

Neutral Citation Number: [2008] EWCA Civ 180

Case Nos: C5/2007/1700  
C5/2007/1699

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL**  
**CC/00027/2006 & AA/05797/2006**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/03/2008

**Before :**

**LORD JUSTICE PILL**  
**LORD JUSTICE SEDLEY**  
and  
**LORD JUSTICE LONGMORE**

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**Between :**

**XZ (RUSSIA) & ANOTHER**  
**- and -**  
**SECRETARY OF STATE FOR THE HOME**  
**DEPARTMENT**

**Appellant**

**Respondent**

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**Mr P Haywood** (instructed by Messrs Wilson & Co) for the **Appellants**  
**Miss S Chan** (instructed by The Treasury Solicitors) for the **Respondents**

Hearing date: Wednesday 13 February 2008  
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**Judgment**

## Lord Justice Sedley :

1. These conjoined appeals come before the court by permission of Sir Henry Brooke, who, while recognising that both involve essentially factual challenges, took the view that the need for anxious scrutiny meant that they were not without a real prospect of success.
2. The appellants are mother and son; she is now 43; he is now 22. They are ethnic Chechens, Muslims and, for well-known political and historical reasons, Russian nationals. They came together to the United Kingdom in September 2001, the mother having returned to Chechnya to collect the son. Their asylum and humanitarian protection claims, which were first separately processed, were both rejected. On appeal both failed, but in both cases reconsideration was directed because of arguable errors of law. In due course such errors of law were established, and reconsideration proceeded to a now linked second stage. In the mother's case this was to be at large; in the son's, it was to be on the basis that the principal findings of fact made by the first immigration judge, which I will set out below, were to stand.
3. The linked reconsiderations came in June 2007 before a tribunal consisting of DIJ McCarthy and IJ Grimmett. Their determination (signed only by the first-named judge - a practice which gives a misleading impression and in my view calls for reconsideration) is well structured and methodically reasoned – qualities which make it easier than it sometimes is to follow the tribunal's thinking and to see whether they have gone wrong in law. In terms of structure, it is relevant that they have set out the medical evidence (none of it challenged) and the expert evidence (effectively all of which they accept), and have related the latter to the other in-country evidence, before setting out and evaluating the appellants' own accounts. The issue was summarised by them as follows:
  14. In brief, the appellants contend they would face a real risk of persecution or other serious harm if they returned to Russia. They say they would be identified as being from Chechnya and would be at risk simply for their ethnicity. In addition, they believe the Russian authorities would think they held political opinions against the state because of their long absence from Russia, their stay in London and their association to the husband of the first appellant and his political activities. The appellants relied on the fact they had experienced serious harm (including abduction, assaults, threats to life and attacks on property, relatives and friends) in Chechnya and that they had encountered discrimination elsewhere within the Russian Federation and had been arrested when living in Russia, resulting in the Russian authorities maintaining a record about them. The appellants fear being identified and ill treated at the Russian boarder post because of their ethnicity and imputed political opinion. The appellants fear is compounded at this time because the relationship between Moscow and Chechnya and between Moscow and the United Kingdom had deteriorated.

4. The material sources of law are now the 2006 Regulations (sometimes called the Qualification Regulations and sometimes the Protection Regulations) transposing the minimum standards directive 2004/83/EC, with the corresponding amendments to the Immigration Rules. No issue arises either upon the detail of these provisions or upon the tribunal's characterisation of the test to be applied by them, whether in relation to political persecution or to serious harm, as a "real risk" test. At the centre of these appeals is the all but self-evident proposition that a counterpart of a real risk of future events is a real possibility that such events have already occurred. The question is whether the tribunal was wrong not to deduce from the evidence a real possibility that the traumatic events experienced by both appellants were targeted acts; for if that was a real possibility, there was no dispute that there would be a real risk of their recurrence if the appellants were returned, nor therefore that they would be entitled to international protection. It is necessary to stress at the start that this is the relevant standard of proof, because at several points of her skeleton argument Susan Chan, for the Home Secretary, has asserted that the tribunal have found that this or that event did not happen or did not have the character attributed to it. As will be seen, the tribunal were more circumspect than this in their findings: had they not been, the appellants' task might have been easier.
5. In his skeleton argument the appellants' counsel, Philip Haywood, has helpfully summarised their case as follows:

11. The background to the claim advanced by both Applicants lies in the extremely traumatic events surrounding the Chechen War and the appalling treatment that they, along with other members of their family, had suffered at the hands of Russian Security force personnel. Essentially, the claim advanced by the Applicants was that they had been targeted because of the political activities of A1's husband (and A2's father) who had been active within the Chechen Parliament (and therefore associated with the Chechen Separatist movement), leading to reprisals being taken against him and other family members, that came to include A1 and A2; or on more general account of the position of their family.

