

SPECIAL IMMIGRATION APPEALS COMMISSION

APPEAL NUMBER: SN/42/2015

DATE OF HEARING: 14th November 2018

DATE OF JUDGMENT: 13th December 2018

BEFORE:

MR JUSTICE MALES

UPPER TRIBUNAL JUDGE GILL

MR PHILIP NELSON CMG

BETWEEN:

SS

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MR S. SAEED (instructed by Aman Solicitors) **appeared on behalf of the Applicant**

MR D. MITCHELL (instructed by the Government Legal Department) **appeared on behalf of the Secretary of State**

MR Z. AHMAD & MR B. RAWAT (instructed by the Special Advocates' Support Office) **appeared as Special Advocates**

A. Introduction

1. This is an application for review of the decision by the Secretary of State to refuse the application by the Applicant ("SS") for naturalisation as a British citizen. The application was refused on the ground that SS had failed to demonstrate that he was of good character. The refusal letter explained that it would pose a risk of damage to national security to give reasons for this decision.

B. Factual background

2. In summary, SS (D.O.B. 05.05.79) is an Iraqi national who arrived in the United Kingdom on 9 February 2001 and applied for asylum the same day. His application for asylum was refused in a decision dated 13 March 2001 but his appeal was allowed in a determination promulgated on 30 September 2002. SS was granted refugee status and indefinite leave to remain on 23 October 2002.
3. On 24 May 2006 SS applied for naturalization as a British citizen. He had no criminal convictions in this country and there has been no suggestion that he had any convictions elsewhere.
4. The application for naturalisation was refused by a letter dated 3 October 2008 in which it was explained that:

"Your application for British citizenship has been refused on the grounds that the Home Secretary is not satisfied that you can meet the requirement to be of good character. It would pose a risk of damage to national security to give reasons in this case".
5. In a letter of 6 October 2008 SS sought a reconsideration of the refusal decision. In his request he stated:

"After studying the information provided on the UKBA website ... I strongly believe that I have not been involved in those matters to prove that I am not of good character.
I have not been convicted or have unspent conviction. I had points endorsed on my driving licence which have been cleared and been confirmed by the DVLA (see attached).
I also had a matter with the Cambridge police authority which was eventually dropped as there was no evidence to make any charge.
This is all I know of which might have caused speculation on my character"

6. In the Secretary of State's reply of 10 November 2008, SS was advised that there were no grounds for reconsideration of the decision. Reference was made to section 6(1) of the British Nationality Act 1981 and the good character guidance in Chapter 18, Annex D of the Secretary of State's Nationality Instructions.
7. By letters dated 6 April 2009 and 8 June 2009 Aman Solicitors made a further application for reconsideration on behalf of SS. In a reply dated 16 June 2009, the Secretary of State reviewed and upheld the original decision.
8. On 16 September 2009 SS lodged an application for judicial review of the refusal decision dated 3 October 2008 refusing him naturalisation. This claim was stayed pending the outcome of the litigation in *AHK v SSHD* (SN/2/2014, SN/3/2014, SN/4/2014 and SN/5/2014).
9. SS made a second application for naturalisation on 11 January 2011. However, SS was informed by the Secretary of State that this application could not be considered while he was pursuing a claim for judicial review of the earlier refusal. As a result SS decided to withdraw his second application which he did by a letter dated 3 January 2012. The Secretary of State has now admitted that requiring an applicant to withdraw a claim for judicial review of an earlier application as a condition for considering a further application was contrary to Home Office policy. Mr Saad Saeed for SS and the special advocates submitted with some justification that the position adopted by the Secretary of State in 2011 was unfair. However, there has been no legal challenge to the refusal to consider the 2011 application. We are concerned with the challenge to the 2008 decision.
10. By a letter dated 1 September 2015 the Secretary of State certified her decision of 3 October 2008 in accordance with section 2D of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"). That section was inserted into the 1997 Act by section 15 of the Justice and Security Act 2013.
11. On 17 September 2015 SS issued an application for judicial review challenging the Secretary of State decision of 3 October 2008 refusing naturalisation and seeking to set aside the certification of 1 September 2015 pursuant to section 2D(2) of the 1997 Act.
12. In accordance with Rule 38 of the Special Immigration Appeals Commission (Procedure) Rules 2003 (as amended) ("the 2003 Rules"), by a letter from the Government Legal Department dated 13 December 2017, SS was provided with the following information:

"On 15 December 2004, SS was arrested along with two other individuals, Saman KADIR and Dilshad Ali DARWESH on the grounds of money laundering. Four properties associated with those arrested were searched. As a result of the searches, several items were seized including details of bank accounts and a number of mobile phones. During interview, SS and DARWESH claimed to deal with small scale money transfers. The SSHD notes that SS was

released on bail and not charged”.

