

# Standards of Scrutiny in Judicial Review of Deportation Decisions Involving Article 3, ECHR.

–*X.X. v Minister for Justice and Equality*. \*

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## Introduction.

On the 24<sup>th</sup> of June 2016 Humphreys J., sitting in the High Court, dismissed two judicial review applications that challenged a decision of the Minister for Justice and Equality to deport a Jordanian national.<sup>1</sup> The Applicant –who was alleged to have links to the so-called Islamic State (IS)– claimed to be, “deeply afraid of facing persecution, including torture, if he [was] returned to Jordan.”<sup>2</sup> The present case comprised two elements. The first application was for declaratory relief relating to the decision to reject the Applicant’s asylum claim. The second was an application for *certiorari* of the deportation order. It was in the context of the second application that the Court considered the State’s obligations under Article 3 of the European Convention on Human Rights (ECHR). In this article, I focus on the Court’s treatment of that second application.

Humphreys J.’s judgment is interesting on multiple levels. The facts of the case highlight a significant challenge faced by modern European legal systems: The challenge of combatting transnational terrorism whilst respecting the rule of law and upholding human rights. Humphreys J.’s judgment also raises questions concerning the nature and standard of review that should be applied in the judicial review of cases involving fundamental rights. A comprehensive exploration of both of these important questions is beyond the scope of this article. Instead, what I address is a point of intersection between these two larger areas. I first consider the standard of review required to be applied by the domestic courts in Article 3 expulsion cases, under the case law of the European Court of Human Rights’ (“ECtHR” or “the Strasbourg Court”) concerning expulsion and Article 3. I then consider the general approach of the Irish courts to the judicial review of cases involving fundamental rights, as set out by the Supreme Court in *Meadoms v the*

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<sup>1</sup> *X.X. v Minister for Justice and Equality* [2016] IEHC 377 (Unreported, Humphreys J., High Court 24th June 2016).

<sup>2</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [129].

*Minister for Justice, Equality and Law Reform*.<sup>3</sup> I argue that it is possible to discern among the High Court judiciary, at least two separate interpretations of the balance between scrutiny and deference that the *Meadows* standard requires in cases such as this. I conclude that while one of these interpretations is potentially compatible with the requirements of the ECHR, the other approach—that taken by Humphreys J. in the present case—does not provide the required level of scrutiny or protection.

## 1) Facts.

It is perhaps useful to set out some of the salient facts of the case.<sup>4</sup> The Applicant arrived in Ireland in 2000 and applied for asylum. One of his children was born in Ireland in June of that year. According to Irish nationality law, as it stood at that time, this child is an Irish citizen. The Applicant applied for residency based on this child's citizenship and he withdrew his prior application for asylum.<sup>5</sup> He was granted residency in February 2001.

The Applicant unsuccessfully attempted to renew his residency permission in February 2015. Soon after this, he was notified of the Minister's intention to deport him to Jordan. This decision was based on the belief that the Applicant was an organiser for IS, a claim that he denied. The Applicant claimed he would face a real risk of being tortured or otherwise ill-treated if he was deported to Jordan. Because of this, he maintained he could not be deported lawfully, as to do so would *inter alia* breach the State's obligations under Article 3, ECHR. Despite these objections, on 30 November 2015 the Minister made a deportation order, which was supported by forty pages of reasoned analysis.<sup>6</sup>

## 2) Applications for Judicial Review.

### a. The Asylum Claim.

The first judicial review essentially considered whether the Applicant's original asylum claim was withdrawn prior to the commencement of the Refugee Act 1996. If it was, the Applicant asserted that he would be entitled to make and have considered, a second application for asylum without the consent of the Minister for Justice and Equality. The application was ultimately dismissed. This part of the Judgment will not be considered further here.

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<sup>3</sup> *Meadows v Minister for Justice Equality and Law Reform* [2010] 2 I.R. 701 (IESC).

<sup>4</sup> The full facts of the case are set out at [1]-[48] of the decision.

<sup>5</sup> The withdrawal of this asylum claim and its effect on the Applicant's later attempts to bring another such claim were the subject matter of the first judicial review.

<sup>6</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1), [39].

b. The Deportation Order.

In the second application, an order of *certiorari* was sought in relation to the deportation order against the Applicant on a number of grounds. Some of these related to the Applicant's purported asylum application and the first judicial review application. The Applicant claimed that matters arising from these proceedings affected the deportation order's validity. The Court disagreed.

The Court then examined the reasoning upon which the Minister based the deportation order. Humphreys J. considered the correct standard of proof as to the level of risk of ill-treatment that the Applicant would face in Jordan. As far as he was concerned, the test applied by the Minister was the same as the one the Applicant considered to be correct. The Court considered that the "crucial question is whether the Minister satisfied herself that a risk of *refoulement* did not arise."<sup>7</sup> The Court then asserted briefly that:

"...the fact that a person may be viewed as a danger to the public interest does not diminish his or her entitlement to protection against ill-treatment."<sup>8</sup>

The Minister's reasoning was said to take no issue with this proposition. As such, this reasoning could not be challenged, "on the basis that it states the wrong test in that respect."<sup>9</sup>

Humphreys J. then turned to the decision of the ECtHR in *Saadi v Italy*.<sup>10</sup> There the Grand Chamber affirmed the established test under the Article 3 non-expulsion obligation. Humphreys J. articulated this test as follows:

"...that 'substantial grounds... have been shown for believing that there is real risk' of treatment contrary to art. 3."<sup>11</sup>

Humphreys J. considered the Supreme Court's analysis of this test in *Minister for Justice Equality and Law Reform v Rettinger*.<sup>12</sup> He stated that the burden for showing substantial grounds fell on the Applicant. Ultimately, he held that the correct standard of proof on real risk had been applied by the Minister. In the Court's opinion, the Applicant had not provided the requisite substantial grounds for believing he faced a real risk of ill-treatment in Jordan.

