ASYLUM APPLICATIONS IN JERSEY AND REMOVAL TO SAFE COUNTRIES

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This article discusses the decision of the Royal Court in X v Minister for Home Affairs,[1] *where the court dismissed the application for judicial review by an applicant of the refusal to grant him asylum. The particular novelty of the case was that the application for asylum had not been subject to a "substantive consideration" by the Minister but was effectively dismissed summarily by the Jersey Customs and Immigration Service on the ground that the applicant could be removed to a safe country.*

*This was the first judicial review of an asylum matter before the Royal Court. Coincidentally, there was an unrelated asylum case also heard later in 2019 (*A v Minister for Home Affairs[2]*).*

Framework

UN Convention and Protocol Relating to the Status of Refugees ("the Refugee Convention")

1 The UK's ratification of the 1951 Refugee Convention[3] was extended to the Channel Islands on 11 March 1954,[4] and the ratification of the 1967 Protocol was extended to Jersey on 20 February 1996.[5]

2 Article 33(1) of the Refugee Convention provides that—

> "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his

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[1] [2019]JRC132.
[2] [2019]JRC206.
[3] https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+167%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfece1d47 (accessed 15 March 2020).
[4] https://www.unhcr.org/5d9ed32b4 (accessed 15 March 2020).
[5] https://www.unhcr.org/5d9ed32b4 (accessed 15 March 2020).

> life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

3 A "refugee" is defined in Article 1 of the Refugee Convention, as amended by the Protocol, to mean any person who:

> ". . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it."

4 Often the mistake made by members of the public, politicians and the media is to conflate the terms "refugee" and "asylum seeker." The latter is a person who is seeking international protection with their claim not yet decided upon; the former will have been an asylum seeker but after a successful application becomes recognised as a refugee.

European Convention on Human Rights ("the ECHR")

5 The ECHR provides, *inter alia*, that "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally . . ." (art 2) and "No one shall be subjected to inhumane or degrading treatment or punishment" (art 3).

6 The ECHR (the UK's ratification of which has also been extended to Jersey) is implemented into domestic law through the Human Rights (Jersey) Law 2000. That Law provides, at art 7, that it is unlawful for a public authority to act in a way which is incompatible with an ECHR right, and "public authority" not only covers Ministers and officers[6] but also the courts and tribunals of the Island.

7 The central argument in the *X* case was whether the return of the applicant to the European jurisdiction in which he resided, prior to arriving in Jersey, would constitute a violation of art 3 ECHR.

Immigration (Jersey) Order 1993 ("the Immigration Order")

8 To complete the introductory notes on the framework, it is also necessary to highlight the Immigration Order and the Jersey Immigration Rules. The Immigration Order extends to Jersey, with

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[6] "[A]ny person certain of whose functions are functions of a public nature."

amendments, by way of Order in Council, the Immigration Act 1971 of the UK and other UK immigration statutes.

9 Section 3(1) of the Immigration Act 1971, as extended to Jersey by the Immigration Order, provides that:

> "3.-(1) Except as otherwise provided by or under this Act, where a person is not <a British citizen> –
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> (a) he shall not enter the [Bailiwick of Jersey] unless given leave to do so in accordance with this Act;
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> (b) he may be given leave to enter the [Bailiwick of Jersey] (or, when already there, leave to remain in the [Bailiwick of Jersey]) either for a limited or for an indefinite period;
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> (c) if he is given a limited leave to enter or remain in the [Bailiwick of Jersey], it may be given subject to conditions restricting his employment or occupation in the [Bailiwick of Jersey], or requiring him to register [as provided under section 4(3) below], or both."

10 The enabling power to make rules on immigration is provided under s 1(4A) of the Act, as extended*:*

> "The [Minister[7]] shall give directions as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the Bailiwick of persons not having the right of abode and such directions shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the directions and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for the purposes of study, or as visitors, or as dependants of persons lawfully in or entering the Bailiwick."