13. In addition, on 16 March 2018 Aman Solicitors were provided with a redacted document from Cambridgeshire Constabulary dated 7 January 2005 concerning the arrest and interview of SS on 15 December 2004.

C. OPEN Grounds of challenge

14. SS’s Amended Grounds of Review dated 13 July 2018 raise three grounds of challenge to the refusal of his application for naturalisation.
15. The first ground is that it was unreasonable for the Secretary of State to refuse to interview SS before rejecting his application as this would have enabled her properly to evaluate his character.
16. The second ground is that it was *Wednesbury* unreasonable for the Secretary of State to refuse his application because he had been arrested when he had also been released without charge. It was submitted that the mere fact of an arrest did not cast any doubt upon his character.
17. The final ground was that the process followed by the Secretary of State was unfair and not in accordance with her own policy. The complaint here is that SS was not provided with information about the reasons for refusal of his application and that he ought to have been invited for an interview in accordance with paragraph 3.7.5 of the policy which applied at the relevant time.
18. The submissions made in writing and orally by Mr Saad Saeed on behalf of SS focused on the fact of SS’s arrest in December 2004. In particular Mr Saeed submitted that the application form which SS was required to complete, together with the accompanying guide, did not require disclosure of an arrest (as distinct, for example, from convictions or charges where proceedings had not been completed), that the mere fact of an arrest did not cast doubt on SS’s character, and that the information provided in December 2017 could have been provided much earlier.

D. The law

19. The applicable legal principles are well known and uncontroversial. They have been stated in many cases. A brief summary will therefore suffice.
20. An applicant for British citizenship must demonstrate that he is of good character: section 6 and paragraph 1 of Schedule 1 of the British Nationality Act 1981. The burden of doing so is on the applicant and the Secretary of State is entitled to apply a high standard in deciding whether the requirement is satisfied (*R v SSHD ex parte Fayed (No 2)* [2001] Imm A.R. 134 at [41]).
21. In considering the application the Secretary of State must act fairly which, in general, requires an applicant to be informed of any areas of concern (*R v SSHD ex parte Fayed* [1998] 1 WLR 763 at 773G-H. However, a requirement for such disclosure poses obvious problems in cases involving national security. Those problems have been resolved by the guidance provided to applicants as to the kind

of matters which must be disclosed, together with the provision for closed material procedures before the Commission at which the Secretary of State's reasons for refusing an application on good character grounds can be scrutinised with the assistance of special advocates. In this way a fair balance can generally be struck between the interests of the applicant and the protection of national security (*R (Thamby) v SSHD* [2011] EWHC 1763 (Admin) and *JJA v SSHD* SN/40/2015). In many cases, of which this is one, no further disclosure will be required as such further disclosure would prejudice national security. It is true that these procedures mean that neither the applicant nor special advocates representing his interests will be informed of the nature of any concern before the refusal decision is taken but, as Mitting J pointed out in *JJA*, that is unavoidable.

22. The approach to be adopted by the Commission is set out in section 2D(3) of the 1997 Act:

“In determining whether the decision should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.”

23. The following principles regarding the proper approach of the Commission to the statutory review of a decision refusing naturalisation arise from the Preliminary issues Judgment in *AHK v SSHD* SN/2/2014, SN/3/2014, SN/4/2014 and SN/5/2014:

- a) The Commission is required to apply a conventional judicial review approach to naturalisation challenges. Its task is to review the facts and consider whether the findings of fact by the decision-maker are reasonable - [14].
- b) The Commission need not determine for itself whether the facts said to justify a naturalisation decision are in fact true. As a matter of ordinary public law, the existence of facts said to justify the denial of nationality does not constitute a condition precedent, and fact-finding is not necessary to determine whether the procedure is fair or rational - [23] to [24].
- c) If the factual or evidential conclusions drawn by the Secretary of State are reasonable, the Commission should proceed to review the judgments made by the Secretary of State based on that factual picture. At this stage a degree of deference to the Secretary of State is appropriate. The Commission should only interfere if the Secretary of State has been unreasonable - [32].
- d) The refusal of naturalisation will not engage ECHR rights in the absence of an arbitrary or discriminatory decision, or at the very least some other specific basis in fact. The challenge to the decision is open only on grounds of rationality; and even if ECHR rights are engaged, the exercise is still one of proportionality rather than merits decision-making by the Commission - [22] to [24].

