THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 78

[2023 No. 1335 JR]

BETWEEN

E.H.

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 23rd day of January, 2024.

INTRODUCTION

1. The proceedings herein concern a deportation order made in respect of the applicant. The applicant is an Egyptian national who entered the State a number of years ago. While there will be some need, for the purpose of context, to understand the history of his involvement with the immigration process, the central issue arises from his contention that if he is returned to Egypt there are substantial grounds for believing that there is a real risk of torture or inhuman or degrading treatment. As such, in deciding on whether the applicant should be deported (which followed the applicant's unsuccessful application for subsidiary protection) the Minister was required to consider the principle of non-refoulement in the context, *inter alia*, of Article 3 of the European Convention on Human Rights ("ECHR"). In these proceedings, the issues that the court must address essentially are focused on claims made by the applicant regarding the adequacy of the reasons given by the Minister in a written document setting out

why the Minister decided that there were no substantial grounds for believing that there was a real risk of torture or inhuman or degrading treatment.

2. For the reasons explained in this judgment, the court has decided that the reasons set out by the Minister are not adequate, that the applicant is entitled to an extension of time and to an order of *certiorari* quashing the deportation order, and that the matter should be remitted to the Minister for fresh consideration.

PLEADINGS AND PROCEDURAL HISTORY

3. Following an initial *ex parte* application on 24 November 2023, the applicant obtained leave to apply for judicial review on 11 December 2023, for the following reliefs: -

> "(i) An order of *certiorari* quashing the deportation order dated 11 October, 2023 made by the respondent ('the Minister') in respect of the applicant under s. 3(1) of the Immigration Act 2009 ('the 2009 Act') as notified by letter of 11 October 2023.
>
> (ii) If necessary, an injunction, including an interim and an interlocutory injunction, restraining the deportation of the applicant pending the outcome of these proceedings.
>
> (iii) Further or other relief including an order pursuant to s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 (as amended) extending the period for making the application for leave to apply for judicial review in these proceedings."

4. Following the grant of leave, and a prompt exchange of all relevant papers, the matter was heard in early course before this court on 20 December 2023.

5. The application to quash the deportation order was grounded on the primary contention that the Minister breached her obligations to give reasons or adequate reasons for finding that the deportation would entail no real risk of torture or inhuman or degrading treatment or punishment. The argument was made that the International Protection Appeals Tribunal

("IPAT") when considering an application for subsidiary protection found that there was such a risk, and that there were insufficient reasons explaining how the Minister could reach a different conclusion. It was contended that the Minister had acted in breach of the applicant's constitutional rights to be free from torture or inhuman or degrading treatment or punishment pursuant to Article 40.3 of the Constitution, and that the Minister acted in breach of s. 3(1) of the European Convention on Human Rights Act, 2003 because the proposed deportation breached the State's obligations under Article 3 of the ECHR.

6. During the hearing before this court, and as set out in the applicant's written legal submissions, the applicant also sought to argue that the Minister mistakenly placed some reliance on Article 21(1) and (2) of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of protection granted ("the Qualification Directive").

7. The Minister's opposition papers were filed on 14 December 2023 and were grounded on an affidavit of Eileen O'Reilly sworn on 15 December 2023. Ms. O'Reilly is an Assistant Principal Officer working in the Removals Unit/Repatriation Division of the Immigration Service Delivery in the Department of Justice. The Minister contests that she did not provide reasons or adequate reasons as to why deportation was deemed to pose no real risk of torture or inhuman or degrading treatment or punishment in this case. In addition, the Minister argues that the application for leave to apply for judicial review was out of time, and that no extension of time should be permitted by the court.

THE MAIN LEGAL ISSUES

8. The court has had the benefit of detailed written legal submissions on behalf of each party and of very considered oral submissions made by each side at the hearing of the action.

9. The deportation order in this case was made pursuant to s. 3 of the Immigration Act, 1999, as amended ("the 1999 Act"). Section 3A of the 1999 Act sets out the statutory basis for the prohibition on refoulement. This has been framed by the Oireachtas as follows:-

> *"3A. - A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister—*
>
> *(a) the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or*
>
> *(b) there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."*

10. The parties were in general agreement as to the meaning, implication and origin of the statutory provision. The statutory provision expresses a requirement equivalent to the international law requirements reflected in Article 3 of the ECHR and making clear that, as a matter of Irish law, refoulement is absolutely prohibited where the serious risk criteria are met.

BACKGROUND

11. The history of the applicant's engagement with the immigration and international protection the system within the State is quite extensive and has been set out comprehensively in the affidavits and exhibits put before the court. The applicant is an Egyptian national. He has explained his presence in the State as flowing from an initial incident involving a workplace accident in which a man died. The family of the deceased blamed the applicant for his death. The applicant asserted that that family of the deceased was connected to the Muslim Brotherhood organisation and was of such power and influence that they were able to cause the police in Egypt to detain the applicant on false charges, and that, when detained, the applicant was tortured.

12. To understand how the issues in the case were presented it is important to note that the applicant's case is not simply that he was detained and subjected to torture and inhuman and degrading treatment by the police in Egypt, but that those events were brought about at the instigation of the deceased man's family and that they have, up to recently, continued to seek to pursue the applicant.

13. The applicant arrived in Ireland illegally at Dublin Port a number of years ago, having spent time in Italy, France and the UK. In September 2013, the applicant was found to be in the State without permission. In early 2013, while in Cloverhill Prison, the applicant applied for asylum under a false identity, including a false date of birth, claiming to be a national of Syria. In 2014, the applicant failed to attend for transfer to the UK. The applicant was due to be interviewed by the Office of the Refugee Applications Commissioner ("ORAC") under the Refugee Act, 1996 in 2015. He did not attend for that interview and for that reason by operation of law his asylum application was deemed to be withdrawn. Eventually the applicant applied for re-admission to the international protection process in his own name, but this was refused as he did not meet the test prescribed under s. 22 of the International Protection Act, 2015 ("the 2015 Act"). The applicant then made an application for subsidiary protection which, for reasons that are set out in more detail below, was refused. Ultimately, the Minister announced a deportation process, and this culminated in the negative decision dated 11 October 2023 which gave rise to this action.

