ZB (Russian prison conditions) Russian Federation [2004] UKIAT 00239

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 13 July 2004
Date Determination notified: 27 August 2004

Before:

Mr C M G Ockelton (Deputy President)
Mrs J A J C Gleeson (Vice President)
Mr D K Allen (Vice President)

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

For the Appellant: Ms C Nicholas, instructed by Dare Emmanuel Solicitors
For the Respondent: Mr T Otty, instructed by Treasury Solicitors

Conditions in prisons in the Russian Federation have greatly improved since the time that gave rise to the decision of the ECtHR in Kalashnikov and in 2004 it cannot be said in general that they breach Article 3.

DETERMINATION AND REASONS

1. The Appellant, a citizen of the Russian Federation, appeals against the determination of an Adjudicator, Mr T Ward, dismissing his appeal against the decision of the Respondent on 23 October 2001 to direct his removal from the United Kingdom as an illegal entrant after refusal of asylum. This appeal is before us in pursuance of an Order of the Court of Appeal, which set aside an earlier determination of the Tribunal and directed that the Appellant's appeal be reheard by a differently-constituted panel.

2. Originally, the Appellant's appeal was on Refugee Convention and Article 3 grounds. So far as concerns most of the matters he has raised in the course of his appeal, he has been unsuccessful, and the judgments in the Court of Appeal [2003] EWCA Civ 1489 confirm that we are concerned with only a limited argument. We gratefully adopt the following summary of the Appellant's case and of our task from the judgment of Munby J (with whom Mummery LJ and Sedley LJ agreed).

> "2. The appellant is a citizen of the Russian Federation. He is of Tuvan (Mongolian) ethnic origin. His claim to asylum was based on his fear of persecution by the Russian authorities on account of his non-Russian ethnic original and the inevitability of imprisonment both for 'draft' evasion caused by his unwillingness to participate in military action in Chechnya and for illegal drug dealing – the appellant's case was that he was not a drug dealer in the ordinary sense but someone who, albeit illegally, was selling medicines to Chechens, in part at least for humanitarian reasons. The appellant had in fact been imprisoned but managed to escape and made his way to this country.
>
> 3. So far as concerns the appellant's claim to the protection of the Geneva Convention it turned on whether what he faced on return to Russia was persecution or only prosecution. In granting the appellant permission to appeal to this court on the Article 3 point only Lord Justice Sedley observed that there was no viable Geneva Convention case here for the reasons given below. Mr Ogunbiyi who appeared before us for the appellant has not sought to challenge that ruling. The appeal has accordingly proceeded solely in relation to the appellant's claim to the protection of Article 3 of the European Convention. Only one issue arises, namely whether the return of the appellant to the Russian Federation would put the United Kingdom in breach of Article 3. the sole remaining basis for asserting that it might turns on the conditions of detention in the penal system in which the appellant would be held in Russia.
>
> 4. There are many cases in which an asylum seeker's claim to the protection of the European Convention in reality stands or fails with his claim to the protection of the Geneva Convention. This was plainly not such a case. The appellant's claim to the protection of the Geneva Convention, although founded in large measure on the conditions he might be expected to have to endure if returned to a Russian prison, was based on his fear that he would be singled out for persecution as a non-ethnic Russian draft evader and convicted drug dealer. His claim to the protection of Article 3 of the European Convention, in contrast, was founded not on his own particular circumstances but on the conditions faced generally by persons, whether or not the victims of persecution, incarcerated in the Russian prison system. The dismissal of his claim to the protection of the Geneva Convention accordingly could not be in any way determinative, nor necessarily even indicative, of his quite separate claim to the protection of Article 3.
>
> …
>
> 33. In the circumstances the proper course, in my judgment, is for us to give the Secretary of State permission to adduce the new evidence and to allow the appeal to the extent of remitting the case to the Immigration Appeal Tribunal for rehearing on such evidence, including but not limited to that which we have been shown, as either side may now wish to adduce. It will

> be for the Tribunal to determine, in the light of all the evidence, whether there are substantial grounds for believing that the appellant will face a real risk of treatment that violates Article 3 if returned to a Russian prison. Central to that investigation, as it seems to me, will be a consideration of the extent to which conditions in the Russian prison system have or have not improved since *Kalashnikov*."

