SPECIAL IMMIGRATION APPEALS COMMISSION

Field House, Breams Buildings
London
Tuesday, 17 July 2012
Date of Judgment: Thursday, 26th July 2012

Case No. SC/116/2012

BEFORE:

THE HONOURABLE MR JUSTICE KEITH
UPPER TRIBUNAL JUDGE ALLEN
SIR ANDREW RIDGWAY

BETWEEN:

D2

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR H SOUTHEY QC and MR E GRIEVES (instructed by Wilson & Co) appeared on behalf of the Appellant.

MR J SWIFT QC and MR R WASTELL (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

MR A UNDERWOOD QC and MS M PLIMMER (instructed by the Special Advocates' Support Office) appeared as special advocates.

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APPLICATION FOR BAIL
JUDGMENT
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MR JUSTICE KEITH:

1. The appellant is a Russian national. He comes from Chechnya. He was granted asylum in this country in 2002 together with indefinite leave to remain here. As a result, he was issued with a Refugee Convention travel document, endorsed for all countries except Russia. Between then and November 2009, he has, on his own admission, travelled extensively outside the UK. An order has been made preserving his anonymity. He is known as D2.

2. In November 2009, D2 left the UK. In May 2010, while he was still out of the country, the Secretary of State for the Home Department personally decided that D2 should be excluded from the UK because his presence here was not conducive to the public good. The reason for that decision was the threat he was assessed to pose to national security. He was also informed that he was no longer recognised as a refugee in the UK, and that his indefinite leave to remain in the UK had been cancelled. He was notified that he had an out-of-country right of appeal against the Secretary of State's decision to cancel his indefinite leave to remain. Because that decision had been certified under section 97(3) of the Nationality, Immigration and Asylum Act 2002, D2's right of appeal lay to the Special Immigration Appeals Commission ("SIAC"). D2 duly appealed against that decision.

3. Shortly before the hearing of that appeal, D2 applied for an adjournment. That application was refused, and no evidence was served on behalf of D2 relating to the Secretary of State's case against him. The appeal was heard by SIAC (with Mitting J presiding) over three days in March and April 2011. In the course of the hearing, a new point emerged. On 25 March 2011,

the Court of Appeal had handed down its judgment in _Secretary of State for the Home Department v MK (Tunisia)_ [2011] EWCA 333 (Civ) holding that a person whose indefinite leave to remain in the UK had been cancelled had a short period thereafter to commence an in-country appeal, and for that purpose such a person had to be permitted to re-enter the UK if he had been outside the UK at the time the decision had been made. As a result, D2 made a last-minute claim for judicial review which sought to quash the Secretary of State's original decision because it had incorrectly stated that he could not enter the UK in order to pursue any appeal against it. That claim was dismissed by Mitting J sitting as a High Court judge in the course of the hearing of D2's appeal, and the hearing of his appeal continued.

4. On 20 April 2011, SIAC dismissed the appeal. SIAC found that the Security Service's assessment of the threat posed by D2 to national security was "well founded". It also found that D2 had voluntarily re-availed himself of the protection of the country of his nationality, or had re-established himself in the country he had left, and accordingly the Refugee Convention had ceased to apply to him.

5. D2 appealed against the dismissal of his claim for judicial review. He also appealed against the refusal of SIAC to adjourn the hearing of his appeal. On 28 February 2012, the Court of Appeal allowed his appeal against the dismissal of his claim for judicial review. The Court of Appeal held that he had been entitled to an in-country appeal, and it therefore quashed the Secretary of State's original decision. In the light of that, D2 withdrew his appeal against the refusal of SIAC to adjourn the hearing of the appeal. The Secretary of State immediately decided to exclude D2 from the UK again, as well as to cancel his indefinite leave to remain and to cease to

recognise him as a refugee. He was permitted to enter the UK to conduct any appeal from that decision, but he was told that he would be detained on his arrival here. On 7 March 2012, he flew to Heathrow from Moscow whereupon he was detained by immigration officials, and on 13 March 2012 he lodged his appeal against the Secretary of State's decision. That appeal is due to be heard in February 2013.

6. In the meantime, D2 applied for bail pending the hearing of his appeal. That was refused by SIAC (again with Mitting J presiding) on 8 May 2012. The hearing on that date did not purport to be Art. 5(4) compliant, and in any event D2 had not at that stage given a complete account of his personal history or a comprehensive answer to the open national security statement against him. Mitting J said that the position "may change" if and when he did so. D2 has now done so, and has renewed his application for bail. The special advocates accept that for the purpose of his renewed application for bail, the disclosure which has been made to him of the case he has to meet satisfies the requirements of Art. 5(4). The hearing of the renewed application for bail took place on 17 July. Mitting J thought that it would not be appropriate for him to hear any further bail application, but he directed that it should be heard by a three member panel. The hearing took place in private – essentially for the same reasons Mitting J had given on 8 May for the hearing of the original application for bail to be in private. At the conclusion of the hearing, we announced that the renewed application for bail would be refused. We said that we would hand down our reasons for that in writing, and this we now do. There is a closed judgment as well as this open one.