Jersey Immigration Rules ("the Rules")[8]

11 Using the power under s 1(4A), successive Lieutenants-Governor and since 2017, successive Ministers for Home Affairs, have from time to time given directions by way of Immigration Rules. The Rules

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[7] The executive powers for immigration previously rested with His Excellency, the Lieutenant-Governor, but were transferred to the Minister for Home Affairs pursuant to the Immigration (Jersey) (Amendment) Order 2017.

[8] https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/JSY%20Immigration%20Rules%20061219.pdf (accessed 15 March 2020).

are not promulgated in the same manner as secondary legislation (*i.e.* they are not laid before the States or subject to the formalities of the Subordinate Legislation (Jersey) Law 1960 or the Official Publications (Jersey) Law 1960), but they are published and are available on www.gov.je.[9]

12 The Rules provide a comprehensive framework for all immigration matters, including asylum which is governed by Part 11 of the Rules. This sets out the process for asylum applications, the factors to be considered and provides that decisions in relation to asylum applications ultimately rest with the Minister. In particular, r 344 sets out that if the Minister is satisfied that refusing an asylum application would result in the applicant being removed, in breach of the Refugee Convention, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group, then the applicant will be granted refugee status.

13 There is an exception to the matter and that is found in r 345 which is as follows:

> "1) If the Minister or, in the case of a person arriving in Jersey, an Immigration Officer not below the rank of Senior Immigration Officer, is satisfied that there is a safe country to which an asylum applicant can be sent, his application will normally be refused without substantive consideration of his claim to refugee status.
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> 2) A safe country is one in which the life or freedom of the asylum applicant would not be threatened (within the meaning of Article 33 of the [Refugee] Convention) and the government of which would not send the applicant elsewhere in a manner contrary to the principles of the Convention.
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> 3) An asylum applicant shall not be removed without substantive consideration of his claim unless—
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> i. the asylum applicant has not arrived in Jersey directly from the country in which he claims to fear persecution and has had an opportunity at the border or within the territory of a third country to make contact with that country's authorities in order to seek their protection, or

[9] In the United Kingdom, the equivalent rules are laid before Parliament.

> ii. there is other clear evidence of his admissibility to a third country.
>
> Provided that [if] a case meets the above criteria, there is no obligation to consult the authorities of the third country before the removal of an asylum applicant."[10]

14 Therefore, it is permissible under the Rules for a person of the rank of Senior Immigration Officer or above to make a summary assessment of an asylum application and to refuse it if there is a safe country to which the applicant can be sent, and thus avoid a substantive consideration and determination by the Minister. It was this very Rule which was engaged in the *X* case.

15 What is a "safe country" then? Rule 345(2) above defines it in simple terms but no list is kept locally, and therefore the Jersey Customs and Immigration Service ("JCIS") must consider each jurisdiction on a case-by-case basis. Assistance can also be gleaned from non-binding sources such as the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 which lists countries which may be considered safe, and the Protocol No 24 to the Treaty on the Functioning of the European Union which provides that EU Member States shall be regarded as constituting safe countries for all legal and practical purposes in relation to asylum matters. There is also Home Office guidance on the Dublin III Regulation[11] which notes that any jurisdiction listed in the Schedule to the 2004 Act may be considered safe. Indeed, enquiries made with the Home Office in the *X* case confirmed that it was the view of HM Government that the particular European jurisdiction was safe.

Background

16 The applicant, Mr X, was originally from Syria. His evidence was that he had undergone arrest, detention, interrogation and extreme torture by the military in Syria. After leaving Syria through Turkey and Egypt, he eventually arrived in Europe and sought asylum in a European jurisdiction. That jurisdiction cannot be named for safety reasons and was anonymised in the Royal Court's judgments.

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[10] A similar rule is provided for by r 345 of the Immigration (Bailiwick of Guernsey) Rules 2008.

[11] EU Regulation 604/2013: this governs asylum matters between signatory jurisdictions to mitigate against asylum shopping. This does not apply in Jersey but the guidance thereon is generally followed and the court agreed (para 25) that regard might be usefully had to the provisions of the Regulation.

