Neutral Citation Number: [2022] EWHC 582 (Admin)

Case No: CO/1499/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2022

Before :

HUGH MERCER QC sitting as a Deputy Judge of the High Court

- -

Between :

THE QUEEN on the application of AHN

Claimant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -
- -

M Fazli (instructed by **Reliance Solicitors**) for the **Claimant**
Richard Evans (instructed by **Government Legal Service**) for the **Defendant**

Hearing dates: 10 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HUGH MERCER QC sitting as a Deputy Judge of the High Court :

1. This is an application for judicial review against the decision of the Defendant, Secretary of State for the Home Department, dated 22 January 2021 ("the Decision"). The Decision gives reasons for refusing to grant British nationality to the Claimant on the basis that the Defendant is not satisfied that the Claimant meets the 'good character' requirement on the grounds of his links to and support for Hizb-e-Islami ("HEI"). Permission was granted for this application by Matthew Gullick QC, sitting as a Deputy High Court Judge, in a decision dated 24 November 2021.

2. The Claimant was born on 1 January 1973 in Afghanistan, entered the United Kingdom on 25 June 2001 and was granted refugee status on 9 September 2004 after an appeal against refusal. The Claimant is married with four children, all UK nationals, and his original profession is that of a doctor albeit he is not currently working as a doctor. The Claimant has made four applications for naturalisation in total. He has previously applied on 4 September 2008, 2 November 2011 and 3 July 2013 which have all, including reconsideration decisions, resulted in refusals on good character grounds. His current application was refused on 19 August 2019. The refusal was maintained on 15 May 2020 which gave rise to an application for judicial review compromised by a consent order agreeing to reconsideration. On 22 January 2021, the decision of 15 May 2020 was maintained and an application for judicial review followed.

3. Section 6 of the British Nationality Act 1981 (the 1981 Act) provides the Defendant with a discretion to grant a person a certificate of naturalisation as a British citizen. It states as follows:

> "*(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 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 as such a citizen.*
>
> *(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 as such a citizen.*"

4. One of the requirements in Schedule 1, para. 1, is that the person is of "*good character*".

5. Mr Evans for the Defendant stresses the wide discretion of the Defendant in determining whether she is satisfied that a person is of good character. There is no dispute about this and so I limit my citation to the remarks of Pitchford LJ in Regina (DA (Iran)) v. Secretary of State for the Home Department [2014] EWCA Civ 654, Pitchford LJ at [4]:

> "*The parties are in agreement that the Secretary of State enjoys a significant measure of appreciation in assessing for herself the requisite standard of good character in the factual context of the application under consideration.*"

6. Mr Evans also cites the statement of King J in Regina (OM) v. SSHD [2016] EWHC 1588 (Admin), at [9]:

> "*It is well established that there is no right to citizenship and the onus is on the applicant to satisfy the Secretary of State that he is of good character. See for example Sales J (as he then was) in Chockalingam Thamby [2011] EWHC 1763 (Admin) at paragraph 40. In any challenge to a refusal of an application on good character grounds the question is not whether the Secretary of State has established that the Claimant was not of good character but rather ' whether she was entitled not to be satisfied that he was of good character' (per Stanley Burnton LJ in SK (Sri Lanka) [2012] EWCA Civ 16 at para. 38. The court can interfere with such a refusal only on well known public law grounds of error of law or irrationality/ Wednesbury unreasonableness / procedural unfairness. What it cannot do is substitute its own decision for that of the primary decision maker. This is not an appeal as to the merits of the original application*."

7. The principal public law ground relied on this case is the requirement derived from Secretary of State for Education and Science v. Tameside MBC [1977] AC 1014 to have regard to relevant considerations in exercising a discretionary power and to put aside irrelevant considerations.

Whether the application for judicial review is academic

8. On 29 December 2021, the date when the Detailed Grounds of Defence were due, the Defendant wrote to the Claimant with a draft consent order which proposed reconsideration of the Decision.

9. Citing the four applications for naturalisation since 2008 and the fact that this very application for judicial review results from an agreement to compromise a previous application for judicial review on the basis that the Defendant reconsidered matters, the Claimant refused on the basis essentially that it seemed inevitable in the light of the history of the case that any reconsideration would be adverse to the Claimant, that reconsideration after success at a substantive hearing would be substantially different to that on the basis of a brief permission decision and that the Claimant had prospects of relief which went beyond reconsideration at the substantive hearing.

10. Nothing was said at this stage in early 2022 by either party about the basis of reconsideration. Mr Evans argued that, implicitly, the Defendant would take into

account the points made in the Claimant's Grounds and that the Claimant should have asked if he wanted to know the basis of reconsideration. Whilst I can see force in those points for many cases, they appear to me to have less weight in a case with a long history of decisions and reconsiderations combined with an agreement to compromise a previous application for judicial review on the basis of a reconsideration which is in fact the Decision against which this application is brought.

