IN PRIVATE

SPECIAL IMMIGRATION APPEALS COMMISSION

Field House
Breams Building
London
EC4A 1WR

Tuesday, 8th May 2012

BEFORE:

THE HONOURABLE MR JUSTICE MITTING

BETWEEN:

D2
(SC/116/12)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR E GRIEVES (instructed by Wilson Solicitors)) appeared on behalf of the Appellant.

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

MR A UNDERWOOD QC (instructed by Special Advocates' Support Office) appeared as Special Advocate.

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JUDGMENT

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Cliffords Inn
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IN PRIVATE

MR JUSTICE MITTING:

1. I refuse this application. On the basis of SIAC's findings to which I was a party, there is a compelling case that the appellant was and remains a henchman of a ruthless political leader, able and willing to use extreme violence against his opponents. One such opponent is Zakayev, a United Kingdom resident. The appellant has not yet explained in detail his account of his history or his answer to the open case against him, which goes, in some but not complete detail, into the reasons for making those findings. If and when he does, the position may change. I make it clear now that I will not hear any future bail application by the appellant. I will arrange for another High Court judge to determine it in the light of whatever detailed evidence the appellant wishes to adduce.

2. I accept that there are compelling family circumstances which tend in favour of the grant of bail and that measures proposed by the Secretary of State and additional measures, which I will contemplate, including a complete prohibition on the use of telephone or electronic means of communication by the appellant and the need to declare all visitors to his house, could be put in place which would reduce the risk that would otherwise exist. But until and unless a judge can consider his own explanation for his activities, those are not measures, which, for reasons, partly expressed in this open judgment, but also in a short closed judgment, will suffice to eliminate the risk.

3. I deal with the discrete issue raised by Mr Grieves in deference to the argument that he and Mr Swift QC addressed to me.

4. The appellant has made a remarkable proposal, which, if I have understood the position correctly, he intends to stick to at any subsequent bail application. It is that he will waive his right to disclosure of the grounds upon which bail might be revoked or, if revoked by the Secretary of State, refused in future, so that, if something occurs which indicates either the appellant has broken a condition of his bail or that the risk that he might do so has materially increased, then the Secretary of State may rely upon it, notwithstanding that it has neither been disclosed or gisted to him so as to permit him to give effective instructions to the special advocate to deal with it in a closed session.

5. Mr Grieves submits that such an undertaking can be given and he relies on *Miller -v- Dickson* [2002] 1WLR 1615 and, in particular, the observations of Lord Bingham and Lord Hope, with which all of their Lordships, with the qualified exception of Lord Clyde, agreed. They accepted that a Convention right could be waived. At paragraph 31 Lord Bingham observed:

> "In most litigious situations, the expression 'waiver' is used to describe a voluntarily, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is, in my opinion, the meaning to be given to the expression ... It is apparent from passages already cited from cases decided by the European Court of Human Rights that a waiver to be effective must be unequivocal, which I take to mean clear and unqualified."

6. Lord Hope observed, at paragraph 53:

> "The court's jurisprudence shows that this element of the right to a fair trial, like the right to a public hearing, is not so fundamental that it is incapable of being waived if all the circumstances which give rise to the objection are known to the applicant and the waiver is unequivocal."

7. I do not accept Mr Swift's submission that, by analogy with the naturalisation cases recently heard by Ouseley J, it is not possible to waive full Article 5.4 procedural rights. In the naturalisation cases, there is no statutory scheme. In SIAC cases there is a statutory scheme, which has been qualified by case law. I see no reason why an appellant should not accept that the statutory scheme unqualified by case law should apply to a bail hearing, provided that he does so on an informed and advised basis and does so unequivocally. That is what I understand the appellant to offer. If I had thought that the offer tipped the balance in favour of granting bail, I would have accepted it and would have done so in the belief and on the basis that it was of significant or determinative weight in deciding whether or not to grant bail. In my view, if this issue is revisited, when the appellant's full application for bail is determined, the Commission could accept the undertaking and apply it in any future revocation hearing, but, because of the reasons I have indicated at the start of this judgment, and in the closed judgment, I do not intend to grant bail today, so the question does not arise.

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