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NR (Gang warfare – Witness – Risk on return) Jamaica [2005] UKIAT 00008

## **IMMIGRATION APPEAL TRIBUNAL**

Date of Hearing: 6 September 2004

Date Signed: 1 December 2004

Date Determination Notified: 6 January 2005

**Before:**

Mr C M G Ockelton (Deputy President)

Mr S Batiste (Vice President)

Mrs J A J C Gleeson (Vice President)

Between

**Appellant**

And

**Secretary of State for the Home Department**

**Respondent**

### Representation

For the appellant

Miss R Dajani of Counsel

Instructed by Antons Solicitors

For the respondent

Mr J Gulvin, Home Office Presenting Officer

## **DETERMINATION AND REASONS**

1. The appellant appeals with leave against the determination of the Adjudicator, Mr J.G. Macdonald, who dismissed his human rights appeal under Articles 2, 3 and 8. The appellant has rightly not challenged the determination of his claim under Article 8 of the European Convention on Human Rights and Fundamental Freedoms 1950. He has permission to challenge the findings under Articles 2 and 3, based upon his argument that his core account of being present at a gangland killing in Tivoli, Jamaica was credible and the issue for the Tribunal was the risk on return and, if applicable, the internal relocation alternative.

2. There was a further issue in the grounds of appeal relating to the Adjudicator's self-direction in paragraph 110 of the determination that Articles 2 and 3 of the ECHR did not apply to those whose problems were self-induced. That is plainly wrong, as Mr Gulvin conceded, and in that respect the Adjudicator's determination is defective and cannot be sustained.

3. The Adjudicator accepted parts of the appellant's account. He accepted that the appellant was a friend of a notorious drug don, Willie 'Haggart' Moore, leader of the Black Roses Crew, and was present on the occasion when Willy Haggart and two others were killed in a drive-by shooting. The appellant was asked to give evidence to the police and to attend an identity parade to discover the killer of Willy Haggart. However, the identity parade was cancelled and the appellant has never actually informed against the gang who shot Mr Haggart.

4. It is the appellant's case that the police are unable to protect him, or alternatively are unwilling to do so, and that given the size of Jamaica, internal relocation would be difficult. The rival gang are from Tivoli which is a known gangland area.

5. Mr Gulvin submitted that the issue for the Tribunal was whether return would be a breach of Article 3 and accepted that the arguable issue would stop at the point of return and not be affected by the appellant's actions after he returned to Jamaica.

6. Miss Dajani sought an adjournment of the appeal hearing on the basis of a last minute change of solicitors but the Tribunal refused that request, as the appellant had been properly served, with more than sufficient time to prepare his case. She then asked us to look at the skeleton argument, the US State Department Report and news reports together with observations, which she accepted were obiter dicta, in the Court of Appeal decision *Atkinson v The Secretary of State for the Home Department* [2004] EWCA Civ 846, in relation to the current position in Jamaica. Miss Dajani suggested that there had been evidence of a threat to the appellant and that the Adjudicator's findings at paragraphs 102-105 indicated that he had accepted that element of the appellant's account.

7. That strains the language of the Adjudicator's determination almost to breaking point. At paragraph 102 he said that the appellant's evidence was 'particularly vague' on that made the threats, when the threats were received, what was the nature of the threats and how these threats were communicated. There was no evidence that he knew the identity of his attackers and would be able to identify them, even if asked to do so. The Adjudicator

found that the police were doing their best to respond to the shooting and that the objective evidence indicated that the police would investigate such crimes and bring persons to trial to secure convictions.

8. There was no evidence that the police had been unable, despite their limited resources, to assist the appellant and to investigate the 18 April 2001 murders, and there was no evidence of pursuit of the appellant by the opposing gang after he came to the United Kingdom. The appellant had never been a gang member of the Black Roses.