11. At the hearing, Mr Evans stated that if reconsideration were accepted by the Claimant, it would be on the basis that the Defendant would take into account the Claimant's 20 years of residence in the UK; the fact that HEI to which the Claimant formerly belonged was proscribed by the UK after the Claimant left HEI; the possibility that less weight needed to be attached to the findings of an Immigration Adjudicator in 2004 where the findings were made under a lower standard of proof.

12. On that basis, Mr Evans submitted that the application was academic. He took me first to Regina v. Secretary of State for the Home Department, ex parte Salem [1999] 1 AC 450, HL. In that case, Lord Slynn accepted that, in a public law case, the House of Lords had the discretion to hear an appeal, even if, by the time that the appeal reached the House of Lords, there was no longer an action to be decided which would directly affect the rights and obligations of the parties. He held (at page 457A to B):

> "*The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future*."

13. In Regina (Zoolife International Limited) v. Secretary of State for Environment, Food and Rural Affairs [2007] EWHC 2995 (Admin.), Silber J, in a rolled-up application, conducted a detailed review of the authorities and concluded that the factors identified in Salem applied to first instance decisions. At paragraph 36, he stated:

> "*In my view, these statements show clearly that academic issues cannot and should not be determined by courts unless there are exceptional circumstances, such as where two conditions are satisfied in the type of application now before the court. The first condition is in the words of Lord Slynn in Salem (supra) that 'a large number of similar cases exist or are anticipated' or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive. If the courts entertained academic disputes in the type of application now before the court but which did not satisfy each of these two conditions, the consequence would be a regrettable waste of valuable court time and the incurring by one or more parties of unnecessary costs*."

14. I note also in *The Administrative Court: Judicial Review Guide 2021* para. 6.3.4.1:

> "*Where a claim is academic, i.e. there is no longer a case to be decided which will directly affect the rights and obligations of the parties to the claim, it will generally not be appropriate to bring judicial review proceedings. An example of such a scenario would be where the defendant has agreed to reconsider the decision challenged. Where the claim has become academic since it was issued, it is generally inappropriate to purse the claim.*"

15. On the issue of other similar cases, Mr Evans was not prepared to acknowledge even the possibility of such cases but the Defendant has had the opportunity to put in evidence of the existence or otherwise of other applications for naturalisation involving members of HEI and has not done so. Also, it would seem unrealistic in the light of current events in Afghanistan not to anticipate that some Afghan refugees will reach UK shores and that, if they do, a proportion of such refugees will have had links to or been members of HEI, given in particular that there is evidence from the Claimant (and none from the Defendant to answer this point) that around 50% of the Afghan population had been members of HEI. Indeed, the Defendant's Afghan Citizens Resettlement Scheme which opened earlier this year is designed to resettle up to 5,000 people this year with up to 20,000 in total. Mr Evans submitted that there would be a time delay before any such current applicants for asylum applied for citizenship which must be right but that does not seem to me to detract from a reasonable anticipation that other cases of naturalisation will come before the Court where the links of the applicant to HEI are likely to be in issue.

16. Mr Evans also argued that consideration of HEI is fact sensitive. That is right in terms of the Claimant's personal links to HEI but not in terms of the position and activities of HEI itself which are likely to be common to those applicants for naturalisation who have been members of HEI. It is alleged among other things that the Defendant has failed to have sufficient regard to: the changing activities of HEI and the UK Government's assessment of those activities over time; to the support afforded to HEI by the UK Government and other Western allies; to the need to take into account the Defendant's approach to the assessment of good character for other former members of HEI who have successfully applied for naturalisation. If those submissions are made out, they apply without regard to the personal circumstances of the individual applicant which would then have to be considered in individual cases. Moreover, as the Master of the Rolls said in R v. Hertfordshire CC ex p. Cheung, The Times, April 4, 1986, cited in paragraph 11-064 of De Smith, 7th edition:

> *"… it is a cardinal principle of good public administration that all persons in a similar position should be treated similarly."*

17. From this perspective, in particular the point regarding consistency of treatment of former members of HEI, it seems to me that, as submitted by Mr Fazli, there is a public interest in a court considering this application. In R v Secretary of State for the Home Department, ex p Abdi [1996] WLR 298 at 302F, concerned with whether Spain was a

safe third country to which an asylum seeker can be returned, the Secretary of State had agreed to review the matter but Lord Slynn held at p. 302F that he would nevertheless proceed. I accept that that was a more obvious case in which it was accepted by the Secretary of State that the case raised issues of fundamental importance but nevertheless this case does appear capable of influencing the approach of the Secretary of State in future cases and it is therefore in the public interest that this case be heard.

