CO/8519/2008

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 9th September 2008

B e f o r e:

MR JUSTICE COLLINS

Between:
THE QUEEN ON THE APPLICATION OF NIKOLAY GLUSHKOV
Claimant

v

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) ASYLUM AND IMMIGRATION TRIBUNAL
Defendants

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(Official Shorthand Writers to the Court)

Laurens Fransman QC and Duran Seddon (instructed by Gherson Solicitors) appeared on behalf of the **Claimant**
Tim Eike and Robert Palmer (instructed by the Treasury Solicitor) appeared on behalf of the **First Defendant**
The Second Defendant was not represented and did not attend

J U D G M E N T
(Approved by the court)

1. MR JUSTICE COLLINS: This is a claim for judicial review of a decision of the Secretary of State which was made on Friday, whereby she indicated that she was minded to reconsider the asylum claim which had been made by the claimant, and so it was not appropriate that his appeal go ahead.

2. His appeal had been fixed for yesterday and the tribunal had set aside some 3 weeks to hear it because it was a very substantial appeal indeed. I am told that there were 18 witnesses lined up, some of whom I think were expert witnesses, and some of whom were to come from abroad. There are real concerns that if the matter is put over and an appeal has to be pursued at a later date, then some at least of the witnesses may be unable or, more importantly, unwilling to attend again, because of fears of repercussions if they do. Whether or not those are realistic fears is perhaps not the point; the point is whether they are genuinely held and so would mean that the witnesses did not attend.

3. The history is very briefly as follows. The claimant is a Russian national. He was for a time the director of Aeroflot when Aeroflot was what I suppose would be described in this jurisdiction as privatised, following the changes in Russia after the collapse of the Soviet Union.

4. It was asserted that Mr Berezovsky, who has not endeared himself to the powers that be in Russia at the moment and who has, I am told, been granted refugee status in this country as a result, and who has been the subject of criminal proceedings in Russia, is behind this claimant.

5. This claimant was himself prosecuted in Russia for alleged offences arising out of his management of the affairs of Aeroflot. He was remanded in custody for a period of some 2 years and was held in a notorious prison run by the FSB, in which the conditions are said to be such as would contravene Article 3 of the European Convention on Human Rights. Whether or not that is established may be a matter for consideration at a later date. There is certainly a prima facie case that that is the position.

6. As I understand it, he was convicted of an offence, but was not immediately imprisoned, and was able to leave Russia. In 2006 he came to this country and on arrival claimed asylum here. The Secretary of State considered the claim and considered it for a substantial period of time. It was not until October 2007 that she rejected his claim. He was then given, as one would expect, the usual notice of his rights of appeal. An appeal was lodged with the Asylum & Immigration Tribunal. It was apparent that the appeal was going to be a lengthy one, so there were a number of case management hearings before the tribunal and timetables were set for the submission of evidence on both sides.

7. There are issues as to who was at any one time to blame for the failures to keep to the timetables. The claimant is clear that the fault lay with the Home Office, which took longer than it should to produce the material that it was supposed to produce. There are counter-assertions by the Home Office. In any event, there was served, very much at

the last minute, a substantial body of material, which arrived with the Treasury Solicitor during the course of last week, and finally on Friday.

8. The claimants say that the bulk of that was nothing new, in the sense that it was fresh material, but was a means whereby what had been served and put together in perhaps a somewhat piecemeal fashion, was all gathered together and put in a sensible and digestible form for the purpose of the hearing before the tribunal. However, as I understand it, it is recognised that there was some extra material, which included a further statement from the claimant and a statement from a witness whom he proposed to call, together with some exhibits. It is said that there were 160 separate exhibits. Mr Fransman tells me that at least half of those were not new. It follows that perhaps some half were new.

