SPECIAL IMMIGRATION APPEALS COMMISSION

APPEAL NUMBER: SN/69/2017

DATE OF HEARING:
6th July 2020

DATE OF JUDGMENT:
3rd November 2020

BEFORE:

THE HONOURABLE MR JUSTICE GARNHAM
UPPER TRIBUNAL JUDGE RINTOUL
MR ROGER GOLLAND

BETWEEN:

GA

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MR E GRIEVES (instructed by Fountain Solicitors) appeared on behalf of the Applicant.

MS NATASHA BARNES (instructed by the Government Legal Department) appeared on behalf of the Secretary of State.

MR S CRAGG (QC) (instructed by the Special Advocates' Support Office) appeared as Special Advocate.

OPEN JUDGMENT

Introduction:

1. This is a review of the Secretary of State's decision dated 29August 2017 to refuse the Applicant's application for naturalisation as a British citizen, on the grounds that he does not meet the statutory requirement of "good character".

2. We had submissions in OPEN session from Edward Grieves for the Applicant and Natasha Barnes for the Secretary of State for the Home Department ("SSHD"). In the CLOSED session, we heard from Stephen Cragg QC, Special Advocate and from Ms Barnes. We are grateful to counsel for their assistance.

The Statutory Scheme

3. The application for naturalisation was made under s.6 of the British Nationality Act 1981 which provides:

> '(1) If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirement of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.
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> (2) If, on an application for naturalisation as a British citizen made by a person of full age and capacity who on the date of the application is married to a British citizen or is the civil partner of a British citizen, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation such as a citizen.

4. It is well established that an applicant for naturalisation seeks a privilege, not a right and that the 1981 Act invests the Secretary of State with considerable discretion (*R v SSHD Ex Parte Fayed* [1998] 1WLR 769a). The burden of proof is on the Applicant to satisfy the SSHD that the requirements of s6 are met on the balance of probabilities. The Secretary of State must refuse the application if the test is not satisfied and the good character requirement cannot be waived.

5. The SSHD has set a high standard for the good character requirement. In *ex parte Fayed* Nourse LJ said (at [41]) "*It is no part of the function of the courts to discourage Ministers of the Crown from adopting high standard in matters which have been assigned to their judgement by Parliament, provided only that it is one which can reasonably be adopted in the circumstances*". To similar effect Stanley Burton LJ said in *SSHD v Sri Lanka* [2012] EWHC Civ 16 that it is "*for the applicant to satisfy the Secretary of State. Furthermore, while the Secretary of State must exercise her powers reasonably, essentially the test for disqualification from citizenship is subjective. If the Secretary of State is not satisfied, she is bound to refuse naturalisation.*"

6. The principles to be applied in determining this challenge are those that are applied in judicial view proceedings (s.2D(3) of the SIAC Act). As was held in *JK and others (application no. 59166/12)*, the Commission is required to apply a conventional judicial review approach to naturalisation challenges. The Commission's task is to review the facts and consider whether the procedure operated by the SSHD was a fair one and whether the findings of fact made by the decision maker were reasonably open to her. The Commission does not need to 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 naturalisation does not constitute a condition precedent which it is for the Court, or here the Commission, to determine.

A fact-finding exercise by the Commission is not necessary to determine whether the procedure is fair or rational.

The Facts

7. The Applicant was born in Algeria in December 1969. He first entered the UK on 9 May 2000 and claimed asylum unsuccessfully. He married an EC national and on 29 November 2005 was granted both a Permanent Residence Card and indefinite leave to remain.

8. On 23 May 2002 the Applicant was convicted of possessing a false instrument and sentenced to 16 months imprisonment. He did not declare that conviction on the application for naturalisation which he made on 23 May 2002. More than three years later, that application was refused by letter dated 21 December 2015.

9. That letter included the following:

> "Your client was convicted on 24 July 2002 at Leicester Crown Court. Your client did not declare this on the application form as required. As your client's conviction is not one that we would normally disregard, nor can we find grounds to disregard it exceptionally outside our published policy, we cannot be satisfied that the good character requirement is met".

10. On 4 March 2016, the Applicant made an application for re-consideration on the grounds that the relevant policy was to the effect that the conviction would ordinarily be disregarded under the prevailing policy.

