SPECIAL IMMIGRATION APPEALS COMMISSION

TRS/300/2011

Field House
Breams Building
London
EC4A 1WR

Thursday, 29th September 2011

BEFORE:

THE HONOURABLE MR JUSTICE MITTING

BETWEEN:

EKATERINA ZATULIVETER

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

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MR T OWEN QC and MS H LAW (instructed by Public Interest Lawyers) appeared on behalf of the Appellant.

MR J GLASSON and MR R WASTELL (instructed by the Treasury Solicitor) appeared on behalf of the Respondents.

MR A MCCULLOUGH QC and MR B WATSON (instructed by the Special Advocates' Support Office) appeared as Special Advocates.

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JUDGMENT
Recusal Hearing
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MR JUSTICE MITTING:

1. Sir Stephen Lander is not going to recuse himself of his own volition. I am, therefore, going to give judgment in the application that I should require him to recuse himself.

2. The application is made on three grounds: first, that he was the Director-General of the Security Service, from 1996 until October 2002, and in the Service, in more junior capacities, for 21 years before then, therefore, he should not judge the assessments of the Security Service about the appellant; secondly, he has expressed views, since 2002 about, to use the portmanteau phrase, "the Russian Intelligence Services" and the Security Service, which should disqualify him from sitting; and, thirdly, statements made by a Mr Fielding, who the appellant intends to call as an expert witness, about him in a book, written jointly with a Mr Hollingsworth, first published in 1999, mean that he should not sit.

3. The basic test is not in doubt, it is that set out by Lord Hope in *Porter -v- McGill* [2001] UKHL 67, at paragraph 103: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased".

4. That is a test of universal application; it applies to SIAC. It is a test, however, which requires not qualification but expansion in the case of SIAC. The real question is what would the fair-minded observer, who was well informed, decide about the possibility of bias of any panel member? In answering that question, the observer would have in mind

a number of factors, which are peculiar to SIAC. First, it is not simply a passive referee of evidence, material and arguments submitted to it by the parties. Rule 4(3) of its Procedural Rules requires it satisfy itself that it has sufficient information to decide a case justly. It, therefore, has, to a limited extent, an inquisitorial role. Secondly, the panel is required to be constituted of three members: a High Court Judge, or someone who has held judicial office, a Senior Immigration Judge and a lay person. There is no statutory requirement that the layperson should have any particular expertise, but SIAC was set up to succeed a system which had been condemned by the Strasbourg Court in *Chahal*, the so-called three advisors system, in which there was both legal and intelligence or diplomatic expertise. Accordingly, it has been generally recognised that the third lay member of the panel is expected to have a background in, a familiarity with and to have made use at a high level of, secret intelligence. Most panel members have been drawn from what can broadly be termed the "intelligence services", a portmanteau phase which includes SIS, the Security Service and GCHQ, and the Foreign and Commonwealth Office. That recognition was briefly made by Lord Woolf in *The Secretary of State for the Home Department -v- Rehman* [2003] AER, 782, and by Lord Steyn, [2003] 1 AC 153 at paragraph 30. The well-informed and fair-minded observer would, accordingly, recognise that the panel would include amongst its members someone who is likely to have an expert understanding of the issues to be decided.

5. The third factor is that the correct determination of an appeal is important for both sides. Obviously, it is right that an appellant should not be deported on erroneous grounds, but, equally obviously, it is right that the national security of the United Kingdom, in a case in which national security is in issue, should not be put at risk by an erroneous decision.

Therefore, in my judgment, the informed and fair-minded observer would expect a SIAC panel to have on it at least one person, who, by dint of knowledge and experience, was able to bring an informed, even expert, mind to bear on the determinative issues.