3. The reference to *Kalashnikov* is to *Kalashnikov v Russia* (2002) 36 EHRR 587, a decision of the European Court of Human Rights pre-dating the Tribunal's judgment in this case but not cited to it.

4. Although Ms Nicholas did her very best to persuade us that we are concerned with wider issues affecting the Appellant, it seems clear to us that our task is that identified in the paragraphs from Munby J's judgment which we have cited. The Appellant's Article 3 claim is not dependant upon his own personal characteristics, as the learned judge made clear in paragraph [4]. We have to decide whether the general prison conditions in Russia, to which the Appellant will, he says, inevitably be exposed, are at the present time such as to breach Article 3.

5. Before we embark upon that task, there are two further observations which we must make. The first is that *Kalashnikov v Russia* is, as its title suggests, a case in which a citizen of Russia brought proceedings against his own country for breach of the latter's obligations under the European Convention on Human Rights. In the Court's judgment, the Russian Government is recorded as having conceded most of the facts alleged by the Claimant, and also that prison conditions within the Russian Federation fell below the standard set by other member states of the Council of Europe. The position is summarised by Munby J at paragraph [25]:

> "The decision in *Kalashnikov* establishes, on facts conceded by the Russian Federation, that any person held in a Russian prison at the time Kalashnikov was imprisoned was at real risk – indeed at clear risk – of degrading treatment. *Kalashnikov* revealed a consistent pattern of gross and systematic – even if not intentional – violations of the human rights of those detained in Russian prisons."

6. The learned judge goes on to say at paragraph [27]:

> "The question is simply whether there are substantial grounds for believing that there is a real risk that if the appellant is returned to the Russian Federation he will be subjected to degrading treatment such as to involve a breach of Article 3. *Kalashnikov*, in my judgment, demonstrates that, prima facie, the answer to that question is that he will be subjected to such degrading treatment, and therefore his return to Russia is prima facie unlawful."

7. No doubt that last sentiment is entirely justified on the basis of the particular facts in *Kalashnikov* because not only were they admitted, but they led to the strongest of conclusions. We would, however, express some caution about any assumption that, in general, a judgment of the

European Court of Human Rights on an internal case on past facts should be regarded as having (even prima facie) an inevitable result on the determination of expulsion claims predicated on future risk.

8. The second issue is this. After the judgment of the Court of Appeal in this case, the Court of Session held on 26 April 2004 in *Napier v The Scottish Ministers* (Lord Bonomy) that conditions in Barlinnie jail in Glasgow in the period 20 May to 27 June 2001 had themselves amounted to a breach of a Claimant's human rights. At the hearing, we investigated with the parties whether they wished to make any submissions arising out of that judgment. Ms Nicholas specifically disavowed any intention to rely on it as indicating any level of harshness of conditions (short of those exemplified in *Kalashnikov*) that would amount to a breach of Article 3.

9. We need say no more about these two issues.

10. The Claimant in *Kalashnikov* originally applied to the Court in 1998. His detention, which formed the subject of the Court's judgment, lasted from 29 June 1995 to 26 June 2000. He was in a detention facility or 'SIZO' (????) in Magadan for most of his period of detention, although he spent about three months in a penitentiary establishment (or ordinary prison). His own claimed account of the circumstances of his detention is set out in paragraphs 14 to 20 of the Court's judgment as follows:

