Appeal no: SC/98/2010
Hearing Dates: 30th & 31st March, 5th April 2011
Date of Judgment: 20th April 2011

SPECIAL IMMIGRATION APPEALS COMMISSION

OPEN JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE PERKINS
MR J LEDLIE CB, OBE

(E1)

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellants:	Mr E Grieves Wilson Solicitors
For the Respondent:	Mr J Glasson & Mr R Wastell Instructed by the Treasury Solicitor for the Secretary of State
Special Advocate:	Mr A Underwood, QC & Ms M Plimmer Instructed by the Special Advocates Support Office

The Hon Mr Justice Mitting:

Background

1. The appellant is a Russian national. He was born in Chechnya on 17 April 1966. In a statement made by him in support of his application for asylum in the United Kingdom made on 15 April 2002, he gave a detailed description of his activities in Chechnya before his arrival in the United Kingdom. We have no reason to doubt the truthfulness and general accuracy of that account. In August 1994, he joined the Chechen forces fighting for independence from Russia. He was appointed as one of the twelve bodyguards of the military leader of the Chechen independence movement, Aslan Maskhadov. On 1 October 1994, he was captured by pro-Russian forces and beaten severely. He was able to rejoin Maskhadov on 3 December 1994. He was involved in fighting against the Russians. After the negotiation of the truce in 1996, he was appointed prefect of a Chechen district. After the election of Maskhadov as President, he was appointed deputy commander of his presidential guard, a force of about 800 people. He sustained temporary injuries in two attacks on the President in 1998 and 1999. In June 1999, he was sent by Maskhadov to the United Kingdom to accompany another wounded bodyguard who needed treatment. They arrived In England on 11 July 1999, with leave to enter as visitors. While in the United Kingdom, the second Chechen war broke out. For the next two and a half years the appellant acted as Maskhadov's representative in a variety of roles in the United Kingdom and elsewhere in Europe. His Soviet passport bears numerous visas and entry stamps during this period, not all of which are easy to read. He and his wife had three children

before he left Chechnya and a fourth before he made his application for asylum. Their whereabouts during that period are not clearly described. They appear to have been in Chechnya at the start and in Azerbaijan at the end. The appellant was granted asylum and indefinite leave to remain on 30 July 2002. His wife says that she and the four children arrived in the United Kingdom in November 2002. They were granted indefinite leave to remain on 31 January 2003. The appellant and his wife have since had two more children, both born in the United Kingdom.

2. In April 2007, the appellant, his wife and children applied for naturalisation. On 30 October 2009, his wife and four eldest children, but not the appellant, were granted British citizenship.

3. On 26 February 2003, a ten year Refugee Convention travel document, endorsed for all countries except Russia, was issued to the appellant. In 2008 and 2009, he travelled extensively outside the United Kingdom – he says to Turkey, Russia, Italy, Poland and Ukraine. He last left the United Kingdom in November 2009. On 11 May 2010 the Secretary of State personally directed that he should be excluded from the United Kingdom on the grounds that his presence was not conducive to the public good based on the threat that he was assessed to pose to national security. He was notified of that decision by a letter dated 28 May 2010. The letter also told him that he was no longer recognised as a refugee in the United Kingdom and that his indefinite leave to remain had been cancelled under Article 13(7)(b) of the Immigration (Leave to Enter or Remain) Order 2000. He was notified that he had an out of country right of appeal against the decision to cancel indefinite leave to remain.

Because the decision was certified under s97(3) of the Nationality, Immigration and Asylum Act 2002, his right of appeal lay to SIAC. He exercised it in time.

Law

4. Save for an argument relating to the procedural rules by which the appellant's claim that his and his family's right to respect for their family life under Article 8 has been infringed (which is set to be heard by the Court of Appeal in the week commencing 11 April 2011) the approach which we should adopt to the determination of this appeal is not controversial. There is no free standing right of appeal against the Secretary of State's decision that the appellant should no longer be recognised as a refugee. Although there is no right of appeal against the decision to exclude the appellant from the United Kingdom in the exercise of prerogative powers, we can consider the merits of the decision when determining the appeal against cancellation of indefinite leave to remain. We will apply, without opposition from either side, the approach which we summarised in *OL v SSHD* (SC/86/2009) in paragraph 6. We will, to the extent possible, find the facts – as to past events on balance of probabilities – and giving due deference to the view of the Secretary of State that it is conducive to the public good to exclude the appellant from the United Kingdom, review her decision in the light of the facts which we find.

