

**THE HIGH COURT  
JUDICIAL REVIEW**

**Record No: 2019/940 JR**

**BETWEEN:**

**ZM**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND  
COMMISSIONER OF AN GARDA SIOCHANA**

**RESPONDENTS**

**JUDGMENT of Ms Justice Tara Burns delivered on 25th day, January 2021**

**General**

1. The Applicant seeks an order of Certiorari of the decision of the First Respondent made pursuant to s. 3(11) of the Immigration Act 1999, as amended, refusing to revoke a Deportation Order issued against him on 26 August 2016.

**Refugee Claim**

2. The Applicant is a national of Pakistan who arrived in the State on 23 September 2008. He applied to the Office of the Refugee Applications Commissioner (hereinafter referred to as "ORAC") for refugee status but was refused such status on 7 April 2009. His appeal to the Refugee Appeals Tribunal (hereinafter referred to as "RAT") was refused on 14 September 2009. A challenge was not taken by the Applicant to the determination of RAT.

**Determinations of ORAC and RAT**

3. The Applicant's claim for refugee status was based on an asserted family dispute with his cousin over land in his hometown. He claimed that his brother was murdered on 16 April 1994 and his father was murdered on 26 March 1997. The Applicant claimed he was wrongly charged with the murder of a friend of his cousin and spent 30 months in prison between 1998 and 2001, after which he was released on bail pending trial. After his release, the Applicant claimed that he moved with his wife and children to his in-laws home elsewhere in Pakistan until 2005 when he left that jurisdiction leaving his wife and children behind him. Prior to leaving that jurisdiction and after his release from jail, he claimed that he returned to his home village in 2003 for a wedding. On that occasion, the car in which he was travelling was shot at and his brother in law was injured. He claimed he returned home in 2005 to participate in local elections and was again shot at. He asserted that the murder investigation against him has been ongoing since 2001 and the family of the deceased have gathered witnesses to testify against him even though he was not present at the altercation where the man was killed. The Applicant's claim for protection was he feared that if returned to Pakistan he would be arrested and given the death penalty for a crime he did not commit.
4. The documents supplied to ORAC for the purpose of the asylum claim included fax copies of FIR reports where the murdered man had been named by the Applicant in relation to the land dispute. The Applicant asserted that it was because of this FIR that the family of the murdered man named the Applicant as his assailant.

5. ORAC assessed the Applicant's claim in the following manner:-

"The applicant claims that he was brought to court each month of his incarceration but made no mention of a prosecution when asked. He was asked if the case continued after his release. He asserted that he was on bail. It was put to the applicant that he was accused of murder, an extremely serious crime and was again asked for the details of the case in the four years from 2001 to 2005. He failed to answer this question directly and stated that shots were fired at him during this time. He was asked why he had not been charged or prosecuted during the seven years from his arrest to the time of his departure from Pakistan. He claimed that this was common and often the judges or solicitors were on holiday. It was queried with the applicant as to why he left in 2005, considering the case was ongoing for seven years at that stage, and why he fled, therefore projecting a guilty image rather than fighting his case in a court of law. He claimed that there was a Chief Justice in Pakistan who was sentencing people within forty days and reiterated that they had witnesses against him. The applicant was asked why he, or a member of his family, did not gather witnesses to counteract these witnesses. He asserted that a person who had been injured in the 1998 fight had been coerced by the deceased man's family to bear witness against him."

6. ORAC found there was a number of credibility issues with the Applicant's evidence: he was vague on the purported court case against him; and he did not supply any verifiable documents that such a case was ongoing. ORAC found that it did not seem plausible that the case was ongoing for seven years at the time he left Pakistan if there was so much evidence against him, yet no verdict had been reached during such a lengthy period of time. ORAC also found that if the Applicant really believed that he would be wrongly sentenced to death and had been remanded for thirty months between 1998 and 2001, it did not seem logical that he would wait four years after his release before leaving the country. It also found that the Applicant had successfully internally relocated within Pakistan when he lived with his in-laws. ORAC ultimately found the Applicant had not established a well-founded fear of persecution.

7. The decision, on appeal, of RAT was that the Applicant had not established a link with any of the Convention grounds for any persecution he may have suffered, nor was the persecution element made out. The Tribunal specifically rejected that he was persecuted for reasons of his political opinion: his prosecution, if true, was motivated from personal revenge arising from a family row based on financial interest. RAT further found that there was nothing to suggest that his prosecution, if accepted as genuine, was politically selective, or that he was denied basic standards of fairness or that if convicted he would receive a differential or disproportionate punishment, particularly given his evidence at the hearing that he had been afforded legal representation and his lawyer had been allowed to cross-examine witnesses and that he had been released on bail in 2001. He also stated that three of the attackers who allegedly killed his brother had themselves been arrested and detained for some months before being released on bail. The Applicant had not demonstrated that the alleged prosecution in Pakistan resulted in serious

violations of his human rights for any Convention reason, and there was no indication that the Pakistani authorities wished to bring false charges against the Applicant or deny him fair procedures for political reasons.