18. Though not specifically enumerated as an exceptional circumstance by the authorities cited above, a point of significant weight in this case is the long history of decisions and reconsiderations culminating in the settlement of the previous 2020 judicial review claim on the basis of reconsideration by the Defendant. That history must be considered alongside the refusal of the Defendant to engage with the point made by the Claimant's Member of Parliament in 2008 with regards to the inconsistency of the Defendant's treatment of other former members of HEI as compared with the Claimant. The Defendant has also refused to engage with the point made by the Claimant that at the time he joined HEI and for several years thereafter the UK Government and other Western governments were financing the activities of HEI, giving rise to the question whether finance implies approval of HEI, at least for a sixteen year old Afghan, as he was when the Claimant joined HEI in 1989, in circumstances where the Decision relies on the reasons for the Claimant joining HEI. It seems to me on the basis of the Defendant's approach to date that there is no prospect of the Defendant taking such matters into account unless there were a decision of this Court and it seems further that these matters are capable of affecting the consideration by the Defendant of other similar cases. With regard to the Claimant's argument that the Defendant's offer of reconsideration can be considered to be tactical, in my judgment there is no material on which I could make such a finding. Also, while the Claimant's suicidal state of mind is a matter of regret, it is not in my judgment an exceptional circumstance.

19. For those reasons, I find that there are exceptional circumstances such that I should hear and determine this application for judicial review.

The Facts

20. I need to summarise briefly the relevant factual material before me, save for the Claimant's witness statement filed in these proceedings which was not of course before the Secretary of State and could not therefore have been taken into account. The Claimant joined HEI as a 16-year-old in 1989, at a time when HEI was fighting against the Russians who had invaded Afghanistan. That fighting went on until at least the fall of the puppet regime installed by the Russians in Kabul in 1992. Though without evidence from his client, Mr Evans did not contradict the Claimant's assertion that the UK Government with other Western Governments supported HEI in its struggle to rid Afghanistan of the Russian occupation. Indeed, the Defendant's own Research Annex to the decision of 19 August 2019 quotes an author, Peter Bergen, who records a conservative estimate of American aid of $600m in addition to further aid from Saudi Arabia. What is currently unclear is whether that aid ceased in 1992 or continued for a period.

21. As recorded in the Decision, HEI was responsible for the bombardment of Kabul between 1992 and 1995 which gave rise to many civilian casualties and which

apparently formed part of a civil war between rival mujahedin factions which lasted until the rise of the Taliban and a decisive defeat for HEI at the hands of the Taliban. The bombardment of Kabul is unsurprisingly characterised by the Defendant as a war crime or a crime against humanity. However, the Defendant's Research Annex also records a long list of crimes committed by HEI during the 1980s, i.e. apparently before Western support for HEI, so that HEI became "*one of the foremost mujahedin groups active during the 1980s*".

22. Dr Antonio Giustizzi, visiting professor at the War Studies Department of King's College London, in a witness statement of 25 October 2019 quoted in part in the Decision, in summary gives the following evidence:

    i) That getting a job in Afghanistan's state-dominated economy required good political connections so that most students joined one of the competing groups. In the university where the Claimant studied, HEI was the main group active on campus with some other splinter factions of HEI;

    ii) That HEI as a military force de facto ceased to exist in 1996 due to its comprehensive defeat by the Taliban;

    iii) After 2001 (by which time it appears from other evidence that Western forces were present in Afghanistan), HEI members had joined the Taliban and HEI itself had tried to play an independent role in the insurgency;

    iv) An amnesty has been declared by the Government in Afghanistan for crimes committed during the 1980s and 1990s and up until 2001;

    v) Many former members of HEI had cooperated with the Afghan Government and have even occupied senior positions (including Ministers of Education, Finance and Justice) within it after 2001. The former leader of HEI, Mr Hekmatyar, who was renowned for his violent tactics, stood as a candidate in the Afghan presidential elections of 2019;

    vi) The Claimant's role, as a partially trained medic, is likely to have been attending to the injured given the shortage of doctors and medics;

    vii) The Claimant is likely to have been aware of HEI's shelling of Kabul;

    viii) The Claimant is highly unlikely to have been involved in war crimes as a youth member of HEI, would have been used as a medic and not a combatant and "*must have been very junior in the party … given his age*".

23. The Claimant, in his correspondence with the Defendant prior to the Decision, described the events around the period when he was a member of HEI as being that:

    i) HEI was one of seven Pakistani-based parties formed in order to fight against Russian occupation of Afghanistan;

    ii) Mr Hekmatyar was one of several jihadist leaders invited by Ronald Reagan to the White House in the 1980s;

iii) When the Claimant's family left Kabul for Pakistan in 1986, the Claimant remained behind in order to complete his secondary education (early) which he did in 1989 at the age of 16 years;

iv) The Claimant joined HEI in 1989 in order to liberate the country from Russian occupation;

v) In joining HEI, he was following in the footsteps of family members as it is very common in Afghani tradition and culture to follow the example set by one's elders and family;

vi) Approximately 50% of Afghans were members in the 1980s and 1990s;

vii) This extensive membership attracted the attention of Western governments and when he joined in 1989 "*the policy of the USA and the UK was to support the freedom fighters of that time including [HEI]*" and *"... the west including the UK and USA were supporting and were encouraging voluntary [sic] for that war*";

viii) The Claimant's voluntary participation in activities on behalf of HEI was recognised in a letter from Mr Hekmatyar which specifically referenced the period 1989-1992;

ix) The Claimant wished to become an educated and peace loving person who has, since 1996 when the links with the party collapsed due to the defeat by the Taliban, "*not supported, actively worked or glorified the current policies of [HEI]*";

x) This is evidenced by the fact that when the Taliban took power in 1996, rather than retreat to the mountains with the military groups hostile to the Taliban, the Claimant returned to continue his medical studies until he completed them.

