Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Sean Devons Irons) v Secretary of State for the Home Department FCJR [2013] UKUT 00495(IAC)

Given orally at the hearing at Field House On 12 September 2013 **Judgment sent**

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE QUEEN (ON THE APPLICATION OF SEAN DEVONS IRONS)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Representation:

Mr A Khan, instructed by Makanda Bart & Co appeared behalf of the Applicant.

Mr S Singh, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

JUDGMENT

JUDGE STOREY:

1. This is an application for judicial review of a decision of the respondent to refuse the further representations of the applicant, a citizen of Jamaica, as a fresh claim following the making of a deportation order against him under Section 32(5) of the UK Borders Act 2007 and the subsequent decision to remove him to Jamaica.

2. Refusal decisions of 30 May 2012 and 28 and 29 June 2012 have been augmented by consent by a supplementary decision letter of 24 June 2013. This letter takes into account both materials previously relied on and letters of 2 May and 14 August 2013 from a Specialist CAMHS Worker of Enfield Council Mental Health Trust.

Immigration history and judicial proceedings

3. It is of some significance to the overall context in which this application stands to be decided to recount briefly the applicant's immigration history and related judicial proceedings. He arrived in the UK in July 2000 as a visitor but in February 2001 was granted leave to remain as a student and in October 2001 was granted exemption from immigration control, having enlisted in the British army. In May 2006 however he was convicted at Croydon Crown Court of being knowingly concerned in the fraudulent evasion of prohibition or restriction on importation of class A controlled drugs and sentenced to eleven years' imprisonment.

4. On 26 May 2006 he was discharged from the army due to his criminal conviction. On 14 July 2010 he was given notice of liability of deportation. In March 2011 a deportation order followed. On 2 June 2011 a First-tier Tribunal panel dismissed his appeal against that decision, this dismissal being upheld by the Upper Tribunal soon after. The applicant became appeal rights exhausted in December 2011.

5. Following his re-detention under Immigration Act powers in January 2012 the applicant claimed asylum. On 14 March 2012 the respondent treated this as an application to revoke an automatic deportation order and certified it as clearly unfounded under Section 94 of the Nationality, Immigration and Asylum Act 2012. On 1 May 2012 his judicial review application against this decision was refused and identified as being totally without merit. In June 2012 the applicant made further representations which included submissions that the applicant and his mother had recently received threats in the UK from a criminal gang that he would be shot on his arrival at the airport in Jamaica and that there were serious concerns about the mental health of his younger half-sister, S. As noted earlier, the respondent refused to accept these as a fresh claim in letters dated 28 and 29 June 2013. On 13 February 2013 permission to apply for judicial review was granted by Upper Tribunal Judge Lane. He stated that the new evidence about the applicant's younger half-sister was arguably different. He added that the evidence of threats to the applicant in the UK was also arguably different enough to require an answer to the question of what a hypothetical judge would do. On 2 April 2013 the parties signed a consent order providing, among other things, that the applicant serve on the respondent up to date medical records in respect of the applicant's half-sister and that the respondent consider those medical records and issue a further decision. On 16 May 2013 the applicant wrote to the respondent enclosing a report from a specialist CAMHS worker, dated 2 May 2013. On 24 June 2013 the respondent issued a further refusal letter.

Relevant law

6. The respondent does not dispute that, in conformity with paragraph 353(i) of the Immigration Rules HC 395 (as amended), the materials on which the applicant has sought to rely include content that had not already been considered. The basis of her latest refusal is rather paragraph 353(ii). Paragraph 353 specifies that further submissions will only be significantly different if the content "… ii) taken together with the previously

considered material, created a realistic prospect of success, notwithstanding its rejection." Hence I have to decide whether in accordance with the latter paragraph the respondent asked herself the right question and acted rationally in considering that there was no realistic prospect of the new materials taken together with the old causing a hypothetical Tribunal Judge applying anxious scrutiny to find in the applicant's favour on asylum and/or human rights grounds. (The reference made in lead decisions to a "hypothetical judge" must, of course, be read in the light of the observation made by Carnwath LJ (as he then was) in YH, R (on the application of) v Secretary of State for the Home Department [2010] EWCA Civ 116 at [16] that it is a "helpful discipline" but not a legal formula.)