8. RAT went on to find that the Applicant's claim was lacking in credibility in several material respects. Of particular relevance to the instant case was RAT's finding that the Applicant's description of the ongoing trial procedures in Pakistan were implausible, incoherent and vague. All of the credibility findings made by ORAC were found to be valid. RAT also found the Applicant's failure to claim asylum in the first third country he transited, having transited through several, undermined the well-foundedness of his alleged fear of persecution. The conclusion drawn by RAT was that the Applicant's evidence was not credible.
9. RAT proceeded to find that if it was wrong about the credibility findings, it was satisfied that internal relocation was available to the Applicant. The Tribunal stated that where a person can access protection in another part of the country it cannot be said that there is a failure of state protection. As already noted, the decision of RAT was not challenged by the Applicant.

#### **Progress after the RAT determination**

10. On 5 November 2009, the First Respondent notified the Applicant of his intention to issue him with a Deportation Order. On 26 November 2009, the Applicant made an application for subsidiary protection and an application for leave to remain within the State. Representations were also made by the Applicant in respect of the proposed Deportation Order on 26 November 2009.
11. The First Respondent deemed the Applicant's application for subsidiary protection to be withdrawn and therefore refused this application on 26 November 2014 after the Applicant had moved from the address where he had indicated, by compulsion, that he was residing at: correspondence issued to the Applicant between October 2013 and November 2014 had been returned marked "gone away".

It transpired that the Applicant had left the State in early June 2012 and was residing in the United Kingdom. He has averred in an affidavit that he went to the United Kingdom to be with his sister-in-law who was diagnosed with cancer. She died on 5 June 2012. He then remained in the United Kingdom to assist his brother with the couple's four young children.

12. The Applicant was detected by the authorities in the United Kingdom as being unlawfully present in that jurisdiction. A request was made by the UK authorities on 12 February 2016 to "take back" the Applicant pursuant to the Dublin III Regulation. On the 25 May 2016 the Applicant was transferred from the United Kingdom to this State under the Dublin III Regulation.

#### **Deportation Order**

13. On 26 August 2016, a Deportation Order issued against the Applicant. The Examination of File document reflects that refoulement was considered for the purposes of section 5 of the Refugee Act 1996. It states:-

"It was submitted on behalf of [the Applicant] in representations dated the 26th November 2009 that if returned to Pakistan he would continue to experience the same problems which he had previously experienced. It was submitted that he fears arrest and imprisonment if he is returned to Pakistan.

[The Applicant] made an application for asylum and subsidiary protection as set out above... [The Applicant] was refused a declaration of refugee status for failure to establish a well founded fear of persecution. Together with a failure to establish a convention nexus, the material elements of [the Applicant's] claim were found to be lacking in credibility. No new claimed fear has been made by [the Applicant] and nothing has been submitted which would suggest that the finding of ORAC and RAT should be departed from in respect of the fear claimed by [the Applicant]. It is not accepted that he faces a risk of refoulement if returned to Pakistan on the basis of the claims made by him.

Article 3 of the UN Convention Against Torture prohibits State parties from expelling, refouling or extraditing a person to another State "where there are substantial grounds for believing that he would be in danger of being subjected to torture." In that context, the UN Committee against Torture has held that the threat does not have to be highly probably or highly likely to occur but must go beyond mere theory or suspicion or a mere possibility of torture.

In his application for subsidiary protection [the Applicant] claimed fear of serious harm in Pakistan for reasons of "torture or inhuman or degrading treatment or punishment of a person in his or her country of origin

[The Applicant] subsequently failed to cooperate fully in respect of his claim for subsidiary protection and left the State on an undisclosed date to reside unlawfully in the United Kingdom. His failure to participate in the subsidiary protection process undermines his credibility with regard to any claim to be at risk of serious harm if returned to Pakistan"

Taking account of the representations made on [the Applicant's] behalf, the information available on Pakistan, the fact that he did not pursue his application for subsidiary protection to its natural conclusion and the relevant case law of the ECHR, I am satisfied that the deportation of [the Applicant] to Pakistan would not be contrary to Article 3 of the ECHR."

14. The First Respondent proceeded to consider five further separate pieces of country of origin information relating to Pakistan from the UK Home Office, the US Department of State, Amnesty International and Human Rights Watch and concluded:

"I have considered all the facts of this case. Country of origin information confirms that there is a functioning police force and judicial system in Pakistan and I am satisfied that State protection is available to [the Applicant] in Pakistan.

Accordingly, I am of the opinion that repatriating [the Applicant] to Pakistan is not contrary to Section 5 of the Refugee Act 1996 as amended, in this instance"

15. The decision was notified to the Applicant under cover of letter dated 6 September 2016 indicating that the Applicant was to leave the State by the 7 October 2016. The Applicant did not challenge the Deportation Order. Accordingly, a valid Deportation Order remains in place with respect to the Applicant.

**Application pursuant to s.3(11) of the Immigration Act 1999**

16. On 11 October 2016, the Applicant made an application pursuant to section 3(11) of the Immigration Act 1999, as amended, seeking the revocation of the Deportation Order. In the Solicitor's letter accompanying the application, representations were made "that the [murder] offence ... are laid against our client as a form of political persecution, and that our client is of good character .... Our client has been subject to imprisonment pending trial for capital offences. It is submitted that, on a humanitarian level as well as a legal one, [the Applicant] ought not be returned to Pakistan given his previous persecution and the real risk of prospective persecution."