14. The court also notes that the applicant has been in custody since he was committed to Cloverhill Remand Prison a number of years ago, having been found guilty by a jury of rape, two counts of sexual assault, and one count of threat to kill. The applicant was sentenced to ten years' imprisonment and he unsuccessfully appealed his conviction and the length of his sentence.

LEGAL PRINCIPLES

15. This is a case squarely focused on the process of reasoning employed by the Minister in a single decision. However, that decision must be considered against the backdrop of the existing legal principles regarding the giving of reasons in connection with administrative decisions, and also in the specific context of provisions of domestic and international law that are of profound importance.

16. Article 3 of the ECHR provides that:

> *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

17. There is a long line of authority in the European Court of Human Rights (the "ECtHR") to the effect that expulsion of a non-national by a contracting state may give rise to an issue under Article 3. The ECtHR put the matter as follows in *Ahmed v. Austria* [1997] 24 EHRR 278 starting at para. 39:

> *"39. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country. In these circumstances, Article 3 (art. 3) implies the obligation not to expel the person in question to that country (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 35, paras. 90-91; the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69-70; the above-mentioned Vilvarajah and Others judgment, p. 34, para. 103; and the Chahal v. the United Kingdom judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1853, paras. 73-74).*

40. The Court further reiterates that Article 3 (art. 3), which enshrines one of the fundamental values of democratic societies (see the above-mentioned Soering judgment, pg. 34, para. 88), prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 163; the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 42, para. 115; and the above-mentioned Chahal judgment, p. 1855, para. 79).

41. The above principle is equally valid when issues under Article 3 (art. 3) arise in expulsion cases. Accordingly, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Article 33 of the 1951 Convention relating to the Status of Refugees (see paragraph 24 above and the above-mentioned Chahal judgment, p. 1855, para. 80)."

18. Those principles were reiterated by the ECtHR in *Saadi v. Italy* (App. No. 37201/ 06) [2009] 49 EHRR 30. The principles applicable to the assessment of the risk set out in *Saadi* were summarised and applied by Denham J. (as she then was) in *Minister for Justice v. Rettinger* [2010] IESC 45, [2010] 3 IR 783 at paragraph 16:

"(i) the court takes as its basis all the material placed before it or, if necessary, material obtained of its own motion;

(ii) the court's examination of the existence of a real risk is necessarily rigorous;

(iii) it is in principle for the respondent to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it;

(iv) the court must examine the foreseeable consequences of sending the respondent to the receiving country, bearing in mind the general situation there and his personal circumstances;

(v) the court has attached importance to the information contained in recent reports from independent international human rights protection associations such as Amnesty International, or governmental sources, including the State Department of the United States of America;

(vi) the mere possibility of ill treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of article 3, and, where the sources available describe a general situation, a respondent's specific allegations in a particular case require corroboration by other evidence;

(vii) in cases where a respondent alleges that he or she is a member of a group systematically exposed to a practice of ill treatment, the court considers that the protection of article 3 of the Convention enters into play when the respondent establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned;

(viii) if the respondent has not yet been extradited or deported when the court examines the case, the relevant time will be that of the proceedings before the court; accordingly, while it is true that historical facts are of interest in so far as they shed light on the

current situation and the way it is likely to develop, the present circumstances are decisive."

19. The references to "the court" in *Rettinger* were made because that case involved a challenge to an extradition request that had to be determined by the court. In this case the challenge is to a deportation order made by the Minister. Hence, the references to "the court" in the extract from the *Rettinger* judgment quoted above can be taken as referring to the Minister. In defending this case, the Minister was clear that the principles set out in *Rettinger* were accepted as applicable to this situation.

20. In *B.M. (Eritrea) v. Minister for Justice and Equality* [2013] IEHC 324, [2014] 2 ILRM 519, McDermott J. described the following principle as well-established: -

"17… when considering the risk to a proposed deportee of torture, inhuman or degrading treatment or punishment contrary to Article 3 of the European Convention on Human Rights, his or her misconduct, however heinous, may not be invoked or weighed against that risk because the duty cast upon a contracting state to provide protection under Article 3 is absolute."

21. In *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61, [2018] 1 ILRM 109, the Supreme Court also addressed the caselaw and general principles relating to non-refoulement. That case concerned a challenge to the adequacy of reasons given in the context of a deportation decision and a consequent application for revocation of the deportation order in respect of an Algerian national who, following a grant of refugee status in the State in 1997, left Ireland and committed multiple terrorism related offences abroad. The decision of the court was delivered by O'Donnell J. (as he then was) and in addressing the legal issues, the court noted that the test to be applied by the Minister in making a decision on deportation where an issue arises in relation to Article 3 of the ECHR was "*whether there were substantial grounds for believing*

that there was a real risk of torture or inhuman or degrading treatment, and if so a person could not be surrendered, deported or expelled to such a country" [original emphasis].