9. Whether they were sufficient to tip the balance in the view of the Secretary of State and require reconsideration is, submits Mr Fransman, questionable. She ought to have appreciated from the material with which she had been served before that there was a powerful case to be made on the claimant's behalf, in particular that the contention made by the official, who made the decision on her behalf in October 2007, that the claimant would have a fair trial were he to be returned to Russia was one which could not be sensibly maintained, since it was coupled with the assertion that Mr Berezovsky would have a fair trial, and that was contrary to the acceptance that Mr Berezovsky had been entitled to asylum here. I know I am putting it in a very broad way, but that is certainly an indication of the concerns that have been expressed. The decision made by the Secretary of State through the Treasury Solicitor on 5th September 2008 was one which was viewed with a high degree of suspicion as a result of the way in which the claimant's case had thitherto been dealt with.

10. The letter from the Treasury Solicitor commences with this statement:

> "It is with the greatest regret and with deep reluctance that the Secretary of State hereby notifies the Tribunal under Rule 17(2) of the Procedure Rules that, due to circumstances beyond her control, she is compelled to withdraw the decision of 9 October 2007 under appeal in this matter to enable her to reconsider that decision. This is in light of the new evidence served late by the Appellant including the statement from Mr Berezovsky served by email at 20.13 last night (and only received - without its 160 exhibits - today) and the new statement of Mr Glushkov, foreshadowed in the accompanying letter of last night but not yet received."

Then there are further concerns expressed about the late service and the history of service last week (of the extra material), including an expert's report dated 2nd September and the statement of another witness dated 29th August. There can be no doubt that there was extra material which was served, and it may be for good reason, very late. That is undoubted. The letter continues:

> "As a result, it is clear that the SSHD, through no fault of her own, has been placed in an untenable position with regard to this appeal. There is simply no time for the SSHD to consider this further late evidence and in

> light of the fact that it relates to the two main protagonists in the Appellant's case, namely Boris Berezovsky and the Appellant himself, the SSHD has no choice but to withdraw her decision letter and issue a further decision once she has had a chance to consider the documentation properly."

11. Mr Fransman claims that the letter does not make it at all clear that the Secretary of State's state of mind was, as a result of the material with which she had been served, that she considered it appropriate to reconsider the matter, because it might be that she would reach a contrary decision and decide that her original refusal was wrong. He submits that if only that had been made clear, it may be that these proceedings would not have been considered necessary, but because the claimant could not be satisfied that this was other than a tactical move to avoid having to apply for an adjournment but to bring the appeal process to an end by a notification under Rule 17(2), these proceedings were therefore necessary.

12. I should go briefly to the relevant statutory and regulatory provisions, so far as they are material. The rights of appeal are given in Part 5 of the Nationality, Immigration and Asylum Act 2002, starting with section 81. I do not need to read the general provisions in detail. Suffice it to say that it is clear that the tribunal reconsiders the matter on fact. It can consider any evidence, whether available to the Secretary of State or not, which is put before it and will reach its own conclusions, so far as the facts are concerned, untrammelled by any conclusion reached by the Secretary of State. It is a full factual reconsideration. It also has to consider whether there were any errors of law, because if there were, and that includes any failures to apply any immigration rule correctly, that will also require that an appeal be allowed.

13. Section 104 of the Act is headed "Pending appeal" and provides that an appeal is pending during the period beginning when it is instituted and ending when it is finally determined, withdrawn or abandoned, or when it lapses under special provisions with which we need not concern ourselves. Then there are detailed provisions relating to that in subsection (2), but subsection (4A) provides:

> "An appeal under section 82(1) [which is the relevant provision for the purposes of this case] brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom..."

That is subject to some subsequent sections which I do not need to need to go into, but which create their own difficulties.

14. The Asylum and Immigration Tribunal (Procedure) Rules 2005 pick up the distinction between withdrawal and abandonment. Withdrawal is dealt with in Rule 17, which provides that an appellant may withdraw an appeal at any time, either orally at a hearing or by written notice, but the relevant provision is subparagraph (2), which reads:

> "(2) An appeal shall be treated as withdrawn if the respondent notifies the

> Tribunal that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn."
>
> Rule 18 deals with abandonment and provides that:
>
> "(1) Any party to a pending appeal must notify the Tribunal if they are aware that an event specified in -
>
> (a) section 104(4) or (5) of the 2002 Act [or relevant EEC regulations apply]..."