Enclosed with the application was a copy letter dated 26 January 2016 purportedly from Sultan Mahmood Chaudhry who was the Prime Minister of the Azad Jammu and Kashmir Province at the relevant time. It is asserted in the Applicant's solicitor's letter that the letter from Mr Chaudhry supports the Applicant's account regarding the offences which he faces in Pakistan. Also enclosed was a copy letter dated 26 January 2016 from the Office of the Superintendent, Central Jail Mirpur, certifying the Applicant's imprisonment on 16 August 1998 and subsequent bail on 23 May 2001 and reciting the sections of the Pakistan Penal Code alleged to have been contravened. A copy of the First Information Report was also included. However, this had already been submitted and considered by ORAC and RAT during the refugee application stage.

17. The "copy letter" from Barrister Sultan Mahmood Chaudhry, dated 26th January 2016, which appears to be faxed states:-

"To Whom it May Concern"

It is to certify that I know [the Applicant] personally. I further know that he has a murder case in Azad Kashmir courts because of his political activities. If he returns to Pakistan [the Applicant] surely he will be prosecuted according to the Azad Kashmir Laws. The case is pending and the maximum punishment is death sentence. So his case in London must be considered in this background and may be on humanitarian grounds."

18. It is of course important to note the date of the letter, namely 26 January 2016. Clearly it came into existence when the Applicant was resident in the United Kingdom and before

he had been returned to Ireland. No explanation accompanies the letter as to why it had not been produced before the 11 October 2016; the Applicant's acquaintance with Mr Chaudhry; how the Applicant came to be in receipt of the letter; or the significance of the reference to "London".

**Application seeking re-admission to the international protection process**

19. The Applicant sought re-admission to the international protection process on 1 November 2016. This application was considered under s. 22(2) of the International Protection Act 2015 and was refused on 10 August 2017. This decision was appealed to the International Appeals Tribunal who affirmed the refusal on 16 January 2018. This decision was the subject of Judicial Review proceedings which culminated with an order of certiorari quashing the refusal and remitting the matter to IPAT. When re-considered by IPAT, the refusal to re-admit the Applicant to the international protection process was reaffirmed on 15 November 2018.

**Section 3(11) application, further submissions**

20. On 22 April 2019, the First Respondent refused the s.3(11) application. This decision was the subject of Judicial Review proceedings which culminated with an order of certiorari quashing the refusal and remitting the matter to the First Respondent for re-consideration.
21. Further submissions were made regarding the s. 3(11) application on 15 August 2019. These representations enclosed an original letter purportedly from Mr Chaudhry dated 15 June 2019 together with photographs. The Court has inspected these documents. The Applicant's solicitor's letter stated that "An original copy of this letter was not previously available to our client." The photographs which accompanied the letter depict a meeting between Mr Chaudhry, Joan Burton and what I assume to be an Irish delegation.
22. The letter purportedly from Mr Chaudhry dated 15 June 2019 stated:-

"To Whom It May Concern

It is to certify that I know [the Applicant] personally, I further know that he has a murder case in Azad Kashmir courts because of his political activities; if he returns Pakistan (Azad Kashmir) surely he will be prosecuted according to the Azad Kashmir Law. The case is pending and the maximum punishment is death sentence. So his case in Ireland must be considered in this background and may be on humanitarian grounds."

Barrister Sultan Mahmood Chaudhry"

23. When re-considered by the First Respondent, the Applicant's s. 3(11) application was again refused on 15 November 2019. The Applicant was notified of the decision on 11 December 2019.
24. Having set out extensive portions of the representations made on behalf of the Applicant, the decision sets out the following:

“Consideration of representation submitted pursuant to section 3(11) of the Immigration Act 1999 (as amended)

All documentation and information received from, or on behalf of [the Applicant] in support of his case, have been read and fully considered.

It must be noted that representation made under section 3(11) of the Immigration Act 1999, as amended, to revoke a Deportation Order, must advance matters which are truly materially different from those presented or capable of being presented earlier....

On the basis of representations dated 11th October 2016, 18th December 2018, 29th April, 8th and 20th May and 15th August 2019, submitted in respect of the prohibition of refoulement, a further consideration of all refoulement related issues is warranted at this time.

#### Prohibition of Refoulement

[The Applicant] applied for asylum in the State on 23rd September 2008 and the [ORAC] recommended refusal of his application, which was affirmed by the [RAT] on 14th October 2009. [The Applicant’s] application for subsidiary protection in the State was deemed withdrawn, and an examination of his case pursuant to section 3(6) of the Immigration Act, 1999, as amended, with due regard given to the prohibition of refoulement, resulted in the making of a Deportation Order on 26th August 2016. This Deportation Order remains valid and subsisting at this time.

[The Applicant’s] application under section 22 of the International Protection Act, 2015, seeking the permission of the Minister to make a subsequent application for international protection in the State was refused and upheld on appeal on 16th November 2018 and [the Applicant] was advised of same on 22nd January 2019. This decision also remains legally valid and subsisting at this time.