9. Miss Dajani accepted that there was no evidence of a threat to annihilate friends of members of the gang and referred us to paragraph 50 of the *Atkinson* decision, which cites an Amnesty International report which was not otherwise before us. She also referred to a gentleman called Bogle Dancer, another witness, but accepted that there was no evidence of his subsequent risk level or indeed his survival.

10. For the respondent, Mr Gulvin contended that the Adjudicator's conclusions were sustainable despite his error at paragraph 110. There was no evidence that the return of the appellant would give rise to a likely breach of Article 3 and no real risk. He had not been a gang member of the Black Roses and it was the leader who was killed. He had not given any evidence which could be brought to the attention of those who perpetrated the crime; there had been no identity parade and no follow-up. The credibility findings did not extend to acceptance that the threats alleged had been made and a vague threat fell below the level of a real risk. That, he contended, was dispositive of the appeal.

11. At paragraph 109 of the determination, the Adjudicator found that the Jamaican authorities were willing and able to protect the appellant if necessary, and if not, relocation would not be unduly harsh. The question was whether the act of removal itself was a breach of Articles 2 and 3 (*E and R v The Secretary of State for the Home Department* [2004] EWCA Civ 49). Factually, that argument did not get off the ground. The Adjudicator's consideration of sufficiency of protection was sound: if the Tribunal were against him on that point there was objective sufficiency of protection. Jamaica was a designated country where specific evidence of risk was required. Mr Gulvin relied upon paragraphs 5.6 and 5.20-5.27 of the CIPU Country Report for April 2004:

- '5.6 Jamaica is a constitutional parliamentary democracy. The Head of State is the British Monarch and is locally represented by the Governor-General. The legislature is bicameral and comprises the upper chamber or the Senate and the lower chamber or the House of Representatives. The Senate consists of 21 Senators, 13 of whom are appointed by the Governor-General on the advice of the Prime Minister and 8 by the Governor-General on the advice of the leader of the opposition. In the absence of an opposition leader, 8 independent Senators may be appointed to the Senate. The House of Representatives consists of 60 elected members called Members of Parliament....
- '5.20 The Constitution provides for an independent judiciary, which generally exists in practice but lacks adequate resources. The judiciary consists of a Supreme Court, a Court of Appeal and minor courts. The Judicial system is based on English common law and practice.
- 5.21 Final appeal is to the Judicial Committee of the Privy Council in UK, although in 2001 the Jamaican Government signed an agreement to establish a Caribbean Court of Justice (CCJ) to fulfil this function. The appellate court is scheduled to be established in 2003 and will be based in Port-of-Spain, Trinidad. In November 2003 Edward Seaga renewed his proposal for a referendum on the model of government including the plans to supersede the Privy Council with the CCJ. Jamaica's law association and the main opposition party the JLP have insisted that the Government hold a referendum on the issue.
- 5.22 The defenders of the proposed CCJ argue that the Privy Council is very expensive because of its geographical distance and also the high cost of retaining attorneys in England. They predict that the proximity and the lower cost of CCJ will facilitate more matters being heard in the final court of appeal.
- 5.23 There was some opposition from the Jamaica Bar Association to the proposed CCJ. The members of the bar were concerned that there would potential for political influence on the proposed Judicial Services Commission, which will appoint the Court's judges. The bar association also insisted that the Court be included in the member countries' constitution to ensure that succeeding governments would not be able to withdraw it.

