Case No: C1/2003/0453

Neutral Citation Number: [2003] EWCA Civ 1489
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL
(Chairman: Mr N H Goldstein)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th November 2003

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE SEDLEY
and
MR JUSTICE MUNBY

- -

Between :

ZORIG BATAYAV	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Oluwole Afolabi Ogunbiyi (instructed by Dare Emmanuel) for the appellant
Mr Neil Garnham QC and Mr Tim Eicke (instructed by the Treasury Solicitor) for the respondent

Hearing date : 7 October 2003

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JUDGMENT

Mr Justice Munby (giving the first judgment at the invitation of Lord Justice Mummery)

1. The appellant arrived in this country and on 7 August 2001 claimed asylum in accordance with the Geneva Convention. He also claimed the protection of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Both applications were refused by the Secretary of State on 15 October 2001. His appeal was dismissed by the Adjudicator (Mr Thomas Ward) on 21 June 2002. A further appeal to the Immigration Appeal Tribunal (Chairman: Mr N H Goldstein) was dismissed on 7 February 2003. His application dated 17 February 2003 for permission to appeal to this court was refused by the Tribunal (The Vice President: Dr H H Storey) on 24 February 2003. He applied to this court on 5 March 2003 for permission to appeal. Limited permission to appeal was granted by my Lord, Lord Justice Sedley, on 16 April 2003.

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 origin 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 falls 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.

5. I need therefore say no more about the appellant's claim to the protection of the Geneva Convention. I turn to Article 3.

6. The general principles are well established. So far as is material for present purposes they can be briefly summarised. Article 3 makes it unlawful for the United Kingdom "to remove an individual to a country where he or she is foreseeably at real risk of being seriously ill–treated" in a manner sufficiently severe to engage Article 3: see *R (Ullah) v Special Adjudicator* [2002] EWCA Civ 1856, [2003] 1 WLR 770, esp at para [47]. Article 3 provides protection only against ill–treatment which attains a "minimum level of severity", and in the context of expulsion cases the ill–treatment "must necessarily be serious" such that "it is an affront to fundamental humanitarian principles to remove an individual to a country where there is a real risk of serious ill–treatment": *R (Razgar) v Secretary of State for the Home Department* [2003] EWCA Civ 840, para [10], referring to *Ullah* paras [38]–[39]. The burden of establishing the Article 3 claim lies on the appellant: *Aziz v Secretary of State for the Home Department* [2003] EWCA Civ 118, esp at para [19]. What the appellant has to establish is that there are "substantial grounds for believing that there is a real risk of ill–treatment" of the requisite degree of severity in the receiving state: *Razgar* para [11], referring to *Soering v United Kingdom* (1989) 11 EHRR 439, para [91], and *Chahal v United Kingdom* (1996) 23 EHRR 413, para [74]. As the European Court of Human Rights said in the latter case:

> "it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country."

7. As Mr Garnham correctly points out on behalf of the Secretary of State, an applicant may be able to meet this test either by referring to evidence specific to his own circumstances or by reference to evidence applicable to a class of which he is a member. The present case falls into the latter category. Mr Garnham submits, and I agree, that in this latter category of case an applicant will only be able to demonstrate substantial grounds for believing that there is such a real risk if he can point to a consistent pattern of gross and systematic violation of rights under Article 3.

8. In support of that submission Mr Garnham points to two authorities which, I agree, fully make good the proposition for which he contends. The first is the decision of the Immigration Appeal Tribunal in *Muzafar Iqbal v Secretary of State for the Home Department* [2002] UKIAT 02239, where the Tribunal said at para [57]:

> " … in cases which rest not on a personal risk of harm (for example, where the police or prison staff would have cause to target a claimant) but on a risk of serious harm said to face people generally, for example in this case all persons detained pending trial, it cannot be said that they would face a real risk of serious harm unless in that country there is a consistent pattern of gross and systematic violations of their human rights whilst in detention."