6. Given the area from which panel members are recruited, mainly, although not absolutely exclusively, former senior officials from the intelligence agencies and the Foreign and Commonwealth Office, it is inevitable that the lay member will, in the ordinary case, bring to the decision-making process an expertise which a panel consisting entirely of judges could not have. Of course, that lay member could not sit on a case for which he had had responsibility, in this case as Director-General, or for which he had an operational or managerial responsibility, but such cases can be readily identified in advance. Sir Stephen Lander, for example, could not sit upon an historical North African counterterrorism case, because, during his time as Director-General, he would have had overall responsibility for the cases. But the fair-minded observer would recognise that, if SIAC did not have the necessary expertise, it might be hampered - and in some cases would certainly be hampered - if it was not equipped in its constitution to make an informed assessment about the issues.

7. Although this case primarily concerns assessments of the Security Service about intelligence issues, in almost every deportation case there are two issues: first, whether or not an individual appellant presents a threat to national security; and, secondly, whether the individual can be safely returned to their home country. On the basic proposition which Mr Owen QC advances, that no one with inside expert knowledge of those issues could sit to determine them, it would necessarily follow, although he does not for understandable tactical reasons choose to address the question, that no former Foreign and Commonwealth

Office officer could determine questions of safety on return and no former officer of an intelligence agency could determine national security questions. In the case of safety on return, the issue would be acute. A former ambassador, Anthony Layden, gives evidence about country conditions and about the viability of assurances given by foreign governments; in so doing he expresses his own individual view, and also expresses the collective view of the Foreign Office or the section of the Foreign Office which deals with that country. It is far from uncommon that those who sit on a SIAC panel know Anthony Layden and, in the case of one of the Foreign and Commonwealth Office's former officers, served at the same time as him. If we are required to exclude such individuals from cases in which safety on return arises, then we would have only two possible means of proceeding: one would be to try the case in two halves, so that national security was dealt with by a diplomat and safety on return by a former intelligence officer, or we could call upon the one member of the SIAC panel of lay members who fits into neither category. This would be deeply unsatisfactory and it cannot have been what Parliament intended when it established the constitution of SIAC.

8. Accordingly, in my judgment, the informed fair-minded observer would recognise that the intention of Parliament was that we should equip ourselves, where possible, with sufficient expertise to deal with the very difficult and very important questions which we have to determine.

9. I, therefore, reject the proposition, which is at the heart of Mr Owen's submissions, that, simply by dint of his former occupation, Sir Stephen Lander is excluded from sitting on the panel.

10. I deal in this context with a number of issues that have been raised and an authority which bears upon them: the first, *Abdroikov* [2008] 1 AER, 315. That case is simply not in point. It involved the exclusion of jurors from a criminal trial. Two policemen had sat in on two different trials and one employee of the Crown Prosecution Service. The upshot of the case was that one policeman in the Metropolitan Police, who was part of a jury which determined the case in which Metropolitan Police Officers gave evidence but which was not decisive for the case, was not disqualified from sitting as a juror. One policeman, who was in the same division as a police officer who gave evidence, which was determinative, because he was the claimed victim of the crime, whose division sent its cases to the same Crown Court, should not have sat on the jury and should have been excluded. Any serving CPS officer could not sit on a case prosecuted by his or her agency.

11. I accept Mr Owen's proposition that there is not a simple and crude line to be drawn between those who are serving officers at the time when they are called upon to judge the evidence of other serving officers and there could arise circumstances in which someone who had, for example, only recently retired from a police force or from the CPS could not serve on a jury. But there is no settled principle that someone who was a policeman cannot sit on a jury or someone who was a CPS lawyer could not do so. In the only case in which this type of question has arisen, not for decision but for observation (*A*[2010] EWCA (Civ) 1490) Lady Justice Smith, at paragraph 17, expressly stated that, in the situation of a professional relationship between a Recorder hearing a case involving children and a guardian who gave controversial evidence, the result, which was that the Recorder should

have recused herself, "might have been different had the relationship been closed some time ago".