So there is a distinction between abandonment and withdrawal. It is difficult to follow the rationale behind that distinction but, be that as it may, Parliament has seen fit to provide for it.

15. The submission made by Mr Fransman is that withdrawal of an appeal, because it takes away from the tribunal, which has become seized of the factual decision once an appeal has been put before it, its jurisdiction, should only occur if the Secretary of State is intending to concede that the claim made by the appellant is one which should be accepted. If she has decided and notified an appellant that she has decided to accept his claim, then it is difficult to see why Rule 17 is needed, because that will create an abandonment. Not so, says Mr Fransman: there is a time between notification that a claim will be accepted and the actual act of acceptance. It is that period of time that withdrawal is to cater for.

16. He has prayed in aid a statement in a consultation paper produced under the procedure rules by the Department for Constitutional Affairs which said:

> "**Rule 17(2)** simplifies the procedure if the respondent concedes a case, i.e. withdraws the original decision to which the appeal relates. Under the proposed rule, the parties will be notified that the appeal is considered as withdrawn without any action required from the appellant himself. This provision intends to avoid unnecessary paper work for both parties and for the Tribunal."

It is said that that indicates that the purpose behind this was to apply where the respondent, that is the Secretary of State, conceded the case. It depends what is meant by "concede" in the circumstances. The one thing that is clear is that a consultation or a statement in a consultation document by the department is no sensible guide to the proper construction of a statutory provision, or indeed a rule. It is necessary to see what is covered by the rules. Certainly, so far as the language of the rule is concerned, there is no limitation such as suggested by that statement, assuming that statement does suggest such a limitation, or such as Mr Fransman submits.

17. I have a great difficulty with the submission made because it seems to make the distinction between 17 and 18 somewhat unnecessary and to provide a severe limitation to the effectiveness and point of 17(2), in particular, and one asks one's self, "Where is it appropriate to draw the line?" Does the Secretary of State have to say to herself, "It

is likely that I will decide in favour of the claimant, the appellant"? Is possibility sufficient or is certainty required? There is nothing in the wording of the rule that suggests that that exercise has to be gone through and, absent the wording from the consultation document, it seems to me that it would be very difficult for a submission, such as was made by Mr Fransman, to get off the ground, certainly having regard to the wording of the rule. After all, it is surely sensible, as a general approach, that if the Secretary of State receives further material which persuades her that it is appropriate to give careful reconsideration because it may be that the original decision will be changed, that that should be done.

18. Mr Fransman says, "In those circumstances there ought to be a request for an adjournment so that the tribunal can consider whether it is appropriate to allow that, or whether it is necessary, because of the disadvantages to the particular appellant that may result if the matter is put over in this way, that the tribunal must have the last word and must consider whether it is appropriate." It is clear beyond doubt, in my view, that the Secretary of State must not use the withdrawal power as a tactical exercise to avoid having to apply for an adjournment. She must only use it if she is genuinely of the view that she might change her mind on reconsidering the material that is put before her. It would be a wrongful exercise, and unfair to an appellant, if she were simply to use this power because she wanted more time to deal with the material that was put forward but had no intention of changing her mind as a result of it. I do not understand that the contrary would have been argued on behalf of the Secretary of State, but the position that was made clear to me in the course of the hearing is that she is indeed approaching this on the basis that she accepts that the material may result in a change, that there is sufficient to require her to consider it and that it is not a matter that can be dealt with speedily, in the sense that it will take only a few days.

19. Having said that, this is not an encouragement to spend any particular time. It is obviously a matter that will have to be considered with reasonable dispatch, having regard to the length of time that has already elapsed since the original application was made. It is now some 2 years since the original claim was made. I appreciate the pressures on the Secretary of State but, particularly as there are witnesses, one of whom is now 90 years old, who are vulnerable and whose evidence is essential, it is all the more important that the Secretary of State reaches her decision as soon as she reasonably can, but it is clear that there is a considerable body of material which she will have to take into account. If that was the basis upon which she decided to withdraw, then the tribunal was right to say that there was no jurisdiction for it to consider it.