The Court also examined whether the Minister properly took certain factors into account in her decision-making process: Reports before the Court; the general situation in Jordan; factors personal to the Applicant, which he claimed placed him at risk of post-return ill-treatment; the risk

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<sup>7</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [120].

<sup>8</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [121].

<sup>9</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [122].

<sup>10</sup> *Saadi v Italy* Application No. 37201/06 Grand Chamber Judgment (Merits and Just Satisfaction) 20 February 2008.

<sup>11</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [123].

<sup>12</sup> *Minister for Justice Equality and Law Reform v Rettinger* [2010] 3 I.R. 783; neutral citation: [2010] IESC 45.

to the Applicant arising out of the allegation of extremism. The Minister was held to have properly taken account of all the required material before making a decision. Furthermore, her decisions were considered to have been reasonably open to her to make based on that material.<sup>13</sup>

### 3) The Standard of Review.

As mentioned above, this article focuses on the standard of scrutiny that Humphreys J. applied to the Minister's decision-making process. The approach taken by him suggests that tensions exist between the standard of review in Article 3 deportation cases required by the ECHR, and the level of scrutiny to which the Court in this case subjected the deportation decision. In other cases involving similar issues, other High Court judges seem to have adopted more robust approaches to reviewing such decisions. This divergence in approaches to reviewing executive decisions involving fundamentally important human rights merits further consideration.

#### a. ECHR Principles.

Given that the *X.X.* case involved the deportation to Jordan of an individual alleged to have Islamist links who claimed to fear ill-treatment on his return, it is hard not to be immediately reminded of *Othman v the United Kingdom*.<sup>14</sup> However, in the context of Article 3<sup>15</sup> the *Othman* judgment is most notable for its consideration of the question of diplomatic assurances.<sup>16</sup> Otherwise, it adds little to the jurisprudence on the burden of proof or the level of scrutiny required in expulsion cases. While the case was referred to in *X.X.*,<sup>17</sup> this was done to demonstrate the risk likely to be faced by the Applicant in Jordan because of the allegation that he was involved in Islamism. While this will be considered further below this section will focus on the principles of ECHR law raised by the judgment.

In his judgment, Humphreys J. stated that, in contrast to the U.S. Supreme Court or the Court of Justice of the European Union, the ECtHR was subject to “no legislative checks and balances to moderate the effect of any particular Strasbourg decision.”<sup>18</sup> He observed somewhat

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<sup>13</sup> *X.X. v Minister for Justice and Equality*, above, (fn1) [163].

<sup>14</sup> *Othman v the United Kingdom* Application No. 8139/09 Judgment (Fourth Section)(Merits and Just Satisfaction) 17 January 2012.

<sup>15</sup> The restraint of the Applicant's deportation to Jordan in *Othman* was decided on the basis that he risked suffering a flagrant denial of a fair trial there on the basis that evidence obtained by torture could be admitted against him. Deportation in this context was held to violate Article 6 ECHR. This aspect of the case will not be considered further here.

<sup>16</sup> *Othman v the United Kingdom*, above, (fn.14) [188]-[189].

<sup>17</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1), [153]-[163].

<sup>18</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [124].

contradictorily, that the only amendments that the Contracting States had made to the Convention system, “have been to extend the list of rights protected, and to deal with procedural matters.”<sup>19</sup> He then noted that some Strasbourg decisions ameliorate this supposed judicial absolutism through the application of the Margin of Appreciation doctrine. This allows some balancing of certain qualified Convention rights<sup>20</sup> against communitarian aims and values.<sup>21</sup> Humphreys J. considered that:

“...where the Court is dealing with a matter where such checks and balances are absent, one might hope that a finding of a violation would arise only where the breach was clearly established.”<sup>22</sup>

The Margin of Appreciation is applicable to qualified rights such as those found in Articles 8 to 11 of the Convention. The ECtHR has made it clear that there is no scope for qualification or balancing in relation to rights that are considered absolute, such as those set out in Article 3.<sup>23</sup> The rationale underlying the Court’s view of the absolute nature of Article 3 rights was well articulated in *Soering v the United Kingdom*.

“This absolute prohibition... shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe.”<sup>24</sup>

On first glance it seems, therefore, that Humphreys J. was stating that a court should only find a violation of an important fundamental right where a breach of that right was clearly established. This, with respect, seems somewhat tautological. Regardless of whether the right involved is absolute or qualified, a violation can only ever be found where a breach is *clearly established* in accordance with the relevant tests laid down by the ECtHR.

Perhaps the dictum is more correctly understood as a reference to the ECtHR’s differential approach to the burden of proof and the level of persuasion necessary in cases involving different

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<sup>19</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [124].

<sup>20</sup> For example the rights enshrined in Articles 8–11.

<sup>21</sup> *Handyside v the United Kingdom* Application No 5493/72 Plenary Court Judgment (Merits) 07 December 1976, [48]–[49]. See also Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Oxford, 2002).

<sup>22</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [125].

<sup>23</sup> *Ireland v the United Kingdom* Application No. 5310/71 Plenary Court (Merits and Just Satisfaction) 18 January 1978, [163]; *Saadi v Italy*, above, (fn.10) [138]. See Mavronicola N. ‘What is an Absolute Right? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights’ (2012) 12:4 *Human Rights Law Review* 723.

<sup>24</sup> *Soering v the United Kingdom* Application No 14038/88 Plenary Court Judgment (Merits and Just Satisfaction) 07 July 1989.

rights. The Strasbourg Court bases this differential approach on, “the nature of the allegation made and the Convention right at stake.”<sup>25</sup> Humphreys J. continued by asserting that the Strasbourg case law “does imply a rigorous and careful approach before concluding that deporting an individual would be a violation of Article 3.”<sup>26</sup> Thus, it is possible to detect two principles of ECHR law in paragraphs 124 and 125 of Humphreys J.’s judgment. First, that different rights under the Convention attract different burdens of proof depending on the nature of the right and the circumstances of the claim. Second, that alleged breaches of a fundamental right require greater scrutiny from the Court.