17 Mr X was successful in his asylum application in that European jurisdiction, but by the time he had arrived in Jersey, his residence permit had expired and he had written to the authorities stating that he did not want his residence/refugee status renewed and did not wish to return there. JCIS made enquiries with the authorities of the European jurisdiction, who confirmed that they would nonetheless accept responsibility for him.

18 On 5 August 2018, Mr X arrived at Anne Port on a small dinghy, having made most of the journey on a larger boat from, he said, Antwerp. He then travelled into St. Helier to present himself at States of Jersey Police Headquarters to claim asylum. He was transferred to JCIS at Elizabeth Terminal and was served with a notice of illegal entry and subject to a screening interview.

19 The reasons Mr X did not wish to return to the European jurisdiction were because he stated that he had faced threats and physical harm from other ex-patriate Syrians who were Muslim extremists and affiliated to the so-called Islamic State and other such organisations. He was perceived by those threatening him to belong to a different sect to them.

20 In his screening interview with JCIS, he revealed that the authorities within the European jurisdiction had moved him to other cities, at least four or five times, to avoid those threatening him. He claimed that the sizeable Syrian ex-patriate community in the European jurisdiction, his name, his accent and communication on social media about him all meant he continued to be susceptible to being discovered or identified. His affidavit disclosed a situation of him living a life of fear and as a recluse. He alleged that on one particular occasion, he returned home to find a knife left on a table and letter purporting to be from ISIS.

21 The applicant did not dispute that the authorities had done their best to protect him. In addition to moving him several times, he was also in receipt of a letter from the police which he could present anywhere in the country to avail himself of the assistance of local authorities.

22 There had also been several other failed attempts by Mr X to get to and/or seek asylum in other jurisdictions such as the Republic of Ireland, Canada and Gibraltar. A combination of being stopped at the points of entry/exit trying to enter Ireland and Canada, and leaving Gibraltar in fear of his safety because his name was published in a media article, meant that he failed in pursuing asylum elsewhere and each time was returned to the European jurisdiction where he had first been granted asylum.

23 The applicant's entry into Jersey on 5 August 2018 followed an earlier failed attempt on 16 July 2018 (where after getting into difficulty at sea, he was assisted by the French coastguard back to France).

24 On the basis that the applicant could be removed to a safe country, and taking at face value his claims that the authorities of the European jurisdiction had done all they could to assist him, the JCIS determined on 15 August 2018 to remove him under r 345 without substantive consideration.

25 Through his counsel, Mr X applied for leave to bring an application for judicial review. Mr TJ Le Cocq, then Deputy Bailiff, ordered an *inter partes* hearing to be convened to determine the matter of leave, and a stay on Mr X's removal was imposed in the meantime.

26 The parties originally came before the Deputy Bailiff for a leave hearing on 13 September 2018. However, just before the hearing Mr X disclosed a psychological report which stated that, in the opinion of the psychologist, he suffered from PTSD (*inter alia*), was at risk of suicide, and that therapy might have only limited benefit were he to remain in the European jurisdiction where he felt under threat.

27 The matter was adjourned so that JCIS could consider the psychological report and what options would be available to Mr X if he was returned to the European jurisdiction. Having considered these matters, JCIS maintained its decision on 3 October 2018 to refuse the application for asylum and to remove the applicant back to the safe country.

Application for leave

28 The resumed leave hearing took place on 14 November 2018. The applicant's three grounds for seeking leave were:

(i) the decision to remove him without investigating whether or not he could be safely returned was a breach of the procedural requirements of art 3 ECHR;

(ii) the decision to remove him was a breach of art 3 ECHR because he faced a real risk of inhuman or degrading treatment on his return; and

(iii) the respondent's failure to consider all material matters was unreasonable, or the decision to remove him was in all the circumstances unreasonable.

29 The Minister argued in response that r 345 was engaged, and therefore there was no need for substantive consideration. It was further argued that the harm the applicant asserted he was facing was

not art 3 ECHR ill-treatment because it originated from non-state actors and there was a sufficiency of protection from the state authorities. Further, notwithstanding his mental health issues and his alleged risk of suicide, this did not prevent his removal based on the principles set out in the jurisprudence and because he would be able to avail himself of treatment when back in the European jurisdiction.