20. For this claim to succeed there must be some proper material to suggest that there has been bad faith, because it really seems to me, and I do not think Mr Fransman would demur from this, that a claim that the decision of the Secretary of State should be overturned is one which will depend upon showing that it was a decision which was irrational and really would be irrational in circumstances such as this, if it were made in bad faith. That is to say, it was made not for the purpose of a genuine reconsideration, because of a view that the decision might be changed, but with a view to getting an advantage in not having to deal with an appeal at the time that it was fixed.

21. That brings me to the second ground, which is that the decision of the Secretary of State was an irrational one. I can understand the suspicion, I can understand the concern, but there is, in my judgment, insufficient material to enable me to say that the threshold has been crossed and that this was a decision which is vulnerable to judicial review because it was one no reasonable Secretary of State could have made. The letter from the Treasury Solicitor could perhaps have made clear that it was the Secretary of State's view that there was sufficient to require her to reconsider. Nonetheless it was implicit, on a fair reading, that that was the approach that was to be adopted. That approach has now been confirmed before me in this court.

22. On the material, I am quite unable to conclude that there is sufficient to establish a claim that the Secretary of State's decision to treat the matter as withdrawn was one which could not reasonably be reached. In my judgment, in those circumstances this claim cannot succeed.

23. There are two matters I would add. The first is that this came before the court, inevitably and correctly, very quickly, as a result of a decision by the Duty Judge that permission be granted. That is what he was asked to do. He should not have done it. What he should have done was to put the matter in for immediate oral hearing with an indication, if he saw fit (and it would have been a perfectly proper indication, and indeed an indication that should have put the Secretary of State on notice) that the court might well be minded to make an immediate order if persuaded that that was appropriate. But it is, I must emphasise this for future reference, never appropriate for a Duty Judge to grant permission. The most he should do is to put it for oral hearing before this court for the earliest possible consideration.

24. The second is that if the Secretary of State in due course maintains her decision and so the appeal has to be reheard, if any witness is unable to attend on any subsequent appeal and if it can be shown that there was a genuine inability, whether due to real reluctance or because, for example, of old age and frailty, then I would be very surprised if the tribunal did not decide that it was appropriate to allow the witness statement to be put in evidence and to give it such weight as it considered appropriate, even though the witness could not be cross-examined.

25. MR FRANSMAN: Yes, my Lord, thank you. I think that is very helpful to all to include that.

26. MR JUSTICE COLLINS: Mr Eike, you say you want your costs?

27. MR EICKE: My Lord, yes. This came on as a substantive judicial review.

28. MR JUSTICE COLLINS: That is another reason why the Duty Judge should not have granted permission, because if this had been an oral hearing, then the practice direction would have applied.

29. MR EICKE: My Lord, I fully accept that, but your Lordship would have seen in the opening paragraphs of skeleton argument, we were ready to be here to deal with this as

a permission hearing, even, despite what your Lordship said about the Duty Judge, in front of the Duty Judge yesterday. That did not happen.

30. MR JUSTICE COLLINS: The Duty Judge is not, as it happens, a Nominated Judge, which is another problem.

31. MR EICKE: My Lord, exactly, but we are now finding ourselves at a substantive judicial review which the Secretary of State has won, your Lordship has indicated that the decision was implicit in the letter, it could have been ascertained by just asking the Secretary of State if there was uncertainty and your Lordship did not call upon me to make any submissions. In my respectful submission, this is an appropriate case in which the Secretary of State should be awarded her costs.

32. MR FRANSMAN: We would ask your Lordship not to award costs against us and let each party bear their own costs. We did not, in good faith, know that the Duty Judge should not be granting permission --

33. MR JUSTICE COLLINS: No, no, that is not your fault.

34. MR FRANSMAN: -- otherwise I would have mentioned that to MacDuff J last night.

35. MR JUSTICE COLLINS: That is something the Duty Judges are asked not to do. It is probably quite helpful that I should have said it in open court as part of a judgment so that everyone knows that they should not ask the Duty Judge to grant permission; they should ask the Duty Judge to do what most Duty Judges will do, which is to put in for an immediate -- and if necessary make an interim order that until it is considered, for example, the individual cannot be removed or whatever may be the particular case.