> "14. As regards the first period of his detention in the Magadan detention facility, the applicant alleged that he had been kept in a cell measuring 17 square meters ('m^2') where there were 8 bunk beds. However, it nearly always held 24 inmates; only rarely did the number fall to 18. As there were three men to every bunk, the inmates slept taking turns. The others would lie or sit on the floor or cardboard boxes waiting for their turn. It was impossible to sleep properly as the television was on around the clock and, during the day, there was much commotion in the cell. The light in the cell was never turned off.
>
> 15. The lavatory pan in the corner of the cell offered no privacy. A partition separated it from a wash stand, but not from the living area and dining table. The lavatory pan was elevated from the floor by half a meter while the partition measured 1,1 meters in height. Therefore, the person using the toilet was in the view of both his cellmates and a prison guard observing the inmates through a peep-hole in the door. The inmates had to eat their meals in the cell at the dining table which was only a meter away from the toilet. The meals were of poor quality.
>
> 16. The cell, which had no ventilation, was stiflingly hot in summer and very cold in winter. Because of the poor quality of the air in the cell, a window had to remain open all the time. Being surrounded by heavy smokers, the applicant was forced to become a passive smoker. The applicant claims that he was never given proper bedding, dishes or kitchen utensils. He only received a quilted mattress and a thin flannel blanket from the administration, and had to borrow kitchenware from cell-mates who had received these items from relatives.

17. The cells of the detention facility were overrun with cockroaches and ants, but no attempt was made to exterminate them. The only sanitary precaution taken was that once a week the guards gave the inmates a litre of chloride disinfectant for the lavatory.

18. He contracted a variety of skin diseases and fungal infections, losing his toenails and some of his fingernails. During the trial from 11 November 1996 to 23 April 1997 and from 15 April 1999 to 3 August 1999, a recess was ordered so that he could be treated for scabies. On six occasions detainees, with tuberculosis and syphilis were placed in his cell and he received prophylactic antibiotic injections.

19. The applicant submitted that he could only take a walk outside his cell one hour per day and that usually he was only able to take a hot shower twice a month.

20. Finally, the applicant stated that, following his transfer back to the same facility on 9 December 1999, the detention conditions had not materially improved. He was not provided with proper bedding, towels or kitchenware. There was no treatment available for his skin disease due to a lack of proper medication. His cell was still overrun with cockroaches and there had been no anti-infestation treatment for 5 years. However, in March-April 2000 the number of inmates in his 8-bed cell was reduced to 11."

10. We need to set out in full the Court's analysis of those facts, which, as we have said, were largely admitted.

"97. The Court notes from the outset that the cell in which the applicant was detained measured between 17 m^2 (according to the applicant) and 20.8 m^2 (according to the Government). It was equipped with bunk-beds and was designed for 8 inmates. It may be questioned whether such accommodation could be regarded as attaining acceptable standards. In this connection the Court recalls that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment ('the CPT') has set 7 m^2 per prisoner as an approximate, desirable guideline for a detention cell (see the 2nd General Report – CPT/Inf (92) 3, § 43), ie 56 m^2 for 8 inmates. Despite the fact that the cell was designed for 8 inmates, according to the applicant's submissions to the Court the usual number of inmates in his cell throughout his detention was between 18 and 24 persons. In his application for release from custody of 27 December 1996, the applicant stated that there were 21 inmates in his 8-bed cell. In a similar application of 8 June 1999, he referred to 18 inmates (see paragraphs 43 and 73 above). The Court notes that the Government, for their part, acknowledged that, due to the general overcrowding of the detention facility, each bed in the cells was used by 2 or 3 inmates. Meanwhile, they appear to disagree with the applicant as to the number of inmates. In their submission there were 11 or more inmates in the applicant's cell at any given time and that normally the number of inmates was 14. However, the Government did not submit any evidence to substantiate their contention. According to the applicant, it was only in March-April 20900 that the number of inmates was reduced to 11. The Court does not find it necessary to resolve the disagreement between the Government and the applicant on this point. The figures submitted suggest that that any given time there was 0.9 – 1,9 m^2 of space per inmate in the applicant's cell. Thus, in the Court's view, the cell was continuously,

severely overcrowded. This state of affairs in itself raises an issue under Article 3 of the Convention. Moreover, on account of the acute overcrowding, the inmates in the applicant's cell had to sleep taking turns, on the basis of eight-hour shifts of sleep per prisoner. It appears from his request for release from custody on 16 June 1999, that at that time he was sharing his bed with two other inmates (see paragraph 74 above). Sleeping conditions were further aggravated by the constant lighting in the cell, as well as the general commotion and noise from the large number of inmates. The resulting deprivation of sleep must have constituted a heavy physical and psychological burden on the applicant. The Court further observes the absence of adequate ventilation in the applicant's cell which held an excessive number of inmates and who apparently were permitted to smoke in the cell. Although the applicant was allowed outdoor activity for one or two hours a day, the rest of the time he was confined to his cell, with a very limited space for himself and a stuffy atmosphere.