12. From very detailed psychiatric evidence before the Panel (considered further below), it was clear that A1 and A2 had both been profoundly affected by what had happened to them in Chechnya. That psychiatric evidence was uncontroverted before the Tribunal. Both Applicants were said to be suffering from PTSD and the psychological sequelae of their experiences, such that their presentation and ability to give evidence was likely to be significantly affected and impaired.

15. In outline:

- (a). A1 has been married on two occasions. Her second husband was involved in politics and, so she believed, worked with the [Chechen separatist] Jorhar Dudaev Government. Her husband came from a wealthy family. A1 explained in her witness statement and the point is clearly significant in the light

of the subsequent approach taken by the Tribunal to her evidence that he spent very long periods (in some cases, years) away from home, so that she had little specific knowledge of his political *activities*. Furthermore, she had never asked or been told about what he was actually doing (the Chenciner report takes up this point and indicates that such, as is in any event is probably self-evident, was likely to be the case in a traditional and patriarchal society such as that of Chechnya). A1 had had to become essentially self-sufficient in order to support herself and her children and had run a business in Grozny;

(b). A2's evidence was that his father had been connected with the Chechen Parliament, although that was not a matter that he could discuss with his father, and he had in any event been very young at the time. He said in his witness statement that he knew of his father's political involvement and that such was in point of fact common knowledge in the community 'Our neighbours knew and people would talk. Also my friend Shamil's father worked in the Chechen Parliament and I knew that my father worked with him. Also important looking people would come to our house and when they would take their jackets off they would be armed. Sometimes they would take the bullets out of the gun and give me the gun to play with'

(c). A2 also stated that his uncle and cousins had been involved with the Chechen government (and it was not in issue before the Tribunal that they had been killed: see below). His cousins had been working in the militia of the rebel Chechen President Maskhadov;

(d). A1's husband had been killed. She believed that his death had resulted from his political involvement

(e). A1 was living with her son in Grozny. In 1995, during the period of the first Chechen war, A1 had been waiting at a bus stop and had been dragged in to a car and punched so that she lost consciousness. When she regained consciousness, she discovered that she been taken up in to the mountains. She believed that her abductors were members of the Russian security forces, and that they had all spoken in Russian. She was raped on multiple occasions by a group of men who surrounded her. After the ordeal had finished she was left under guard; she asked the men who were guarding her if they were going to let her go. They replied that could not do so as they risked being killed themselves and 'said something about my husband and the political things he was involved in but I didn't understand them.' In her later statement she explained, during the ordeal of her abduction, that they had asked for 'documents' although she had not understood to what they were referring and had said to her 'You Hamza's wife, we

waited for this moment a long time' A managed to get away from her captors in the darkness, and hid in a nearby field. Eventually, she managed to return home where she was reunited with her son. He had been abducted on the same night, as he described in his own statement;

(f). A2 (as a nine year old child) had been taken from the street to a school building and forced to view a number of badly mutilated corpses;

(g). A1 stated that there had also been an incident in which a bullet had come through the window of their flat, and that a friend, who had been wearing A1's coat at the time, had been killed. A1 believed that her death had resulted from a case of mistaken identity ;

(h). A fire was started in the family's apartment, and A1 believed that it had been deliberately targeted, because no other apartments had been affected. A family friend had suggested that they needed to move for their own safety because her husband had been 'involved in political issues', and that he held information that other people wanted;

(i). A1 stated that she had been forced to move around, and that she had been told that her mother and neighbours had been questioned on many occasions about her whereabouts (the Tribunal were critical of A1's evidence on this point, as her evidence appeared to place her mother in two completely different places in and out of Chechnya at the same time);

(j). A1 and her son then moved around, staying for short periods in various locations, and feeling very scared.