5. One issue as to the approach which we should adopt was canvassed in closing submissions. The basis for the Secretary of State's decision is that by October 2008 the appellant had aligned himself with the current President of Chechnya, Ramzan Kadyrov, and would be prepared to undertake actions on

Kadyrov's behalf in the United Kingdom, in particular actions which put at risk the life of the self-appointed Prime Minister of the Chechen Republic of Ichkeria (ChRI), Ahkmed Zakayev, a refugee with indefinite leave to remain in the United Kingdom. Kadyrov is said to pose a threat to the life of Zakayev. Mr Grieves submits that such a threat could only give rise to a threat to the national security of the United Kingdom if made by the Russian Federal State. We do not accept that submission. At the general level, determination of what does and does not put at risk the national security of the United Kingdom is in the first instance a decision for the Secretary of State, informed as she will be by her security advisors, the views of other departments and of other political colleagues. It is a decision to which for the reasons explained by Lord Slynn in paragraphs 22 and 26 of *SSHD v Rehman* (2001) UKHL 47, we must give great weight. She was, in our view, fully justified in determining that a threat to the life of Zakayev from Kadyrov would pose a threat to the national security of the United Kingdom. Kadyrov is the President of a republic in the Russian Federation. Chechnya is an unusual republic in that it is accorded a degree of independence by federal authorities because of its history and the political and military cost of imposing federal policies on it by military force alone. As a matter of principle, the Secretary of State, in our view, is entitled to conclude that a threat to the life of a political opponent by the leader of a constituent republic of a federal state is just as capable of threatening the national security of the UK as a similar threat by the federal authorities. On the simplest level, 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 is capable of posing a threat to national security. We not

only respect the view of the Secretary of State on this issue, but unhesitatingly agree with it.

National Security

6. The Secretary of State's case is founded on the premise that the appellant has changed sides in the long running conflict between Zakayev and Kadyrov and now poses a threat to the life of Zakayev. Before any judgment can be reached about the merits of that case, it is necessary to set out and understand the nature of Chechen politics. Their hallmarks are violence and treachery. The Chechen independence movement led by Dzhokhar Dudajev and Aslan Maskhadov has, since the first Chechen war of 1994-1996, fractured into at least four factions. The first split occurred during the second Chechen war in 1999, when Chechen nationalists led by Kadyrov's father and the Yamadayev family switched sides and joined the Russians, enabling them to overrun the lowlands of Chechnya rapidly. The Presidential election in October 2003 resulted in the election of Kadyrov's father. He was assassinated in May 2004. Maskhadov was killed by the Russians on 8 March 2005. Kadyrov became Prime Minister of Chechnya in March 2006 and President in March 2007. There are now four principal Chechen factions, all, for the time being, bitterly opposed to each other. In power for the time being is the Kadyrov faction. Kadyrov is now opposed to his former allies, the Yamadayev faction. Those who remained hostile to the Russians – the ChRI – in part fled Chechnya and in part took to the mountains. They comprised Islamists and nationalists. There was an acrimonious split in 2007 when the ChRI president, Doku Umarov split from Zakayev. Umarov's faction is now fighting a guerrilla war

in the mountains of Chechnya and committing atrocities in Russia – the most recent to be claimed was the bomb attack on Moscow Airport. Russian interests are also engaged. For the time being, Kadyrov has the support of Vladimir Putin. However, nothing can be taken for granted in Chechen politics. Any combination of the factions is possible and transfers of allegiance by individuals are commonplace.