The first principle is clearly visible in *Saadi v Italy*. But, it is a subtly different formulation to that stated by Humphreys J. In *Saadi*, the Grand Chamber identified the relevant burden and standard of proof in Article 3 expulsion cases. It stated:

“...it is in principle for the Applicant to adduce *evidence capable of proving that* there are substantial grounds for believing that if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3.”<sup>27</sup>

If such evidence is produced then it is for the respondent Government to, “dispel any doubts about it.”<sup>28</sup>

Humphreys J. placed considerable emphasis throughout his judgment on the burden of proof that the Applicant must discharge. In this regard he observed:

“Of course the question to be applied by the court is not whether there was any country of origin information supportive of the applicant’s position. It is whether the applicant has discharged the onus of proof to show that there was a risk of ill-treatment such that the decision made fell outside the range of decisions that were reasonably open to the Minister.”<sup>29</sup>

And, again:

“...there is still an onus on the applicant to show a real risk of ill-treatment of himself personally...”<sup>30</sup>

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<sup>25</sup> *Nachova and Others v Bulgaria* Grand Chamber Judgment (Merits and Just Satisfaction) 06 July 2005, [147].

<sup>26</sup> *Nachova and Others v Bulgaria*, above, (fn.25) [147].

<sup>27</sup> *Saadi v Italy*, above, (fn.10) [129].

<sup>28</sup> *Saadi v Italy*, above, (fn.10) [129].

<sup>29</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [134].

<sup>30</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [137].

These statements of the law, however, do not capture the whole picture. As is evident from the passage in *Saadi* cited above, the Applicant does not need to “show that there is a real risk of ill-treatment.” What he must do is to “adduce *evidence capable of proving that* there are substantial grounds for believing” there would be a real risk of ill-treatment. The importance of this nuance becomes clear when we consider the second principle: the level of scrutiny required of the Court under the ECtHR’s jurisprudence.

The totality of the written judgment suggests that Humphreys J. understands the ECtHR’s insistence on a rigorous approach to considering breaches of Article 3 as requiring scrutiny of the Applicant’s submissions only. The Strasbourg case law in fact demonstrates a more balanced approach. There is no doubt that the Court must scrutinize thoroughly the Applicant’s claims in Article 3 cases. As the ECtHR put it in *Ribitsch v Austria*:

“[The Court’s] vigilance must be heightened when dealing with rights such as those set forth in Article 3 of the Convention, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment...”<sup>31</sup>

However, it is also clear that in the expulsion context, this heightened vigilance and thorough scrutiny goes beyond examining only the Applicant’s submissions. When considering the range of evidence to which it was appropriate to have regard when assessing whether a real risk was established, the Grand Chamber in *Saadi* held as follows:

“In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis *all the material placed before it or, if necessary, material obtained proprio motu* [citation omitted]. In cases such as the present one, the Court’s examination of the existence of a real risk must necessarily be a rigorous one.”<sup>32</sup>

When considered alongside the Grand Chamber’s dicta on the burden of proof cited above,<sup>33</sup> this passage attenuates somewhat the burden placed on the Applicant. He or she must adduce evidence capable of proving substantial grounds for believing there is a real risk of post-deportation ill-treatment. But, it is to be noted that the evidence adduced must merely be *capable of proving that there are substantial grounds* for believing in that real risk.

This serves to create something more like an evidential burden of proof rather than a legal one. In other words, the evidence adduced by the Applicant need not be conclusive but it must

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<sup>31</sup> *Ribitsch v Austria* Application No. 18896/91 Court Judgment (Merits and Just Satisfaction) 04 December 1995 [32].

<sup>32</sup> *Saadi v Italy*, above, (fn.10) [128] (Emphasis added).

<sup>33</sup> Text to (fn.27).

raise a *prima facie* risk of post return ill-treatment. It is then for the Court to decide if substantial grounds have in fact been shown for believing this risk reaches a level of “real risk”. It is clear from the dictum in *Saadi* referred to above<sup>34</sup> that, in so deciding, the Court must consider not only the submissions of the Applicant; it must also scrutinise all of the material before it. In contrast to this more holistic approach, Humphreys J. in *X.X.* focused the burden of proof on the Applicant.<sup>35</sup> In this regard the scrutiny concentrated on whether or not the Applicant had discharged the Judge’s narrow conception of that burden.

Given the sometimes confused nature of Strasbourg’s case law on Article 3 expulsion proceedings, it was perhaps inevitable that misunderstandings and misapplications of these principles would arise at the domestic level. The Article 3 jurisprudence is, in places, convoluted<sup>36</sup> and sometimes contradictory.<sup>37</sup> Such confusion arises particularly where the absolute nature of Article 3 is concerned.<sup>38</sup> Indeed, in a recent concurring opinion in the Grand Chamber, Judge O’Leary cited Humphreys J.’s dicta at paragraphs 124 to 125 of *X.X.* in support of her call for greater rigour and care if the ECtHR’s “...jurisprudence in this field is to be understood and followed.”<sup>39</sup>

Judge O’Leary wrote this concurring opinion in the context of one of three recent cases in which the Grand Chamber considered the manner in which Article 3 operates in the expulsion context.<sup>40</sup> Whether these judgments manifest the care and rigour for which Judge O’Leary was calling is a question for another day. However, they do reemphasise the balanced conception of

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<sup>34</sup> Text to (fn.32).

<sup>35</sup> Text to (fn.29) and (fn.30).

<sup>36</sup> Compare *Soering v the United Kingdom*, above, (fn.24) [89] and *Chabal v the United Kingdom* Application No. 22414/93 Grand Chamber Judgment (Merits and Just Satisfaction) 15 November 1996 [81].