36. MR FRANSMAN: Yes, but in any event, your Lordship has seen the difference between the wording of the letter of 5th September and the position that the Secretary of State takes today, and your Lordship has heard that if we had been given, not necessarily a bright green light, but at least a dim green light, then we might have taken a different view.

37. There is still the question of balancing the loss of the appeal against "How long is it going to take?" and "How minded are you?", but at least we have been in the realm of discussion.

38. It is with deep regret that I say that the proceedings have been marked all along by a most aggressive form of non-co-operation. I may say that that has infiltrated on both sides and there was, quite frankly, I do not think any prospect on our side of getting an answer to the question "What are you really minded to do?" I think that we would have been directed to the terms of the letter and the terms of the letter would have stood. We were not offered any explanation yesterday. It would have been perfectly clear to say at any time in the proceedings yesterday that this is a reconsideration, like most reconsiderations, because we have now seen so much. It is not just a matter of taking the time to read it and re-make the decision; it is a matter of thinking that perhaps that threshold has been passed. We would say that it is not appropriate in these circumstances, having heard the shift that has taken place between the tone of the letter

of 5th September and what has been said today, that we should have the costs against us. I would ask your Lordship not to make that order.

39. MR JUSTICE COLLINS: I am sad to see the last paragraph of your solicitor's statement.

40. MR FRANSMAN: Yes, but I regret that that is the reality: we are not likely to be included.

41. MR JUSTICE COLLINS: No, I understand that, but there really is not any evidence that can persuade a court that that is the position, whatever his suspicions may be. There we are.

42. MR EICKE: My Lord, just in relation to what my learned friend phrases "the shift", in my respectful submission there was not a shift; it was not clear-cut at any point that the letter -- we said, "This is for reconsideration" -- was to be understood any other way than it is for reconsideration by the Secretary of State. If the question had been asked, an answer would have been provided. The ordinary rule is that costs follow the event. In my respectful submission, my learned friend has not shown any reason why the ordinary rules should not be followed.

43. MR JUSTICE COLLINS: I once persuaded Leggatt J to award me costs when I lost a case.

44. MR EICKE: My Lord, very belatedly, if I may congratulate your Lordship, but in my respectful submission my learned friend has not made a strong enough case to deviate from the ordinary rule, which is that costs follow the event.

45. MR JUSTICE COLLINS: Yes, I accept that 44(3) provides that the normal rule is that costs follow the event, in the sense that the winner takes costs, but that is not a final consideration, because the rule requires the court to consider, among other things, the conduct of a litigation and the conduct of the parties more generally.

46. The history of this shows that there were said to be faults on both sides, so far as keeping to a timetable and so on is concerned. There is no doubt that the Secretary of State was late in service of some of the material. I take your point that the letter -- and I think I have said that it was probably implicit in the letter that this was the purpose of reconsideration; there was no question that there was late service of material. On the other hand, it is at least possible to say that it sounds strange that it was not flagged up at an earlier stage.

47. There might be a real need to reconsider this in the light of the material that has already been served. I am not in a position to go into the rights and wrongs and the history, because I do not know enough about it. True the trigger for the final decision was the late service of the material; true the claim has failed. On the other hand, I think that the concern by the claimant's advisers was a real and appropriate concern. It may be that they should have asked the Secretary of State, through the Treasury Solicitor, to be more positive in indicating what is the purpose behind this. The letter was not as clear as it might have been, although I accept that it may be said that it was implicit. It is

always difficult for a judge to do more in considering costs than to adopt a very broadbrush approach.

48. MR EICKE: My Lord, while I fully accept what your Lordship says, can I just urge some caution about looking at the conduct in relation to the AIT proceedings, because the costs for that are not before this court.