9. That approach was endorsed by this court in *Hariri v Secretary of State for the Home Department* [2003] EWCA Civ 807, the other case to which Mr Garnham directed our attention. Lord Justice Laws (with whom both Lady Justice Arden and my Lord, Lord Justice Mummery, agreed) said at para [8]:

> "the points concerning the appellant's individual circumstances had all fallen away … his case depended entirely upon it being established that there was a real risk that he would suffer unlawful ill-treatment … as a member of a class or perhaps two classes: draft evaders and those who had left the country without authority. In those circumstances, as it seems to me, the "real risk" … could not be established without its being shown that the general situation was one in which ill-treatment of the kind in question generally happened: hence the expression "gross and systematic." The point is one of logic. Absent evidence to show that the appellant was at risk because of his specific circumstances, there could be no real risk of relevant ill-treatment unless the situation to which the appellant would be returning was one in which such violence was generally or consistently happening. There is nothing else in the case that could generate a real risk. In this situation, then, a "consistent pattern of gross and systematic violation of fundamental human rights", far from being at variance with the real risk test is, in my judgment, a function or application of it."

Having set out the passage from *Muzafar Iqbal* he continued:

> "This seems to me to reflect no more nor no less than the reality of the situation. The fact that ill-treatment or misconduct might be routine or frequent would not be enough."

10. Founding himself on two of the phrases used by Lord Justice Laws – "no real risk … unless … such violence was *generally or consistently happening*" and "the fact that [it] might be *routine or frequent* would not be enough" (emphasis added) – Mr Garnham further submitted that, absent evidence that the individual applicant is at real risk because of circumstances peculiar to him, the fact that ill–treatment of the relevant class is frequent (but falls short of being in the *Iqbal* sense consistent and systematic) will not suffice to establish a "real risk". I have to say that I have some misgivings about this. Having had the opportunity of reading in draft what my Lord, Lord Justice Sedley, has to say on the point I respectfully agree with it.

11. Well known Strasbourg jurisprudence establishes that the conditions in which a prisoner is detained can be so unsatisfactory as to constitute inhuman or degrading treatment within the meaning of Article 3 even though there is no intention on the part of the authorities to humiliate or debase the victim. I need refer for this purpose only to *Peers v Greece* (2001) 33 EHRR 1192 and, in particular, to the following passages in the judgment of the European Court of Human Rights:

> "[67] The Court recalls that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.
>
> [68] Furthermore, in considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3."

12. Having described the conditions in that case the Court continued:

> "[74] In the light of the foregoing, the Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, the Court notes that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.
>
> [75] Indeed, in the present case, the fact remains that the competent authorities took no steps to improve the objectively unacceptable conditions of the applicant's detention. In the Court's view, this omission denotes lack of respect for the applicant. The Court takes into account, in particular, that, for at least two months, the applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cell-mate. The Court is not convinced by the Government's allegation that these conditions did not affect the applicant in a manner incompatible with Article 3. On the contrary, the Court is of the opinion that the prison conditions complained of diminished the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. In sum, the Court considers that

> the conditions of the applicant's detention … amounted to degrading treatment within the meaning of Article 3 of the Convention."

13. I need only add that, as the Court made clear in *Dougoz v Greece* (2001) 34 EHRR 1480, para [45]:

> " … When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions … "

14. So much for the general principles. I turn now to consider the question of whether prison conditions in the Russian Federation are such as to engage Article 3. The Immigration Appeal Tribunal had had occasion to consider this very question in relation to another Russian asylum seeker in *Krotov v Secretary of State for the Home Department* [2002] UKIAT 01325, decided on 2 May 2002. There the Tribunal said (para [9]) that, although the objective evidence showed that prison conditions in the Russian Federation were "extremely harsh and frequently life threatening" and "deeply unpleasant", yet "the conditions of imprisonment in the Russian Federation generally do not raise any real risk of torture or other degrading or inhuman treatment, contrary to Article 3". In the light of that authority it is perhaps hardly surprising that when, the following month, the Adjudicator came to give his decision in the present case he should have found that, although prison conditions in Russia were harsh, the appellant had failed to make out his claim under Article 3.