<sup>37</sup> See *Babar Ahmad and Others v the United Kingdom* Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 Judgment (Fourth Section) (Merits and Just Satisfaction) 10 April 2012 [172]-[178].

<sup>38</sup> See for instance the ‘medical expulsion cases’: *D v the United Kingdom* Application No 30240/96 Judgment (Merits and Just Satisfaction) 02 May 1997 and; *N v the United Kingdom* Application No. 26565/05 Grand Chamber Judgment (Merits) 27 May 2008. For commentary see Greenman K, ‘A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law’ (2015) 27(2) *International Journal of Refugee Law*, 264, 272-273.

<sup>39</sup> *JK v Sweden* Application No. 59166/12 Grand Chamber Judgment (Merits and Just Satisfaction) 23 August 2016, Concurring Opinion of Judge O’Leary [6].

<sup>40</sup> *FG v Sweden* Application No. 43611/11 Grand Chamber Judgment (Merits and Just Satisfaction) 23 March 2016; *JK v Sweden* Application No. 59166/12 Grand Chamber Judgment (Merits and Just Satisfaction) 23 August 2016 and; *Paposhvili v Belgium* Application No. 41730/10 Grand Chamber Judgment (Merits and Just Satisfaction) 12 December 2016.

the burden of proof outlined above. Three months before the decision in *X.X.*, the Grand Chamber delivered its decision in *FG v Sweden*.<sup>41</sup> Here it affirmed that “the assessment of the existence of real risk must be a rigorous one.”<sup>42</sup> And, further, that it is in principle for the Applicant to adduce “evidence *capable of proving* that there are substantial grounds for believing”<sup>43</sup> in a real risk of ill-treatment post return. But, the Grand Chamber then acknowledged that:

“...owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to *give them the benefit of the doubt* when it comes to assessing the credibility of their statements and the documents submitted in support thereof.”<sup>44</sup>

It went on to say that:

“It is for the Court to consider in an expulsion case whether, *in all the circumstances of the case before it*, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention.”<sup>45</sup>

In *JK v Sweden*<sup>46</sup> the Grand Chamber reiterated this necessity of giving the Applicant the benefit of the doubt in expulsion cases.<sup>47</sup> That judgment went on to state that:

“...the rules concerning burden of proof should not render ineffective the applicants’ rights protected under Article 3 of the Convention...”<sup>48</sup>

Such sentiments were reiterated most recently in December, 2016 in *Paposhvili v Belgium*.<sup>49</sup> The judgment in that case goes on to make it clear that:

“...a certain degree of speculation is inherent in the preventive purpose of Article 3 and that *it is not a matter of requiring the persons concerned to provide clear proof of their claim* that they would be exposed to proscribed treatment.”<sup>50</sup>

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<sup>41</sup> *FG v Sweden* Application No. 43611/11 Grand Chamber Judgment (Merits and Just Satisfaction) 23 March 2016.

<sup>42</sup> *FG v Sweden*, above, (fn.41) [113].

<sup>43</sup> *FG v Sweden*, above, (fn.41) [113] (emphasis added).

<sup>44</sup> *FG v Sweden*, above, (fn.41) [113] (emphasis added).

<sup>45</sup> *FG v Sweden*, above, (fn.41) [116] (emphasis added).

<sup>46</sup> *JK v Sweden* Application No. 59166/12 Grand Chamber Judgment (Merits and Just Satisfaction) 23 August 2016.

<sup>47</sup> *JK v Sweden*, above, (fn.46) [93].

<sup>48</sup> *JK v Sweden*, above, (fn.46) [97].

<sup>49</sup> *Paposhvili v Belgium* Application No. 41730/10 Grand Chamber Judgment (Merits and Just Satisfaction) 12 December 2016.

<sup>50</sup> *Paposhvili v Belgium*, above, (fn.49) [186] (emphasis added).

These dicta clearly suggest that the burden of proof on the Applicant in Article 3 expulsion cases is less onerous than that which seems to have been applied by Humphreys J. in *X.X.*

These recent cases also have something to say about the level of scrutiny to be applied to cases involving fundamentally important rights. In *Tanli v Turkey* the ECtHR stated that:

“...in normal circumstances [the Court] requires cogent elements to lead it to depart from the findings of fact reached by [domestic] courts... Where allegations are made under Articles 2 and 3 of the Convention, however, the Court must apply a particularly thorough scrutiny...”<sup>51</sup>

In the context of Article 3 expulsion cases, the Grand Chamber stated in *FG* that “the assessment of the existence of a real risk must necessarily be a rigorous one.”<sup>52</sup> In *Paposhvili* it said: “the risk alleged must be subjected to close scrutiny.”<sup>53</sup> Recall that in *FG* and *JK* the Grand Chamber also stated that the benefit of the doubt may be given to the Applicant in expulsion cases and that the rules concerning the burden of proof should not render ineffective the Applicant’s rights under Article 3. Read together, these dicta make it clear that it cannot be the Applicant’s credibility alone that requires close scrutiny as seems to have occurred in *X.X.*. Instead, the Court must scrutinize closely all of the material available to it in order to assess whether substantial grounds exist for believing there is a real risk of post return ill-treatment.

Despite this requirement for close scrutiny, Humphreys J. appeared to consider the latitude afforded to the Court in judicial review of administrative action to be rather limited. It seems that he did not believe that this was altered by the fact that the Applicant’s fundamental rights were alleged to be at stake. As such, it will be shown below that the judgment in *X.X.* displays a high level of curial deference and a relatively low level of substantive scrutiny of the material on which the Minister’s decision was based.

The Supreme Court has not yet had the opportunity to consider the more recent Strasbourg authorities in this area. However, it has noted the dicta from *Saadi* regarding the burden and standard of proof in Article 3 expulsion cases.<sup>54</sup> It has also considered the impact of fundamental rights on standards of judicial review in *Meadoms v Minister for Justice Equality and Law Reform*.<sup>55</sup> Interestingly, that case has led some members of the High Court to adopt a less

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<sup>51</sup> *Tanli v Turkey* Application No.26129/95 Court Judgment (Merits and Just Satisfaction) 01 April 2001, [111].