22. The Supreme Court confirmed that the guarantee under Article 3 was absolute and applied in all circumstances. The court considered the decision in *Saadi v. Italy,* and noted that in applying the test referred to above the court applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill treatment. At paragraph 49 the court considered the task facing national authorities faced with making decisions on this issue and noted that the decision of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701 is one component of a well-developed code of judicial review which permits exacting scrutiny of the legality of the decision of the Minister. The court went on to note:-

> *"50 The analytic framework established in Meadows and other case law is applied to a decision or series of decisions in which the major components are not within the power of the national authorities, executive or judicial but rather are set by the provisions of the ECHR as interpreted by the ECtHR. The national decision maker must take as given therefore the terms of Article 3, the determination of the scope of that Article and in particular the definition of what is contained in the concept of inhuman or degrading treatment. The case law also established that as it stands no distinction is made between a case in which a person with a legal right to remain in a country and who alleges that they will be subjected to treatment which is not permitted by Article 3, and one where a person has been determined to have no legal right to remain in the country, and who indeed may pose a real threat to the host state and friendly neighbouring states. The jurisprudence of the ECtHR also fixes the test to be applied: a real risk on substantial grounds of conduct being subjected to treatment which itself is forbidden by Article 3. All of this is overlaid upon a refugee and asylum process*

which is now largely, if not completely, controlled by the law of the European Union. What remains within the province of the national decision maker is the determination in the individual case of the existence of a real risk on substantial grounds. That is an issue which may also be addressed by the ECtHR."

23. It is essential to note that the role of the court in a case such as this is not to substitute its view for that of the statutory decision-maker. The *Y.Y.* case, makes clear that the court does not make its own decision in relation to the material in the case:-

"55… It is a review of the decision by the national decision maker by the Court. It is important in that regard to be aware that the purpose of rigorous and searching scrutiny of the evidence is to assess the risk of conduct breaching Article 3 if the individual is returned, deported or expelled. That is not the same as a minute and unforgiving analysis of the decision itself. A decision made by decision makers such as the Minister in conjunction with his or her officials, must necessarily consider and apply legal tests. However, such a decision is not to be condemned for failing to achieve the standard of refined logical reasoning and precision of expression to which judgments of the Superior Courts aspire, but do not always achieve. Rigorous scrutiny does not involve a search for any error, or for some doubt about the language used. Rather it should involve an attempt to understand fairly what the decision maker has decided in that regard, and to consider then whether the decision that there is or is not a real risk on substantial grounds of a breach of Article 3, was lawfully and properly grounded in a rigorous assessment of the evidence."

24. Nevertheless, as noted by the court in *Y.Y.* at paragraph 54, *"[i]t is critically important that the national decision maker apply that test in a searching way with real care and rigour*."

THE NEED FOR REASONS

25. This leads to a consideration of how the court should approach a case where there is an argument that the decision-maker has failed to provide adequate reasons for the decision. The need to provide reasons for a decision and the purpose underpinning that need has been described extensively in cases that address the principles in a wide variety of contexts. In the context of a planning case, but in a way that is of general guidance, in *Balscadden Road SAA Residents Association v. An Bord Pleanála* [2020] IEHC 586 Humphreys J. set out the following helpful observations at paragraph 39 of his judgment after citing relevant caselaw in relation to the giving of giving reasons: -

> "(*i). the extent of reasons depends on the context;*
>
> *(ii). what is required is the giving of broad reasons regarding the main issues;*
>
> *(iii). there is no obligation to address points on a submission-by-submission basis – reasons can be grouped under themes or headings;*
>
> *(iv). it is not up to an applicant to dictate how a decision is to be organised – the selection of headings or order of materials is, within reason, a matter for the decision-maker;*
>
> *(v). there is no obligation to engage in a discursive, narrative analysis – the obligation is to give a reasoned decision;*
>
> *(vi). there is no obligation to set out the reasons in a single document if they can be found in some other identified document; and*
>
> *(vii). reasons must be judged from the standpoint of an intelligent person who has participated in the relevant proceedings and is appraised of the broad issues involved, and should not be read in isolation.*"

26. The obligation on a decision-maker to provide reasons for a decision in an immigration situation was described by Burns (T) J. in *SKS v. IPAT* [2020] IEHC 560, with an emphasis on the question of why the obligation to give reasons is important: -

"*21. The duty to give reasons is so well established that perhaps an engagement with the essence of the duty is sometimes overlooked. In Connelly v. An Bord Plenala [2018] IESC 31, Clarke CJ set out, at paragraph 5.4 of the report, the purpose behind the duty to give reasons which illuminates a decision maker's duty in this regard. He stated:-*

> *'One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will be rarely sufficient simply to indicate the factors taken into account and assert, that as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons'*

Having considered a number of cases in this area, Clarke CJ continued at para. 6.15 of the judgment:-

> *'Therefore it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in*

general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Clearly related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review'

22. Dealing with a situation where the reasons for a decision are not apparent on the face of a document issuing a determination, Clarke CJ referred to the decision of Fennelly J in Mallak v. Minister for Justice [2012] IESC 59 wherein Fennelly J stated at paragraph 66 of the judgment:-

'The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.'"

27. It can be noted, albeit in the context of planning law, that in *Balz v An Bord Pleanála* [2019] IESC 90, [2020] 1 ILRM 637, at paragraph 57 O'Donnell J. (as he then was) also highlighted the need for a decision-making body to explain why submissions are not accepted as both a function of natural justice in administrative law, but also as a matter of public trust: -

*"*57. *... It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted,*

if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live. ..."

28. If the above comment is apposite in the case of decisions affecting the public generally, it seems to me that it applies *a fortiori* to the case of individuals who seek to prevent a deportation on the basis that there has been an earlier finding by an expert tribunal that there are substantial grounds for believing that there is a real risk that, if deported, the individual will be subject to torture or inhuman or degrading treatment. The law requires a decision-maker when faced with arguments to that effect to apply the requisite tests *"in a searching way with real care and rigour"*. In that context, the court must consider the adequacy of reasons underpinning a decision with particular care and with a view to ascertaining, among other matters, if the relevant main submissions made by an affected person have been considered.