49. MR JUSTICE COLLINS: They have no power --

50. MR EICKE: They have no power to award costs.

51. MR JUSTICE COLLINS: For some reason, although there is power in the Act, the powers that be were adamant that they would not give the tribunal -- I was very cross.

52. MR EICKE: My Lord, I appreciate that, but whatever happened before the AIT, in my respectful submission, should not inform your Lordship's decision as to the costs in relation to these proceedings.

53. MR JUSTICE COLLINS: No, I am not.

54. MR EICKE: Where the decision was that of Friday, and the conduct of those proceedings, there can be no complaint about the way the Secretary of State has conducted herself. In my respectful submission, quite the contrary; if any complaint lies, it lies the other way.

55. MR JUSTICE COLLINS: I am well aware of that, although I think it is an unfortunate lacuna that the tribunal does not have power, even though it may have a limited power in certain circumstances to award costs. For some reason, although Parliament said that the rules could contain the provision, the powers that be have been adamant that they are not going give such a power to the tribunal.

56. MR EICKE: My Lord, yes.

57. MR JUSTICE COLLINS: I find this a difficult decision. I appreciate that I cannot let my heart rule my head. I am bound to say that I see considerable force in [the argument], looked at from a point of view of what, overall, may be considered by some to be fair, that the claimant should not have to pay your costs. I think that on balance I have to follow the rules and I do not think there is enough to enable me to come down in favour of saying that you should not have your costs, but they are limited to the costs of today.

58. MR EIKE: My Lord, it is preparing the skeleton argument and today, in my respectful submission.

59. MR JUSTICE COLLINS: Yes, but no more than the cost of skeleton argument and today, detailed assessment if not agreed.

60. MR EICKE: I am grateful, my Lord.

61. MR JUSTICE COLLINS: I am sorry, Mr Fransman.

62. MR FRANSMAN: Thank you for considering it so carefully.

63. MR JUSTICE COLLINS: I would like to have found in your favour, but I do not think I can properly.

64. MR FRANSMAN: One last matter, we understand from the Admin Court Office that in order for the case materials to be treated as confidential it will be necessary for your Lordship to make an order to that effect. The reason why we ask it is because --

65. MR JUSTICE COLLINS: Yes, it is because of a decision I made in relation to access to the material. The access normally is to the claim form and any acknowledgment of service. Is there anything in the claim form --

66. MR FRANSMAN: The names of witnesses and those witnesses --

67. MR JUSTICE COLLINS: There is no objection to naming Mr Berezovsky or the claimant, but I will direct that no other names be identified, in particular names of any witnesses.

68. MR FRANSMAN: That would mean that any member of the public seeking access to the records would not have access to those names.

69. MR JUSTICE COLLINS: The only record they are entitled to look at is the claim form, which is effectively the grounds. I do not think that that contains anything, does it, which --

70. MR FRANSMAN: I see that the names are at tab 3 and tab 5. Tab 3 is an exhibit to the witness statement.

71. MR JUSTICE COLLINS: They are not entitled to the extra material, that is to say the witness statement and the exhibits, unless they make a specific application to a judge. The only automatic right for any third party is to see the claim form, which will of course be the grounds, but they are not entitled to any witness statements or exhibits.

72. MR FRANSMAN: Is there any way of marking the record so that if an application is made to a judge to see Mr Glushkov's witness statement in this case, the judge can be alerted to the sensitivity?

73. MR JUSTICE COLLINS: Yes, I will ensure that that is taken on board and I will make an order that in no circumstances must the name of any individual who is mentioned in any document which is on the court file be made public, other than the claimant or Mr Berezovsky.

74. MR FRANSMAN: I appreciate that, my Lord, it is simply that promises have been given to individuals that they would not be identified if they came forward, and we have to honour those promises.

75. MR JUSTICE COLLINS: There is no problem with that, John, is there?

76. MEMBER OF THE PRESS: No.

77. MR JUSTICE COLLINS: He is the only press representative here.

78. MR FRANSMAN: My Lord, thank you very much indeed for allowing this matter to come into your list unexpectedly.

79. MR JUSTICE COLLINS: Someone had to deal with it.