24. In his witness statement of 22 May 2003, the Claimant describes:

i) The fact that his "*tribe*" had been involved with a liberation group from the beginning of the jihad in Afghanistan and in particular with HEI in which his siblings, cousins and father were all involved;

ii) The Claimant continued to be an active member of HEI while at university. After the liberation from the Russians, Haje Abdul Qadeer, commander of HEI became a provincial governor and asked the Claimant to establish a new student organisation in place of the communist organisation. This was to be by way of a student union among students of universities and high schools of Nangarhar Province and it was set up in 1992. The Claimant was elected leader of the student union and, in that capacity, had a seat on the Supreme Council of Nengarhar Province after 1993;

iii) In 1994/1995, Haje Qadeer called a meeting in Jalalabad of leaders from other parts of Afghanistan so that they might sit together and agree how to rule the country peacefully. The Claimant was instrumental in a student demonstration to call for the assembled leaders to make peace.

iv) The students requested the leaders to come out into the street and meet them, which they declined to do, but the Claimant was one of 16 students invited into the palace where the leaders were assembled and who spoke (possibly the Claimant personally but it is not clear) to Haje Qadeer and the other leaders for about half an hour;

v) The leaders promised to make an agreement about unity and did so but the in-fighting between leaders later reasserted itself;

vi) Due to his activities in the student union, the Claimant was later taken away and tortured by the Taliban;

vii) Later, the Dean of the university asked for five student representatives to act as mediators between the students and the Dean and the Claimant was chosen by his colleagues to be a representative;

viii) The Claimant described in detail his role as a student mediator and taking part in moves to prevent the Dean's involvement in corruption involving university equipment, conduct which appears to have resulted in the Claimant's later torture by the Taliban;

ix) The Claimant describes not being involved politically at this time (which appears to be after 1996) but "*I was keeping notes for myself about the Taliban's treatment of the citizens of Kabul so that I would at some point in the future be able to write about the Taliban's disregard for women and for human rights*".

25. A later unsigned Additional Witness Statement, unsigned and undated but which appears to date from 2004, is in the bundle which contrasts with the more detailed account in the Claimant's 2003 witness statement. It records:

i) The most important issue being his "*active political involvement*" in HEI;

ii) The Claimant records that he "*had an oath with [HEI] that [he] will be at their side at any time*" and that this is included within the text on his identity card. If he returned to Afghanistan, he "*grew up around this party and [has] always followed their ideas*" and "*will follow my political party and their regulations*".

26. There were three decisions of Immigration Adjudicators in the Claimant's favour (25 February 2002, 18 July 2003 and 9 September 2004) on the issue of his status as a refugee, apparently because the appeal was remitted twice for rehearing by the Immigration Appellate Tribunal. Each of the three decisions found the Claimant to be a credible witness which is significant as regards the Claimant's account of the facts in his witness statements and in his correspondence with the Defendant. The 2002 decision was mainly concerned with the Claimant's nationality (Pakistani or Afghan) and determined that the Claimant was Afghan. The 2003 decision:

i) Notes that he was elected to the student body, that "*The position he held was not particularly important. He was a mediator between students and the university authority.*" (para. 7);

ii) Records the conflict with the Dean which resulted ultimately in the Claimant's torture by the Taliban and expressly accepts that evidence (para. 16).

27. The 2004 decision of the Immigration Adjudicator:

i) Had "*no hesitation in finding the Appellant credible*" and that through the three hearings "*The Appellant's account has remained consistent throughout*" (para. 25);

ii) Linked the Claimant's torture at the hands of the Taliban with the demonstration for peace in Jalalabad in which the Claimant was instrumental (para. 20);

iii) Interpreted the Claimant's unsigned witness statement as a continuing desire on the part of the Claimant to support HEI if he returned there (para. 30);

iv) The Claimant had a higher profile and his involvement in student politics was "*prominent and at a high level*" (para. 32);

v) Those who, like the Claimant, "*were active on behalf of HEI*" may still be at risk in Afghanistan (para. 34);

vi) Recorded that his understanding of what the Claimant had said, apparently in oral evidence, about a "*desire to support and disseminate the ideas of [HEI] in Afghanistan*".

28. HEI was proscribed by the United Kingdom under the Terrorism Act 2000 from 2005 to 2017 inclusive. Mr Evans invites me to infer that the ground for this proscription was the bombardment by HEI of Kabul but that occurred over 10 years before 2005 and the decision of HEI to fight against Western forces from 2001 seems at least just as likely to be causative of the decision to proscribe HEI.