Pursuant to section 3A of the Immigration Act 1999, as amended “a person shall not be expelled or returned 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.

It was submitted under cover of 11 October 2016 that [the Applicant] “faces risks of persecution and serious harm including the death penalty upon repatriation to Pakistan” and a copy of a letter from “Barrister Sultan Mahmood Chaudhry, President PTI Kashmir & Former Prime Minister of AJK” dated “28-1-2016” was submitted. In addition, a translated First Information Report, and a copy letter

from the Office of the Superintendent, Central Jail, Mirpur, Azad Jammu and Kashmir Province certified that "[the Applicant] was sent imprisonment in the jail on 23/5/2001. In this way was remained in jail from 16-8-1988 to 23-5-2001" in support of [the Applicant's] risk of persecution in Pakistan. Mr Chaudhry's letter dated "28-1-2016" advised that he personally knew [the Applicant] who was charged with murder due to his political activities. Mr Chaudhry further advised that the "maximum punishment is death sentence."

I acknowledge the further representation on [the Applicant's] behalf on 29th April identifying a number of issues, that is to say, the letter from Sultan Mahmood Chaudhry, former Prime Minister of Azad Jammu and Kashmir certifying that he personally knows [the Applicant] who has been charged with murder due to his political activities. The Minister was advised that while the death sentence is the maximum punishment allowed by law "the moratorium on the death penalty which was in place in Pakistan at the time when [the Applicant's] original protection application was refused has now been lifted" and same is "a highly relevant and significant piece of evidence in our client's favour..."

It was submitted, in updated submissions by Thomas Coughlan & Co Solicitors, on 15th August 2019, that [the Applicant] would be at risk in Pakistan "in light of new information/documentation which has recently been received and the "original now dated 15-6-2019" and again from "Barrister Sultan Mahmood Chaudhary (emphasis added, the Prime Minister of Azad Kashmir at the relevant time was submitted. In this letter, Mr Chaudhary reiterates that he knows "[the applicant] personally" who "has a murder case in Azad Kashmir courts because of his political activities; if her return Pakistan (Azad Kashmir) surely he will be prosecuted according to the Azad Kashmir law. The case is pending and the maximum punishment is death sentence."

A number of colour photographs, along with a copy of this duly notarised and attested letter dated 15th June 2019, was submitted under cover of 15th August 2019 and the Minister was advised that the original letter from "Barrister Sultan Mahmood Chaudary" but signed ".. Chaudhry" was not previously available to [the applicant] and that "it has been allocated its own reference number and that the letter is printed on the official letterhead of the President of the PTI Kashmir and the Former President of the State of Jammu and Kashmir, which goes to its legitimacy." It was again submitted that the Minister "use the avenues available to him to confirm the authenticity of the letter from Sultan Mahmood *Chaudhry*" (emphasis added).

[The Applicant] claims to be at risk of refoulement for the same reasons as that of his previous claims for international; protection in the State. However, no explanation has been provided as to why the Minister should now be of a different opinion in relation to the fact that his life or freedom would be threatened for reasons of race, religion, nationality, membership of a particular social group or



political opinion, or that there is a serious risk that he would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, in relation to elements that have already been considered by the ORAC and the RAT.

While new documents have been submitted in support of his claim, they do not provide an explanation for the many credibility issues that led the ORAC and the RAT to find that [the Applicant] was not credible, and which ultimately led the ORAC and the RAT to refuse [the Applicant's] claim.

Notwithstanding [the Applicant's] claim of persecution in Pakistan is based on the same reasons as that of his previous unsuccessful claim for protection in the State, I have carefully reviewed the updated supporting documents under cover of the 11th of October 2015 and 15th August 2019. This asserted "original letter dated 15-06-2019" while in similar terms to the copy letter dated 28-1-2016, submitted under cover of 11th October 2016, is in fact wholly different. The letter of 28-1-2016 refers to [the Applicant's] case "in London", however, the letter dated 16-06-2019 refers to [the Applicant's] case "in Ireland".

I note also that while both letters refer to Mr ["Xxxxxx"] and not ["Xaxxxxx"], and the Minister is asked to "use the avenues available" to authenticate same, there are further discrepancies in the spelling of the surname of this former Prime Minister, that is to say:

- "Sultan Mahmood Chaudhry" in the 2016 copy letter; and
- "Sultan Mahmood Chaudhary", but signed "Chaudhry" in the updated and asserted "original" letter dated 15th June 2019.

It is noted, additionally, that the email address recorded on the original letter is incomplete and therefore inaccessible, that is to say, kashmir555@gmail.com (emphasis added). It is further noted that the politician and former Prime Minister of Azad Kashmir between 1996 and 2001 is "Sultan Mehmood Chaudhry" and not either "Sultan Mahmood Chaudhry", as recorded in the 2016 letter; or "Sultan Mahmood Chaudhary" as record in the 2019. On that basis the Minister cannot rely on the authenticity of these letter [sic] in support of [the Applicant's] case, or that the second letter is in fact the original letter from the former Prime Minister, Mr Sultan Mehmood Chaudhry as asserted."