E. The OPEN grounds of challenge - analysis and conclusion

24. It is plain from the refusal letter of 3 October 2008 that SS's application for naturalisation was not refused because of his failure to declare the fact that he had been arrested in 2004. If it had been the SSHD's position that the mere fact of the arrest meant that an applicant could not satisfy the good character requirement or that a failure to declare such an arrest was itself fatal to an application, it would have been easy to say so. To do so would not have posed any risk of damage to national security. However, that is not what the refusal letter said. What it said was that reasons for the decision could not be given because to do so would pose such a risk.
25. Mr David Mitchell for the Secretary of State submitted that SS's failure to disclose the fact of his arrest could of itself provide a justification for the decision to refuse his application. However, this was not the actual reason for the decision and in our view cannot be relied upon to rescue that decision if it was otherwise unlawful.
26. Accordingly this case does not raise the questions whether (a) the mere fact of an arrest is capable of casting doubt upon an applicant's character or (b) failure to disclose such an arrest is itself a valid ground for refusing a naturalisation application. We can see force in Mr Saeed's submissions that neither the application form nor the guidance available to applicants expressly requires disclosure of an arrest which has not been followed up with any charge, in contrast with the requirement to disclose convictions and charges in still pending cases, and that an arrest can hardly need to be disclosed if an acquittal after trial does not (see *AH v SSHD* SN/37/2015 at [25]). However, circumstances can vary widely and it would be preferable in our view to leave these questions to be determined in a case where they arise. The answer is likely to depend on careful consideration of all the circumstances of the case.
27. It is not surprising that Mr Saeed's submissions focused on SS's arrest. That was referred to in the Rule 38 information disclosed in December 2017 and, as he recognised, was all he had to work with in OPEN. However, the December 2017 information was not and did not purport to be a statement of the reasons for the decision to refuse the naturalisation application. It was merely information disclosed pursuant to Rule 38. The reasons for the refusal decision, including the relevance of the arrest, were explained in the CLOSED procedure.
28. Once it is recognised that SS's application was refused on grounds having to do with national security, the OPEN grounds of challenge to the decision fall away. Thus, although the Secretary of State may invite an applicant to interview if there are doubts about his character, that is unlikely to be appropriate in a case where the doubts involve matters affecting national security. For the reasons summarised above and set out more fully in the authorities to which we have referred, an applicant is not entitled to be informed of the nature of any concerns about his character, let alone to be interviewed about them, where to do so would pose a risk to national security. For the reasons explained in our CLOSED judgment, this is such a case. Rather, those concerns fall to be investigated in the CLOSED

procedure.

F. The CLOSED Grounds of challenge

29. Applying the principles set out in *AHK* and summarised above, we have concluded, for the reasons explained in our CLOSED judgment, that the factual basis for the Secretary of State's decision to refuse SS's application was untenable. It was based on what was clearly a mistake as to what was shown by the factual information with which she was provided. The conclusion that SS was not of good character was based on an understanding of the facts which was not reasonably open to her in the light of that information. Accordingly the judgment which she exercised based on that mistaken view of the facts was irrational and the decision must be quashed.
30. For the avoidance of doubt we add that the Secretary of State confirmed in the CLOSED procedure that no point was taken on the timing of the CLOSED grounds of challenge advanced by the Special Advocates.

G. Remedy

31. Mr Mitchell submitted that in this event we should exercise our discretion to dismiss the application on the basis that its outcome in 2008 would inevitably have been the same notwithstanding any public law failure on the part of the Secretary of State. He relied on the decision of the Court of Appeal in *Simplex GE (Holdings) v Secretary of State for the Environment* (1989) 57 P & CR 306. We observe that "inevitably" is a demanding test. (We note that the present claim pre-dates the coming into force of section 31(2A) of the Senior Courts Act 1981, inserted by section 84 of the Criminal Justice and Courts Act 2015; accordingly the question whether that section applies to proceedings before the Commission, on which different views have been taken (see *MB v SSHD* SN/47/2015 at [22] to [26] and *MWH v SSHD* SN/57/2015 at [55] to [66]) does not arise).
32. We reject this submission. We cannot conclude that the decision in 2008 would inevitably have been the same if the mistakes to which we have referred had not been made, although it may have been. A judgment would have had to be made on a proper factual basis. That would have been a judgment for the Secretary of State and not for us.

H. Conclusion

33. For the reasons set out above and in our CLOSED judgment this claim succeeds. The Secretary of State's refusal of SS's application for naturalisation set out in the decision letter dated 3 October 2008 is quashed. The Secretary of State should reconsider the application after giving SS a reasonable time within which to make any representation.