Ground 2 – failure to take account of 20 years concern free residence

29. A major criticism advanced by the Claimant's counsel (see Ground 2 of his Skeleton Argument) is the failure of the Defendant to give any or any sufficient weight to 20 years of concern-free residence by the Claimant in the UK in addition to the 5 years of good character which preceded that. In my judgment, this is a wise concession. As envisaged by Sales J in R (on the application of Thamby) v. Secretary of State for the Home Department [2011] EWHC 1763 (Admin) at [54], there may be some individuals who, by reason of their own actions, will never be naturalised, but UK residence with good character for a sustained period of time is clearly a relevant factor for the consideration of good character required by the British Nationality Act 1981 as the defendant must consider all aspects of the applicant's character which requires there to be a comprehensive assessment of each applicant's character as an individual: see Hiri v. Secretary of State for the Home Department [2014] EWHC 254 at [35-36].

Ground 6 – error in the weight attached to the findings of the 2004 immigration adjudicator decision

30. This ground challenges the Defendant's reliance on the 2004 Adjudicator decision determined on the basis of the standard of a reasonable degree of likelihood as compared with the balance of probabilities which is common ground applies in this Court.

31. First of all, I should say why this matters. The Defendant places great emphasis on the Claimant's continuing support for the "*ideas*" of HEI in 2004 and even, it was submitted, in 2007. When Mr Evans took me to his reference to the Claimant's stance in a 2007 hearing for the Claimant's brother, the Claimant's evidence appeared limited to statements as to the position of the Claimant's family and Mr Evans shifted his emphasis to the undated witness statement believed to be of 2004 and to the 2004 Adjudicator decision.

32. Mr Fazli for the Claimant had three answers to this. The first was that the duty of the Defendant is not to apply an Immigration Adjudicator's decision but to exercise her judgment on the basis of the entirety of the evidence. Mr Fazli took me to the judgment of Lady Justice Rose in SSHD v. BK (Afghanistan) [2019] EWCA Civ 1358 who summarised at [32] the earlier guidance in Devaseelan v. Secretary of State for the Home Department [2002] UKIAT 702 with regard to the approach by a second adjudicator to a first adjudicator's decision. The particular point in that guidance which is at issue in this case is that:

> "*(6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.*"

33. That is not based on res judicata or issue estoppel but rather the need for consistency of approach: [39] of Lady Justice Rose's judgment. In that case, it was the Secretary of State who was arguing that any collateral attack on the findings of a first adjudicator should not be permitted. The Secretary of State's submission was rejected as too broad and the Upper Tribunal had been entitled in the circumstances of that case to use the adjudicator's decision as a starting point but to depart from that starting point and make their own assessment of the evidence before them: [50]. She went to observe in [51] that the position might well have been different if the adjudicator's finding had been made on the basis of admissions made in the asylum interview, or in a witness statement or in the course of the hearing but that a conscientious tribunal would not have been acting fairly if they had made findings of war crimes based on a selection of the evidence. I note also [54] of the judgment in that case where the question was whether, if the applicant's involvement in Taliban militia had been limited to punching and kicking, he could still years later contend to be of good character. Lady Justice Rose said this:

> *"That submission is in my view unrealistic. The Upper Tribunal had plenty of evidence before then as to BK's excellent character in more recent years. Many people - even those putting themselves forward for the highest public office - are challenged*

> *to explain earlier misconduct including criminal conduct. They do so on the basis that that misconduct was committed at other times and in other places. Experience shows that people are "considered to be persons of good character" if their subsequent conduct demonstrates that the earlier faults were atypical and not indicative of some deep-seated malevolence. That was what the Upper Tribunal found here and in my judgement, they were entitled to make that finding."*

34. It seems to me that this statement has potential relevance for the position of a 16-year-old boy who joined an organisation at a time when Western governments were encouraging volunteers to come forward and support the organisation such as in this case.

35. The difficulty for the Defendant under this ground is that it appears that no regard has been had either in the Decision to the second Adjudicator's 2003 decision which assessed the Claimant's position as "*not particularly important*", whereas the 2004 decision found the Claimant to be higher profile and that his position in student politics was "*prominent and at a high level*". Mr Evans relied on the 2004 decision as the most recent findings of fact and submitted that the 2003 decision was no longer relevant. That is not consistent with the approach in Devaseelan or with the task of the Defendant to weigh up the entirety of the evidence but also to take account of relevant matters and to put out of mind irrelevant matters. In my judgment, the prior decisions remain relevant material to which regard needed to be had in so far as it covers relevant ground which the above example demonstrates that they do, at least in that respect.

36. This is particularly important in the light of the second reason of Mr Fazli for not treating the 2004 decision as conclusive on factual matters. This was that statements made by the Claimant are likely to have been subject to the vicissitudes of translation. There certainly is a contrast between the 2003 witness statement and the 2004 witness statement in terms of style and approach and we do not of course have the Claimant's oral evidence to the Adjudicator in 2004. But in addition, paragraph 34 of the 2004 decision uses the past tense "*were active on behalf of HEI*". That is an odd statement if there is some current membership or "*active role*" as found in the Decision and indeed appears at first blush to contradict the finding. What does appear current from the 2004 decision is a desire to support and disseminate the ideas of HEI. There was no evidence before me as to what "*ideas*" this relates to and the overall tenor of the evidence suggests that the relevant ideas are likely to be more political than military, given in particular the evidence with regard to the peace demonstration in 1994-1995 in which the Claimant was instrumental and the fact that that apparently occurred when HEI was continuing to bombard civilians in Kabul. Given the Claimant's strong credibility, such statements must also be considered alongside the Claimant's letter of 17 October 2008 when he said that since his links with HEI collapsed in 1996 and "*since then I have not supported, actively worked or glorified the current policies of that party*". Also, it is unclear whether the Claimant's statements in his 2004 witness statement with regard to what would happen if he returned to Afghanistan relate to his then current personal convictions or to the reality of what would happen given the position of his family and his known allegiances.