98. The Court next notes that the applicant's cell was infested with pests and that during his detention no anti-infestation treatment was effected in his cell. The Government conceded that infestation of detention facilities with insects was a problem, and referred to the 1989 ministerial guideline obliging detention facilities to take disinfection measures. However, it does not appear that this was done in the applicant's cell. Throughout his detention the applicant contracted various skin diseases and fungal infections, in particular during the years 1996, 1997 and 1999, necessitating recesses in the trial. While it is true that the applicant received treatment for these diseases, their recurrence suggests that the very poor conditions in the cell facilitating their propagation remained unchanged. The Court also notes with grave concern that the applicant was detained on occasions with persons suffering from syphilis and tuberculosis, although the Government stressed that contagion was prevented.

99. An additional aspect of the crammed and insanitary conditions described above was the toilet facilities. A partition measuring 1,1 meters in height separated the lavatory pan in the corner of the cell from a wash stand next to it, but not from the living area. There was no screen at the entrance to the toilet. The applicant had thus to use the toilet in the presence of other inmates and be present while the toilet was being used by his cellmates. The photographs provided by the Government show a filthy, dilapidated cell and toilet area, with no real privacy. Whilst the Court notes with satisfaction the major improvements that have apparently been made to the area of the Magadan detention facility where the applicant's cell was located (as shown in the video recording which they submitted to the Court), this does not detract from the wholly unacceptable conditions which the applicant clearly had to endure at the material time."

11. We have been referred to a great deal of material post-dating the facts which were the subject of complaint in *Kalashnikov*, in order to enable us to make findings on the general circumstances in Russian prisons at the present time. One important and wide-ranging document is the report of a visit to the Russian Federation carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). That report was published in June 2003, although the visit on which it was based had taken place some eighteen months previously. The published report, however, is accompanied by the

Russian Government's response, which is not dated in any very obvious way but must follow the CPT's submission of the report in July 2002. We have also looked at US State Department reports, CIPU reports, reports of relevant United Nations Committees in 2002 and 2003, an interim resolution of the Council of Europe's Committee of Ministers following the judgment in *Kalashnikov*, an Amnesty International report of 2002 and the most recent entry in Amnesty International's yearbook, the United Nations High Commissioner for Human Rights' Standard Minimum Rules for the Treatment of Prisoners, a letter to the European Union from Human Rights Watch, dated 19 March 2004, part of a UNHCR paper on claimants from the Russian Federation, dated May 2004, and other documents put before us by the parties.

12. There can be no conceivable doubt that the general conditions in prisons in the Russian Federation have shown improvements in the period since Kalashnikov himself was detained. For this reason, older materials are of very little value save for purposes of comparison. The Human Rights Watch letter, which is generally critical of the human rights situation in the Russian Federation, says that "*As of today, the only institution that has seen truly significant reform is the prison system*".

13. Another feature of the materials we have read is that they appear to show that the conditions in SIZOs are liable to be rather worse than those in other detention facilities. It will be recalled that the majority of Kalashnikov's own detention was in a SIZO. The Appellant's case, however, is based on the inevitability of him serving a prison sentence for crime. Such sentences are not generally served in SIZOs, which are largely used for detention pending trial, although they may occasionally be used for holding sentenced prisoners before they are allocated to a penal colony. One of the factors specifically mentioned by the Court in *Kalashnikov* was the length of time for which the Claimant had been held in poor facilities. It is not, and indeed cannot be, part of the Appellant's case that he is at risk of being held for a long time in a SIZO.