30 The Deputy Bailiff noted that the asylum decision had potentially profound and far reaching consequences for the applicant and that there were serious issues to be considered relating to the applicant's human rights and how those interplayed with the asylum regime in the particular circumstances of the case. Leave was therefore granted on the basis that there were arguable grounds having realistic prospects of success, but there were arguments on both sides which necessitated the matter being referred to a judicial review hearing.[12] It was also confirmed, as per the *dicta* of Sir William Bailhache, Bailiff, in *J v Lieutenant-Governor*,[13] that immigration judicial reviews necessitate a wider examination (or "anxious scrutiny") by the court given the engagement of fundamental human rights—

> "it is not correct to say that there is no deference to the decision-taker. A higher degree of scrutiny on human rights grounds is still not a full merits review. What is needed is that the court examine what reasons have been given, whether they comply with the fundamental rights of the applicant and in particular whether the lawfulness of what has been done meets the structured proportionality test that the courts now apply, recognizing that the decision-taker has a discretionary area of judgment."[14]

Judicial review hearing

31 The final hearing took place on 3 May 2019. The primary issues before the court were (i) whether the threat from non-state actors constituted art 3 ill-treatment, and (ii) whether there would be a breach of art 3 ECHR if he was sent back to the European jurisdiction because of his mental health issues and his threats to commit self-harm, or even suicide.

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[12] *X v Minister for Home Affairs* 2018 (2) JLR 390.
[13] 2018 (1) JLR 421.
[14] *Ibid*, at para 5.

Threat to life from non-state actors

32 This issue was essentially abandoned by Mr X at the hearing, because it was conceded by his counsel that the European jurisdiction was a safe country. Due to the overlap with the mental health/self-harm issue, the matter was nonetheless discussed during oral submissions.

33 The European Court of Human Rights ("ECtHR") and House of Lords had already considered the question of whether harm committed by non-state agents could constitute the ill-treatment proscribed by art 3 ECHR. In *HLR v France*,[15] the ECtHR commented that art 3 ill treatment could in theory emanate from non-public officials but that—

> "it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."[16]

34 In *R (Bagdanivicius) v Home Secretary*,[17] Lord Brown deprecated a failure in some cases to distinguish between the risk of serious harm on the one hand (for example being beaten up and seriously injured by a criminal gang) and the risk of treatment contrary to art 3 ECHR on the other. He said the former will only reach the threshold to transform into the latter when the state has failed in its positive duty to provide reasonable protection against the harm inflicted by the non-state agents.[18]

35 At the original leave hearing in September 2018, the Deputy Bailiff had queried with counsel for the Minister whether the use of the word "obviate" in *HLR* meant that the receiving jurisdiction had to remove any risks. It was submitted that such a threshold would be unrealistically high and that the language used by Lord Brown ("reasonable protection") was a more appropriate threshold. At the final hearing, counsel was able to direct the court to a passage in *Bagdanivicius*[19] where their Lordships referred to the original judgment of *HLR* in the French language and the use of the verb "*obvier*," meaning "to take precautions against"; and so the potential argument that the receiving state would have to remove altogether any threats from non-state actors was disposed of in short order.

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[15] (1998) 26 EHRR 29.
[16] *Ibid*, at para 40.
[17] [2005] UKHL 38.
[18] *Ibid*, at para 24.
[19] *Ibid*, at paras 27, 14.