12. In paragraph 18 of his skeleton argument, helpfully supplied to me several days before the hearing of this application, Mr Owen and Ms Law submit, in effect, that the task of SIAC is that of the passive referee: "The respondent has put forward as expert evidence a lengthy generic statement on the threat posed to the UK by the RIS and the mechanisms by which they operate. The appellant has submitted a report from Nicholas Fielding in response. It is from that material that SIAC must draw its understanding of the factual issues in this case." I disagree. SIAC must draw its understanding not merely from the material presented to it by the parties, together with any other material that it may call for under Rule 4(3), but from its collective expertise. In counterterrorism cases, members of the Commission, myself included, have by now accumulated enough experience to be able to bring our own assessments to bear upon the material produced by the Security Service and their own assessments. This is the first pure counterintelligence case that we have had to consider. Neither I, nor Judge Ockleton have the necessary background, understanding or expertise satisfactorily to resolve these questions unaided. We need to have, as part of the panel, someone expert in determining them.

13. Finally, in this context, we were informed this morning that one of the two Security Service witnesses had served in the Security Service at the same time as Sir Stephen. They are known to each other. The Security Service witness, AE, said, "I have had very little professional contact with Sir Stephen in my Service career. What contact I had is set out below. A slight contact when I worked on an operational section and Sir Stephen held the

post of Director of that section; slight contact when I was working in IT provision and Sir Stephen was Director-General. I have had no contact with Sir Stephen in relation to Russian matters. Sir Stephen has never been my line manager and I have had no social contact with him".

14. The fair-minded observer, in my judgment, would not regard that slight contact by a man who was then much junior in rank to Sir Stephen as requiring Sir Stephen to disqualify himself.

15. Finally, in this context, there is one point that can be made on the basis of what I have been told by Sir Stephen. In his various capacities, particularly in senior roles, in the Security Service, he was frequently required to make judgments upon the assessments of subordinate officers. It will come as no surprise to anybody to learn that he did not always accept them. It is of critical importance in the intelligence world to make accurate assessments, to check and to countercheck, to probe and to test. That, indeed, is what we, as a Commission, are able to do in counterterrorism cases with the basis of the accumulated knowledge that we have. The suggestion that Sir Stephen might have or might be thought to have a bias resulting from his service in the Security Service, in the light of that obvious fact, is, in my judgment, farfetched.

16. I turn to the second ground of challenge, Sir Stephen's public pronouncements on security issues in the media. I do not propose to refer to every single one of the pronouncements relied upon, but I do intend to refer to three, both because they include that of supposedly greatest concern and because they illustrate the general nature of the complaints.

17. The first is a talk given by Sir Stephen in 2004, the Harry Hinsley lecture at St John's College, Cambridge, which was an extensive review of international intelligence co-operation. Towards the end, Sir Stephen dealt with general intelligence matters and posed for himself a rhetorical question, which he then answered. "What about failure? Failure in the intelligence business comes, in my view, not when pre-emptive intelligence about a terrorist attack cannot always be secured but (a) when there is insufficient intelligence to warn in general terms about a threat or about a risk of adverse political developments, it is reasonable for governments to expect early warning of problems coming so that preparations can be made; (b) where intelligence is available and it has not been assessed correctly or used effectively, that failure, of course, may lie outside the intelligence community; or (c) where the intelligence is just plain wrong. This does happen, but it is rather less common than commentators would suggest. It is far more often merely incomplete".

18. I, for my part, do not see how anyone, let alone the fair-minded and informed observer, could conclude that that passage about the failure of intelligence in a counterterrorism context could possibly lead Sir Stephen not, fairly and independently, to assess the accuracy or otherwise of the Security Service's assessment about the basic issue in this case, whether or not the appellant was and is a recruited agent of a Russian intelligence service.

19. In the same vein, I deal with his most recent observations in August 2011 in a programme, a rather interesting programme, about the history of the Official Secrets Act, going back to

1911 and up to modern times. He made a limited number of observations about it, which are not the subject of criticism. The remark picked upon by Mr Owen is not one of his own, but a remark of the introducer of the programme, Professor Hennessy, who said, of Sir Stephen Lander, that he was "Cold War reared, steeped in operational secrecy". I entirely fail to understand how Professor Hennessy's observations in that programme about Sir Stephen Lander could, conceivably, lead anybody to doubt his independence or lack of bias in determining this appeal.