"I acknowledge the several photographs submitted by Thomas Coughlan & Co, solicitors under cover of 15th August 2019 which depict Joan Burton TD and former Tanaiste, alongside Mr Chaudhry. However, these pictures do not corroborate [the applicant's] assertion that he is at risk in Pakistan.

Having considered same, and in light of all of the above, I am of the opinion that no probative weight can be attached to the documents and photographs submitted."

Notwithstanding the above, I have also considered if there could be reasons, other than the ones asserted by [the Applicant], why he could be at risk of refoolment

and the following country of origin information report such as [Freedom House] does not indicate that the prohibition of refoulement applies to [the Applicant] if returned to Pakistan.

In light of the above, having taken into consideration all of the facts of this case and relevant country of origin information, I am of the opinion repatriating [the Applicant] to Pakistan is not contrary to Section 3A of the Immigration Act 1999, as amended.

Therefore, it is contended, on behalf of the Minister that this case has already been considered with due regard given to the prohibition of refoulement and a Deportation Order was made on 26th August 2016. No information that could be considered truly materially different from that presented or capable of being presented has been submitted in support of this Section 3(11) revocation request.

#### Conclusion

[The Applicant] has been given an individual assessment and due process in all respects. All correspondence submitted by and on behalf of [the Applicant] requesting the revocation of the Deportation Order made in respect of him pursuant to section 3(11) of the Immigration Act 1999, as amended, has been fully considered at this time.

[F]urther it is for [the Applicant] in asking for a revocation under section 3(11), to demonstrate some new basis that has not been previously considered by the Minister, and I find that no basis has been shown that has not been given previous due consideration. There is no new information submitted that tends to suggest that the Minister should depart from the earlier order.”

#### **Grounds for Challenge**

25. The grounds relied on by the Applicant in seeking an order of Certiorari of the First Respondent's decision are that she:-

- a) failed to afford the Applicant fair procedures or comply with the principle of *audi alteram partem* in the manner in which she arrived at the impugned decision;
- b) failed to authenticate the letters from the former Prime Minister of AJK Province, Pakistan;
- c) reached a decision which was unreasonable/irrational having regard to the material before him;
- d) took irrelevant factors into account or failed to take relevant factors into account;
- e) failed to give reasons for the impugned decision.

#### **The law regarding a challenge to a s. 3(11) decision**

26. In *CRA v. Minister for Justice* [2007] 3 IR 603, MacMenamin J considered the obligations on the First Respondent when considering section 3(11) applications to revoke deportation orders in respect of failed asylum seekers. He reasoned as follows:

"[82] Section 3 is not an interactive process. The requirements of natural justice and the statutory requirements are satisfied once the prospective deportee has been afforded an opportunity to make submissions and these submissions have been considered by the Minister, particularly in the consideration of whether the principle of non-refoulement under s. 5 of the Act of 1996 has been satisfied. There is too a substantial overlap between the matters to be considered in an asylum application and under s. 5. The very fact that a person has been refused asylum may be highly relevant to the question of non-refoulement.

[87] Thus, an applicant making representations to the Minister for leave to remain on humanitarian grounds is obliged actively to put his or her best case forward in such representations. To address the second issue directly any such application under s. 3(11) to revoke a deportation order made having considered such representations, must advance matters which are, truly materially different from those presented or capable of being presented in the earlier application. There must be, in the words of Clarke J. in *Kouyape v. Minister for Justice* [2005] IEHC 380, (Unreported, High Court, Clarke J., 9th November, 2005) "unusual, special, or changed circumstances". Furthermore, the test in law must include one further test which is as to whether the material was capable of being presented earlier. To omit this latter aspect might have the effect of actually encouraging delay in the making of an application for humanitarian leave to remain and might permit the approach which was specifically criticised and rejected by Peart J. in *Mamyko v. Minister for Justice* (Unreported, High Court, Peart J., 6th November, 2003).

27. The relevant test in respect of a s. 3(11) application; the effect of not challenging the underlying deportation order; and the effect of not submitting available material at the time the application was made was considered further by the Supreme Court in *Smith v. Minister for Justice and Equality* 2013 IESC 4. Clarke J, as he then was, stated at paragraph 5.4 of his judgment:-

"[I]t is only where a relevant applicant can point to some significant feature, not present when the original deportation order was made, that there can be any obligation on the Minister to give detailed reconsideration to the question of deportation... Where, as here, ... the original deportation order was [not] challenged in the courts by judicial review... it must be assumed that the analysis of the Minister, on the basis of the facts, materials and considerations then before the Minister was correct.

And at paragraph 5.6:-

"[T]here is an obligation on persons seeking to invoke their right to invite the Minister to revoke a deportation order to put before the Minister all relevant

materials and circumstances on which reliance is sought to be placed. The question of the presence of new and significantly material considerations such as might justify a reconsideration of a previous deportation decision...must be judged against that obligation. The mere fact that what is said to be a new consideration was not before the Minister when an earlier decision was made does not of itself render it the sort of consideration which requires the Minister to actively reconsider. It what is asserted to be a significant and material new consideration was actually available to the applicant at the time of the previous application, but was not advanced or brought to the Minister's attention, then, in the absence of special circumstances, it is difficult to see how the existence of such a consideration can properly be advanced as a new consideration requiring an active reassessment by the Minister of the substantive merits of the case. For a new circumstance to require such a reassessment it must have arisen after the earlier decision of the Minister or there must be a compelling explanation as to why notwithstanding its existence at the relevant time, it was not then advanced.