37. The third reason for caution in the use of the 2004 decision advanced by Mr Fazli is the context in which the adjudicator is likely to have been considering matters. We know that this was the third adjudicator to consider asylum after two remissions by the Appeal Tribunal. Mr Fazli argued that this provided an incentive for the adjudicator to seek if anything to defend his decision against any further appeal by making unassailable findings. Whilst I accept that the context of the 2004 decision is relevant, I would expect adjudicators to decide cases on the evidence before them.

38. The 2004 decision was used as the basis of a finding in the Decision that the Claimant was a "*high-ranking and highly political member of HEI*". Mr Evans sought to argue that "*high-ranking*" meant the same as "*high profile*" or was justified by the finding that the claimant was "*highly political*" but I reject that submission and it seems to me that the 2004 decision does not, contrary to the Decision, provide any reasonable basis for a finding that the claimant was a "*high-ranking*" member of HEI. It is common ground that the letter referred to as coming from Mr Hekmatyar related specifically to the period 1989-1992, a period when no one suggests that the Claimant was high profile, let alone high-ranking. As a student representative of HEI on the student union, the Claimant had been elected to head the student union and thereby had a place on the provincial council which tends to support the finding that he was "*high profile"* but not without more that he was "*high-ranking*". That alone tends to undermine the legality of the Decision though, in my judgment, the clearest error at this point is that which arises under Ground 6 as opposed to Ground 1.

39. To conclude on Ground 6, it is the consideration of the 2004 adjudicator decision to the exclusion of the finding in the 2003 decision that the Claimant held a position which was "*not particularly important"* which seems to me to amount to a failure to have regard to a material and relevant consideration in assessing the Claimant's role within HEI. The nature of the Claimant's role seems in my judgment to be an important factor in the Decision when taken with what the Defendant considered to be the Claimant's continuing support for HEI.

Ground 3 – Defendant's treatment of other members of HEI, including those with more senior roles within HEI than the Claimant

40. The origin of this ground is to be found in the letter from the Claimant's Member of Parliament, Dr Brian Siddon, of 21 October 2008:

> *"We also understand that the British Government has allowed the naturalisation of people who were active members of [HEI] much more recently than [the Claimant]."*

41. Mr Evans commented that the letter is signed by a caseworker and is simply speculation by the Claimant. First, Dr Siddon, as an MP for Bolton South East (and his Senior Caseworker Mr Peacock), is likely to have had experience of other applicants for British passports and I think it improbable that he or his case worker would lend their names to an assertion which they did not reasonably believe to be true. Second, it appears potentially invidious for the Claimant to name the former members of HEI to which he refers as he has no knowledge of what was disclosed by such persons in their application

for a British passport and such naming would be likely to be considered dishonourable within the Claimant's community.

42. Third, and in any event, it is primarily the Defendant whose officials have knowledge of which successful naturalisation applications have involved former members of HEI and their position within HEI. I bear in mind on this issue the estimated 50% of the Afghan population who were at one time HEI members. It seems very likely that other applications for British passports have involved members of HEI. Indeed, rather than asserting that prior successful applications have not involved former members of HEI, the Defendant's response does not address this point which might suggest that there have been such applications.

43. Mr Fazli puts his case on this point on the basis of lack of candour in that the Defendant has filed no evidence before this court. It does not seem to me that I need to make a finding on that issue as the primary point at which such material is to be considered would be in the Decision or in any reconsideration – Mr Evans for the Secretary of State did not demur from the proposition that the principle of consistency applies to the Defendant. If the Claimant's submission is correct, that other more senior members of HEI who were members later than the Claimant have been naturalised as British citizens, it seems to me as a matter of consistency that one would expect to see consideration in the Decision which acknowledges the relevance of that principle when considering the good character or otherwise of a series of persons whose good character is being questioned by reference to their activities in and/or their support for HEI. Any such consideration would of course be in addition to the Defendant dealing with the facts specific to the Claimant.

44. Without knowing the facts which are before the Defendant, I am not in a position to assess whether there has been a failure to have regard to a relevant consideration, but this is clearly a matter which will need to be considered as part of the reconsideration.