36 Mr X had, by his own case, been relocated some four/five times by the authorities and was in possession of a letter which he could use to seek the urgent assistance of local authorities. Thus, the Minister argued, the authorities of the European jurisdiction had satisfied Lord Brown's requirement to provide "reasonable protection" against the risk of harm. The court agreed with the Minister and noted:

> "Even taking the assertions made by the Applicant at face value and in the light of the principles in the case law, with regard to this part of the application, in our judgment the Applicant's fears of steps being taken against him by non-state agents in the European Jurisdiction by reason of his background, even were they well founded, have been met by the more than reasonable and appropriate steps taken by the authorities there to address those risks. In our judgment the case law did not require the Minister nor does it require us to be satisfied that the authorities of the European Jurisdiction have obviated those risks in the sense of removing them completely but merely that they have taken reasonable and appropriate steps to protect the Applicant from them. Indeed on our understanding of the facts it is difficult for us to see what more the authorities of the European Jurisdiction could have done."[20]

Mental health and self-harm risks

37 The main thrust of the applicant's argument at the final hearing was that the decision to remove him back to the European jurisdiction would be a breach of art 3 ECHR because it would cause an increase in PTSD symptomology and risk of suicide (as per the opinion of the psychologist). He had attempted to commit suicide more than once whilst in Jersey and this was said to be associated with his apprehension of being returned to the European jurisdiction. The psychological evidence was not disputed.

38 There is a body of ECtHR jurisprudence[21] which provides that a deterioration of health (physical or mental) caused by a return to the receiving country can *in theory* be a breach of art 3 ECHR, but it has only been in exceptional circumstances where such a claim has succeeded.

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[20] *Ibid*, at para 81.

[21] *D v UK* (1997) 24 EHRR 423; *Bensaid v UK* (2001) 33 EHRR 10; *N v UK* (2008) 47 EHRR 39; *MN v Home Secy* [2011] EWCA Civ 193.

39 In terms of mental health, the seminal case is a decision of the Court of Appeal (England and Wales); *J v Home Secy*.[22] In *J*, the appellant alleged that he would commit suicide if returned to his country of origin, Sri Lanka. He had previously been in enforced slave labour and had been subject to the "most horrific torture at the hands of the Sri Lankan army." Consultant psychiatrists had agreed that he was a high risk of suicide if returned to Sri Lanka.

40 Lord Justice Dyson drew a distinction between "foreign cases" and "domestic cases". Domestic cases, he explained, are claims where a state is said to have acted within its own territory in a way which infringes the enjoyment of an ECHR right within that territory. This would cover the first two stages of removal; (i) being told that you are being removed, and (ii) the transfer to the receiving jurisdiction. Foreign cases represent the third stage, *i.e.* when the applicant is in the receiving country. In a foreign case it is not claimed that the removing state has itself committed a breach of ECHR in its own territory but that the removal will lead to a violation of the ECHR rights in the receiving state.

41 The domestic stages referred to above were not in dispute in the *X* case; *i.e.* it was accepted that the necessary safeguards would be in place if and when Mr X was told his application had failed and in the transport back to the European jurisdiction (para 86). What was in dispute was the "foreign case" stage, *i.e.* once he was back in the European jurisdiction. Dyson, LJ had said that in such cases, where the art 3 claim relies on suicide or self-harm, the test is whether there are strong grounds for believing that the person, if returned, faces a real risk of ill treatment, and the test does not differ in suicide cases. Mr X was rather hoist by his own petard on this because he conceded the European jurisdiction was safe and the authorities were taking reasonable precautions to safeguard him and as a result there was no threat of art 3 ill-treatment (applying the *Bagdanivicius* test above). Therefore, if there was no art 3 ill-treatment (albeit there might have been harm faced by non-state actors) then the claim based on self-harm was bound to fail.

42 The test was amplified by Dyson LJ as follows:

(i) the treatment must attain a minimum level of severity;

(ii) a causal link must be shown to exist between the removal and the treatment;

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[22] [2005] EWCA Civ 629.

(iii) the art 3 threshold is particularly high in foreign cases and is even higher where the alleged inhuman treatment results from some naturally occurring illness, physical or mental, and not the responsibility of the public authorities of the receiving state;

(iv) an art 3 claim can in principle succeed in a suicide case;

(v) is the applicant's fear of ill-treatment upon which the risk of suicide is based objectively well-founded? If not, this tends to weigh against there being a real risk of ill-treatment; and

(vi) do the removing and receiving states have effective remedies to reduce the risk of suicide? If they do, then this will also weigh heavily against the claim.