6. Of the foregoing facts, the following, concerning the son, were to remain undisturbed on the second-stage reconsideration:

- (a) In 1995, when he was 9, he was abducted in the street and taken to a building where he was shown a badly mutilated corpse.
- (b) This happened on the same day as the mother was kidnapped and raped by Russian soldiers.
- (c) In 1995 his father was killed. So were his uncle and cousins.
- (d) A friend of the mother's was shot dead through her apartment window while wearing the mother's coat.
- (e) On separate occasions a shot was fired at their apartment, a break-in was attempted and a fire was started there.

(f) In Moscow both had been arrested on one occasion.

7. The psychiatric evidence was that both appellants were badly traumatised. This, together with the objective evidence and the testimony of an acknowledged expert, Mr Robert Chenciner of St Anthony's College, Oxford, led the tribunal to accept that both had suffered badly, but also presented them with a problem in relation to inconsistencies in their personal testimony. They addressed it in this way:

41. It is accepted that the appellants have not given consistent accounts. The first appellant had given a number of accounts each of which contains significant differences about what happened to her. The accounts given by the second appellant have similar difficulties. In addition, there are material differences between the accounts given by the first and second appellants. Furthermore, both appellants give vague accounts being unable to recall dates or places and often running one incident into another. Their accounts vary because there is no consistency over which incidents are mentioned. Some incidents mentioned in earlier statements do not appear in later accounts and some incidents appear only in later accounts. These discrepancies are unsurprising given the medical evidence we have examined. The medical evidence is unchallenged.

42. In other circumstances we would probably have concluded that the inconsistencies in the accounts were evidence that the appellants were not truthful. We do not draw such a conclusion here because there is a clear explanation why the accounts should not be expected to be consistent. However, that is not to say that we accept everything the appellants say as having happened. We cannot draw that conclusion because it is unclear what accounts we should accept over other accounts. We do accept, however, that the medical evidence is of such strength as to indicate that both appellants experienced severe trauma in the past. The medical report about injuries suffered by the first appellant further supports her claim to have suffered severe trauma.

43. The first difficulty we have, therefore, is identifying what traumatic events were encountered.

8. From here the tribunal go on directly to consider the matters on which the appellants had been consistent:

44. The appellants have been generally consistent about a number of incidents which include the death of the husband of the first appellant, the abduction of the first appellant by

Russian military men and her rape, the abduction of the second appellant and his having to view a corpse, a shot fired through the window of their apartment, a break-in and arson attack on the same flat after they moved out, the death of a tenant/friend in another flat owned by the first appellant who may have been mistaken for the first appellant. These events have appeared throughout the appellants' accounts and have been acknowledged by the Tribunal in relation to the scope of the reconsideration of the second appellant's appeal.

45. We accept these claims as facts for the purposes of these appeals because the expert reports and background country information indicate that there was a likelihood that such events happened at that time. As we have already said, the medical reports strongly support the claim that the appellants suffered severe trauma. In reaching this conclusion we have also borne in mind the scope of the appeal of the second appellant and the findings which were sustained at the outset of this reconsideration.

9. In the tribunal's view, however, neither singly nor together did these elements establish a real possibility that the family were being either persecuted or targeted, at least by the Russian troops, rather than caught up either in indiscriminate Russian lawlessness or in internecine Chechen conflicts. More was needed, but they found no more. They were not prepared to accept, on the basis of the appellants' own unspecific and uncorroborated testimony, that the first appellant's husband had been active in Chechen politics. While it was accepted that a traditionalist male Chechen might well tell his family very little about his activities, no record or document had been produced to confirm the second appellant's evidence that he had been a member of the Chechen parliament. They said this:

46. However, we cannot make any other positive findings of fact. Neither the medical reports nor the expert reports can assist with regard to the political activities of the husband of the first appellant or whether the appellants were targeted because of links with him. At best Mr Chenciner has identified that the appellants bear a name which is renowned in Russia in a work by Tolstoy. We note that the second appellant suggested that his father's name was well known in the area and throughout Russia which might be a reference to this background information.