11. On 7 April 2016 the Home Office responded to the application for reconsideration appearing to refuse it on the basis that the conviction could not be disregarded under the prevailing policy, but stating also that:

> "The main area of focus for the purpose of the reconsideration is on the deception which was employed by [GA] during the course of our consideration of his application. In signing the declaration at section 6 of the AN form [GA] was obliged to inform the Home Office of information which may affect the accuracy of the application under consideration. In this case, the information in question which was omitted from [GA's] AN from relates to the conviction incurred in May 2002."

12. On 4 August 2016, the Applicant's solicitors wrote to the Home Office in response to that letter, explaining that there had been a failure by the Home Office to apply its policies correctly in the Applicant's case. Applying that policy and the written guidance produced in support it was not necessary, it was said, to refer to the conviction on the application form. There was no response to this letter. On 21 October 2016 the Applicant's solicitors wrote a reminder letter to the Home Office.

13. On 26 October 2016 the Home Office Nationality Team responded. Their letter read:

> "I'm writing in response to your letter of 21.10.16. I apologise that your earlier letter of 04 August 2016 was not responded to. I will ensure that you are provided with a full response to both letters as soon as I have reviewed the case. I have today requested the file from our storage facility which may take several days. Therefore, I may not be able to provide you with a full response by 04.11.16 but I can assure you that I will provide a response as soon as I am able."

14. On 22 December 2016 the Nationality Team wrote again:

"I am writing in response to your letter of 20 December 2016. I last wrote to you on 26 October 2016 and I advised that I will provide you with a full response to your letter of 04 August 2016. I apologise for not responding sooner. I have considered the content of your letter and I have considered that there are grounds to reopen this case. I will consider the application again and provide you with a decision by 19 January 2017"

15. On 12 January 2017 the Home Office maintained its refusal, stating the Applicant's conviction could not be disregarded. On 14 February 2017 the Applicant's solicitors wrote again to the Home Office explaining why they said the Home Office policy had been wrongly applied in the Applicant's case and concluded by saying

"[GA] has been placed at a disadvantage by the initial delay in processing his application by the Home Office and the subsequent errors in the decision making process and we would therefore be grateful for your response granting the application within 14 days making the deadline 28 February 2017."

16. On 29 March 2017 the Applicant's solicitors sent a further letter to the Home Office requesting a response to the letter of 14 February 2017. They received no response. On 24 April 2017 they sent a Pre-Action Protocol letter requesting a response/decision. On 04 May 2017 the Secretary of State responded to the Pre-Action Protocol letter stating that a full response would be provided by 18 May 2017. On 15 May 2017 the Secretary of State stated that:

"Having reviewed the decision we will now proceed to reconsider your client's application in light of the representations you have made."

17. On 20 June 2017 the Applicant's solicitors wrote to the Home Office to enquire as to the progress of the application and requesting a time estimate for the same. They received no response to this letter. On 15 August 2017 they sent a further Pre-Action Protocol letter in which they stated that:

"Over three months have now passed since the letter from the Secretary of State dated 01.05.17 and exactly three months since the letter dated 15.05.17. The delay in reconsidering this application cannot be justified given that the Secretary of State is well acquainted with the representations we have made throughout which have remained consistently the same."

18. On 31 August 2017 the Applicant's solicitors received a letter from the Home Office dated 29 August 2017, which addressed a Mr Qader, and which appeared to refuse the application on an entirely new basis (without conceding any of the previous complaints) and giving no reasons whatsoever:

"The Home Secretary has refused your application for citizenship on the grounds that you do not meet the requirement of good character. It would be contrary to the public interest to give reasons."

19. The Appellant appealed to SIAC and, on 3 May 2018, following the Rule 38 hearing, the Secretary of State provided the following further explanation:

"The Home Secretary has refused your application for citizenship on the grounds that you do not meet the requirement of good character. This is because you have associated with Islamist extremists in the past."

20. The Secretary of State referred to a section of previously unpublished guidance to caseworkers in relation to association with extremism/terrorism.

The Grounds of Review

21. In his Replacement Grounds of Review the Applicant advances two grounds for a review of that decision. First, he says that the Secretary of State has failed to provide him with a fair opportunity to address matters which had been held against him. Second, he argues that the Secretary of State relied upon an unlawful policy contained in the National Policy guidance and casework instructions.