<sup>52</sup> *FG v Sweden*, above, (fn.41) [113].

<sup>53</sup> *Paposhvili v Belgium*, above, (fn.49) [187].

<sup>54</sup> *Minister for Justice, Equality and Law Reform v Rettinger*, above, (fn.12) Fennelly J. [79].

<sup>55</sup> *Meadoms v Minister for Justice Equality and Law Reform* [2010] 2 I.R. 701 (IESC).

deferential, more rigorous, approach when reviewing deportation decisions involving fundamental rights.

b. The Irish Approach Generally.

The Supreme Court has considered the principles set out in *Soering* and reaffirmed and developed in *Saadi* in *Minister for Justice, Equality and Law Reform v Rettinger*.<sup>56</sup> It is uncontroversial that in accordance with section 3 of the European Convention on Human Rights Act 2003, any expulsion from the State must comply with these principles. The *Rettinger* case concerned a proposed extradition. As such the High Court had jurisdiction on matters of fact and law. In these circumstances the *Saadi* principles are of direct applicability to the Court's decision. Challenging a deportation<sup>57</sup> decision on the basis that it would breach the non-expulsion obligation under Article 3, however, is more problematic.

Under section 5 of the Illegal Immigrants (Trafficking) Act 2000 such decisions may only be challenged by means of judicial review. Such challenges therefore must be made on the traditional grounds of judicial review.<sup>58</sup> In *X.X.*, Humphreys J. had to consider whether the Minister's decision to deport the Applicant was reasonable.

The ECtHR has recognised that certain forms of reasonableness judicial review may be an effective remedy under Article 13 of the Convention in deportation cases. We have seen that the ECtHR requires close scrutiny of all of the material in cases where it is alleged a deportee faces a real risk of ill-treatment. In *Soering*, the ECtHR held that the reasonableness standard employed by the English Courts in cases involving human rights provided a sufficiently rigorous standard of scrutiny when reviewing the compatibility of expulsion decisions with Article 3.<sup>59</sup> It stated:

“...a court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take.”<sup>60</sup>

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<sup>56</sup> *Minister for Justice, Equality and Law Reform v Rettinger*, above, (fn.12).

<sup>57</sup> Such decisions include decisions to make a deportation order under section 3(1) of the Immigration Act 1999; decisions on the revocation of such an order under section 3(11) of that Act; and decisions concerning the risk of *refoulement* under section 5 of the *Refugee Act 1996* and Article 3 ECHR as incorporated by Section 3 of the European Convention on Human Rights Act 2003.

<sup>58</sup> On the grounds of judicial review generally see: Morgan DG, Hogan GW and Daly P, *Administrative Law in Ireland* (Fourth edition, Round Hall, Thomson Reuters 2010).

<sup>59</sup> *Soering v the United Kingdom*, above, (fn.24) [121].

<sup>60</sup> *Soering v the United Kingdom*, above, (fn.24) [121].

The ECtHR has reiterated this approach in other Article 3 expulsion cases involving the UK.<sup>61</sup> However, Strasbourg's acceptance of the sufficiency of the UK's judicial review regime for vindicating Article 3 rights is based on the level of scrutiny UK Courts apply in such cases.<sup>62</sup> The UK Courts will apply "anxious scrutiny" in assessing the reasonableness of a decision impinging on human rights. This approach was set out by Lord Bridge in *R v Secretary of State for the Home Department (Ex Parte Bugdaycay)*:

"...the court must, I think, be entitled to subject an administrative decision to the most rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."<sup>63</sup>

Irish administrative law adopts a somewhat different approach. The traditional *Wednesbury*<sup>64</sup> reasonableness standard was adopted into Irish law in *Keegan v The Stardust Victims Compensation Tribunal*.<sup>65</sup> It was then developed in *O'Keefe v An Bord Pleanala & Ors*.<sup>66</sup> The Supreme Court considered the application of *Keegan/O'Keefe* unreasonableness to cases involving fundamental rights in *Meadows v Minister for Justice Equality and Law Reform*.<sup>67</sup> Here, the Court rejected the "anxious scrutiny" standard applied by the UK Courts. Instead the majority felt that, in judicial review of administrative action that impinged on fundamental rights, a proportionality test could

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<sup>61</sup> *Vilvarajah v the United Kingdom* Application Nos. 13163-5/87; 1314477-8/87 Court Judgment (Merits and Just Satisfaction) 30 October 1991 [125]; *Hilal v the United Kingdom* Application No 45276/99 Court Judgment (Merits and Just Satisfaction) 06 March 2001 [78].

<sup>62</sup> *Soering v the United Kingdom*, above, (fn.24) [122].

<sup>63</sup> *R v Secretary of State for the Home Department (Ex Parte Bugdaycay)* [1987] 1 All ER 940, 952. For a more recent consideration of contextual standards of review in UK administrative law see *Pham v Secretary of State for the Home Department* [2015] UKSC 19. It should be noted that the ECtHR has held the anxious scrutiny standard to be incapable of affording an effective remedy for a breach of Article 8 in *Smith and Grady v the United Kingdom* Application Nos. 33985/96 and 33986/96 Court Judgment (Merits) 27 September 1999. However, anxious scrutiny has been held appropriate in cases involving Article 3 expulsions. See: *Soering v the United Kingdom*, above, (fn.24) [122].

<sup>64</sup> *The Associated Provincial Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223 (EWCA).

<sup>65</sup> *The State (Keegan) v The Stardust Victims Compensation Tribunal* [1986] I.R. 642 (IESC).

<sup>66</sup> *O'Keefe v An Bord Pleanala & Ors* [1993] 1 I.R. 39 (IESC).