47. The expert provides no information to indicate that the second appellant's father was involved in the Chechen parliament or was well known for any other political activity. That is despite the second appellant describing his father as having been a member of the Chechen parliament or at the very least having been well known for his opposition activity to the Russian regime. It is also in spite of the first appellant's

description of her husband having held an influential role in the National Guard and having worked at the Parliament.

48. The expert points out that neither appellant should be expected to have knowledge about the activities of their husband/father. We accept that they do have very limited knowledge and that they have had to speculate in order to answer questions. That conclusion, however, leads us to find that they have not shown that their husband/father had a political profile. In turn that leads us to find that the appellants have not shown that they were specifically targeted for abuse in 1995 or 1996.

49. We also bear in mind that the appellants have not been consistent in any of their accounts regarding the role of their husband/father. This is in stark contrast to the consistency shown with regard to the incidents we have identified above. We have considered the medical reports which indicate difficulties the appellants would have in recalling information. That explanation, however, does not cover the situation where the appellants have remembered facts and incidents which have no consistency over time.

50. For example, it may be that the appellants have difficulty remembering what happened and that they have to speculate to fill in the many gaps in their memories. We reach this conclusion because the first appellant appears to have introduced further risk factors each time she has received a negative decision about her claim. She did not mention anything about her husband having a political profile before her claim was first refused. She only mentioned his political activity before her first appeal and only mentioned further details about her abductors asking about her husband's military documents in connection with the hearing before us. This speculation is not something we find to undermine the overall credibility of the appellants but does mean that we cannot rely on those vague memories as sufficient evidence.

10. Mr Haywood does not attack this passage as an impermissible departure from the warning the tribunal had earlier given itself about inconsistent evidence from badly traumatised witnesses. He is right not to do so. Psychiatric evidence may well explain inconsistency, and background evidence may well explain a witness's ignorance about other individuals, but the tribunal still needs sufficient affirmative evidence from one source or another to establish a claim to protection. I will come shortly to how in these circumstances Mr Haywood puts his case.
11. The tribunal go on to deal with the question of independent risks facing Muslim Chechens on return to Moscow or St Petersburg. They find that the mother has already been able to return (to collect the son in 2001) and to leave again without



being harmed. They also find, following the country guidance decision *RM (Young Chechen male – risk – IFA) Russia CG* [2006] UKIAT 50, that there is not a generalised risk to Chechens on return from the UK. Their conclusion with regard to asylum, from which the same conclusion on other forms protection inexorably followed, was this:

62. We accept that the appellants suffered incidents in 1995 and 1996 which severely traumatised them. However, for the reasons already given, we do not find they would amount to serious harm or persecution because the incidents took place during an internal armed conflict. Therefore, the fact these incidents happened is not a basis on which we can infer the appellants would face a real risk of other serious harm or persecution. In reaching this conclusion we have taken account of the fact that between 1998 and 2001 the appellants appear to have returned and lived in Chechnya voluntarily for varying amounts of time without incident. They have not shown there was any particular need for their return.

63. We do not find that the appellants have shown any political aspect to their claims. We have not accepted that the appellants have shown that the husband of the first appellant had a political profile. We do not accept that the appellants were targeted for ill-treatment in 1995 or 1996 because of any link to him. We do not accept that the fact they suffered numerous incidents is not an indication that they were targeted specifically for the reasons we have already given. Therefore, we do not infer from the number of incidents any inference that the appellants were targeted for political reasons.

12. Mr Haywood, recognising that his task is not an easy one, directs his critique at the part of the determination which immediately precedes this conclusion. In it the tribunal first decline to infer from the sheer number of hostile incidents recounted by the appellants that they were being persecuted or targeted, given the lawless situation in Chechnya. For the same reason they are also unpersuaded (*cf De Sousa v Home Secretary* [2006] EWCA Civ 183, §11) that the background evidence supplied a consistent motive. They decline to infer that the abductions of mother and son were related (the mother had been abducted from a bus stop, the son from the street, and although both abductions had happened on the same day neither appeared on the appellants' own evidence to be directed, save possibly marginally, to eliciting information about the first appellant's husband).
13. They then posed what Mr Haywood accepts is the right question, namely "whether the appellants faced an individual threat", and answered it:

"Their claim rests on the political profile of the husband of the first appellant. We have not been able to accept that he had any political profile. Without any other explanation, we cannot accept that what happened to the appellants, tragic though it was, was not the result of the indiscriminate violence caused

by the armed conflict rather than by an individual threat to them arising from that conflict.”