Grounds 4 and 5 – Whether a) the fact that Claimant left HEI in 1996 when HEI only proscribed in 2005 and/or b) support by the UK Government for HEI are relevant factors

45. This ground relies on the fact that HEI was proscribed in 2005 under the Terrorism Act 2000 and ceased to be proscribed in 2017. It is clearly indicated that HEI is no longer proscribed (see "*once proscribed*"; "*previously proscribed*") but not that HEI was not proscribed at the time of the Claimant's active participation in HEI through his representing HEI in the student union of the university in Jalalabad. It is somewhat difficult to understand the relevance of and therefore the reliance in the Decision on the fact that HEI was proscribed. There is no direct evidence of the basis for proscription and it is not in my judgment possible to infer that this was based on events more than ten years prior to proscription (the bombardment of Kabul in 1992-1995) when it is at least equally plausible that Dr Giustizzi's evidence with regard to HEI and its members participating in the insurgency against the Western coalition forces from 2001 is behind the decision to proscribe. But if proscription is relevant, any decision should in principle indicate the relevance and to acknowledge that HEI was not proscribed when the Claimant was a member.

46. The Decision is careful in listing the various international crimes attributed to HEI and to specify that these were committed "*during the period of your involvement*" so that this does not depend on the proscription either but on the actual crimes attributed by the Defendant to HEI. There is some suggestion that the main period which gave rise to those crimes is a three week period in August 1992 (see Defendant's Research Annex at p. 12 of 27) though it seems more likely from the sheer number of crimes listed that they were distributed over the 1992-1995 period. This material appears in my judgment to reduce the importance of the reliance by the Defendant on HEI having been proscribed. It follows that, in my judgment, the reliance on proscription is a fairly minor taking into account of an irrelevant consideration.

47. What is troublesome however about the material relating to 1992-1995 is the failure to refer to undoubtedly material evidence with regard to the Claimant's organisation of a demonstration for peace in 1994-1995 which gave rise to subsequent torture at the hands of the Taliban or indeed to his role as a student mediator. The peace demonstration is on the face of things important evidence as it goes to a personal initiative or at least personal direct participation. It is also, again on the face of matters, inconsistent with the same person at the same time supporting any HEI policy to force Kabul to submit by relentless bombardment of civilian areas. It may also be that the Claimant's active opposition to the corruption of the Dean of Jalalabad University and his keeping notes on the misdeeds of the Taliban both of which appear to postdate 1996 also shed light on the Claimant's character which goes to corroborate his earlier position and attitude.

48. Turning to Ground 5, it is also instructive on the issue of relevant factors to compare the Defendant's treatment of another fact alleged against the Defendant but to which there has been no response. This is the allegation that the Defendant supported HEI financially in a period which commenced in 1979 with no clear end date. As already noted, the Defendant's Research Annex records journalistic research giving a figure of $600m of US aid paid to HEI and "*the lion's share"* of Saudi aid going to HEI which lends weight to the Claimant's claims, at least as regards the actions of Western allies at the time. Further news cuttings are in the papers before me which quote the Rt Hon Margaret Thatcher as stating in October 1981 on a visit to an Afghan Mujahideen camp in Pakistan that "*The hearts of the free world are with you*". A report from The Detail reports on Mark Urban, the BBC Newsnight's diplomatic editor's book *War in Afghanistan.* The article reports that Mr Urban outlines in his book how "*over 300 of the Belfast-built [blowpipe missiles] were supplied to [the mujahideen] in the 1980s*". I reject Mr Evans's summary of this material as "*vague assertion*". The sources are in part his own client's document and in part also a respected BBC journalist.

49. The potential relevance of this material is the reliance by the Defendant on the circumstances in which the Claimant joined HEI in 1989 which establishes that those circumstances are a material consideration in the consideration of character. If the Secretary of State is aware that Western allies were encouraging volunteers to join HEI in 1989 by providing weapons, financial and military support and that that support continued for a period, that seems in my judgment to be relevant to the consideration of the Claimant's reasons for joining HEI and, depending on the duration of the support, potentially also to the continuation of membership. Moreover, I do not see reference in consideration of the Claimant's motives for joining HEI any reference to the Professor Giustozzi's views on why Afghans joined HEI. I can see that the main thrust

of the relevant part of the Decision appears to be based principally on the Claimant's continuing support for at least the ideas of HEI in 2004 rather than the original reason for joining and also that the reliance on HEI being proscribed seems somewhat gratuitous so I do not feel that I should grant relief on the basis of either Ground 4 or Ground 5 but, as will be apparent from the above, there are indications that the Decision has failed in certain respects to be even-handed in its consideration of the evidence.

Ground 7 – whether the refusal of naturalisation attracts or ought to attract a right of appeal to the First Tier Tribunal

50. The Claimant's formulation of this ground is revealing of the real nature of the point and I shall deal with this shortly. As a statutory tribunal, the First Tier Tribunal only has such jurisdiction as is granted by statute, however desirable it may appear that the Tribunal's jurisdiction should be broader. Though there are issues in this case which involve aspects of human rights, Mr Evans drew the court's attention to the definition of a human rights claim in section 113 Nationality, Immigration and Asylum Act 2002 as interpreted by Stephen Morris QC, sitting as a Deputy High Court Judge in Regina (Alighanbari) v. SSHD [2013] EWHC 1818 (Admin). In essence, it is limited to removal decisions which seems to me to be a complete answer to this ground.