29. Perhaps the most applicable authority in this area is *Y.Y. v. Minister for Justice and Equality*. The factual issues giving rise to that case are described above, but notably involve a challenge to the adequacy of reasons given in a deportation decision where there was an argument that his deportation to Algeria would breach the international law obligations of the State, notwithstanding compelling evidence that the person presented a threat to the security of the State and others. In *Y.Y.* the Refugee Appeals Tribunal had made a finding that on the facts of that case there was a "*personal, present, foreseeable and substantial risk of serious harm by the Algerian authorities*." However, the Minister made a finding that the evidence put forward did not have sufficient weight to establish that the applicant was at risk of torture and inhumane treatment or execution if returned to Algeria.

30. In *Y.Y.*, because leave had not been granted to address the issue, the Supreme Court did not address in any detail the question of whether the Minister when considering a risk of torture or inhuman or degrading treatment was bound as a matter of law by a determination made by, in that case, the Refugee Appeals Tribunal. Nonetheless, the court noted at para. 64 that the decision of the Refugee Appeals Tribunal was a plainly significant aspect of the decision making process, and a matter, along with other important points, which would normally require to be addressed in any logical reasoning process. As put by the court at paragraph 64 of that decision, "*the manner in which the decision addresses those issues is a test of the reasons as provided, the reasoning process, and ultimately the reasonableness and lawfulness of the decision*."

31. The court considered that it was useful to focus on the decision of the Refugee Appeals Tribunal in circumstances where the Minister came to a different conclusion on what was in effect the same issue: the risk that if deported, the applicant would be subjected to inhuman or degrading treatment. In *Y.Y.* the situation was somewhat different from this case in that not only did it appear that the Minister departed from the finding of the Refugee Appeals Tribunal but also differed from approaches adopted by the ECtHR and UK authorities regarding deportations to Algeria in certain recent cases. Insofar as the Minister departed from the views of the Refugee Appeals Tribunal the court noted that clear reasons were required which could be assessed by the court.

32. In that case, in finding that the Minister had not provided adequate reasons for the deportation decision, the court concluded:

> "*80. Having considered the matter, I have come to the conclusion that the reasons provided by the Minister were inadequate to support the decision here. In requiring more by way of reasons, I consider 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. But even taking that broad and common sense approach, I have come to the conclusion that it is not sufficiently clear why the Minister came to the conclusion that the applicant could be deported to Algeria without a real risk of torture, or inhuman or degrading treatment, and why the Minister considered that such a decision ought not to be revoked. I have come to the conclusion that I cannot have the level of assurance that is necessary 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 IPAT DECISION

33. By way of a report in 2022, an International Protection Officer ("IPO") considered the appellant's claim for subsidy protection and recommended that the applicant should not be given a subsidiary protection declaration. The decision, as far as the current application is concerned, found that the applicant had not demonstrated substantial grounds for believing that he would face a real risk of suffering serious harm if he was returned to Egypt. That decision was appealed by way of an appeal dated 31 March 2022. The IPAT affirmed the recommendation of the IPO and communicated that decision to the applicant by way of a letter in February 2023 enclosing the decision.

34. Because of the centrality of the IPAT decision to the arguments made by the applicant about the reasons provided by the Minister in making her deportation order, it is necessary to set out in some detail the matters contained in the IPAT decision.

35. The report itself issued following a hearing at which the applicant was present together with his solicitor and an interpreter. The Tribunal had the benefit of a number of written

documents including written legal submissions and a medical legal report from "Spirasi" which had been submitted by the applicant. In addition, the Tribunal identified four documents that had been relied on by the IPO as part of its report and that it had considered country reports provided by the US Department of State and Human Rights Watch, both of which appeared to deal with the matters up to the year 2021.

36. As summarised by the Tribunal, the gravamen of the applicant's appeal to the Tribunal was based on the following factual contentions:

1. The applicant is a single Egyptian male of the Muslim faith and the Arab ethnicity.
2. A man died in a workplace accident at the applicant's place of work. The deceased man's family blamed the applicant and attempted to kill him on a few occasions.
3. The applicant was also arrested and during his detention was subject to various forms of torture on the instruction of the deceased man's family.
4. The applicant moved to Italy and there was a further attempt on his life.
5. The applicant moved to the United Kingdom and received threatening phone calls which caused him to travel to Ireland and seek international protection.

37. The workplace accident was reported to have occurred in 2007 or 2008. The Tribunal considered the applicant's evidence surrounding the events and immediately following it and found that the applicant's account of the incident was consistent with his earlier accounts, demonstrated specificity and detail when recounting the incident, and the Tribunal found that persuasive. On the balance of probabilities, the Tribunal accepted that aspect of the applicant's claim.

38. The applicant gave evidence of the first period of detention in Egypt. He stated that he was arrested on the basis of falsified information of about selling drugs. The applicant stated that he was held at a police station for ten weeks. During the course of his detention, he was beaten and tortured with electricity. In addition, he was hung from a ceiling with his hands over

his head while weights were placed on his feet, which hurt his spine and he stated he continued to have spinal issues despite taking painkillers. Following his release on bail he continued to be pursued by the family of the deceased. The Tribunal found the applicant's evidence regarding his first period of detention to be consistent with his earlier accounts, that the applicant demonstrated specificity of detail when recalling or recounting the torture he experienced, which also mirrored his Spirasi report. The Tribunal found the evidence persuasive, and on the balance of probability the Tribunal accepted that aspect of the applicant's claim.

39. The applicant gave evidence that he left Egypt for Libya in 2009 and returned to Egypt in 2010. At that point he assumed that matters would return to normal. However, he was arrested by the police again and was detained in a prison for approximately two months and was also detained at a police station for three to four weeks during that period. The applicant stated that during his time in prison he was beaten, electrocuted, had food withdrawn from him and was left to sleep in a room full of water which led to sleep deprivation. When the applicant informed the guards that he did not wish to defecate in front of other prisoners without any privacy he stated that the guards held his hand behind his back while another guard forced his hand into the applicant's anus. Significantly, the applicant stated that he was informed by one officer that if he had paid money to the family of the deceased man this would not have happened to him. Once again, the Tribunal found that the account by the applicant of his detention in prison was consistent with earlier accounts, that the applicant demonstrated specificity of detail when recounting the torture he experienced, that his account was mirrored in his Spirasi report, and the Tribunal found the evidence persuasive. On the balance of probabilities, the Tribunal accepted that aspect of the applicant's claim.