<sup>67</sup> *Meadows v Minister for Justice Equality and Law Reform* [2010] 2 I.R. 701 (IESC).

be accommodated within the strictures of the existing *Keegan* reasonableness standard.<sup>68</sup> Murray C.J., in his leading judgment, held:

“It is inherent in the principle of proportionality that where there are grave or serious limitations on the rights and in particular the fundamental rights of individuals as a consequence of an administrative decision the more substantial must be the countervailing considerations that justify it.”<sup>69</sup>

In her concurring opinion Denham J. explained that the basis for this principle lay in the need for the Court to:

“...have regard to the implied constitutional limitation of jurisdiction of all decision-makers which affects rights, and whether the effect on the rights of the applicant would be so disproportionate as to justify the court in setting it aside on the ground of manifest unreasonableness.”<sup>70</sup>

Some commentators have questioned whether this *Meadows* proportionality refinement of unreasonableness complies with the Article 13, ECHR requirement of an effective remedy for breach of Convention rights.<sup>71</sup> But, this question does not seem to have been considered with regard to absolute Convention rights like those in Article 3.

Indeed, on the face of it, references to proportionality make little sense when considered in the context of cases such as *X.X.* –that is, deportations that allegedly fall foul of Article 3. As noted earlier, Article 3 is an absolute right. Accordingly, if Article 3 is engaged no countervailing considerations can apply. One cannot justify limitations of, or interference with Article 3 protections, regardless of the objective. Surely, in this context proportionality can have no place.

However, the role of proportionality in such cases becomes more clear if we consider that the decision that is being reviewed is not the decision whether or not to infringe directly the deportee’s absolute rights. To do so would be impermissible. It is the decision whether or not those rights are engaged in the first place. Thus, the question is not whether the decision to interfere with a fundamental right is proportionate and therefore reasonable. The question, rather, is whether it was reasonable for the decision maker to conclude that the absolute right was not, in fact, engaged.

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<sup>68</sup> See: Daly P. ‘Standards of Review in Irish Administrative Law after “Meadows”’ (2010) 32 *Dublin University Law Journal* 379.

<sup>69</sup> *Meadows v Minister for Justice Equality and Law Reform*, above, (fn.67) per Murray C.J. at [62].

<sup>70</sup> *Meadows v Minister for Justice Equality and Law Reform*, above, (fn.67) per Denham J. at [45].

<sup>71</sup> Biehler and Donnelly ‘Proportionality in the Irish Courts: The Need for Guidance’ (2014) 3 *European Human Rights Law Review* 272.

It is also important to note that the *Meadows* decision clarified the existence of a duty on the decision maker to give reasons supporting his or her decision. Murray C.J. put it very clearly:

“An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.”<sup>72</sup>

Subsequently, *Meadows* has been considered by at least some members of the High Court to have had a significant impact on reasonableness judicial review of decisions involving fundamental rights.

In one such recent case, *Meadows* has been interpreted as requiring the decision maker to provide greater justification for his or her reasoning in concluding that a fundamental right is not engaged. In *PBN v Minister for Justice and Equality*,<sup>73</sup> Faherty J. had to consider the reasonableness of a ministerial decision to decline an application under section 3(11) of the Immigration Act 1999 to revoke a deportation order. She stated that:

“It is thus well settled jurisprudence that the potential interference with fundamental human rights, the greater the justification necessary for the reasoning by a decision- maker.”<sup>74</sup>

Like *X.X.*, the *PBN* case concerned *inter alia* an administrative decision relating to fundamental rights. The Applicant asserted that a decision not to revoke a deportation order impinged on her “right of protection under s.5 of the [*Refugee Act 1996*] and Article 3 ECHR...”<sup>75</sup> Faherty J. ruled that on judicial review such decisions “must be scrutinized for the reasons set out in *Meadows*...”<sup>76</sup> The judge came to this conclusion after considering the *Meadows* decision and subsequent High Court decisions in which it was applied. Most prominent among these was Hogan J.’s judgment in *Efe & Ors v Minister for Justice, Equality and Law Reform & Ors*.<sup>77</sup>

In that case, Hogan J. suggested that the requirement for greater justification also permitted the courts to apply more scrutiny when reviewing such decisions. He considered that following *Meadows*:

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<sup>72</sup> *Meadows v Minister for Justice Equality and Law Reform*, above, (fn.67) per Murray C.J. [97].

<sup>73</sup> *PBN v Minister for Justice and Equality* [2016] IEHC 316 (Unreported: Faherty J., High Court, 02 June 2016).

<sup>74</sup> *PBN v Minister for Justice and Equality*, above, (fn.73) [164].

<sup>75</sup> *PBN v Minister for Justice and Equality*, above, (fn.73) [163].

<sup>76</sup> *PBN v Minister for Justice and Equality*, above, (fn.73) [163].

<sup>77</sup> *Efe & Ors v Minister for Justice, Equality and Law Reform & Ors* [2011] 2 I.R. 798 (IEHC)].

“...it can no longer be said that the Courts are constrained to apply some artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness and rationality grounds. This test is broad enough to ensure that the *substance and essence* of constitutional rights will always be protected against unfair attack...”<sup>78</sup>

Hogan J. also considered the role that curial deference should play in judicial review. Drawing on dicta from Denham J. in *Meadows*, he accepted that bodies with special experience and expertise in a particular area should enjoy a level of deference in respect of decisions within their bailiwick. However, in the context of asylum decisions, he accepted that while there might be occasions where the decision maker has specialist knowledge that warrants deference:

“...in the general run of things, the decision maker has not even visited the country in question and is, for example, entirely reliant on country of origin information to assist with a credibility assessment.”<sup>79</sup>

In those circumstances, Hogan J. considered that, “any doctrine of curial deference would seem misplaced.”<sup>80</sup>

