SPECIAL IMMIGRATION APPEALS COMMISSION

Field House
Breams Building
London
EC4A 1WR

Wednesday, 23rd March 2011

BEFORE:

THE HONOURABLE MR JUSTICE MITTING

BETWEEN:

E1

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

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MR E GRIEVES (instructed by Messrs Wilson and Co) appeared on behalf of the Appellant.

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

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

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APPLICATION FOR ADJOURNMENT
JUDGMENT

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Transcribed by Harry Counsell
Court Reporters
Cliffords Inn
Fetter Lane,
London EC4A 3LD
Tel: 020 7269 0370

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MR JUSTICE MITTING:

1. This is a renewed application to adjourn a full SIAC appeal scheduled to start next Tuesday.

2. A little needs to be said about the timetable and the background. On 11th May 2010, the Secretary of State made a decision to exclude the appellant, on conducive grounds, in the exercise of prerogative powers. To ensure that he had a right of appeal, at the same time, she cancelled his leave to remain. The decision was served on 1st June 2010. Because he was abroad, he had 28 days in which to appeal; he appealed in time on 21st June.

3. The appeal was lodged by solicitors, Arlington Crown, on his behalf; they had acted for his wife and children in their successful naturalisation application and were acting for him in his as yet undetermined naturalisation application.

4. On 1st July 2010, directions were set at a hearing attended on behalf of the appellant by legal representatives. At the hearing, as the transcript shows, I queried the length of time that the appeal was likely to take in the directions that were to be set and was assured that, notwithstanding

that it would mean that the appellant would be separated from his family for many months, it was, nonetheless, acceptable. The hearing was fixed for the week commencing 28th March 2011.

5. On 1st September 2010, the first open statement was served; it was four days late and it was served late with SIAC permission. It was bland and uninformative.

6. On 3rd November 2010, the appellant's witness statement and supporting documents were served; the statement was served three weeks' late, after a request had been made for an extension to 12th November, which I refused. I allowed an extension until 29th October; the statement was a few days after the period allowed, but nothing turns on that. The statement is, basically, but not entirely, that which the appellant submitted in support of his application for asylum, made with the assistance of Birnberg Peirce, many years ago.

7. On 21st January 2011, the Secretary of State served her second open statement. That was six weeks after the time specified in the directions. Of that period, three weeks can reasonably be attributed to the late service of the appellant's statement, but three weeks were also due to the need to obtain further information before the statement was

served. It set out the substance of the Secretary of State's case and revealed, for the first time, that it was her case that the appellant had been complicit in the killing of a Chechnyan exile called Israilov in Vienna. I am satisfied that that allegation could not be made openly until it was made in the statement served on 21st January, because the open source material upon which it was based was not put into the public domain until 29th November 2010. I do not accept the observation of the special advocate that it could, and should, have been put into the public domain in these proceedings before then.

8. If a request for an adjournment had been made at that stage, then I would have entertained it sympathetically. The appellant could have said that the open case against him had now been transformed from a bland and general allegation to one that was highly specific and he needed time both to respond to it and to assemble evidence in support of his response. If an application had been made then, the problem, which arises in all SIAC appeals, that the security service witness who gives evidence for the Secretary of State is required to immerse him or herself in the detail of the case for many weeks before the hearing, would not have occurred. Unhappily, no application was made. Matters proceeded in accordance with a somewhat modified and

attenuated timetable, with a view to ensuring that the hearing would take place on the fixed date.

9. On 1st March 2011, a Rule 38 hearing was held. As is invariably the case, it had been preceded by exchanges of views, which had resulted in the disclosure of further information to the appellant by agreement between the special advocates and the Secretary of State. The hearing was to determine one question of principle only, upon which I upheld the Secretary of State's view. No further disclosure, therefore, resulted from the hearing.

10. On 10th March 2011, an amended second open statement was served. In substance, it set out, in slightly greater detail, the Secretary of State's assessment of the position played by the appellant in the Chechnyan diaspora and in the political relations between the Government in Chechnya and those still abroad.

11. On 10th March 2011, the same day, the appellant's then solicitors said that they had received an email from a family friend saying that he was changing his legal representation. No reason for that was given.

12. On 17th March 2011, a request for an adjournment was made from the appellant's present solicitors, Wilson & Co, which I refused on the same day, on paper. This is the renewed oral application.

13. Mr Grieves has submitted a detailed skeleton argument supported by oral submissions and has relied on witness statements from the appellant's current solicitor, Anita Vasisht, and from a family friend, Mr Marks. The picture that they reveal from the point of view of the orderly progress of this case is disturbing. Accusations are made against Arlington Crown about lack of preparation and even misleading statements made to the appellant about the conduct of his case. Very fundamentally, an accusation is made by the appellant that his then solicitor suggested to him that he should lie in his witness statement about the fact that he was living in fear in Russia. According to the appellant, the solicitor said to him that, unless he said that he was living in fear in Russia, he would lose his appeal. The appellant denies living in fear in Russia and did so at the time, but, nonetheless, agreed to go along with and, indeed, to sign a statement containing that assertion.

14. I am conscious of the fact that I have not had any statement from the appellant's former solicitor, still less

has his file been opened to me. Clearly, privilege has been waived, but I only have a partial statement of what the file would contain if I were to see it fully. I, of course, accept, as I indicated in correspondence, that the appellant's present solicitors, a skilful and reputable firm, have dealt with his case in accordance with the high standards of their profession and, in the representations that have been made by them to me, they have acted throughout in good faith.