40. The applicant had stated that the case against him was dismissed by the judge at a retrial, and he left for Alexandria. He continued to be pursued by the family of the deceased man, who

continued to demand money from him. At the time of the revolution or the Arab spring he became frightened of the Muslim Brotherhood who he feared might kill him. He stated that the family of the deceased man was connected with the Muslim Brotherhood, and that on one occasion in either 2010 or 2011 he was beaten with a machete by an uncle of the deceased man. As a consequence, the applicant left Egypt for Italy. Under questioning, the applicant described a number of attacks on him by the family of the deceased man. Similar to the other incidents, and for the same reasons, the Tribunal accepted that aspect of the applicant's claim.

41. The applicant stated that he travelled to Rome but again was located and threatened by the deceased man's family whereupon he left Italy and travelled to the United Kingdom. While in the United Kingdom he received a phone call telling him "*we got your number from your friend and we will find you*" and, as a result, he travelled to Ireland. The applicant stated that since he came to Ireland, the deceased man's family continued to threaten his father. According to the IPAT report, at some point in mid-2022 the deceased man's family had gone to his father's house, vandalised it and demanded money from the applicant. Noting that the applicant's claim in that regard was largely consistent with his earlier accounts, on the balance of probabilities the Tribunal accepted that aspect of the applicant's claim.

42. As part of its overall conclusion on the facts, the Tribunal noted that all material aspects of the applicant's claim were accepted. It is important to note that, at that point, the IPAT was considering the question of subsidiary protection. As part of its analysis of serious harm for the purposes of subsidiary protection, the IPAT made determinations including at 7.1(III) that:

> "*the Appellant was also arrested and during his detention in two separate prisons was subject to various forms of torture <u>on the instruction of the deceased man's family</u>."*
>
> [emphasis added]

43. In analysing the question of serious harm, the Tribunal came to the conclusion that the applicant would not be subject to the death penalty or execution should he be returned to his

country of origin on the basis of his marital status, nationality, gender, religion, tribal status or the fact that the workplace accident took place involving a man's death and his family blamed him. Likewise, the Tribunal did not consider the physical attacks on the applicant as demonstrating substantial grounds that he would be subject to torture or inhuman or degrading treatment or punishment. Those incidents, while serious, did not amount to torture in the analysis of the Tribunal.

44. The Tribunal then focussed on the question of the treatment of the applicant by police while he was in detention. In that regard, para. 7.14 the Tribunal noted that the applicant presented evidence of being subject to anal penetration in front of others, electrocutions, and being hung from the ceiling by his hands over a prolonged period. The applicant had also given evidence of physical suffering and humiliation because of his treatment, and that this was documented in his Spirasi report. The Tribunal concluded those incidents amounted to torture in that the actions of the police could be classified as an aggravated and deliberate form of cruel, inhuman or degrading treatment to which special stigma was attached.

45. The Tribunal also noted, at para. 7.15, that the applicant presented evidence of intense mental and physical suffering and feelings of fear, anguish and inferiority which were humiliating and debasing as a result of his treatment during his detention, as documented in his evidence and his Spirasi report. As noted at para. 7.16 of the IPAT report, in reaching those conclusions the Tribunal had full regard for the surrounding circumstances, including the physical and mental impact on the applicant and the motivation behind it, which was described by the IPAT as "*police inflicting arbitrary and unlawful violence <u>on the orders of the dead man's family</u>*". [emphasis added]

46. The Tribunal found that State protection was not available to the applicant in this case on the basis that State agents were responsible for the torture carried out against the applicant.

Similarly, there was a finding that internal relocation was not an option for the applicant in the absence of state protection.

47. The core finding in that regard was set out as follows at para. 8.1 of the IPAT report:

> *"As a result of the foregoing analysis, the Tribunal finds that the material or core elements of the applicant's claim provide a basis for finding that there are substantial grounds for believing that the appellant will face a real risk of serious harm if he is returned to his country of origin and therefore the claim is accepted."*

48. Having made those findings, the Tribunal went on to consider whether the fact of the applicant's conviction for rape excluded him from eligibility for subsidiary protection pursuant to Article 17 of the Qualification Directive, as implemented by s. 12 of the 2015 Act. In that regard, the Tribunal noted that the applicant had been convicted and sentenced to a period of ten years' imprisonment for the offence of rape. For the reasons explained in the decision, the Tribunal was satisfied that the applicant had committed an excludable crime, that he was individually responsible for this crime in a manner that required his exclusion from subsidiary protection, and that his exclusion from subsidiary protection was therefore mandatory pursuant to s.12(1) of the 2015 Act.

49. As noted above, the decision of the IPAT was delivered in February 2023, and the applicant has not sought to challenge that decision.

THE MINISTER'S REASONS

50. Following the decision of the IPAT, the Minister informed the applicant that his application for a subsidiary protection declaration was being refused. As the applicant no longer had permission to remain in the State, the applicant was informed that the Minister proposed making a deportation order under s. 3 of the 1999 Act. The applicant was informed that, in addition to the options of consenting to the making of a deportation order or leaving the

state before the Minister decides the matter, the applicant also was entitled to make representations against the making of a deportation order, as provided for under s. 3 of the 1999 Act. The applicant was afforded a period of fifteen working days to communicate whether he wished to avail of any of the three options.