Faherty J. considered these precedents and concluded that scrutiny was warranted in judicial review of a deportation decision. She then sought to ascertain the appropriate level of scrutiny to apply. She referred to *FRN v Minister for Justice*.<sup>81</sup> In that case Charlton J. was of the opinion that actions of statutory bodies under the Refugee Act 1996 require a “...heightened level of scrutiny when compared to other forms of judicial review.”<sup>82</sup> Charlton J. went on to state that, in cases concerning country of origin determinations, he did not think it would be fair to the principle of primary importance of human rights to apply the ordinary judicial review test for overturning decisions of fact. Instead he believed:

“...that a decision on the country of origin of an applicant and the availability of protection within its territory *should be scrutinized if a judicial review is taken...*”<sup>83</sup>

This reference to “heightened scrutiny” is interesting. In *Meadows* the Supreme Court expressly rejected the adoption of an anxious scrutiny standard<sup>84</sup> like that applied by the UK courts in judicial

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<sup>78</sup> *Efe & Ors v Minister for Justice, Equality and Law Reform & Ors*, above, (fn.77) [34] (emphasis added).

<sup>79</sup> *Efe & Ors v Minister for Justice, Equality and Law Reform & Ors*, above, (fn.77) [20].

<sup>80</sup> *Efe & Ors v Minister for Justice, Equality and Law Reform & Ors*, above, (fn.77).

<sup>81</sup> *FRN v Minister for Justice* [2009] 1 I.R. 88 (IEHC).

<sup>82</sup> *FRN v Minister for Justice*, above, (fn.81) [57].

<sup>83</sup> *FRN v Minister for Justice*, above, (fn.81) [57] (emphasis added).

<sup>84</sup> *Meadows v Minister for Justice Equality and Law Reform*, above, (fn.67) [65].

review of decisions involving fundamental rights.<sup>85</sup> But, it is evident from her written judgment that Faherty J. did indeed apply rigorous –if perhaps not “anxious”– scrutiny in her consideration of the process leading to the impugned decision.<sup>86</sup> As such, it is arguable that Faherty J.’s approach might be sufficient with respect to the requirements of Article 13 within the context of an Article 3 expulsion complaint.

c. The X.X. Approach.

Humphreys J. delivered his judgment in X.X less than a month after Faherty J. handed down her judgment in PBN. Humphreys J.’s understanding of reasonableness review seems to be more circumscribed.. In this regard he wrote:

“...an unreasonable decision is one where the Minister has taken into account relevant matters but drawn a conclusion from them that could not be supported and could not fall within the range of reasonable decisions that were open to her on that material.”<sup>87</sup>

No authorities were cited as the basis for this statement of the law. The passage does not suggest that any consideration was given to the effect of the *Meadows* judgment. At paragraph 154 Humphreys J. notes that counsel for the Applicant had relied on the *Meadows* case. However, no mention is made of the context in which *Meadows* was relied upon. Nor is any further consideration given in the judgment to *Meadows*, or to any other authorities on reasonableness review.

In applying this narrow conception of reasonableness review, Humphreys J. displayed far less willingness to scrutinize the Minister’s decision-making process than is evident in PBN and the High Court decisions referred to therein. There is little direct reference in the judgment to the content of the Minister’s forty pages of reasoned analysis. This contrasts with Faherty J.’s detailed references to the reasoning and decision-making process considered in PBN.<sup>88</sup> In X.X. Humphreys J. cited the pre-*Meadows* decision in *M.E. v Minister for Justice Equality and Law Reform*<sup>89</sup> as authority for the proposition that:

“The assessment of whether a particular piece of evidence is of probative value, or the extent to which it is of probative value, is quintessentially a matter for the tribunal and *mutatis mutandis* for any decision maker.”<sup>90</sup>

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<sup>85</sup> *R v Secretary of State for the Home Department (Ex Parte Bugdaycay)*, above, (fn.63).

<sup>86</sup> *PBN v Minister for Justice and Equality*, above, (fn.73) [167]–[205].

<sup>87</sup> *PBN v Minister for Justice and Equality*, above, (fn.73) [142].

<sup>88</sup> *PBN v Minister for Justice and Equality*, above, (fn.73) [167]–[205]

<sup>89</sup> *M.E. v Minister for Justice Equality and Law Reform* [2008] IEHC 192 (Unreported, High Court, 27 June 2008).

<sup>90</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [110].

When considering the Minister's treatment of conflicting country of origin reports, Humphreys J. considered that "[h]ow best to assess these matters is a matter for the Minister."<sup>91</sup> He continued: "[h]ow these are weighed is a matter, subject to law, for her."<sup>92</sup> It seems clear that Humphreys J. was not prepared to scrutinize thoroughly the Minister's decision-making process. Nor did he seek greater justification of her decisions just because fundamental rights were at stake. He deemed such deference appropriate despite the absence of any suggestion that the Minister had any specialist expertise on Jordan extending beyond having read the country of origin reports. This curial deference is also evident in the consideration given to the *Othman* case in the judgment.

As alluded to above *Othman* was referred to by counsel for the Applicant in order to highlight the risk of ill-treatment faced by alleged Islamists in Jordan. This submission was dismissed by Humphreys J. who felt that it was, in fact, open to the Minister to take comfort from the *Othman* case in coming to her decision. Humphreys J. considered that the outcome of the case "showed the capacity of the Jordanian legal system to deal fairly even with very high profile Islamist suspects."<sup>93</sup>

This part of the Judgment illustrates, in addition, the high level of curial deference afforded by Humphreys J.'s to the Minister's reasoning. The *Othman* judgment reveals that the ECtHR stated explicitly that:

... the applicant's high profile will make the Jordanian authorities careful to ensure he is properly treated...<sup>94</sup>

Furthermore, the ECtHR based its assessment that Abu Qatada did not face a real risk of ill-treatment on a combination of this high profile and the presence of diplomatic assurances regarding his post-return treatment.<sup>95</sup> Given that the Applicant in *X.X.* was anonymous and there were no diplomatic assurances in place between Ireland and Jordan regarding his deportation, it is difficult to see how the Minister could reasonably draw *any* conclusions about the present case from the *Othman* case, let alone take comfort in it. The two cases are simply too different. Such levels of deference and light-touch scrutiny stand in stark contrast to Hogan J.'s dicta in *Ejé*<sup>96</sup> and Faherty J.'s approach in *PBN*.<sup>97</sup>

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<sup>91</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [134].