14. The evidence before us shows with great clarity that the Russian prison system no longer suffers the severe problems of overcrowding that were identified in *Kalashnikov* and by international observers in the late 1990s and a little later. The amount of space available per prisoner now contrasts very favourably with that which Kalashnikov was allowed to occupy in his SIZO in 1995 to 1999. The CPT delegation records at paragraph 45 that progress was being made in addressing the issue of overcrowding and recommends an allowance of 4 m^2 per person. In its reply, the Russian Government was able to say that in the Vladivostok SIZO 1, which the delegation had visited, the allowance was now 3.8 m^2. In the US State Department report for 2002, it is said that the introduction of the new Criminal Procedure Code (which came into force on 1 July 2002) had had the effect of "*virtually eliminating the problem of overcrowding in [SIZOs]*". The delegation of the Russian Federation reporting to the

Human Rights Committee of the United Nations in October 2003 summarised improvements made in Russian prisons since 1998. Only three percent of detention centres (that is to say, SIZOs) were currently overcrowded compared with seventy percent in 2000. Each detainee throughout the system had access to 4 m^2 of living space. A human rights service had been established to monitor the observance of human rights in the prison system. The prison establishments were open to international inspection. In commenting on the report, another member of the Committee remarked that although progress was commendable, some of the problems of prison conditions related to health and sanitation. On 6 November 2003, the Human Rights Committee noted that it remained concerned about reports of poor hygiene and violence by prison officers in some places of detention, and encouraged the Russian Government to continue to make progress. The US State Department report for 2003 (published February 2004) again records the virtual elimination of overcrowding, although there is reference to health concerns in detention facilities. A minute from the British Foreign and Commonwealth Office, dated 9 June 2004, again records a fall in the Russian prison population. So far as the health of prisoners is concerned:

> "5. Conditions in some prisons, and especially in pre-trial detention centres (SIZOs) remain very poor with overcrowding, poor diet and little exercise contributing to sanitation and health problems. Deputy Head of the Prison Service, Alla Kuznetsova, said in October 2003 that almost three quarters of prisoners (590,000 people) suffered from serious health problems. She said that one-third of inmates had mental problems, 26,000 had syphilis, 1,500 had hepatitis and 74,000 had TB. Public health measures have had some effect in stemming the spread of TB (eg Deputy Minister Kalinin noted in November 2003 that the incidence of TB had reduced by 27% in 2003), but have not contained the spread of HIV. HIV/AIDS infection rates now stand at around 37,000 prisoners, up from 5,000 in 2000."

15. Ms Nicholas conceded, as she had to, that overcrowding cannot now be seen as a major or universal problem in Russian prisons. She submitted, however, that the remaining problems, in particular those relating to health, were such as to show that it would still be a breach of Article 3 to cause anyone to be subject to the prison regime in Russia. Many of her arguments were, as we have already hinted, marred by being based on out-of-date material: but the general concerns about health in Russian prisons are widely shared and we must treat them seriously. We have just set out the figures available to the Foreign and Commonwealth Office on various diseases, and there is no reason to suppose that they are not accurate. There are also some figures for deaths in detention. The 2003 US State Department report indicates a figure in former years of 10-11,000 deaths in custody per year, of which about 2,500 were in SIZOs. It is not clear what the prison population was at the time of those figures. It looks as though it may have been over one million. Despite Ms Nicholas' efforts to persuade us, we have no basis for drawing conclusions from the number of deaths: we do not know what number of deaths would be expected in a similarly-aged population not in custody, nor do we know to

what extend the figures are affected by the health profile of criminals (rather than detainees) in the population.

16. In its analysis of the facts in *Kalashnikov*, the European Court of Human Rights clearly regarded overcrowding as the single most important feature. What is equally important, as it seems to us, is that their comments show that they regarded the overcrowding as having contributed to many of the other difficulties which *Kalashnikov* had suffered. In paragraphs 97 to 99, which we set out above, the need to share sleeping accommodation, the stuffy atmosphere and the toilet facilities are specifically attributed to the overcrowding and "crammed" conditions. The constant lighting in the cell was itself a consequence of the need to sleep in shifts, because two-thirds of the inmates would be awake at any time. The contracting of disease by contagion is an obvious consequence of overcrowding, and infestation by pests is not very far removed from that cause.