7. The nature of Kadyrov's rule is best described in a sentence in an article in the Independent of 17 April 2009,

> "The few Russian journalists who have investigated the internal politics of Chechnya in recent years paint a picture of an unpleasant tyrant who oversees a system riddled with torture and abuse".

(2/3a/6ii)

His methods include the assassination of political opponents. Between September 2008 and March 2009 seven fairly prominent Chechens were assassinated, all but two of them outside Russia. The assessment of the Security Service which, for reasons largely set out in the closed judgment, we accept, is that Kadyrov was responsible for at least three of them (two outside Russia, and one in Moscow): Ruslan Yamadayev, shot in Moscow on 24 September 2008 outside the British Embassy; Umar Israilov, shot in Vienna on 13 January 2009; and Sulim Yamayadev, shot in Dubai on 28 March 2009. He was also probably responsible for the attempted assassination of Isa Yamadayev, a surviving younger brother of Ruslan and Sulim.

8. In 2008, Kadyrov despatched emissaries to attempt to persuade significant individuals in the Chechen diaspora to return to Chechnya. His ostensible

purpose is to restore Chechen harmony and unity: as he told Rossyskaya Gazeta on 10 February 2009, "my long term strategic program is to return to the republic everyone who does not have bloodstained hands". (2/1a/1ii). He has been partly successful. Amongst those whose return has been publicly announced, in the same article, is the appellant. (2/1a/1iii and 2/2/2). Those who have returned have, so far as is known, come to no harm. The appellant certainly has not done so, as he now acknowledges.

9. Those who will not return and who remain vocal opponents of Kadyrov are, however, at risk, as the example of Israilov shows. The Austrian indictment against Ramzan Edilov, Suleyman Dadaev and Turpal-Ali Yeshurkaev sets out in considerable detail how he came to be killed in a Viennese street on 13 January 2009. (2/6/15-54). We have analysed this and other material about the killing of Israilov in the closed judgment. No good purpose would be served by attempting to disentangle our open from our closed reasoning on an inevitably complicated issue. All that we can usefully do is to set out some of the principal conclusions which we have reached, on balance of probabilities. They are:

(i) Israilov was, and was perceived by Kadyrov to be, a political opponent who had caused and could continue to cause political embarrassment to him by complaining of torture and ill-treatment, including torture by Kadyrov personally, to the European Court of Human Rights.

(ii) In June 2008, Artur Kurmakev attempted to persuade him to abandon his claims and to return to Chechnya. He failed.

(iii) On 22 October 2008, Shaa Turlayev and the appellant, acting on Kadyrov's orders, arrived in Vienna, to be met by, amongst others, two men directly implicated in the killing, Edilov and Letscha Bogatirov. Their purpose was (or included) to set in train the events which led to the killing of Israilov.

(iv) The killing may have been the outcome of a botched kidnap or a planned assassination. It does not matter which.

(v) Immediate planning of the killing was entrusted to Edilov who travelled to Chechnya to meet Kadyrov on 21 November 2008.

(vi) Dadaev began stalking Israilov on 15 December 2008.

(vii) Israilov was shot down in the street by Yeshurkaev and Bogatirov at about 12 noon on 13 January 2009. They made their getaway in Edilov's Volvo, driven by Dadaev and then by tram.

(viii) Edilov was told what had happened at 12.11pm. At 12.48, 13.03 and 13.06, he made three calls on his mobile telephone to Chechen numbers. The third of them 79282663482 was to Turlayev. The evidence which he gave at the trial that it was to congratulate the three recipients on the orthodox New Year was an absurd lie.

10. No more can be said in the open judgment about the reasons for implicating the appellant in these events or about the conclusion which we reach from them: that, by the time that they had concluded, the appellant was, and had demonstrated to Kadyrov that he was, a henchman of Kadyrov, prepared to carry out his orders, even if they involved complicity in serious crimes committed abroad.