<sup>92</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [134].

<sup>93</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [159].

<sup>94</sup> *Othman v the United Kingdom*, above, (fn.14) [196].

<sup>95</sup> *Othman v the United Kingdom*, above, (fn.14) [196]-[206].

<sup>96</sup> *Ejé & Ors v Minister for Justice, Equality and Law Reform & Ors*, above,(fn.77) [20].

<sup>97</sup> *PBN v Minister for Justice and Equality*, above, (fn.73) [167]-[205].

Finally, the level of scrutiny to which the Minister's reasoning was subjected is demonstrated by the judge's summary rejection of the Applicant's suggestion that the Minister would have made the Jordanian authorities specifically aware of him in the context of his deportation.<sup>98</sup> He dismissed this as, "totally speculative and highly unlikely." In *Saadi*, the Grand Chamber held that "the protection of Article 3 of the Convention comes into play" in situations where the Applicant establishes 'serious reasons to believe' that he is a member of a group that is systematically exposed to a practice of ill-treatment in the receiving State.<sup>99</sup> The Applicant claimed that he fell into this category. This was because his deportation was based on suspicions of Islamist extremism. He alleged that in Jordan those so suspected are systematically exposed to ill-treatment. Humphreys J. was unwilling to explore this argument in any great depth. He believed that it would be:

"...extremely unlikely that the Irish Authorities would have volunteered information about the applicant's alleged involvement in Islamism to the Jordanians."<sup>100</sup>

The judge based this belief on the fact that to do so would, "be counterproductive" to the Government's goal of reaching a repatriation agreement with the Jordanians. Interestingly, he added that such disclosure might also damage the hope of "avoiding any ill-treatment being visited on the applicant."<sup>101</sup> Thus, Humphreys J. was obviously alive to the risk that the Applicant could be ill-treated in Jordan if he was a suspected extremist. Furthermore, he was aware that the Irish suspicions about the Applicant, if made known to the Jordanians, could increase this risk. But, despite this, he did not seem to engage in any significant scrutiny of the suggestion that the Jordanian authorities might be aware of Irish suspicions concerning the Applicant's activities.

It is clear from the above that Humphreys J. and Faherty J. diverge in their approach to scrutiny of decisions involving fundamental rights. In *X.X.*, Humphreys J. focused on the Applicant's burden of proof. He does not seem to have engaged in the thorough scrutiny to which the Court must submit all of the material before it according to *Saadi*. He considered it within the bounds of reasonableness review to assess whether the Applicant had adequately proven to the Minister that he would face a risk of ill-treatment. But, it would go beyond the pale to subject the Minister's overall reasoning to any more robust scrutiny than to ask if her conclusions were within the range of findings reasonably open to her.

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<sup>98</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1) [134].

<sup>99</sup> *Saadi v Italy*, above, (fn.10) [132].

<sup>100</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1)[136].

<sup>101</sup> *X.X. v Minister for Justice and Equality*, above, (fn.1)[136].

It would seem, however, that Article 13 and the jurisprudence of the ECtHR require more thorough scrutiny to be given to the decision-making process. Thus, if Humphreys J.'s approach to judicial review of Article 3 deportation decisions is correct under Irish law, there is a tension between the ECtHR's jurisprudence and domestic practice. In contrast, Faherty J.'s approach may be capable of easing that tension.

### **Conclusions.**

The *X.X.* case is of interest for the questions it raises about how the Irish courts safeguard the non-expulsion protection under Article 3 ECHR and whether that approach complies with the requirements under Article 13. Humphreys J.'s highly deferential approach to reasonableness review in *X.X.* stands in stark contrast with the rigorous scrutiny applied by Faherty J. in *PBN*. This latter approach is likely to be more in line with what is required under Article 13 of the ECHR. In the *X.X.* case leave to appeal to the Court of Appeal was denied and with that denial the stay on the Applicant's deportation was lifted.<sup>102</sup>

The ECtHR had issued a rule 39 indication<sup>103</sup> on 30 December 2015 requesting that the Applicant's deportation be stayed for the duration of the proceedings. This was lifted with the conclusion of the High Court proceedings and the refusal of leave to appeal. The Applicant's legal team were denied a second Rule 39 indication and the Applicant was deported to Jordan on the 06<sup>th</sup> of July 2016.<sup>104</sup> As of January 2017 solicitors on behalf of the Applicant are petitioning the ECtHR by way of a full application regarding this case. If this application is declared admissible it will provide Strasbourg with an opportunity to consider the nature and level of scrutiny that the Irish courts must apply when judicially reviewing deportation decisions involving an alleged risk of post return, Article 3 ill-treatment. Such a judgment would provide welcome clarity in this area of the law.

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<sup>102</sup> *X.X. v Minister for Justice and Equality (fno. 2)* [2016] IEHC 475 (Unreported, Humphreys J., High Court, 29 July 2016).

<sup>103</sup> See: European Court of Human Rights, *Factsheet – Interim measures* (September 2016) <[http://www.echr.coe.int/documents/fs\\_interim\\_measures\\_eng.pdf](http://www.echr.coe.int/documents/fs_interim_measures_eng.pdf)> (accessed 06 January 2017).

<sup>104</sup> Colm Keena 'Alleged Recruiter for ISIS in Ireland Deported to Jordan' *The Irish Times* (Dublin, 08 July 2016.) <<http://www.irishtimes.com/news/crime-and-law/alleged-recruiter-for-isis-in-ireland-deported-to-jordan-1.2714275>> (Accessed: 20 July 2016).