**Failure to comply with the audi alteram partem principle?**

28. The First Respondent determined that she could not place any probative weight on the two letters and photographs purportedly from Mr Chaudhry, in light of issues which arose on the face of the documentation, set out in full earlier.
29. The Applicant complains that the First Respondent should have raised these concerns with him before making a determination in relation to the documents so that he could have had an opportunity to address them. He relies on a number of authorities relating to the international protection bodies, including *Idiakhuea v. Minister for Justice* (Unreported, High Court, 10th May, 2005), where Clarke J., as he then was, stated at pp. 8 and 9 of his judgment:-

"It should be recalled that the process before the RAT is an inquisitorial one in which a joint obligation is placed on the applicant and the decision maker to discover the true facts. It seems to me that an inquisitorial body is under an obligation to bring to the attention of any person whose rights may be affected by a decision of such a body any matter of substance or importance which that inquisitorial body may regard as having the potential to affect its judgment.

If a matter is likely to be important to the determination of the RAT then that matter must be fairly put to the applicant so that the applicant will have an opportunity to answer it. If that means the matter being put by the Tribunal itself then an obligation so to do rests upon the Tribunal. Even if, subsequent to a hearing, while the Tribunal Member is considering his or her determination an issue which was not raised, or raised to any significant extent, or sufficient at the hearing appears to the Tribunal Member to be of significant importance to the determination of the Tribunal then there remains an obligation on the part of the Tribunal to bring that matter to the attention of the applicant so as to afford the applicant an opportunity to deal with it."

30. The Respondent submits that this line of case law does not apply to s. 3(11) decisions; that it is specific to international protection applications before the relevant bodies who exercise an inquisitorial function; and that there was no obligation on the First Respondent to raise her concerns regarding the authenticity of the documents with the Applicant.
31. The case law relating to s. 3(11) decisions, set out earlier, emphasises the very different function which the First Respondent is carrying out compared to the inquisitorial function carried out by the international protection bodies. *CRA v. Minister for Justice* makes it clear that s. 3 is not an interactive process; that an applicant is obliged to put his best case forward; and that the requirements of natural justice are satisfied once an applicant has been given the opportunity to make submissions and these submissions are considered by the First Respondent. The line of authority reflected in *Idiakhuea* is not applicable to the First Respondent when making a s. 3(11) decision.
32. The Applicant does not demure from this general statement of law but asserts that the decision in *Smith v. Minister for Justice and Equality* permits a different approach to be taken in unusual and special circumstances which it is asserted are present in this case. Further, it is submitted that in light of the fact that the Applicant did not have the benefit of a subsidiary protection assessment, which is accepted was his own fault, and in light of the fact that the First Respondent indicated in its s. 3(11) decision that a further consideration of all refoulement related issues was warranted at this time, that the process in the s. 3(11) decision making should have been more akin to that identified in *Idiakhuea*.
33. Firstly, I do not accept that this case is unusual and exceptional: it is protracted, has had a complicated history and the introduction of the Chaudhry letters lends an air of theatrics to the case, but none of that makes it unusual or exceptional. In reality, the Chaudhry letters are merely a new piece of evidence in the case which must initially be assessed by the decision maker to determine their authenticity.
34. Secondly, the fact that a subsidiary protection determination did not occur in this case, and that the First Respondent indicated that in light of the representations made, a further consideration of all refoulement related issues was warranted, does not mean that the process should start afresh or transform into an inquiry akin to that conducted by the international protection bodies. The process being engaged in remained a s. 3(11) decision making process to which the test of whether the new material was truly materially different applied.
35. Lastly, I do not in any event agree that the principle of *audi alteram partem* requires a decision maker to engage in discussions with an applicant about the authenticity of documents submitted by him, particularly in a s. 3(11) application where there is an onus on an applicant to put his best case forward. The *audi alteram partem* principle requires that an affected person should be given an opportunity to make his case about any relevant matter. If an affected person is unaware of a relevant issue, then he should be made so aware, so that he can make submissions thereon. In the instant case, these

documents were produced by the Applicant: he had full knowledge of their content. The issues which the First Respondent had with the documents were plain to see on the face of the documents, it was not necessary to point these issues out. I do not accept that the principle of *audi alteram partem* requires a decision maker to engage in a consultative decision making process in relation to an item of real evidence, which it has the function of assessing, when the issues which it has with the document are clear on an examination of the document.

36. I am supported in my view by *Khan v Minister for Justice Equality and Law Reform* [2017] IEHC 800, where Faherty J. in the context of an EU citizen's right application, rejected an argument that the Minister was required to give advance notice to the applicants of perceived deficiencies or contradictions in the documents submitted in visa applications prior to reaching a decision. Faherty J. also rejected the contention that had they been forewarned they would have been able to address the perceived deficiencies or contradictions. Instead, Faherty J. favoured the Minister's submission that it was incumbent on the applicants to put their best foot forward and that the Minister could not be criticised for the condition of the applicants' own proofs.