14. The thrust of Mr Haywood’s case is that the tribunal, despite the explicable gaps and inconsistencies in the evidence, had sufficient material to show that the husband was a politically active Chechen separatist and to found an inference that this was why the appellants had been targeted. He pointed out that in *RM* §39 it was recognised that “if a young Chechen male is wanted in connection with suspected rebel involvement he will be at real risk”. At a late stage he added to his argument the second appellant’s evidence that, in addition to his father, his uncle and two cousins had been killed at about the same time as the abductions. He also took the point, when it was offered to him, that the first appellant had testified that her mother had told her that, after her departure, men had come looking for her and the second appellant, but that the tribunal had failed to deal with this except obliquely.
15. I am prepared to accept that the tribunal might legitimately have drawn the inference of political targeting from such evidence as they had; but I am not able to accept that they made any error of law in declining to do so. They were careful throughout not to reject any aspect of the evidence simply on grounds of inconsistency. But they could not invent evidence where there was none, and there was no evidence to indicate more than that the first appellant’s husband had been involved in some capacity with the nationalist Chechen regime. Mr Haywood submits that this is enough in the light of *RM*, and that a political profile – that is, something that makes the individual stand out – is not needed in order to create a real risk in Chechnya. But unless there was sufficient evidence to show that the abductions of the appellants were connected to the husband’s political activity, whatever it was, even this argument cannot avail him. The tribunal noted that membership of the Chechen parliament would have been a matter of public record (and there was none in the evidence), so that the second appellant was in all probability mistaken or confused about his father’s role. But there was no other firm evidence of his role, and what happened to the two appellants was in their judgment explicable without having to infer that it was related to any political activity on his part.
16. So far as concerns the late suggestion that, after the appellants’ departure, men had come looking for them, the tribunal said this:

59. A second example relates to the first appellant’s account of her contact with her mother. The first appellant told us during the hearing that she had just recalled that when she returned to Chechnya after being in Europe her mother told her about an incident when a group of men had come to her house and threatened her with weapons because they wanted the appellants. The first appellant also told us that this happened when she last returned to Chechnya which was in 2001. She said that her mother had told her about other similar incidents but these had not been as serious as the group had not been armed. The first appellant also told us that her mother went to Spain in 2000, where she claimed asylum and now holds citizenship. As with the accounts she gave of her son, her mother appears to have been in two places at the same time.

When these points were put to the appellant, she said she did not understand but offered no clarification relying on her mental health condition.

60. We have considered the evidence and what to make of it. The first appellant has said she returned to Chechnya in 2001 to collect her son but both she and her son have been adamant that she never left him in Chechnya. The appellant evaded questions about why she returned to Chechnya in 2001 if she was in fear of her life and did not have to collect her son from there. We can only conclude that the appellant did not fear for her life in Chechnya in 2001.

17. This is perhaps the closest the determination comes to holding inconsistency against the appellants. But what the tribunal are saying is that, here again, they do not have dependable evidence. The point is the starker for the fact – although they do not rely on it – that there was no first-hand statement from the first appellant’s mother, who was granted asylum in Spain and could quite well have supplied this testimony. All the tribunal had was a late recollection of what her mother had told the first appellant at a date which did not fit with the other evidence.
18. It must seem very hard that a case of two badly traumatised people, supported by undisputed expert medical and political evidence of an unusually high quality, should have failed in this way. The grounds for granting permission to appeal to this court acknowledge as much, and we have examined the case with corresponding anxiety. But without proof to the required modest standard of a motive for at least some of the attacks on them which renders them a form either of political persecution or of cruel or inhuman treatment, and so likely to recur if they are returned, their suffering does not make them eligible for international protection. The AIT determination under appeal confronts the difficulties in a legally principled and methodical way; it does not disbelieve the appellants because they cannot give consistent account of themselves; it notes the gaps, however, and looks carefully for evidence to complete the picture, but fails to find it. I do not think the tribunal were required to do more, or that in doing what they did they made any legal error. I would dismiss these appeals.

**Lord Justice Longmore:**

19. I agree.

**Lord Justice Pill:**

20. I also agree.