51. On 9 March 2023, the applicant's solicitors sent a letter of representations under s. 3 of the 1999 Act, together with certain supporting documents. In his submissions, the applicant stated that he faced a threat to his life or freedoms and/ or suffering serious harm if returned to Egypt, as recognised by the IPAT decision. In that regard, on the basis of the prohibition of refoulement, it was submitted the applicant could not lawfully be deported. Among the documents submitted by the applicant in connection with the s. 3 review was a letter drafted by the applicant himself dated 21 February 2023, where he noted the following: -

> *"(i) The risk to my life in Egypt, that I have outlined in my application still exists.*
>
> *(ii) The possibility and ability of those who seek to harm me still exists. Their ability to 'influence' police to help locate me, harass me, etc remains extant."*

52. Before considering the reasons that were given by the Minister, it may be helpful to understand how this should be approached in this particular instance. The task of the court as set out above is to establish whether the person affected by the decision knows in general terms why the decision was made. The applicant is also entitled to have enough information to consider whether he could appeal or challenge the decision by way of judicial review. The decision under consideration in this case engages fundamental rights that are subject to special protection, in the sense that there is an unqualified prohibition on returning a person to the frontier of a state where there are substantial grounds for believing that there is a real risk of torture or inhuman or degrading treatment. The Minister is obliged to approach the decision with particular rigour, and in turn, the court must be able on any challenge to satisfy itself that the decision was lawful and properly grounded in a rigorous assessment of the evidence. The

court, in considering the reasons given by the Minister, should be satisfied that the decision explains properly how the various submissions made by the applicant were treated and how the decision of the IPAT, including the findings of fact made after an oral hearing by that expert body, was addressed. On the other hand, the decision should not be subjected to an over-refined or over exacting scrutiny.

53. The Minister communicated a decision to the applicant by letter dated 16 February 2023 to the effect that the Minister has decided to make a deportation order, and that order was made on 5 April 2023. Following correspondence, the initial deportation order was revoked on 28 April 2023.

54. On 11 October 2023 the applicant was written to again, and informed that the Minister was making a deportation order, a copy of which dated 11 October 2023 was attached together with a document entitled "Examination of file under s.3 of the Immigration Act, 1999 (as amended)". The consideration by the Minister of the arguments on refoulement are set out at para. 6 of the document attached to the letter informing the applicant of his deportation.

55. The Ministerial decision begins with a note of the terms of s.3A of the 1999 Act. It can be noted that the Ministerial decision deals with the objections to deportation by reference to different issues and by considering different legal criteria. Two particular risks were identified by the applicant. First, there is the specific issue around the serious risk that he would be subjected to torture or other inhuman or degrading treatment or punishment if returned to Egypt, and, in that regard, the applicant drew the Minister's attention specifically to *B.M. (Eritrea) v. Minister for Justice and Equality* [2013] IEHC 324. Secondly, and this appears to be a subsidiary point, the applicant submitted that he was at risk simply as a deportee/ failed asylum seeker. This case is concerned with the manner in which the Minister addressed the first and primary risk.

56. In relation to the threat of torture, the Ministerial decision rehearses the essence of the applicant's narrative about the circumstances that led him to travel to Ireland to seek international protection. The decision specifically noted that the applicant's claim was that he was arrested, imprisoned and tortured on the instructions of the deceased man's family.

57. The decision acknowledges the IPAT determination that the applicant would face a real risk of serious harm if were returned to Egypt. At page 8 of the document, the decision states that all the facts of this case, including the determination of the IPAT and the country-of-origin information, have been independently considered and taken into account.

58. The decision noted the 2022 Country Reports on Human Rights Practices: Egypt released by the U.S. Department of State. Having quoted from that report, the Ministerial decision states "*there is no doubt that instances of police brutality and instances of torture by state agents do occur in Egyptian detention facilities, including in police stations and in prisons. This was also likely to be the case in 2007 and 2010 when [the applicant] claims to have been detained in a police station and in a prison respectively*".

59. In that regard, at page 9, the following is stated:

> *"I accept* ***[the applicant]*** *claims as to his experiences in 2007 and 2010, and as to the effect of those experiences on him, as entirely credible and this decision should not be interpreted as impugning his credibility on these matters.*
>
> *However, I do not accept that* ***[the applicant]*** *experiences of 16 years ago and 13 years ago must lead to the inevitable conclusion that the principle of non-refoulement would be breached by his repatriation to Egypt, as that principle is defined by Section 3A of the Immigration Act, 1999 (as amended)."*

60. It should be noted that the test to be applied by the Minister is not whether the evidence leads to an "inevitable conclusion" that the principle of non-refoulement would be breached by the return of the applicant. Moreover, it is apparent by this stage in the reasoning process that

the Minister appears to have accepted the essential factual basis of the applicant's claim. It can be recalled, as set out in more detail in the section above dealing with the IPAT decision, that IPAT not only accepted that the applicant had been subjected to conduct amounting to torture or inhuman or degrading treatment, but that this conduct occurred at the instigation of the deceased man's family, and that the deceased man's family continued to engage in threatening conduct towards the applicant and his family until relatively recently.