15. That was on 21 June 2002. A little less than a month later, on 15 July 2002, the European Court of Human Rights decided what for present purposes is on any view the crucially important case of *Kalashnikov v Russia* (2002) 36 EHRR 587. The Court summarised the jurisprudence at para [95]:

> "The Court recalls that, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour.
>
> The Court further recalls that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.
>
> The Court has considered treatment to be "inhuman" because, inter alia, is was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feeling of fear, anguish and inferiority capable of humiliating and debasing

> them. In considering whether a particular form of treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3. The suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.
>
> Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain specific medical treatment.
>
> Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.
>
> When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant."

16. The conditions in which the claimant in that case had been held during the period from June 1995 until June 2000 were described by the Court in some detail: see paras [97]–[99]. Finding that there had been a breach of Article 3 the Court continued:

> "[101] The Court accepts that in the present case there is no indication that there was a positive intention of humiliating or debasing the applicant. However, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot exclude a finding of violation of Article 3. It considers that the conditions of detention, which the applicant had to endure for approximately 4 years and 10 months, must have caused him considerable mental suffering, diminishing his human dignity and arousing in him such feelings as to cause humiliation and debasement.

> [102] In the light of the above, the Court finds the applicant's conditions of detention, in particular the severely overcrowded and insanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, amounted to degrading treatment.
>
> [103] Accordingly, there has been a violation of Article 3 of the Convention."

17. What is important for present purposes, and what gives the decision in *Kalashnikov* its wider significance, are the admissions of the Russian Federation's Government as recorded by the Court in paras [93]–[94]:

> "[93] The Government argued that the applicant's conditions of detention … did not differ from, or at least were no worse than those of most detainees in Russia. Overcrowding was a problem in pre-trial detention facilities in general. The authorities had had no intention of causing physical suffering to the applicant or of harming his health. The administration of the detention facility took all available measures to provide medical treatment for those persons suffering from any disease and to prevent the contagion of other inmates.
>
> [94] It was acknowledged that, for economic reasons, conditions of detention in Russia were very unsatisfactory and fell below the requirements set for penitentiary establishments in other member States of the Council of Europe. However, the Government were doing their best to improve conditions of detention in Russia. They had adopted a number of task programmes aimed at the construction of new pre-trial detention facilities, the re-construction of the existing ones and the elimination of tuberculosis and other infectious diseases in prisons. The implementation of these programmes would allow for a two-fold increase of space for prisoners and for the improvement of sanitary conditions in pre-trial detention facilities."

18. Put shortly: conditions which the Russian Federation accepted fell below the standards set by other member States of the Council of Europe, and which the Court held amounted to degrading treatment constituting a breach of Article 3, were admitted by the Russian Federation to apply to "most detainees in Russia".

19. Thus the Court on 15 July 2002. The present case, as I have said, was determined by the Immigration Appeal Tribunal on 7 February 2003, seemingly without any reference to *Kalashnikov*. It seems that the case was not cited to the Tribunal by those who at that stage were representing the appellant. Be that as it may, the fact is that the Tribunal made no reference at all to *Kalashnikov*. Indeed it would seem that the

Tribunal cannot have had it in mind, for it appears to have based its decision to dismiss the appellant's appeal on its own previous decision in *Krotov*, a decision which of course pre–dated *Kalashnikov*. Only in an annexure to his application dated 17 February 2003 seeking permission from the Tribunal to appeal to this court did the appellant for the first time seek to rely on *Kalashnikov*. Explaining why permission to appeal to this court was being refused on the Article 3 ground the Vice President made no reference to *Kalashnikov*. He merely said:

> "Regarding prison conditions, the Tribunal was perfectly entitled to conclude that the appellant could not succeed in showing his imprisonment would expose him to a real risk of serious harm, since the evidence did not show that the scale and extent of human rights abuses in prisons was systematic (see *Muzafar Iqbal*)."

20. Before the Tribunal, as before the Adjudicator, the appellant had sought, as I understand it, to rely upon the objective materials contained in the relevant 'Country Report' for the year 2001 relating to the Russian Federation published by the Department of State of the United States of America on 4 March 2002 and the corresponding Home Office CIPU 'Country Assessment' published in April 2002. His primary contention before us is that the Tribunal in effect disregarded this material, came to a conclusion in absolute contradiction to the objective evidence, and adopted an attitude inconsistent with that of the European Court of Human Rights in *Kalashnikov*.