7. Two preliminary points should be noted. First, the new statement which D2 has filed is not his final national security statement. His solicitors need more time to complete it. The statement is therefore very much work in progress. In addition, it has been drafted by D2's legal team based on his instructions, but he had not yet had an opportunity to approve it by the date of the hearing. It was not served on the Secretary of State until 11 July, and the Secretary of State has not had an opportunity to consider it in detail – or for that matter the statements of three other witnesses which purport to confirm the accuracy of particular features of D2's statement.

8. Secondly, we have read SIAC's judgments – both the open and closed judgments – in the earlier appeal. We have noted what SIAC said. The judgments were prepared without D2's evidence, and without the special advocates having had the opportunity to take his instructions. It is not possible for us to say to what extent the endorsement by SIAC of the assessment of the risk which D2 posed to national security may have been different if D2 had been able to participate in the appeal, and although the judgments help to identify some of the evidence which SIAC had, we have decided not to take into account any of the findings which SIAC made.

9. The lawfulness of D2's detention until his appeal is heard is not in doubt. It is not suggested, for example, that the time it will take for his appeal to be heard means that his removal from this country cannot be effected within a reasonable time. The question is whether his detention until his appeal is heard is appropriate. The test to be applied in a case of this kind is not controversial. We can neither form nor express a firm view about the nature or extent of the risk which D2 poses to national security at this stage. The time for forming and expressing a concluded view about that is following the hearing of the appeal. All we can do at this stage is

to consider whether the assessment of that risk is sufficiently compelling to justify for present purposes proceeding on the assumption that the assessment of the risk is correct. In that event, the critical question becomes whether there is a real risk that if D2 is released on bail, he will continue to pose such a risk to national security, whatever conditions were imposed. In other words, could the risk he is assessed to pose be sensibly managed by permitting him to be released on bail but subject to suitable (and if necessary onerous) conditions? On that issue, respect, but not undue respect, should be accorded to the views of the Security Service, which has, of course, considerable experience in assessing how the risk which someone like D2 is assessed to pose can be managed.

10. The recent history of Chechnya shows that it is beset by infighting between feuding factions. We do not give undue weight to SIAC's decision dismissing D2's earlier appeal when we note that it was said then that nothing can be taken for granted when it comes to Chechnyan politics, and transfers of allegiance are commonplace. The Secretary of State's case that D2's presence in the UK would pose an unacceptable risk to national security is based on such a transfer of allegiance. He was originally aligned with the Chechnyan separatist movement when he was a bodyguard to its leader at the time. The current head of the movement is Akhmed Zakayev, the self-styled Prime Minister of the Chechnyan Republic of Ichkeria, who is living in exile in the UK with indefinite leave to remain here. His faction does not recognise the legitimacy of the current President of the Chechnyan Republic, Ramzan Kadyrov, whose regime has the support of the Russian authorities. D2 is assessed by the Security Service to have switched his allegiance to Kadyrov. The assessment is that he is Kadyrov's henchman, and that Kadyrov might "seek to use him to facilitate an attack on Zakayev".

11. There is a good deal of material in the public domain which supports two components of the Security Service's assessment. First, there is the Security Service's assessment that Kadyrov is responsible for the deaths of people he regards as his political opponents despite his claim that accusations of that kind are part of a conspiracy to discredit him and destabilise his regime. The second is the Security Service's assessment that as an opponent of Kadyrov's regime, Zakayev is likely to be regarded by Kadyrov as a possible target, especially as Kadyrov's rhetoric indicates disdain for Zakayev. The issue which is more likely to be debated when D2's appeal comes to be heard is the Secretary of State's assessment that D2 (a) has aligned himself with Kadyrov, and (b) is prepared to do his bidding to the extent of lending his support to the assassination of Zakayev.