43 Points (i)–(iv) of the above analysis are fairly uncontroversial and were not the focus in the *X* case.

Objectively well-founded fear of ill treatment

44 Regarding (v), as mentioned above, the difficulty for Mr X was that he had accepted the European jurisdiction was safe. In any event, the court were satisfied that the authorities had taken reasonable precautions and that therefore the harm he faced had not transformed into ill-treatment. As a result, and applying Dyson, LJ's test, he could not justify that his fear of art 3 ECHR ill-treatment (rather than harm) was objectively well-founded.

Effective remedies

45 In respect of (vi), what is required are "effective remedies" to reduce the risk of suicide. In another case put before the court, *CK v Slovenia*,[23] the Court of Justice of the European Union had considered the issue of asylum seekers at risk of self-harm and/or suicide in the context of art 4 of the Charter of Fundamental Rights (which does not apply in Jersey but which is analogous to art 3 ECHR[24]). In that case, the applicants were successful and the CJEU said that where the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in his state of health, then such transfer would constitute inhuman and degrading treatment.[25] The CJEU went on to say that the transfer of an asylum seeker in such circumstances could only take place in conditions "which exclude the possibility that

[23] *CK v Slovenia* (case C-578/16 PPU).
[24] The ECtHR can and does cite CJEU decisions
[25] *Ibid*, 21, at para 74.

the transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment,"[26] and the authorities and courts must "eliminate any serious doubts" regarding the impact of the transfer.[27] Essentially, the removing authorities must consider what is in place in the receiving jurisdiction to assist the applicant in terms of mental health facilities and services. The CJEU confirmed in the CK case that it regards it as a strong presumption that the medical treatment offered to asylum seekers/refugees in EU member states will be adequate,[28] and there was no suggestion that Mr X would not be able to avail himself of the comprehensive health care system in the European jurisdiction. In fact, enquiries with the counterpart authorities confirmed that, as a recognised refugee, he was entitled to the same access as citizens of that jurisdiction (which had excellent facilities for dealing with those with mental health issues). Mr X's situation was therefore far removed from the situation in *J*, and also another case *Y&Z*,[29] where the applicants in both cases faced a return to a place still at civil war and where they had been tortured by the state authorities themselves. As the Royal Court rightly observed, the facts in *Y&Z* in particular "might be termed as extreme and in our judgment were markedly more severe that presented in the instant application" (para 40).

46 In response to the argument of the Minister that the applicant could avail himself of the health system in the European jurisdiction, he asserted that any treatment in the European jurisdiction would not have any effect on him because of his fears about residing in that jurisdiction. This argument was not successful; counsel for the Minister had made the point that all those challenging removal based on a risk of suicide could simply argue the same, *i.e.* that treatment in the receiving jurisdiction would be of no benefit. There was, as a result, a dangerous risk of a precedent being set which would mean that in theory no one would ever be removed if they advanced this argument. Sedley LJ had opined in *ZT*,[30] that—

> "the internal logic of the Convention has to give way to the external logic of events when these events are capable of bringing about the collapse of the Convention system . . . The ECHR is neither a surrogate system of asylum nor a fallback for those who have otherwise no right to remain here. It is for particular cases

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[26] *Ibid*, 21, at paras 96, 19.
[27] *Ibid*, 21, at paras 96, 19.
[28] *Ibid*, 21, at para 70, 19.
[29] *Y&Z v Home Secy* [2009] EWCA Civ 362.
[30] [2005] EWCA Civ 1421.

> which transcend their class in respects which the Convention recognises . . . just as the Convention has grown through its jurisprudence to meet new assaults on human rights, it is also having to retrench in places to avoid being overwhelmed by its own logic."

47 Longmore LJ emphasised in another case, *KH*[31] *that* —

> "the truth is that the presence of mental illness among failed asylum-seekers cannot really be regarded as exceptional. Sadly even asylum-seekers with mental illness who have no families can hardly be regarded as 'very exceptional'."