20. The programme upon which most reliance is placed, understandably, is a programme broadcast in August 2010 about the arrest of Anna Chapman and other Russian nationals in the United States. They, it seems, had been living in the United States, leading ostensibly, normal lives, for very many years. It was alleged that they were long-term Russian agents. Professor Hennessy, again, in introducing the topic and inviting Sir Stephen to make his comment, said that headline writers had had a field day with Anna Chapman and had said that her spy ring was "risible". Sir Stephen Lander's response was as follows: "They are not the people who are going to have their hands on the intelligence. They are part of a machine and the fact that they are nondescript or don't look serious or are just like anybody else is part of the charm of the business. That is why, if you like, the Russians are so successful at some of this stuff, because they are able to put people in those positions over time to build up their cover and to build up their position to be useful. They are part of a machine and to see them as that is the way to view it and the machine is very professional and a serious one you should take seriously."

21. If the issue in this case had been whether or not the Russian Intelligence Services conducted espionage or other intelligence- gathering activities in the West and, specifically, in the United Kingdom, the expression of that view might well have precluded Sir Stephen Lander from sitting on the Panel, but it is not only not in issue that the Russian Intelligence Services do so conduct themselves, it is common knowledge and common ground and Mr Fielding, the appellant's expert, says as much in his report. In paragraph 14 of it, he summarises the intelligence case advanced by the Security Service and notes their observations about the extent of its activities, its competence and so forth. His reply is: "While these points are partly correct, it should be noted that in relation to external activities the reformed RIS now devote considerable time and effort outside Russia to shadowing the activities of the oligarchs who live abroad ... and into counterterrorism particularly in relation to the Caucusus ... The RIS also put a high priority on acquiring scientific and technical information, particularly on the energy sector. There is no longer an ideological aspect to their intelligence activities." Not only in that paragraph does Mr Fielding correctly, as far as I can tell at the moment, accept the substance of the security cases about the nature of the Russian Intelligence Service's activity, but he also makes his own comments, which, as far as I can tell and as far as Sir Stephen Lander can tell, are, themselves, uncontroversial.

22. Accordingly, on the issue which we are required to decide, was and is the appellant a recruited agent of the Russian Intelligence Services, his comments, although forceful, in no way disqualify him from answering that question.

23. Accordingly, I do not accept the second of Mr Owen's propositions.

24. The third is an unusual one. Judges are sometimes required to recuse themselves because of what they have said. This is the first occasion which I have encountered or of which I am aware on which it is claimed that a judge or a member of a panel judging should be required to recuse himself because of what someone has said about him. The issue arises in this way. Nick Fielding is now a freelance investigative journalist with an interest in intelligence affairs. In 1999, he, together with Mark Hollingsworth, another journalist, who I think is not currently interested in intelligence affairs, produced a book called "Defending the Realm". As originally published, it also referred in its title to a disaffected former Security Service officer, David Shayler. The appellant's solicitors supplied to me a copy of a few pages of the book in which observations were made about Sir Stephen Lander. In an extended passage, they purported to describe the manner in which he came to be appointed Director-General in 1996. The book referred to "informed sources", but, to the casual reader, at least, it suggested that what the authors were describing was a true picture of what occurred. I need not describe it in detail. It is set out in pages 284 to 285 of the book. Broadly speaking, it asserts that a sort of office coup took place, organised by Sir Stephen Lander and Lady Eliza Manningham-Buller, to secure his appointment in preference to that of the then Deputy Director-General.