37. Khan was applied by Barrett, J. in *Badshah v Minister for Justice* [2018] IEHC 758 and in *Aziz & ors. v Minister for Justice and Equality* [2020] IEHC 21, which states at paragraph 2 of its judgment:-

"There was no need for the Minister to revert to the first-applicant before reaching this conclusion; the Minister is entitled to arrive at a decision by reference to the application documentation placed before him (*Khan & Anor. v Minister for Justice, equality and Law Reform* [2017] IEHC 800, paras. 84-85; *Badshah & Anor. v The Minister for Justice and Equality* [2018] 759, para. 4(III))."

38. *Khan* was also quoted with approval in *Qureshi v Minister for Justice* [2019] IEHC 446, where Keane J. suggested that an obligation to give advance notice might arise where an applicant was not on notice of the material or information upon which the decision was reached. Keane J. noted:

"61. In that context, it is important to bear in mind that both the first instance and review decisions were based solely on the material provided by the applicants. This was not a case involving the consideration by the decision-maker of further or other material of which the applicants were not on notice. Thus, there is no question in this case of the applicants being deprived of a reasonable opportunity to know the matters that may be likely to affect the judgment of that body against their interest."

39. Accordingly, I find that there was no obligation to revert to the Applicant regarding the issues which the First Respondent identified on the face of the letters.

#### **Failure to authenticate the documents**

40. The Applicant asserts that the First Respondent should have sought to authenticate the documents, either through diplomatic channels or otherwise, in light of the serious consequences for the Applicant. This request had been repeatedly made by the Applicant's solicitor throughout his interaction with the First Respondent.
41. I do not accept that an onus fell on the First Respondent to seek to authenticate these documents in light of the issues which arose on the face of the documents. It was a matter for the First Respondent to assess and weigh these documents as new evidence submitted to her. The initial task in carrying out that exercise is to make a determination as to whether the documents are genuine. Grave issues arose with respect to the question of authenticity which have already been set out. The determination which the First Respondent reached were entirely open to her to make having considered the documents. Having made the determination that she could not accept that the documents were authentic, no obligation arose upon her to seek to authenticate the documents. As stated by Denham J in *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795:

"Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him and on behalf of applicants and which are on the file of the department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances."

42. However, a more fundamental reason arises as to why there was no necessity for the First Respondent to seek to authenticate these letters: the First Respondent actually considered the letters in terms of their content and determined that they did not raise any truly materially different issue within the meaning of the test applicable to s. 3(11) decisions as set out in *CRA v. Minister for Justice* as they raised the same issue which had always been raised by the Applicant since his initial application before ORAC and which had been determined against him. The content of the Chaudhry letters asserted that the Applicant had been charged with murder for political reasons; that if he was returned to Pakistan, he would be prosecuted; and if convicted, he would face the death penalty. This claim was rejected by ORAC and RAT. The RAT findings were not challenged by the Applicant. This claim was also considered by the First Respondent when issuing the Deportation Order and rejected by the First Respondent. Again, the Deportation Order was not challenged by the Applicant. Accordingly, even had the letters been authenticated, their content was not such that a truly materially different matter arose from them. They asserted a political reason for a malicious prosecution which claim had been rejected by RAT; they failed to deal with the credibility issues identified by ORAC and accepted by RAT; they stated that the death penalty applied if convicted, but that had been the case at the time of the Deportation Order and was presented as the position at the time of the ORAC and RAT hearings, although there is now an assertion that a moratorium was in place regarding the death penalty at the international protection stage which has since been lifted. This was never advanced before ORAC and RAT who determined the Applicant's claim on the basis that the death penalty applied to the

offence of murder. Nothing accompanied these letters to explain the author's knowledge of the Applicant; his knowledge of the asserted murder prosecution in Pakistan; or why this information was only being provided at this very late stage. The letters do not bring anything new to the Applicant's claim never mind something truly materially different. For that reason, authenticating them would have been a useless exercise in light of the earlier unchallenged findings of ORAC and RAT which remained valid.

43. Submissions have been made regarding *Singh v. Belgium* – ECtHR Application 33210/11; *A.O. v The Refugee Appeals Tribunal* [2017] IECA 51 and *T.T.(Zimbabwe) v The Refugee Appeals Tribunal* [2017] IEHC 750. Regardless of the issues of interpretation between the Court of Appeal and the High Court in this jurisdiction in relation to the import of *Singh*, as I am of the view that the Chaudhry letters cannot be classified as "critical" and that therefore a duty does not arise to authenticate the letters, it is not necessary for the Court to further consider this caselaw.