The grounds

7. The grounds as amplified by Mr Khan in a skeleton argument were essentially twofold.

8. First, it is contended that the respondent has acted unreasonably in responding negatively to the applicant's asylum and Article 3 related claims, that he would be at risk on return to Jamaica from members of a drug gang who had made serious threats against him and his mother, threats which were the subject of a criminal investigation by UK police based at Uxbridge Police Station to whom the applicant and his mother had reported them in June 2012. It is emphasised by Mr Khan that the applicant has never had an opportunity to have this asylum claim tested before a fact finding Tribunal.

9. Second, it is averred that the respondent has failed to give anxious scrutiny to the evidence relating to the applicant's younger half-sister, S. Letters from her GP and hospital doctors were said to demonstrate that in addition to underlying health problems (she suffers amongst other things from sickle cell anaemia), she developed suicidal ideation as a direct result

of her learning of the applicant's prospect of deportation and her belief that his life would be in danger on return. Here also Mr Khan highlighted the fact that the evidence of this girl's suicidal ideation has never as yet been considered by a fact-finding tribunal.

The asylum and Article 3 claim to risk on return arising from alleged threats from a criminal gang

10. Dealing with the applicant's first ground, I am not persuaded that the respondent's decision letters disclose any Wednesbury unreasonableness. The respondent has clearly given careful consideration to the evidence adduced by the applicant in support of his claim to be at risk from drug gang members. In this regard she was entitled to treat as significant the following matters:

    (i) the fact that despite the incidents said to underpin the adverse interest of gang members having occurred in 2005 (when the applicant was arrested at the airport in the UK in relation to importation of class A drugs), he had never made any mention of any concerns about his safety on return either during his appeal proceedings before the First-tier and Upper Tier Tribunals in 2011 or in the context of his judicial review application which in May 2012, as I have already mentioned, was found to be totally without merit. The applicant had nowhere sought to explain why he made no mention of such concerns previously or why, if threats were only made recently, they had not been made earlier. He had failed to explain why, given his removal had been set on five different occasions, texts had only been sent to forewarn him on one of them.

    (ii) that he had failed to substantiate the claims made by him and his mother to have received the alleged threatening texts in June 2012. (It is now apparent from a copy email of 10 August 2013 that the CID Main Office Inspector who was in charge of investigating these

complaints had noted that they had been made a short time prior to the applicant facing being deported to Jamaica and that "due to the lack of evidence, the possibility of false reporting, the matter was NFA'd [No Further Action-ed] and not in the public interest to proceed").

(iii) that he had failed to explain how the gang members would have been able to obtain either his or his mother's mobile phone numbers to send the alleged threatening text.

(iv) that he had failed to explain why any gang member would forewarn the applicant of any such threats.

11. As regards his asylum-related claim, the respondent also gave consideration to whether, even assuming these threats were real, the applicant would be able to obtain sufficiency of protection. Her written responses cite background country information relating to Jamaica supporting her assessment.

12. Mr Khan, in his submissions, has not sought to identify background evidence to the contrary, but he has sought to rely on a passage in the Operational Guidance Note on Jamaica, version 11.0, December 2012, stating that "[c]laimants who fear a criminal gang who are able to demonstrate that the gang poses a real and serious threat may be at risk of persecution in Jamaica. Unless reasonably likely to be admitted into the Witness Protection Programme, a person targeted by an organised criminal gang will not normally receive effective protection in his home area." Whilst I think it is fair to say that the OGN position on sufficiency of protection in this type of context is more nuanced than the position presented in the respondent's refusal letters, it is nevertheless clear that: (a) its presumption of ineffective protection only applies if witness protection is unlikely to be available; (b) more importantly, there is nothing in the OGN to say that internal flight or internal relocation would

normally be unavailable and indeed the succeeding paragraph (3.6.15) states that "[i]t may be practicable for applicants who may have a well-founded fear of persecution in one area to relocate to other parts of Jamaica where gang violence is less prevalent and where they would not have a well-founded fear ...."; and (c) in the applicant's case the respondent had justifiably considered that the applicant would not be able to demonstrate a real risk of persecution from a criminal gang and so her observations on sufficiency of protection and internal relocation were made in the alternative in any event.