12. We think that there is considerable support for this assessment. As for (a), Kadyrov has been reported as welcoming D2's return to Chechnya, and the registration number of D2's car in Chechnya is assessed to denote that he is a highly-ranked member of Kadyrov's circle. As for (b), D2 is assessed to have played "a significant role" in the assassination of a Russian dissident, Umar Israilov (who is assessed to have been a political opponent of Kadyrov), in Vienna in January 2009, an assassination which is assessed to have been ordered by Kadyrov. It is not without significance that D2 admits in his statement travelling to Austria in the months before the assassination (he claims – not particularly convincingly in our opinion – to have gone there to help a colleague who was going to Austria for medical treatment) and spending time there with at least one of the men subsequently tried for Israilov's murder. SIAC concluded following the earlier appeal that D2 went to Vienna "with the purpose of setting in train a series of events" which led to the assassination of Israilov. We ignore that finding, of course, but in

our opinion the Security Service's assessment that that is indeed the case has force. That, of course, does not *necessarily* mean that D2 would pose a threat to Zakayev if he remained in this country, but the Security Service's assessment that he would is sufficiently compelling to justify SIAC proceeding for present purposes on the assumption that this assessment is correct. It has not been argued – nor could it have been – that the Secretary of State was not entitled to conclude that national security could be compromised by what SIAC described as "a politically motivated threat to the life of an individual who has been granted British protection and is resident here, emanating from a foreign institution".

13. We have obviously considered with care D2's lengthy statement, together with the three other statements which have been filed. D2's statement explains how he came to visit Vienna. It deals at some length with what are claimed to be the limited contacts he has had with Kadyrov over the years. It covers his overseas visits and the reasons for them, including his lengthy stays in Chechnya. And it repeats his willingness to give the Security Service any information he has about Kadyrov. There is some basis to be sceptical about his attempts to downplay his relationship with Kadyrov, as well as his assertion that his extended travelling in Europe was simply to maintain his friendship with Chechnyan colleagues in the diaspora. There is a degree of implausibility about how he claimed that many of his trips abroad were funded. And a plausible interpretation of his conversation with Kadyrov which he set out in paras. 166 and 167 of his witness statement is that Kadyrov was using D2 to get a "serious message" to Zakayev. Because this is not the time for any firm conclusion to be made, it is inappropriate for us to go into any greater detail, but we do not think that the evidence which has now been filed on D2's

behalf undermines the Security Service's assessment of D2. That assessment remains sufficiently compelling for us to proceed on the assumption that it is correct.

14. We turn to whether the risk which D2 is assessed to pose to national security can sensibly be managed by permitting him to be released on bail subject to suitable conditions. We bear in mind two important things. First, the Security Service accepts that D2 "may well hold a genuine desire to be allowed long-term access to the UK". After all, he has been living in this country for many years. His wife and four children joined him here in 2002, and he and his wife have had two children here since then. There is no reason whatever to doubt that he genuinely wants his appeal to succeed. That is why he has engaged with the process, and why he may well be less willing to do anything in the meantime which might jeopardise the prospects of his appeal being successful.

15. Secondly, and related to that, there is a limit to what D2 can do to facilitate an attack on Zakayev if he was on bail subject to stringent conditions. For example, if he was subject to a 24 hour curfew, monitored by electronic tagging, with prohibitions on (a) his use of mobile phones, the e-mail and access to the internet, (b) any contact with Zakayev or Kadyrov, and (c) pre-arranged meetings with anyone within the Chechnyan community without the prior consent of the Secretary of State, his opportunities to organise or mount an attack on Zakayev would be extremely limited. In that connection, it has now been disclosed that in its closed judgment in the original appeal, SIAC concluded that D2 would do no more than provide "valuable intelligence in any Kadyrov-based attack on Zakayev".

16. These are important considerations, but there is a limit to what even stringent conditions can do to prevent D2 from lending covert support to an attack on Zakayev. It may be that he will not be able to provide logistical support of any meaningful kind, but we think it entirely possible that he could (and we must assume would) gather and pass on information about things like Zakayev's movements, and how a potential assassin might have access to him. The best you can really expect from conditions even of the most stringent kind is the prompt identification of their breach rather than the prevention of their breach. We do not think it helpful to talk in terms of whether a conservative or precautionary approach is called for. It is rather a matter of making a judgment about the risk which D2 would continue to pose if granted bail even on stringent conditions.

17. In all of this, it is critical not to lose sight of the humanitarian considerations. We are talking here of D2's liberty, of the impact of his absence from his children (whose best interests must be treated as a primary consideration), and the right to respect for his and his family's family life guaranteed by Art. 8. In that connection, we have not overlooked the immense difficulties which D2's wife has in bringing up their six children without D2's help, particularly when their eldest boy (who is now 15) has cerebral palsy and severe learning difficulties, and requires 24 hours' attention. But we also note that in the 16 months before his exclusion from the UK, D2 was very much an absent father, having spent (going on his statement) no more than about 3 months in the UK in that time.

18. Our judgment is that D2 would continue to pose a threat to Zakayev's life even if he was granted bail on stringent conditions, and that is sufficient to outweigh the other considerations relied

upon in support of his application for bail. It was for these reasons, as well as those in our closed judgment, that we concluded that this renewed application for bail should be refused.