgments in the proceedings, resting with that in *Y.Y. v. Minister for Justice and Equality (No. 10)* [2019] IEHC 77 (Unreported, High Court, 11th February, 2019). In that decision, I gave the applicant liberty to amend the proceedings to challenge the latest decision under s. 3(11) of the Immigration Act 1999 which refused to revoke the deportation order against him on the grounds of the treatment by the Minister of the issue of secret or incommunicado detention in Algeria. Having allowed that amendment, and there having been an amended statement of opposition delivered on behalf of the respondent, dated 22nd February, 2019, the issue now is how to dispose substantively of that claim. 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.

2. On behalf of the applicant, while formally it was suggested that the decision overall should be quashed, the focus of Mr. Lynn's argument was that proceedings should be adjourned to enable the applicant to make further representations on the issue of secret or incommunicado detention, on foot of which the Minister could either affirm or reverse the s. 3(11) decision (see para. 6 of the applicant's legal submissions of 18th February, 2019).

3. On behalf of the respondent, Mr. Farrell's primary argument was that there was no error and that I should simply dismiss the proceedings as amended. While complaint was made in relation to the failure by the applicant to make this point prior to now, the real gist of the Minister's response is that the UN Human Rights Committee's concluding observations on the 4th Periodic Report of Algeria, 17th August, 2018, do not constitute post-2016 reports of secret detention. Mr. Farrell's submissions state at para. 4 that "*it is not at all clear that the concluding observations could be regarded as a contemporaneous report as to secret detention centres*". It was also suggested in oral submissions that the underlying material relied on by the UN Human Rights Committee is available online and had not been mined, investigated or relied on by the applicant, although this seemed to be queried by Mr. Lynn and thus far anyway no such background documents were put before me by either side. Ultimately, as Mr. Farrell puts it, "*the best the applicant can describe [the concluding observations] as is a report of a report*".

4. That may be so, but given the clear statement on behalf of the Minister that there were no post-2016 reports of secret or incommunicado detention in a context where an applicant has already overcome the significant hurdle of establishing substantial grounds of a risk of treatment contrary to art. 3 of the ECHR, as applied by the European Convention on Human Rights Act 2003 demonstrating the existence of even a report of a report of such detention post-2016 should be regarded as showing an error and thus gives rise to a problem that the State should be required to address. In all the circumstances, the best way to do so is in the manner suggested by the applicant. Indeed, there is a certain symmetry in the positions adopted because, while not conceding anything, Mr. Farrell did necessarily and rightly acknowledge that there was "*some logic*" to the position adopted by the applicant in the event of the court proceeding to make some substantive order. The net result therefore will be to proceed as proposed by the applicant, which will mean be that there will be three ministerial decisions that would be potentially legally operative:

(i). The original deportation order, which I have yet to finally deal with;

(ii). The s. 3(11) decision of 22nd November, 2018. The position in relation to that is that the challenge on the grounds prior to the one raised in the present application was dismissed in *Y.Y. v. Minister for Justice and Equality (No. 9)* [2019] IEHC 27 [2019] 1 JIC 2808 (Unreported, High Court, 28th January, 2019); and

(iii). A new decision under s. 3(11) following the order being made today.

5. The order therefore will be:

(i). that finalisation of the challenge to the s. 3(11) decision of 22nd November, 2018 be adjourned pending ministerial consideration of further submissions by the applicant, to be confined to the issue of secret or incommunicado detention;

(ii). that on foot of such submissions, the Minister shall reconsider that decision and either affirm it or reverse it;

(iii). that directions will apply in relation to that process for the reasons stated in the previous judgments in the proceedings, as follows:

(a). that the applicant be treated as having overcome the *prima facie* hurdle of providing evidence capable of demonstrating substantial grounds for believing there would be a real risk of treatment contrary to art. 3 of the ECHR as applied by the 2003 Act and that the Minister should approach the matter by reference to whether doubts in that regard can be dispelled by the Minister in accordance with the ECHR caselaw;

(b). that the applicant have seven days from the oral pronouncement of this order to make any further submissions to the Minister dealing with the sole issue of secret or incommunicado detention, which may include new material on that issue;

(c). that within seven days from such submissions, the respondent provide the applicant with a schedule of material, including country information, caselaw and documents, to which regard is intended to be had in dealing with any such representations relating to the issue of secret or incommunicado detention, but not including material that has already been the subject of previous such communication in the context of the process that culminated in the s. 3(11) decision of 22nd November, 2018, or the UN Human Rights Committee's concluding observations of 17th August, 2018;

(d). that if any schedule of additional material is so provided, within seven days of the delivery of any such schedule, the applicant may deliver any further observations to the respondents, again confined to the issue of secret or incommunicado detention;

(e). that the respondent have two weeks, which will commence either on the delivery of such further observations or on his notifying the applicant that there is no further material being relied on to make a decision on whether to affirm or reverse the s. 3(11) decision;

(f). that the matter be listed for mention on Monday, 25th March, 2019; and

(g). that the challenge to the deportation order remain adjourned pending the outcome of the s. 3(11) process.