17. It is further notable that the Court commented that the overcrowding (apparently taken in isolation) raised an issue under Article 3, but gave no indication that similar issues were raised by any of the other individual matters of which the Claimant complained. Its judgment is that the factors taken together, caused and compounded as they were by the primary problem of overcrowding, amounted to a breach of Article 3.

18. It is clear that an appellant who cannot rely on the overcrowded state of the prisons, as in our judgment the Appellant cannot today, has a much weaker argument. He is deprived of the major factor which enabled Kalashnikov to show that he was entitled to relief against the Russian Government. But Ms Nicholas' problem is not merely that her argument is weaker than Kalashnikov's was: it is an argument of a completely different nature. An Appellant who could base himself of the situation as it was at the time of Kalashnikov's ill-treatment could quite properly say that subjecting him to prison conditions in Russia *inevitably* meant that he would be subject to a *combination* of circumstances which amounted to an affront to human dignity. With the circumstances as they are today, however, the Appellant can say little more than that subjecting him to prison conditions in Russia will (apparently, but by an unquantified amount) raise the risk of his contracting certain medical conditions.

19. The difference between these two arguments lies in two areas. First, the link between prison and the danger is much more tenuous. It is an essential part of a factual matrix within which *Kalashnikov* was decided that the Russian Government admitted that Kalashnikov was treated no differently from any other prisoner. Thus it was accepted that all prisoners were treated in the way that Kalashnikov was, and it would follow that any prisoner would be treated in the way that Kalashnikov was. But it cannot be suggested today that every prisoner is necessarily going to suffer harm from the increased risk of disease. Even on the most up-to-date figures, for example, it appears that nearly ninety-five percent of the

prison population are *not* HIV positive, and even that figure means little without knowing what the incidence of the condition is in the general population in Russia.

20. Secondly, the conditions to which Kalashnikov was subjected came as an inseparable combination, because the overcrowding led to all the other difficulties. Without the overcrowding, there is no reason to suppose that the medical risks ought to be taken in combination at all. There may be a heightened risk of contracting any of these conditions; it does not follow that there is a heightened risk of contracting all of them.

21. In fairness to the Appellant we should add two matters raised by the evidence which were not specifically mentioned by Ms Nicholas. These are the harsh regime and the risk of ill-treatment by prison officers. So far as the regime is concerned, although it is evidently hard, particularly in penal colonies, it has not been suggested that it is so harsh as to amount in itself to a breach of Article 3. (If that were the case, it is extremely surprising that neither *Kalashnikov* nor any other judgment to which we have referred has said so.) The risk of ill-treatment by prison officers, which is referred to in some of the materials, does not appear to be anything other than slight, and the risk must be regarded in any event as reducing because of the steps which are now being taken to oversee prisoners' rights and the conduct of prisons generally. We think therefore that Ms Nicholas was right to ignore both these factors: neither of them show any real increased risk to the Appellant of breach of his rights under Article 3.

22. We return then to the matters upon which she did rely. Taken at its best, the Appellant's argument is that conditions in Russian prisons are still rough and rather unhealthy. If the risk of his contracting various diseases is elevated by his being in prison, that is clearly not something which ought to be ignored, although it is right to say that we have no clear evidence of the level of any increase of risk. We very much doubt whether there is anything in the evidence before us which would entitle us to say that there is a real risk that the Appellant will suffer from any of the diseases mentioned as a consequence of his detention in a Russian prison or penal colony.

23. But even if he were able to establish a real risk of that, he would not be entitled to succeed, because in order to succeed in this case he needs to show a real risk of treatment contrary to Article 3. There is not in our view the slightest basis for saying that the conditions in Russian prisons today are such as to amount to a breach of Article 3 for each prisoner. The general argument, on which alone the Appellant is entitled to rely in this appeal, entirely fails on the basis of the facts as they are today, in contrast to the state of Russian prisons at the time when Kalashnikov was detained. For that reason, the Appellant's appeal is dismissed.

C M G OCKELTON
DEPUTY PRESIDENT