The Competing Contentions

22. The Applicant argues that the Respondent has acted unlawfully and in breach of natural justice in failing to give notice of any adverse concern in advance of the August 2017 decision or during any part of the decision-making process. It is said that the Secretary of State has failed to afford the Applicant any fair opportunity to address her concerns. (Reference is made to *R v Secretary of State for the Home Department, ex parte Fayed* [1998] 1 WLR 763 [773, G-H]; *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700; *Secretary of State v SIAC* (AHK *and others*) [2015] EWHC 1236 (Admin) at [28]; *R (Thamby) v Secretary of State for the Home Department* [2011] EWHC 1763; *ZG & SA V SSHD* (SN/23/2015 & SN/24/2015)

23. Mr Grieves contends that the Secretary of State has now, after the decision under challenge, provided reasons for it. He says it is no answer for the Secretary of State to make "a generalised defence that the non-disclosure of both reasons and guidance occurred in a context where she considered, wrongly, there to be a public interest issue in refusing to provide such information in advance of the decision, or in the body of the decision letter itself". He says the Appellant had substantive legal and factual representations to make on the issue of whether his past associations ought to ground a finding that he is not of good character, informed by the published national guidance and casework instruction, representations he could not have been expected to make prior to the contested decision. It is said that the Applicant had "in fact, been positively wrong footed" when informed that the reason for his refusal was his 2002 fraud conviction and his failure to declare it when he applied for naturalisation.

24. As to his second ground, the reliance on unpublished policy, Mr Grieves argues the Respondent relied upon an unlawful policy contained in the national policy and casework instructions. He says that policy guideline contained "restricted" and unpublished sections under the heading "terrorism", without legitimate public interest justifying the same. He says that is contrary to the principle of natural justice. He says the policy was not published until July 2018. That he argues was a belated response to the decision in *ARM v SSHD* (SN/22/2015) heard on 22 February 2016. On that occasion, he argues the "restricted" part of the terrorism instruction was revealed in SIAC proceedings. He says it is clear in those circumstances there was no justification for restricting the publication of that instruction.

25. Against that background, Mr Grieves argues that the contested decision must be set aside and an order made that the Secretary of State must re-consider the decision in light of any further submissions made on behalf of the Applicant.

26. In response, Ms Barnes, for the Secretary of State argues, first, that the Secretary of State's decision was not procedurally unfair because of the failure to give the Applicant reasons either before or at the time of refusing the application. She says, second, that there is no statutory requirement on the Secretary of State to invite representations before making a decision or to give additional reasons for that decision. This is not a case in which a statutory power is being

exercised which deprives a person of an existing right. Instead it is a refusal of an application. The application itself is the Applicant's opportunity to make his case known.

27. She says, third, that the Applicant was given adequate notice of matters which might be held against him in the application form and associated guidance in force at that time. Fourth, she says that whilst the reason given for the previous refusal of his naturalisation application in December 2015 and April 2016, was his failure to declare a previous conviction, it was never suggested that was the *only* issue the Secretary of State would consider in deciding whether he met the good character requirement.

28. Fifth, Ms Barnes contends that the fact that the reasons for the decision were subsequently removed from CLOSED during the Rule 38 process does not mean the Secretary of State's earlier refusal was unlawful. Sixth, the Secretary of State submits that her decision was not flawed by a failure to disclose to the Applicant before making her decision her restricted good character guidance relating to individuals assessed as associated with extremists. That part of the Home Office guidance was already in the public domain but it would have been contrary to national security to inform the Applicant that she was refusing his application due to his being assessed to have associated with Islamists extremists in the past.

29. Finally, Ms Barnes contends that any error was not material. She reminds the Commission that it has a discretion to refuse relief if satisfied that "if the error which the court has found had not been made the outcome would necessarily have been the same." The Secretary of State says the decision would inevitably have been the same if the Applicant had been provided with the reasons before she made her decision and had had an opportunity to make representations at that time as to any previous association with Islamist extremists. She said the Secretary of State would still inevitably have refused the application on the basis of his past associations. In that regard, she relies on points made in CLOSED. She says the Applicant has now been provided with reasons for the Secretary of State's decision which he can challenge in these proceedings. He has provided a lengthy witness statement in order to do so. She says he is in the same position he would have been in had he been given reasons at the time the decision made.

Discussion

30. In our judgment, the Applicant has good grounds for his initial procedural complaint. It is apparent from the history and the submissions we have heard that there was serious confusion within the relevant department of the Home Office as to the rules and policy to be applied when considering an application such as the present one. It appears that internal guidance indicated that convictions in the previous 15 years should be disclosed, whereas the guidance to applicants was that only convictions in the previous 10 years had to be disclosed.