11. In a part of his witness statement dated 2 November 2010 which he has not since repudiated, the appellant says that his travels to foreign countries were upon Zakayev's instructions to meet with Kadyrov's men for peace meetings. He said that Zakayev funded the trips. Other trips were made to visit family members, and were funded by them. He had been back to Chechnya a few times since 2008. The reason for travelling there in September 2008 and November 2008 was solely to visit his sick father. We accept that in early 2008 he may well have made one or two trips funded by Zakayev of which one purpose was to negotiate terms between Zakayev and Kadyrov. We also accept that one purpose for his visits to Chechnya in September and November 2008 may have been to visit his father. We do, however, reject the general thrust of this evidence. We are satisfied that most of his journeys were for Kadyrov's purposes and were not funded by Zakayev or relatives. Apart from visits to his family in London, we are satisfied that substantially all of his travel outside Chechnya was for Kadyrov's purposes.

12. Until 26 October 2009, there were ongoing negotiations between Kadyrov and Zakayev for the return of Zakayev to Chechnya, as is demonstrated by the Rossyskaya Gazeta article of 10 February 2009. In August 2009, an agreement appears to have been made for the convening of a joint Chechen Congress to work out a unified political platform. (2/3b/6iv-vi). These negotiations came to an abrupt halt when Zakayev gave an interview on 26 October 2009 to the Moscow publication Kommersant-Vlast. In it, he repeated his demand for the handing over of the bodies of dead Chechen leaders and the release of 20,000 imprisoned Chechens. He said that it would be "a crime" to return to Chechnya if nothing would result except "useless PR". He accused the

Russians of exploiting Islamist violence for their own ends. Finally, he referred dismissively to conditions in Chechnya, stating that "there are aquaparks and Putin avenues". The tenor of Kadyrov's response is shown by a later article about a speech made by Kadyrov at the World Forum of Chechens in Grozny on 13 October 2010. He accused Zakayev of being involved in an armed attack by Khusain Gakayev, a Chechen warlord, on his home village of Tsentoroi at the end of August 2010, in which six policemen and seventeen of Gakayev's men were killed and several civilians wounded. He said that the families of all of the policemen killed and of the wounded locals "have declared revenge on Zakayev". He said that all terrorists will be punished, "we will get to Zakayev…". (2/4d/7xiii and 2/4e/7xiv). Against the background of the killing of Israilov and the two Yamadayev brothers, those threats should not be taken lightly.

13. Our conclusion is that the Security Service's assessment, accepted by the Secretary of State, that as a henchman of Kadyrov, the appellant would, if permitted to return to the United Kingdom, pose a threat to Zakayev and so to national security is well founded. Subject to Article 8 considerations and to the position of the children, we are satisfied that it is conducive to the public good that the appellant should be excluded from the United Kingdom for reasons of national security and that the Secretary of State was right to cancel his indefinite leave to remain.

The appellant's refugee status

14. In his witness statement of 2 November 2010, the appellant made the following assertions:

(i) His family is worried about his well-being, because they know that his life is in danger (paragraph 38).

(ii) If relocated to Ukraine or Russia, the lives of his family would remain in constant danger (paragraph 39).

(iii) He was unable to live a proper and safe life in Russia (paragraph 40).

(iv) Throughout the time that he has been in Russia (by implication, in 2008 and 2009), he was living underground and in hiding, because he feared for his life. If found, he would be beaten, tortured and killed (paragraph 41).

15. The appellant now accepts that each of those statements was false. On 22 March 2011, over an open telephone, he told Anita Vasisht and Christine Benson, his current solicitors, that, when he made that statement, he told his then solicitor Christopher Pelentrides that:

(i) He was not afraid of living in Russia.

(ii) He had been back to Chechnya a number of times.

(iii) He was then living openly in Grozny and was not hiding or moving around.

His explanation for these lies is that his solicitor told him that he would lose his appeal unless he said that he was afraid to live in Russia. We have not heard from his former solicitor. In that circumstance, it is both unfair and unnecessary for us to attempt to make a finding about whose idea it was to advance a false case. All that we can say, for certain, is that the appellant was willing to do so and, by his signature at the foot of the statement, adopted the

lies as his own. We accept Mr Grieves' point that they are not directly relevant to the national security issue. In relation to that issue, all that they can do is to reinforce our scepticism about the appellant's explanation for his activities in 2008-2010. On the issue of his refugee status, what his current account demonstrates is that he has voluntarily re-availed himself of the protection of the country of his nationality and/or voluntarily re-established himself in that country. Accordingly, the Refugee Convention has ceased to apply to him under Article 1C(1) and/or (4).