Article 8 and the circumstances of the half-sister

13. Turning to the applicant's second ground, which relates to his and his half-sister's Article 8 circumstances, taking the previous refusal decisions together with that dated 24 June 2013, I am not persuaded it has merit either.

14. As regards the best interests of the child (the applicant's half-sister), it is true that the refusal decisions do not in terms refer to these, but I am satisfied that the relevant letters dealt in substance with the issue of her best interests and constituted a rational response to the further representations regarding them.

15. First of all, the evidence relating to this girl had to be considered - and was considered - by the respondent in the wider context of the applicant's private and family life ties in the UK. In its decision of June 2011 the First-tier Tribunal panel found that the applicant's ties with his mother and half-sister did not go beyond normal emotional ties. The panel noted that as a result of his own social network, his life in the army and his imprisonment, he had not lived in his mother's house for a considerable period of time and at that point in time the primary focus of his family life was indeed his relationship with his wife, K (whom he had married in 2003) and his son KO. Although there was evidence of the applicant's half-sister visiting the

applicant in prison and writing to him in prison, there was no evidence sufficient to require the respondent to consider that there had been a qualitative change in the nature of the applicant's ties with her.

16. Second, in relation to his half-sister's medical circumstances, it is clear that the respondent acknowledged that the medical evidence from the GP and the hospital doctors identified her suicidal ideation as being linked to her distress at the applicant's imminent deportation. However, the same evidence – the discharge summary from Barnet & Chase Farm Hospital, dated 21 June 2012 in particular – also identified this as being linked to his half-sister's pre-existing psychological problems which were said to have a 7 year history ("she described a seven year history of feeling sad most of the time"), and to derive also from a "complex family situation". Significantly, despite the applicant's representatives being afforded by consent the opportunity in April 2013 to adduce further medical reports, the only materials forthcoming were the two letters from the specialist CAMHS worker at Enfield Council and neither of these rejected the medical view previously stated that this girl's suicidal ideation was in part due to her complex family history going back seven years. I also note that no report was adduced specifically seeking to express the "voice of the child", S, herself despite it obviously having been open to the applicant's representatives to obtain such.

17. Thirdly, it is also clear that when assessing the impact on the half-sister of the deportation of the applicant the respondent also took into account, as she was entitled to do, that this same body of medical evidence would be seen to demonstrate that she would have ongoing support from the specialist CAMHS team: it was stated in the letter of 14 August 2013 by the specialist worker in question that "CAMHS will continue to offer ongoing emotional support to [S]. In the event of any further crisis with [S]'s mental health we would work closely with her and her family to ensure that she is supported and her wellbeing being safeguarded". The

earlier 2012 medical evidence also made clear that the girl was not considered a high suicide risk.

18. Fourthly, the contents of the 2 May 2013 letter from the CAMHS worker does not bear out Mr Khan's assertion in his skeleton argument at paragraph 20 that the condition of the girl has deteriorated since June 2012. This recent letter clearly regards the half-sister's suicidal ideation as having lessened. It is made clear that she still has significant anxiety and stress, that there has been some worsening of her academic and social progress and that worry about her brother, the applicant, has left her in a state of "emotional turmoil". At the same time, the letter does not record any clinical indiciae of a significant suicide risk and notes that "S… was able to acknowledge that these [suicide thoughts] had been fleeting thoughts with no actual intent and that in reality she would not act for fear of causing her mother further distress." The letter also clarifies that in the context of the 2012 examination of the girl:

> "Dr Broster [a Consultant Child and Adolescent Psychiatrist] concluded that S's presentation felt more like an expression of suicide or thinking as opposed to an actual plan with intent and that she might benefit from a space in which she could be helped address the issues that had been raised".

19. For the above reasons I conclude that the respondent's decision was not Wednesbury unreasonable and that she was entitled to conclude that there was no realistic prospect of a hypothetical Tribunal Judge, taking the new materials together with the old and applying anxious scrutiny, allowing the applicant's appeal.

DECISION

This application for judicial review is refused.

Mr Khan confirmed that he could not resist the respondent’s application for costs and for an order that assessment will take place on a standard basis. I hereby make such an order.

Mr Khan confirmed he did not wish to make an oral application for permission to appeal to the Court of Appeal.