**Unreasonable/irrational decision**

44. The Applicant asserts that the First Respondent's refusal of his s. 3(11) application was unreasonable and irrational.
45. I do not agree with this assertion for reasons which are already apparent in this judgment.
46. Firstly, the correct test applied by the First Respondent was whether the Applicant had raised a truly materially different issue to that which had previously been presented or was capable of being presented. While the First Respondent referred to it being appropriate to give a further consideration to all refoulement related issues, this does not mean that a different test was appropriate for her to consider. It is clear that the Applicant was applying the "truly materially different" test when one considers the concluding paragraphs of the decision.
47. The First Respondent determined that there was not a truly materially different matter before her for consideration in the s. 3(11) application: the letters claimed the same risk of refoulement as the Applicant had always claimed, the underlying facts of which had already been determined against him by ORAC and RAT and by the First Respondent when issuing the Deportation Order. Nothing new was added to the Applicant's claim by the Chaudhry letters, particularly in light of the fact that no information was provided as to Mr Chaudhry's knowledge of the Applicant; his knowledge of the asserted prosecution; why his assistance was only being provided at this stage; when were the letters provided to the Applicant and in what circumstances; and why there was a reference to the Applicant's case in London and in Ireland.
48. With respect to the assertion that the moratorium on the death penalty has been lifted since the time of the ORAC and RAT findings, the Court fails to see how it can be asserted that this is a truly materially different fact. The reality is that the Applicant's case had been presented before ORAC and RAT on the basis that the death penalty was in effect and that this was what he was facing. The decisions of ORAC and RAT were based on



that proposition. If that was not the correct position, and the evidence in relation to this issue is sparse in the extreme, the protection claim was decided, in any event, on the basis that the death penalty was in operation. Accordingly, the fact that it is now asserted that the death penalty was in abeyance but is now again enforced cannot be described as a truly materially different fact. This is aside from the further complicating issue for the Applicant that the moratorium is asserted by him to have been lifted in March 2015 which clearly is well before the Deportation Order issued. No explanation has been proffered as to why this was not raised, as it should have been, before the First Respondent when the Deportation Order was issued.

49. The First Respondent's decision that a truly materially different fact was not established in the s.3(11) application is not unreasonable or irrational. Rather it was based on a correct assessment of the findings of ORAC and RAT and had proper regard to the issuance of the Deportation Order, which were decisions validly made and unchallenged by the Applicant.
50. The Applicant criticises the First Respondent's reasons for determining that she could not rely on the Chaudhry letters as authentic. In light of the discrepancies on the face of the letters, these were findings which were open to her to make. An issue is asserted to arise with respect to her finding that the two letters were different letters, which clearly they were, but her assumption that they were submitted by the Applicant's solicitor as the same letter. The difficulty from the Applicant's perspective in arguing this point is that his solicitor's letter seems to assert that they are one and the same letter with an "original" being provided in August 2019 and a "copy" being provided in "November 2016 with the reference at the time when the 2019 letter is provided that - "An original copy of this letter was not previously available to our client.".
51. Regardless of this, the fact remains that while the First Respondent commented on the discrepancies on the face of the letters, she nonetheless in fact took account of the content of the letters and came to a reasonable and rational decision in relation to the s. 3(11) decision.

**Failing to take relevant factors into account and taking account of irrelevant factors**

52. The Applicant complains that the First Respondent failed to take relevant factors into account, namely the content of the Chaudhry letters and the fact that the moratorium on the death penalty had been lifted and took irrelevant factors into accounts, namely the negative findings of ORAC and RAT.
53. With respect to the content of the letters, it is clear that while the First Respondent determined that she could not accept the letters as authentic, she in fact gave full consideration to the content of the letters and determined that they did not present anything truly materially of difference.
54. With respect to the lifting of the moratorium on the death penalty, the Applicant's case had always been presented on the basis that the death penalty was in effect. No change presented itself in his case in light of the asserted information.

55. In relation to the negative findings of ORAC and RAT, the findings of these bodies were valid and unchallenged and had been considered and relied on by the First Respondent when issuing the Deportation Order. The First Respondent was absolutely entitled to rely on these earlier unchallenged findings.

**Failure to give reasons**

56. The Applicant complains that the First Respondent failed to give reasons regarding the discrepancies in the Chaudhry letters. As I have already indicated, it was open to the First Respondent to make the determinations which she made in relation to the discrepancies on the face of the Chaudhry letters and the reasons given by her complied with the jurisprudence regarding the requirement to give reasons in that it was clear from the reasons given, which are set out earlier in this judgment, why she made the determinations which she did. In reality, this ground seeks to convince the Court that the First Respondent was wrong in her determination regarding the discrepancies in the Chaudhry letters rather than really advancing a case of a failure to give reasons. This Court has no role in determining whether the First Respondent was in fact right in her determination that being a matter solely for her.

**Drip Feeding**

57. The Applicant's challenge to the s. 3(11) decision is wholly without merit, in any event. He has sought to rely on documentation and information which came into existence prior to the issuing of the Deportation Order on 26 August 2016: the Chaudhry letter in January 2016; the asserted lifting of the moratorium on the death penalty in March 2015. No explanation has been provided as why this has occurred. This is a practise which is to be deprecated. An onus is placed on an applicant to bring all relevant matters to the attention of the First Respondent when a Deportation Order is being made. Failure to do so, without good explanation, will result in an applicant living with the consequences.

58. An Order of Certiorari is not merited in this case. I therefore refuse the Applicant the relief sought and make an order for the Respondent's costs as against the Applicant.