- 5.24 In response to the Privy Council's ruling on the use of death penalty, the Jamaican government withdrew from the UN Optional Protocol on Civil and Political Rights in 1999, giving Jamaicans one less international body to which to appeal human rights cases, especially those involving the death penalty.
- 5.25 According to the Bar Association of Jamaica, the Jamaican judicial system lacks adequate infrastructure, support services and equipment. Many courtrooms need repairs and public-address systems, and a chronic shortage of court stenographers force judges to take their own notes. As reported in "Jamaicans for Justice" the courts are slow and for cases to get through all the stages allowed by the Constitution and International protocols signed by successive governments could take years.
- 5.26 In September 2002 Supreme Court Judges and senior court staff were trained under the Legal Institution component of the Social Conflict and Legal Reform Project (SCLR) to prepare them for a case and "case flow" management under the Civil Procedure Rules. The aim of the initiative is to resolve civil disputes in a more timely and less costly and more accessible manner. Aims of the joint initiative by the Canadian and Jamaican government include improved information access and retrieval within the legal system. This project is under way and involves modernising the Supreme Court and Court of Appeal as well as the resident Magistrate and other Courts in the Justice System of Jamaica. The modernisation is in terms of court case management, document management, office automation, Internet access and electronic case filing. In September 2002 the government introduced a New Civil Procedure Rule to improve the efficiency and management of the judicial system.
- 5.27 The Constitution provides for a fundamental right to protection from arbitrary arrest and detention.'

12. We indicated that Mr Gulvin did not need to make submissions on general risk. He then asked us to dismiss the appeal.

13. In reply, Miss Dajani referred the Tribunal to page 3 of the skeleton argument, in which the references are to an earlier version of the CIPU Country Report and asked us to update the references, read the report and see whether it supported her contentions. If the Adjudicator had thought there was no risk of targeting, he would not have dealt with the sufficiency of

protection at paragraphs 102-103. She also relied on newspaper reports which appear in the bundle.

14. We reserved our determination for postal delivery, which we now give.

15. The core findings in the Adjudicator's determination are at paragraphs 102-105:

"100. The appellant's position is not that he fears persecution or treatment contrary to Article 3 from the state or its agents but rather from non-state actors, namely a rival gang.

101. He does refer to receiving threats and having to move to another house.

102. His evidence is particularly vague on who made the threats, what the nature of the threats was and how these threats were communicated. There is also no evidence that he knows the exact identity of his attackers and would be able [to] identify them.

103. From the information offered by the appellant it seems to me that the police were doing their best to respond to the incident on 18<sup>th</sup> April 2001. The objective evidence indicates that the police will investigate such crimes and that they intend to bring persons to trial and secure convictions.

104. In this case they asked the appellant to attend an identification parade. There could have been many reasons why the parade was cancelled and the appellant acknowledged that it was possible that the police were trying to arrange for a further parade but by that time he was already in the United Kingdom.

105. There is no evidence before me to indicate that the police were unable, despite their limited resources, to assist the appellant and investigate the murders on 18<sup>th</sup> April 2001."

16. The evidence in the newspaper report shows that the death of Willy Haggart was followed by a huge public funeral. It was regarded as so significant that the Jamaican finance minister, Omar Davis, attended the funeral; an orgy of violence gripped the western belt of Kingston for two months, thereafter slowly returning to normal until a raid was led into Tivoli Gardens by a controversial policeman. The attacks which took place during that time were between the authorities and the gang members and there is no evidence at all of any attack on potential witnesses.

17. In particular, the other witness mentioned by the appellant, Mr Dancer, spoke openly to the press. At H2 in the Secretary of State's bundle, a newspaper report provided by the appellant records Bogle as speaking to the press –

“Popular dancehall dancer Bogle, a close friend of Moore, said he was in a nearby house when he heard the gunshots. He said when he ran outside he was just in time to see the men ‘pumping’ the last rounds into Moore before going back to their car and driving away.

‘Mi inna the yard, mi see the niggas when dem a drive way. The way how me vex me all start run dung the car,’ Bogle said, on the brink of tears. ‘up to last night, everything was nice and straight, a pure movie star vibes, and sporting, upon de Roof [a club nearby], but this cramp everything.’”

18. The appellant’s other newspaper reports (H4) show the funeral as attended by 5000 people. Supporters fired a gun salute with their pistols during the funeral. Those attending included: the members of the Arnett Gardens football team; Grammy winner Deejay Beenie Man (who sang his own version of Bob Marley’s Redemption Song); Omar Davies, MP for the South St Andrew; Paul Burke, Region Three Chairman for the People’s National Party, the Water Minister, the Transport Minister, another MP, and several attorneys at law. None of them came to any harm from public association with the funeral.