Article 8 in the interests of the children

16. The appellant's family has been living in rented accommodation in London since November 2002. His wife speaks Russian and Chechen. His children, apart from his eldest son, speak English proficiently or as a first language. All go to local schools. Their school reports demonstrate that they are each doing well at school. His eldest son has cerebral palsy and is the subject of a statement of special educational needs. Educational and social provision is unquestionably of a far higher standard in London than it would be in Chechnya. The picture painted by his wife in her statement dated 1 April 2011, supported in detail by his eldest daughter in her statement of the same date, is that the family was, until his enforced exclusion, happy and settled in London. Both describe a routine in which the appellant played a prominent and regular part. By way of example, his eldest daughter said that he "used to take my three little brothers wrestling every single Sunday". This may have been true in the years before mid-2008 and undoubtedly represents her view of how family life should be lived; but since mid-2008, it has not been true. By

his own admission, the appellant has spent a large part of the period since mid-2008 abroad, much of it in Chechnya. The family life which he has enjoyed with his wife and children since then must have been maintained by remote means of communication, not by reason of his physical presence the UK family home. Until 28 May 2010, this was the result of a conscious decision by the appellant. We make no finding about what the appellant and his wife would have intended to do, but for the exclusion order. Perhaps, they had not, by then, made any decision about their future. We do not doubt that the appellant would, if possible, like to maintain a London base and obtain British citizenship – it would give him a safe haven and/or an alternative if political events in Chechnya took a turn adverse to him. It is unnecessary for us to make any finding about whether or not it would be reasonable to expect this family to go to live with him in Chechnya or elsewhere in Russia. All that we can do is to acknowledge the possibility that even if he were not to be excluded, they might choose to live with him in Chechnya and might do so now that he has been excluded. By virtue of the guidance given by the Secretary of State under s55 of the Borders, Citizenship and Immigration Act 2009, we are required to treat the best interests of the children as a primary consideration in determining this appeal. We are satisfied that their best interests would be served by permitting the appellant to stay with them, at their London family home, for such periods as he chose to do so.

17. We approach both issues (Article 8 and the best interests of the children) by answering the five questions posed by Lord Bingham in *Razgar v SSHD* (2004) 2 AC 368 paragraph 17, to which we give the following answers:

(i) Exclusion will interfere with the exercise of the rights of this family to respect for their family life, although not to the extent maintained by the appellant and his wife.

(ii) Article 8 is engaged.

(iii) The interference is in accordance with the law: the Secretary of State is entitled in the exercise of prerogative powers to exclude for conducive reasons.

(iv) The interference is necessary in a democratic society in the interests of national security.

(v) The interference is proportionate to the legitimate public ends sought to be achieved. The risk to national security posed by the appellant is, for the reasons set out above and in the closed judgment, significant. There is no means other than exclusion by which it can properly be controlled. The only means of ensuring that the appellant, on behalf of Kadyrov, does not pose any real threat to Zakayev is to ensure that, while Zakayev remains in the United Kingdom, he is not allowed here. A control order would provide a measure of protection, but one which would fall far short of the protection secured by exclusion. Further, it is at least doubtful that a control order could be obtained, given the evidential requirements of Article 6. Finally, the exclusion of the appellant need not lead to the permanent separation of this family. Given his own assessment of the situation in Chechnya, it is far from inconceivable that they will decide to join him there.

18. For the same reasons, the best interests of the children are outweighed by the requirements of national security.

19. For those reasons, this appeal is dismissed.

Further observations

20. Since a date which we do not know in April 2011, this appeal has been funded by the Legal Services Commission. The closed material which we have considered leads us strongly to doubt that if the appellant had made the full and frank disclosure of his means required by the legal aid scheme, he would have been granted public funding for this appeal.