61. A number of paragraphs later, the decision considers the question of whether there was a serious risk that the applicant would be subjected to torture or other inhuman or degrading treatment or punishment if he was repatriated to Egypt. In that regard the decision states as follows:-

> "*It is fully accepted that **[the applicant]** was subject to treatment in Egypt in 2007 and 2010 which amounted to torture or to inhuman or degrading treatment or punishment. However, having considered the Country of Origin information, I am not able to establish that there is a serious risk that he will be subject to torture or to inhuman or degrading treatment if repatriated to Egypt now, in 2023. This is because the Country of Origin information documents instances of torture and/or inhuman or degrading treatment in places of detention in Egypt, but does not document any instances of torture and/or inhuman or degrading treatment outside places of detention in Egypt.*
>
> *In this regard **[the applicant]** is not, at the time of writing, subject to any pending charges in Egypt or subject to any unserved sentences of imprisonment in Egypt, nor is there any information before the Minister to indicate that he is suspected of any offences. **[The applicant]** does not present as a person at risk of being detained in Egypt due, for example, to his political opinion or his religion or his membership of a particular social group."*

62. In that section, at paragraph 10, the decision concludes that:-

"There is nothing in his case that would allow the Minister to conclude that ***[the applicant]*** *faces a serious risk of being detained should he be repatriated to Egypt. As no instances of torture and/or inhuman or degrading treatment are documented outside places of detention in Egypt, the Minister is unable to form the opinion that there is a serious risk of* ***[the applicant]*** *being subjected to torture or to inhuman or degrading treatment if he is repatriated to Egypt."*

63. This reasoning however does not address the central issue agitated by the applicant and essentially accepted by IPAT: that the threat in this case was not simply that the applicant would be detained and face a real risk of torture. The issue here is whether that scenario would transpire as a result of the intervention of the family of the deceased man. That intervention had been found to have been the reason for the applicant's earlier experiences of torture in Egypt. The decision does not explain how that issue was treated. That is not to say that the Minster was obliged to accept the reasoning of IPAT. It may well be, for instance, that the Minister was not satisfied that the applicant had established that since the events in 2007 to 2010 or 2011, the family of the deceased man continued to be in a position to influence the police, even if they continued to wish to pursue the applicant. Alternatively, it may be that the Minster simply omitted to consider that relevant factor. The difficulty is that the issue is not addressed, and the court can only deal with the decision as it was originally formulated.

64. Having considered the specific application of s.3A of the 1999 Act, the decision goes on to consider s. 4 of the Criminal Justice (UN Convention Against Torture) Act, 2000 (the "2000 Act"), and this analysis assists in shedding light on the reasoning process of the Minister overall. In that regard the decision noted that Egypt's state detention system contains a consistent pattern of documented instances of treatment appearing to amount to torture within the meaning of s. 4 of the 2000 Act. That notwithstanding, the decision notes that the Minister

approaches the applicant's case on an individualised rather than a generalised basis, and presents the issue as follows:

> *"The question is whether there are substantial grounds to believe that* ***[the applicant]*** *himself is at risk of being subjected to torture if repatriated to Egypt now, based on the facts arising in his particular case and given his individual circumstances."*

65. Considering the individualised risk of torture as posed to the applicant specifically, the decision acknowledges that the applicant was subject to treatment amounting to torture in 2007 and 2010, but states that that does not automatically mean that there are grounds, much less substantial grounds, to believe that he will be subject to it again if repatriated to Egypt now, well over a decade since his experiences. The decision notes that the applicant did not face any pending charges in Egypt at the time of writing. At page 12 of the decision, it is reiterated that it cannot reasonably be inferred or assumed from his past experiences alone that that applicant would be detained again.

66. With respect to the official who prepared the written explanation, that aspect of the decision does still not address the central aspect of the applicant's case. The applicant was submitting that he had been detained and subjected to torture; that seems to have been accepted. The decision also notes that the Minister was satisfied, on the basis of the available up-to-date evidence, that Egypt's state detention system continues to contain a consistent pattern of documented instances of treatment that appears to amount to torture. What the decision fails to do is engage with the individualised concern in this case that the family of the deceased man was able to exert improper influence and cause the applicant to be detained and subjected to mistreatment, and the consequent question of whether there is a basis to believe that there is a risk of that scenario being repeated.

67. At page 13, the Minister's decision notes that there has been a finding that the prohibition on refoulement will not be breached by the applicant's repatriation to Egypt and

the Minister is content that repatriating him to Egypt does not involve any lack of compliance with the Minister's international obligations including pursuant to the 2000 Act.

68. The Minister then goes on to note that IPAT found the applicant to be a person *prima facie* entitled to subsidiary protection, but that he is excluded from being eligible from same by virtue of his having committed a serious crime. The Minister goes on to analyse the provisions of Article 21(2)(b) of the Qualification Directive.

69. At page 15, the decision stated that, having considered all the circumstances of the rape, the manner in which the applicant met the charges, the fundamental interest in ensuring the population's peace of mind and the extent to which this peace of mind would be threatened by his continued presence in the State, the Minister had formed the opinion that the applicant's personal conduct poses a serious threat to the fundamental interest of ensuring the peace of mind of the population and that the seriousness of this threat is sufficient to reach the threshold at which he can be said to constitute a danger to the community of the State.

70. Ultimately, having considered a number of other arguments raised by the applicant, the Minister concludes that there is no breach of principles of refoulement as they are prescribed in s. 3 of 1999 Act or s.4 of the 2000 Act if the applicant was repatriated to Egypt, and therefore a recommendation is made that the Minister make a deportation order.

DISCUSSION

71. In the first instance the court is not satisfied that the applicant should succeed on the argument that the Minster improperly considered or placed mistaken reliance on Article 21 of the Qualification Directive. In the context of an application for subsidiary protection, that provision allows the national decision-maker to find that a person otherwise entitled to subsidiary protection is excluded. The available bases, in brief summary, are that there are reasonable grounds for considering him a danger to the security of the Member State, or that

he is a danger to the community of that Member State on the basis that he was convicted of a serious crime. The operation of the exclusion criteria expressly is qualified by any prohibition by reason of international obligations.