19. *Atkinson* is a decision on certification and is expressly limited to that point. It is authority only for the point that an Article 3 claim for an informer in Jamaica and issues of internal relocation should not be certified as clearly unfounded. The Court of Appeal had evidence before it which seemed to indicate that the authorities in Jamaica could not provide ‘any reasonable system of protection’ and that violent crime was on the increase. There was ‘no doubt about willingness to tackle the problem’ but it was another matter whether effective steps had been taken to achieve the bare minimum required to provide reasonable protection for informers and perceived informers who found themselves in the situation of Mr Atkinson, who had been visited at home by the police and was credibly suspected of helping the police against the JLP.

20. That is not the factual matrix here; this appellant’s rather vague account is that he was on his way to a match with Willie Haggart, Blackdouche and Big Bunny from the Black Roses Gang, when a car pulled up and the other three were shot dead. The appellant was also shot and has a head scar. The police never came to his house and he never informed on the opposing gang. Jan Ark and Bogle Dancer witnessed the killing too. Jan Ark left the country. Bogle Dancer attended the funeral and there is no evidence that he came to any harm.

21. We considered the skeleton argument (pp 1-6 of the appellant's bundle). The references to the previous CIPU Country Report appear in paragraph 7 (referring to paragraph 88 of the determination) and in paragraph 9 (referring to paragraph 6.13 of CIPU Country Report), and go to the history of inter-gang violence, the difficulty of policing in Jamaica and the deficiencies of the police in Jamaica. The equivalent paragraphs are 6.32 –

**6.32** According to the USSD Report 2003, "The police frequently employed lethal force in apprehending criminal suspects. There were 127 deaths, including those of 13 police officers, during police encounters with criminals [in 2003], compared with 147, including 16 police, in 2002. While allegations of "police murder" were frequent, the validity of some of the allegations was suspect."

And 6.102 -

**6.102** According to the Jamaicans for Justice report "Jamaica's Human Rights Situation, "Jamaica today is a case study in tribalist politics typified by inner-city "garrison" communities, that are entrenched in state-built housing, are politically homogenous, intolerant of dissenting views, and defended by guns and bullets ... Out of structures created by political wars, "community" youth gangs have emerged to fight over turf and account for 20-25 percent of homicides. Criminal gangs linked with US "posses", UK "yardies", and now, most lethally, with elements of the Colombian drugs trade menace the entire fabric of society."

22. The relevance of lethal force by the police to this appeal is not clear; the appellant was an innocent witness asked to assist the police and is not at risk from them. The report does support the control which the gangs have over particular areas, but there is no evidence as to the current status of Willie Haggart Moore's Tivoli Gardens gang. Nor is there any evidence of recent pursuit or interest in the claimant, either by the unnamed gang which killed Willie Haggart, or by the authorities as an anonymous witness. The Adjudicator did not believe his evidence of threats, although he found his account credible to the appropriate lower standard in relation to the shooting itself.

23. Otherwise, the skeleton argument merely reasserts the factual claim below and takes matters very little further. The Adjudicator accepted (paragraph 109) that the police would wish to protect the appellant and were willing and able to apply their resources to protect him, having regard to operational resources and the constraints on the provision of police protection. That is in line with the test in *Horvath*. The appellant's evidence did not establish that there was a continuing risk to him today, given his minor rôle in the abortive criminal proceedings against the opposing gang.



24. We accept that the Adjudicator made a significant error of law at paragraph 110 in finding that the provisions of the European Convention on Human Rights and Fundamental Freedoms 1950 were not meant to apply to those whose problems were self-induced. However, for the reasons set out above, even if he had considered the Articles 2 and 3 issues correctly, we consider that he would have come to the same conclusion; the appellant's evidence of current risk is too vague to succeed, even in the light of the difficulties which the police have with Jamaican gang warfare.

**25. The appellant's appeal is dismissed.**

**Date:**

**J A J C Gleeson  
Vice-President**