48 Finally, in *MN*,[32] it was found that there were mental health facilities available in the receiving jurisdiction capable of addressing the appellant's problems, and Maurice Kay LJ commented that—

> "Whilst suicide risks can never be quantified with exactitude, I know of no case in which, absent a legal flaw, facts on a level with those in the present case have produced a favourable outcome for an appellant."

49 There had been a recognition by the judiciary that there was a risk of the ECHR overwhelming itself and being used as a "fallback" for asylum cases. A retrenchment was necessary and the case law established that asylum seekers with mental health issues are not in an exceptional position which takes them into a category of persons who cannot be removed. To reach the threshold at which removal would breach art 3 ECHR (and art 33 of the Refugee Convention), it is necessary for an applicant's case to be exceptional and to satisfy the test set out by Lord Justice Dyson. On this issue the court concluded:

> "With regard to the Applicant's mental health, in our judgment, suitable arrangements can, should and will be put in place to protect him during the process of his removal from Jersey, transit to the European jurisdiction and his reception there, and thereafter. We are satisfied that the European Jurisdiction has a more than sufficient system of healthcare, including psychiatric care, to assist the Applicant."[33]

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[31] *KH (Afghanistan) v Home Secy* [2009] EWCA Civ 1364.
[32] *MN v Home Secy* [2011] EWCA Civ 193.
[33] [2019] JRC 132 at para 88(ii).

Decision

50 For the reasons set out above, the court announced on 1 July 2019[34] that the application for judicial review was refused and provided the draft judgment to the parties. The judgment was then handed down and published on 10 July 2019. Mr X did not seek leave to appeal the court's decision and was subsequently removed from Jersey and transferred back to the European jurisdiction.

Procedure

51 The Royal Court expressed some concerns over the screening interview carried out by JCIS. Because it was the only opportunity afforded to the applicant to put forward his case, the court said that the original decision taken in August 2018 was "potentially flawed because of the misleading nature of the [screening] interview". The court was concerned that the screening interview had been presented as a "conversation" and that it should have been made clear to the applicant that the result of the interview could be his immediate removal, in order that he could take this into account when deciding if he wished to request a translator and/or legal advice (both of which he had declined).

52 The advice from the court was that in future it would be fairer to make it clear what the import of any such interview might be so that the interviewee could take a fully informed view on matters such as translation and legal advice. Such comments were echoed in *A v Minister for Home Affairs*[35].

Conclusion

53 This was the first application for judicial review in respect of an asylum decision, but also, as the then Deputy Bailiff described it "unusual," because of the engagement of r 345 and the summary decision to refuse asylum without a substantive consideration.

54 Given Jersey's geographical situation,, there is an inherent threat of persons (who have fled persecution elsewhere) seeking to enter the

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[34] This was not done by way of a draft judgment being sent to the parties in the usual way but was, at the joint request of counsel, done in open court with the applicant and JCIS officers present. This was so that in the event the result was adverse to the applicant (which it was), then he could be detained immediately by JCIS, because of his suicidal ideation and the need to safeguard against him doing himself harm at the stage of being told he was being removed (*i.e.* Dyson, LJ's first of the three stages).

[35] [2019] JRC 206 at paras 69–70.

Bailiwick without leave to do so. Such threats may be affected by the strengthening of checks on transport between Calais and Dover, and also the terms of the new relationship between the United Kingdom and the European Union.

55 It was therefore useful for this case to have been fully argued before the court. Whilst every case will have different facts, the reality is that many persons arriving in Jersey fleeing persecution elsewhere will have been to at least one, if not multiple, safe countries in the meantime. The *X* case establishes an important precedent that r 345 is an appropriate mechanism to have in such cases when the applicant can be removed to a safe jurisdiction, and it mitigates against the risk of "asylum shopping." Furthermore, the court adopted the approach in other cases which established that whilst mental health issues and suicidal ideation are sadly not uncommon amongst asylum seekers, the threat of self-harm will not automatically render removal to the receiving jurisdiction unlawful.

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