15. What the history discloses is that back in October, when the witness statement was to be served, the appellant's then solicitor, in an email on 15th October, said that "the appellant may also be instructing another firm of solicitors". The material which I now have does not fully deal with that. What it does say is that, in January 2011, the appellant's then solicitor told him what the cost of the case would be; a figure of £20,000 was put upon it. The appellant says that that was beyond his means and he made that clear. Yet he did nothing about it. The possibility of seeking public funding for his case was clearly canvassed. He said in a discussion with Ms Vasisht, on 22nd March 2011, that the solicitor said that he might be able to put him in touch with a legal aid solicitor and he contemplated instructing someone that he knew, Elizabeth Miller. All of

that took place in January 2011. It seems from what I can tell from Mr Marks' statement that the appellant's decision not to seek public funding before the last two weeks was a decision which he made consciously. Mr Marks says, and I have no reason to doubt, that the appellant's then solicitor had said to him that he had offered him the option of a legal aid solicitor "much earlier", but the appellant had said to him, "No, no, we want to go private". Mr Marks took that up with the appellant's wife. He got the impression from her that, in her and the appellant's view, "you only get what you pay for". The implication is that a legal aid solicitor would have been viewed by them as second best.

16. Ms Vasisht's statement makes it clear that the appellant did provide funding to his former solicitor, £450 in June 2010, twice; £800 in September 2011; and £1,057.50 in October 2010. The money was apparently raised from friends.

17. All of this material satisfies me that the appellant has known for very many months that he had the right to change solicitors and that he had the right to apply for legal aid, if he thought it was in his interests to do so, but, for whatever reason, decided to stick with Arlington Crown and to continue to instruct them privately.

18. Mr Glasson submits that, in those circumstances, the appellant is not free of blame for the last-minute application for an adjournment. In my view, Mr Glasson's submission is right. Although I am far from confident that I have got completely to the bottom of this, I am satisfied that the appellant had every opportunity to instruct another firm of solicitors months ago and to apply for public funding, if he thought it was in his interest to do so. The current position has arisen, therefore, substantially because of deliberate decisions made by him.

19. In those circumstances, the difficulties which will undoubtedly be caused to the presentation of his case, if I refuse an adjournment, will lie mainly at his own door. I have considered whether or not, despite that, the interests of justice, nevertheless, require that I should accede to the request for an adjournment. I am satisfied that, although the time for preparation is very short and although the appellant's case may well not be presented at its very best, nevertheless, there is, with hard work and a degree of flexibility, every prospect that his case can be properly and fully presented at an appeal hearing which begins next week. I am told that there are two witnesses that he may wish to obtain statements from, as well as to give evidence himself. His own witness statement, which will inevitably be a

detailed document, can be prepared in the course of the next few days and late service of it will be accepted by the Commission. The Secretary of State will have to do her best to deal with its contents. I have no reason to believe that she will be unable to do so. As to witnesses, I do not name them, but I know who they are. One of them is in the United Kingdom. If approached and if willing to assist, there is no reason why a statement should not be taken from him or, indeed, why he should not be called to give evidence in the course of the hearing. One witness is not in the United Kingdom, it may well be a great deal more difficult to obtain his evidence, but I have no reason to believe that his whereabouts are unknown or that, if he wishes to assist the appellant, that means do not exist which can permit him to do so. I am told that, even at this late stage, it may be possible to set up a television link from Grozny to permit the appellant, and, perhaps, any Chechnyan witness residing in Chechnya, to give live evidence.

20. The possibility of adducing expert evidence has been canvassed. As regards political expert evidence, it may well be too late to adduce such evidence, but, given the somewhat dramatic nature of the allegations against the appellant, general political evidence is unlikely to be determinative or even significant in the appeal.

21. I turn, finally, to the appellant's family situation. He has a wife and six children, one of whom is - I use, no doubt, inaccurate shorthand - disabled. The children are British citizens, as is his wife, by naturalisation. SIAC will be required to treat the interests of the children as a primary consideration and also to have regard to their rights to respect for family life under Article 8. In ordinary circumstances, those who now represent the appellant would have wished to obtain a report from Renee Cohen, a skilled and experienced witness in this field, who has produced many reports on the family situations of SIAC appellants. I can imagine what the report would say. Speaking for myself, and with every confidence for my colleagues as well, who will hear this appeal, we would have no difficulty in assessing the interests of this family and, in particular, of these children, with or without the assistance of Ms Cohen. This is, to be blunt, not a case in which Article 8 is likely to be determinative. If the Secretary of State's case is right, then there will be compelling reasons to put the interests of the children and of the family a distant second to the need to protect national security; if the Secretary of State's case is not right, then their interests will call, inevitably, for the revocation of the decision, even if there might be other reasons for upholding it.

22. Accordingly, in those circumstances, I reject this application for an adjournment and direct that the appeal will take place when it is intended to take place, beginning next week. I am, as always, willing to be flexible about the hearing. I am willing to postpone the start of the hearing by a day to give a little more time to the appellant’s hard-pressed solicitors to assemble his case. One way or another the Commission will ensure that the panel can sit into the next week to accommodate any overrunning or other difficulties.

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