21. Put very shortly the appellant's case is that, as an escaped convict, if he is sent back to Russia he is sure to be returned to prison there; and in the light of *Kalashnikov* it is almost inevitable that the conditions in prison will be such as to subject him to degrading treatment in breach of Article 3.

22. The Secretary of State, whilst accepting that *Kalashnikov* is plainly relevant, asserts that it is neither binding authority nor, says Mr Garnham, does it provide definitive guidance on any of the issues of substance. The judgment in *Kalashnikov*, he says, is a conclusion on the facts of a particular case. No two cases alleging detention in conditions breaching Article 3 will be identical, and the court must look at the individual circumstances of each case to decide if a violation has been established. The appellant's experience of prison in Russia was, he says, hugely different from Kalashnikov's, and even on the evidence adduced by the appellant himself there was nothing to show that he had been kept in conditions breaching Article 3.

23. I cannot accept Mr Garnham's submissions. As I have already said, the appellant's remaining claim to the protection of Article 3 is 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. To establish his case he does not need to refer to evidence specific to his own circumstances but rather to the evidence bearing on the class of which he is a member, in other words, in the

circumstances of this case, to the evidence showing the conditions faced generally by persons incarcerated in the Russian prison system.

24. True it is that the decision in *Kalashnikov* focussed on the conditions in which Kalashnikov himself had been detained, and addressed the question of whether he had been subjected to degrading treatment. But the wider significance of the case emerges from the Russian Federation's admission that conditions which the Federation accepted fell below the standards set by other member States of the Council of Europe, and which the Court held amounted to degrading treatment constituting a breach of Article 3, applied to "most detainees in Russia".

25. In my judgment, if the only basis for deciding whether the appellant faced degrading treatment if returned to a Russian prison were *Kalashnikov*, the decision of the Tribunal would have to be reversed. 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. And, if this is so, it would not be an answer that the appellant's own experience of custody before his escape had not replicated Kalashnikov's.

26. The Immigration Appeal Tribunal had occasion to consider the wider implications of *Kalashnikov* in its recent decision in *B v Secretary of State for the Home Department* [2003] UKIAT 00020 B (Russia), another case involving a Russian asylum seeker. We heard no sustained argument on the point, but I have to confess to misgivings about the Tribunal's description (in para [64]) of *Kalashnikov* as being "of limited relevance to the issue we have to decide" – which was in fact the same issue as that which arises in the present case – and in its assertion (in para [67]) that *Kalashnikov* "did not proceed on the basis that conditions in all Russian prisons generally were contrary to Article 3, only that given widespread problems in such prisons an applicant would have less difficulty proving his case as to ill treatment in a particular prison than would an appellant facing imprisonment in a country where prison conditions were generally good." With all respect to the Tribunal, that does not, in my judgment, adequately recognise the wider general significance of *Kalashnikov*, nor does it accurately reflect the evidential burden facing an applicant either in the position in which *B* found himself in that case or in the position in which the appellant finds himself here.

27. There is in this type of case no burden on an applicant – in the nature of things there cannot be any burden – to show that he will be ill treated in a particular prison in such a manner as to engage Article 3. 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.

28. The only possible answer to this can be that since the events considered in *Kalashnikov* – in other words since June 2000, when Kalashnikov was released from his Russian prison – things have changed sufficiently to reduce the risk faced by the appellant to an acceptable level. That is precisely what the Secretary of State asserts. Specifically he asserts that there is substantial evidence of significant improvements in Russian prisons since *Kalashnikov*; that there was indeed evidence of some improvement even at the time of the judgment in *Kalashnikov*; that the Russian government has recognised the problem and expressed an intention to address it; that both short–term measures and longer term structural changes have been introduced; and that, although the position is still far from perfect, and conditions vary from place to place, there is already evidence that the changes are proving effective. Mr Garnham very frankly concedes that the Secretary of State is not suggesting that there have been improvements in all aspects of prison life throughout the Russian prison estate, but he submits that, given the changes in Russian prison conditions since *Kalashnikov*, the contention that there are substantial grounds for believing that there is a real risk of the appellant being seriously ill treated is impossible to maintain.