72. In this case, a fair reading of the Ministerial decision does not support the contention that the Minister erred in the manner suggested by the applicant on this point. It is correct that the decision includes a reference to the fact that that applicant was convicted of a serious crime and that, like the IPAT, the Minister was satisfied that the exclusionary criteria were applicable. However, this analysis occurred towards the conclusion of the decision and after the Minister had explained why she was satisfied that deporting the applicant would not bring the State into breach of its international law obligations or otherwise contravene s.3A of the 1999 Act. It is clear from a reading of the decision as a whole that the Minister was fully cognisant of the absolute prohibition on repatriation where there are substantial grounds for believing that there is a real risk of torture or inhuman or degrading treatment. I am not therefore persuaded that the Minister conflated the tests or erred by placing mistaken reliance on the Article 21 exclusionary criteria.

73. However, the court is satisfied that the applicant should succeed in the arguments relating to the giving of reasons. As discussed above, the reasoning process that led the Minister to reject the arguments that there were substantial grounds for believing that there was a real risk of torture if the applicant was deported to Egypt is flawed. The Minister did not explain why she did not accept the submissions of the applicant on the issue of the critically important role of the family of the deceased man. On a fair reading of the decision, but bearing in mind the extremely important legal principles on fundamental human rights engaged in the decision-making process, it is not possible to understand whether that issue was considered, and, if so, how the Minister had decided to treat that issue.

74. Likewise, the IPAT decision involved clear findings of facts, and those factual findings allowed the Tribunal to determine that the applicant had discharged the burden of showing that there were substantial grounds for believing that there was a real risk that the applicant would be tortured or subjected to inhuman or degrading treatment if he was repatriated. While it is relatively clear that the Minister considered it appropriate to take into account the passage of time since the events that occurred when the applicant was detained in Egypt, and the fact that there was no evidence that currently he is not facing charges in that jurisdiction, the decision does not explain how the Minister differed from the IPAT in relation to the treatment of the evidence that (a) the family of the deceased man had instigated the detention of the applicant, and (b) that the same family had continued to pursue the applicant and his father until quite recently.

75. In the circumstances, and having regard in particular to the judgment of the Supreme Court in *Y.Y. v. Minister for Justice,* the court is not satisfied that the reasoning process of the Minister in responding both to the applicant's submissions and the findings of IPAT was sufficiently clear in the light of the conclusion that the applicant could be deported to Egypt without a real risk of torture or inhuman or degrading treatment.

EXTENSION OF TIME ISSUES

76. The Minister argued that the proceedings herein were commenced out of time and that the court should not grant an extension of time. The Ministerial decision under consideration was dated 11 October 2023. There is a statutory 28 day time limit for the bringing of judicial review proceedings challenging such orders. The first application to the High Court, effectively for the purpose of stopping time, was made on 24 November 2023, and the full ex parte application for leave was moved and granted on 11 December 2023. Accordingly, the court is faced with an extension application in respect of a delay of 16 days. Under the relevant statutory

test, an extension can only be granted if the court is satisfied that the applicant has made out good and sufficient reasons for same. As set out in the affidavit of Ms. O'Reilly, the Minister makes the point that in the period since the making of the deportation order on 11 October 2023, the Minister engaged in a number of steps such that an extension would prejudice the Minister. In that regard, the Minister incurred expense and deployed administrative resources prior to the 11 December 2023 in making the necessary arrangements for the proposed deportation. These involved arranging with the Egyptian embassy for travel documents for the applicant; incurring non recoverable airline / travel costs estimated to be in the region of €2500 to €3000; and the making of necessary arrangements with the Irish Prison Service and the Garda National Immigration Bureau. Moreover, the Minister argued that the legal issues raised by the applicant were relatively net, and should have been capable of being formulated in relatively short order after receipt of the deportation order.

77. The solicitor for the applicant sought to explain the delay in his initial grounding affidavit of 20 November 2023, and a subsequent affidavit dated 19 December 2023. In essence, the affidavits assert that the applicant expressed his desire to challenge the deportation order almost immediately and thereafter his solicitor set a process in train of engaging counsel and providing instructions. There appears to have been some difficulty in locating some files. Part of the difficulty in this case arose from the fact that the solicitor had a busy practice and the applicant had to be visited in a prison outside Dublin. In reality, it is clear that the proper preparation of this judicial review took a little more time than it ought to have. This is so particularly where the applicant and his legal advisors ought to have aware of the serious risk that a deportation order would be made in light of the earlier abandoned deportation order. That is not to gainsay the efforts of the applicant's legal team to ensure (as they did) that the case presented was thorough and complete. Moreover, it is essential to note that the case formulated by the applicant in this case was based on arguments directed to adequacy of reasons, and as

such required a careful consideration of the explanation provided by the Minister for the proposed deportation. What also is clear is that the case was extremely serious and that the overall delay was in the order of just over two working weeks.

78. In all of the circumstances, I accept that while there was essentially one substantial issue in this case, that issue was extremely serious, and the case required proper preparation. I have taken into account that the period of delay was not very substantial, and that litigation was clearly presaged to the Minister when the solicitor for the applicant sought an undertaking not to deport by letter dated 20 November 2023 (albeit at a point where the deadline for the commencement of proceedings had expired). Thereafter, matters were moved on quickly. I have also taken into account that for the reasons set out above this was not in any sense either a speculative or a routine case. Where there is a serious question that the Minister has proceeded unlawfully in making a deportation order by failing to explain how she engaged with arguments and submissions that engage the State's obligation regarding non-refoulement, it would seem invidious to deprive the applicant of a remedy on the basis of a relatively short delay and in light of the explanation given on his behalf. Hence, I am satisfied to grant the necessary extension of time on the basis that there are good and sufficient reasons to do so.

79. It follows that the deportation order should be quashed, and the matter remitted to the Minster for fresh consideration. In the circumstances, it does not seem necessary or appropriate to address the further issues raised by the applicant regarding constitutional or ECHR rights.

80. As this judgment will be delivered electronically, I will adjourn the matter for a final listing on 26 January 2024 to allow the parties to make whatever submissions are considered appropriate on the final orders to be made and the issue of costs.