25. I asked Sir Stephen Lander to read the passage and to give me his comments about it. I also formed my own view about it, which I am now going to state. The account of Sir Stephen Lander's appointment plainly did not come from primary sources. Those named in the report could not, conceivably, have discussed his appointment with journalists, nor would the Cabinet Secretary. The report was, therefore, based upon secondary sources,

who, of necessity, could not have known what had happened. If Mr Fielding's report for the purpose of this case had been of the same quality, I would have been unwilling to place any reliance upon it. Sir Stephen Lander, who, of course, knows what happened, was a little more direct. He said that the fact that he had been appointed Director-General and that, subsequently, Lady Manningham-Buller had been appointed Deputy Director-General was true, but nothing in the rest of the report was accurate. From that, I doubt that, if Mr Fielding's report had been, in his view, of the same quality, he would have been unduly impressed by it. It is not, however, of that quality. There are possible weaknesses in it, which will have to be explored at the hearing, but my view is that the report, taken as a whole, is an impressive document. It demonstrates that Mr Fielding has, since 1999, both broadened and deepened his knowledge of intelligence matters in such a way as to permit him, with inevitable limitations, to which I will refer in a moment, to speak as an expert about the issues that arise in this case.

26. As in the case of the book extract, I asked Sir Stephen Lander to read the report. He did and made, in brief detail, comments back to me about it. I do not propose to set them out in this judgment, but I do quote that which I have already quoted to Mr Owen, his conclusion: "So in summary on Fielding, I would judge that he has done a good job as an expert witness and raised some important issues on Z's behalf which the Secretary of State will need to resolve if her case is not to be damaged". I share that view, although I would express it in slightly different language. In my judgment, Mr Fielding has raised serious and well-reasoned questions about key aspects of the assessments of the Security Service about the appellant, which need to be explored and answered at the hearing.

27. I trust that the fair-minded and informed observer, in the light of those unusual revelations by me of preliminary thoughts by members of the panel about the evidence of one witness, would be satisfied that there was no possibility of bias in the minds of any member of the panel, Sir Stephen Lander included.

28. I deal, finally, with a point of utter triviality. In the same book, Mr Fielding reported observations by others, some identified, some not, about Sir Stephen's management style in unflattering terms. Unsurprisingly, Sir Stephen paid no attention at the time, because he did not read them, and now that his attention has been drawn to them thinks nothing of them. In the light of what I have quoted from his letter to me about Mr Fielding's report, the fair-minded observer can be fully satisfied that those observations, largely unattributed in the book, are simply irrelevant to the task that we have.

29. For all of the reasons that I have given, I am satisfied that, applying the conventional test to the unusual circumstances of SIAC and of this case, the fair-minded and well-informed observer would conclude that Sir Stephen Lander can properly sit on the panel to assist in the determination of this appeal. Indeed, I would go further than that. For reasons, which I have already explained, the panel would, in my view, be inadequate to determine these questions without his presence on the panel or the presence on the panel of someone against whom identical objections could be raised to those raised by Mr Owen today. Mr Fielding provides a valuable counterpoise to the assessments of the Security Service, but it is, inevitably, and, for no reason which is any fault of his, a partial counterpoise. First, and probably least important, he has never served as an intelligence officer and has never had to analyse raw intelligence or make assessments upon it; secondly, and more important, he

has not seen and will not see the closed material. If we do not have on the panel Sir Stephen Lander, or someone at least of his background and standing, there will be no effective counterbalance to the closed material deployed by the Security Service and the assessments which they make. I say that without in any way disparaging the special advocates. Mr McCullough is a highly-skilled special advocate and he has appeared in a number of SIAC counter-terrorism cases; but he disclaims any knowledge of counterintelligence cases before this one. Doing the effective best that he will, there is, in my judgment, simply no substitute for knowledge within the panel.

30. Accordingly, I am satisfied that Sir Stephen Lander should not only not be required to recuse himself, but that his presence on the Panel is essential to permit us to reach a sound and just decision.

31. I make two final observations. First, I have made, deliberately, no reference to the evidence of the appellant and her lay witnesses, simply because that evidence is not relevant to the question that I have to decide today, but her evidence is likely to be of great importance, possibly even of determinative importance. Secondly, the fact that this application has been made will not cloud or prejudice my mind or that of Sir Stephen Lander. It was always inevitable that concerns about his appointment to the SIAC Panel would be raised by someone in some case. As it happens, it has been raised in this case. Those concerns are understandable, they have been properly presented by Mr Owen, even though I have found them to be, eventually, unfounded in fact and in law. We will approach this appeal objectively and with independent minds.