29. Mr Ogunbiyi disputes this. He says that, whilst the government of the Russian Federation has announced some changes, the improvements are not as significant as they have been made out to be, and that in any case a lot of the proposed changes are still in their infancy. So on any view, he says, it is too early to conclude that the changes are such that the real risks the appellant faces if returned to Russia have been eliminated.

30. By application notice dated 2 October 2003, and for reasons set out in a witness statement by a lawyer in the Treasury Solicitor's Department also dated 2 October 2003, the Secretary of State sought permission to rely before us on certain additional materials that were not – some of which, indeed, could not have been – before the Tribunal. These include: the Fifth Periodic Report of the Russian Federation to the United Nations Human Rights Committee dated 9 December 2002; the State Department 'Country Report' for the year 2002 published on 31 March 2003; the Home Office CIPU 'Country Assessment' published in April 2003; Interim Resolution ResDH (2003) 123 of the Council of Europe Committee of Ministers adopted on 4 June 2003; the Report to the Russian Government on the visit to the Russian Federation carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 2–17 December 2001, published on 30 June 2003; and the Response of the Russian Government to that Report also published on 30 June 2003.

31. The Secretary of State's new material was put forward on 2 October 2003, a Thursday. The appeal came on for hearing before us on 7 October 2003, the following Tuesday. Mr Ogunbiyi did not seek to resist the Secretary of State's application. But inevitably he had had only limited opportunity either to assimilate all this new material or to ascertain whether there were other materials that he might wish to rely on. In fact he was able to tell us that there was material from Amnesty International that bore on the point.

32. I do not see how in these circumstances we can possibly investigate all this new material ourselves. It would in any event be wrong for us to do so, for we sit here as an appellate court and not as a fact-finding tribunal. Moreover, the appellant requires more time to consider both the materials now being relied on by the Secretary of State and any other materials that, given proper time, he may be able to find which bear on the point.

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*.

34. It is a matter for the Tribunal, and not for this court, to give any further directions that may be required. I would only observe that the case should, I think, be heard before a freshly constituted Tribunal.

35. There is one final point I should add. This case is, on any view, one with potentially wide ramifications. It is therefore important that the Tribunal has before it all the relevant materials. The Secretary of State and his advisers can, I am sure, be relied upon to bring to the attention of the Tribunal all the relevant materials, irrespective of whether they may be thought to assist the one side or the other.

Lord Justice Sedley :

36. I agree with the judgment of Mr Justice Munby and with the order he proposes.

37. I want to add a word, however, about the evaluation of conditions which are alleged to create a real risk of inhuman treatment. The authority of this court has been lent, through the decision in *Hariri,* to the formulation that ill-treatment which is "frequent" or even "routine" does not present a real risk to the individual unless it is "general" or "systematic" or "consistently happening": see paragraphs 9 to 10 in the previous judgment.

38. Great care needs to be taken with such epithets. They are intended to elucidate the jurisprudential concept of real risk, not to replace it. If a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it, albeit crashes are not generally or consistently happening. The exegetic language in *Hariri* suggests a higher threshold than the IAT's more cautious phrase in *Iqbal*, "a consistent pattern", which the court in *Hariri* sought to endorse.

39. There is a danger, if *Hariri* is taken too literally, of assimilating risk to probability. A real risk is in language and in law something distinctly less than a probability, and it cannot be elevated by lexicographic stages into something more than it is.

40. Like Mr Justice Munby I have no doubt that the Home Office will give the IAT all possible help in ascertaining what has been the extent of change in the Russian prison system since 2000. It is to nobody's advantage to find that an ostensibly comprehensive background appraisal on which decision-makers then rely in judging individual claims has been arrived at in ignorance of material information and has to be undone

Lord Justice Mummery :

41. I agree with both judgments.