Relief

51. It follows from the above that I grant a declaration in respect of the failure to have regard to the 2003 adjudicator's decision in coming to the conclusion that the Claimant was "*high-ranking*" and also in respect of the failure to have regard to the Claimant's character over the period from 1996. Given the Defendant's acceptance of the need for reconsideration in this case by reason of the second of those two features of the Decision, in my judgment it is not necessary to grant a quashing order.

52. I was urged by Mr Fazli to go much further than this and to grant a mandatory order requiring the Defendant to naturalise the Claimant or a declaratory order to the effect that the Claimant is of good character or, on the evidence appears to be of good character. It appears to me that the clear words of section 6(1) ("*the Secretary of State is satisfied"*) preclude such relief being granted by the Court which would risk usurping the task of the Secretary of State under the Act. I was referred to the exceptional case dealt with at paragraph 30.73 of Auburn, Moffett & Sharland, *Judicial Review, Principles and Procedure* where a court concludes that only one decision is lawfully open to the Secretary of State but that does not in my judgment apply in this case.

Concluding Remarks

53. Though Mr Fazli for the Claimant helpfully reorganised the points made in the Statement of Facts and Grounds into numbered grounds at the end of his Skeleton, there appears to me be a significant degree of overlap between each of Grounds 2-6 and Ground 1. Accordingly, though he argued his oral case mainly under Ground 1

summarising very briefly specific points under Grounds 2-7 at the end of his oral submissions, the above specific consideration of Grounds 2-6 inclusive means that I have dealt with the specific points raised by the Mr Fazli under Ground 1.

54. The scale of the task in assessing the Claimant's character is certainly daunting and there are uncertainties which lend credence to the request that the Claimant has been making for over ten years, viz that any consideration of his character ought to include an interview. There is no general obligation to arrange an interview, but there is a discretion, and the Defendant may well need to consider whether as a matter of fairness in the light of both the volume of material which is available and any conflicts or uncertainties within the material whether a fair disposal of the matter would require an interview.

55. That point is strengthened in the special circumstances of this case where repeated applications for naturalisation have been made by the Claimant and, in his view, which I have found to be well-founded in the respects dealt with above, fail to deal fully and completely with his application despite the Decision being the product of a full reconsideration. It would be appropriate in this context to take into consideration the principle of legal certainty which is inherent in the common law (see Black-Clawson Limited v. Papierwerke AG [1975] AC 591 at 638E per Lord Diplock) in determining whether an interview is needed in order properly to assess the Claimant's application and to seek to give a degree of closure on this issue one way or the other.

Costs

56. The Claimant claims their costs but the Defendant resists on the basis of an argument that the Claimant has not been entirely successful. The Defendant submits that an issues-based order is not appropriate in this case and I accept that submission due to the overlap between the various issues. Accordingly, it is necessary to assess to what degree the Claimant can be said to have won. It won on Ground 2, but the Defendant effectively conceded this point. The Claimant obtained a declaration in respect of Ground 6 which is an important point of substance. I have also found that the Defendant's approach on Grounds 4 and 5 was defective in certain respects albeit I granted no relief in respect of those grounds. Though no relief was granted in respect of Ground 3, I found that the basis of this ground will need to be considered in retaking the decision. The Claimant failed on Ground 7 and also failed to obtain the more extensive forms of relief sought including mandatory relief. However, the Defendant did not submit that, had the Claimant dropped the more extensive claims for relief and Ground 7, the Defendant would have undertaken to reconsider on the basis of the material relied upon in Grounds 2-6 inclusive. The Defendant at the beginning of the hearing did offer to reconsider on the basis of Grounds 2, 4 and 6 but, by that time, the lion's share of the costs had been incurred, Grounds 3 and 5 raise issues of principle with potential relevance to other cases and, in any event, my judgment goes beyond that offer. In all the circumstances I proceed on the basis that the Claimant has substantially won this application for judicial review.

57. After consideration of the schedule of costs in this matter, it is at the upper end of what I might expect for a judicial review of this nature but the work if fully itemised and includes what I would expect by way of reasonable steps in a judicial review. Mr Amer

Manzoor of Reliance Solicitors has claimed an hourly rate of £280 per hour and has had the assistance of another for various tasks on documents which were capable of being delegated. Counsel's fees look to me reasonable. Mr Evans for the Defendant asks that the parties should seek to agree quantum in the first instance but raises no other objection to the fees claimed. Had the fees looked potentially unreasonable I would be likely to have acceded to the request that the parties negotiate first with a view to a detailed taxation. But given my overall approach to fees in the next paragraph, the fact that extra costs would be spent on negotiating fees and my judgment that disputes and debates over fees could well lead to greater costs than the real scale of any dispute over the fees, it seems to me that I should exercise the power granted by the CPR to assess fees given in particular that this case lasted for a little under one day.

58. Taking the above considerations in the round, it seems to me that a reduction of a little over 15% in the Claimant's fees is appropriate to reflect substantial but not total success and the fact that Ground 7 and the application for mandatory relief were very difficult arguments indeed. I therefore assess the Claimant's costs to be paid by the Defendant at £25,000.