31. The result was that caseworkers were acting in accordance with the letter of their internal guidance when they alighted on the Applicant's failure to disclose his 2002 conviction as a ground for refusing the application. However, because of the terms of the external guidance, applicants were being misled; the Home Office was holding against them a failure to disclose information which was not required by the guidance applicants were using. That was manifestly unfair. The cause of the unfairness was the failure on the part of the Home Office to ensure that the external guidance matched the internal guidance.

32. In the letter dated 01 December 2015, the basis of the decision was the Applicant's failure to declare on his application form that he had been convicted of fraud on 24 July 2002. The error as to the date has been acknowledged and corrected, but the point of substance continued to be adopted thereafter. In the letters of 7 April 2016, the focus of the Secretary of State's response

remained the Applicant's failure to disclose the conviction. The Applicant's solicitor pointed out that the Home Office policy extant at the time of the application was that spent convictions were to be disregarded. Even when that was pointed out the Secretary of State maintained her position that the conviction ought to have been disclosed.

33. In our judgment, the Home Office were plainly in error in this regard. Given the policy in place at the time the Applicant first made his application, it was entirely inappropriate to rely on the failure to disclose his 2002 conviction. Applying the policy in place at the time, as explained in the guidance, the Applicant was entitled to make no reference to that conviction.

34. Although the headline ground for refusing naturalisation has always been that the good character requirement has not been met, the essential basis of that conclusion has shifted significantly. Nonetheless, the Secretary of State maintained for a number of years thereafter that the decision as to the Applicant's character was based on the Applicant's failure to disclose the 2002 conviction. That was plainly misleading. When that error was pointed out the Secretary of State changed the basis for his conclusion but did not reveal that change to the Applicant.

35. It is argued that at the time these errors were made it was the view of the Home Office that it would be contrary to national security to make public the relevant parts of their internal guidance or to inform applicants that the real ground for concluding they were not of good character was their association with extremists. However, in April 2016, the Commission handed down its open judgment in *ARM v SSHD* (SN/22/2015). That judgment referred to chapter 6 of the CLOSED Home Office guidance for caseworkers deciding naturalisation applications, entitled "terrorism".

36. From at least that date we can see no good reason why the Secretary of State should not have explained her true concerns about the Applicant's character by using the form of words eventually deployed in this case. He should either have given notice of those concerns in advance of making his final decision or, at the very least, have specified them in the decision of 29 August 2017. In that way the Applicant could have addressed those concerns in his application for re-consideration.

37. Those matters, however, are now historical. The Secretary of State has re-considered the application and reached a fresh decision. That decision is still based on the Applicant's character but is based, not on his previous conviction but on all his alleged association "with Islamist extremists in the past". Following the Rule 38 process, the Applicant has been given a gist of the true basis for the decision.

38. The Applicant has been able, during the course of these proceedings, to provide as comprehensive an answer to the Secretary of State's concerns as he is able. That answer is contained in his witness statement for the Commission. Mr Grieves is right to remind us of the decision of the Commission in *ZG and SA v* SSHD (SN/23/2015 and SN/24.2015) to the effect that the Secretary of State ought not to "subcontract" to this Commission the task of considering the strength of the response to those concerns. However, we are where we are. The Commission is now in a position to consider both the Secretary of State's concerns and the Applicant's best answer to them. Furthermore, the Commission has the benefit of being able to test the Secretary of State's concerns in the CLOSED session with the assistance of the Special Advocate.

39. In our judgment, the substance of the Applicant's case and the strength of the Secretary of State's underlying objection could only properly be resolved in CLOSED session. In approaching that CLOSED hearing, we reminded ourselves that where, on the OPEN evidence,

we have found procedural unfairness in a failure to disclose information so that an applicant knows the case he has to meet, we should be very slow to conclude that, were the SSHD to be required to retake that decision, it is inevitable that the outcome would be the same. As it was put in *LA, MB, RA, SAA v SSHD* (SN/63, 64 and 65/2015) the Commission observed at [114]:

> "We are conscious that if a court has found that the decision maker has acted unfairly in reaching a decision, it will be a very unusual case indeed in which the court could be satisfied, the decision would inevitably, or necessarily, have been the same"

40. Having had the benefit of argument in CLOSED from both counsel for the Secretary of State and the Special Advocate, however, we have come firmly to the conclusion that the outcome was inevitable.

41. In those circumstances, this review must be dismissed. The detailed reasons for that conclusion can only be provided in the CLOSED judgment.