Appeal No: SN/22/2015
Hearing Date: 2nd February 2016
Date of Judgment: 13th April 2016

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

SIR STEPHEN SILBER
UPPER TRIBUNAL JUDGE O'CONNOR
MR B McCLEARY

"ARM"

APPELLANT

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

RESPONDENT

OPEN JUDGMENT

For the Appellant Declan O'Callaghan of Counsel
Instructed by: Kilby Jones Solicitors

For the Respondent: Tim Eicke QC and Claire Palmer
Instructed by: Government Legal Department

Special Advocate Representative: Stephen Cragg QC and Jennifer Carter-Manning
Instructed by: Special Advocate's Support Office

Sir Stephen Silber

Introduction

1. ARM ("the Appellant") applies pursuant to s.2D of the Special Immigration Appeals Commission Act 1997 ("SIAC Act") to set aside the decision of the the Secretary of State for the Home Department (" the Secretary of State") made on 16 August 2006 to refuse to grant him naturalisation under section 6 of the British Nationality Act 1981 ("BNA").

2. The basis of that decision was that the Appellant was only entitled to naturalisation if he could show that he was of "good character" but he was unable to satisfy the Secretary of State of this, in the light of a number of factors including, but not limited to, his close association with Abu Qatada whilst knowing of his extremist beliefs.

3. The Appellant contends that the decision was irrational as, although he met Abu Qatada regularly, he did not share his extremist or jihadist views. Indeed the Appellant has regularly advocated peace. The Appellant's case includes the submission that it is noteworthy that the Secretary of State has not relied on any of his public speeches or writings in reaching her conclusion that he was not of good character.

4. There has been Closed evidence, a Closed hearing and there is an accompanying Closed Judgment.

The Background to the Decision

5. The Appellant is an Iranian national and a Sunni Muslim who was born on 1 January 1958. He arrived in the UK in 1997 with his wife and 3 children. All of them have been naturalised. He has 3 further children who were all born in the UK.

6. The Appellant was initially refused asylum on 10 April 2000, although he was subsequently granted asylum and Indefinite Leave to Remain on 7 November 2002. He applied for naturalisation on 5 December 2003.

7. In the present case, the decision maker considered the evidence available to her of the Appellant's association with, inter alia, Abu Qatada. In the absence of any benign explanation as to the nature of the association, the decision maker concluded that this association cast serious doubt on the Appellant's character so that the Secretary of State could not be satisfied that the Appellant met the requirement to be of good character. As a result, the Appellant's application was refused.

8. By a letter dated 16 August 2006, the Secretary of State communicated the decision to refuse his application in the decision letter which stated that:

> "Your application for British citizenship has been refused on the grounds that the Home Secretary is not satisfied that you can meet the statutory requirement to be of good character. This is due to your close association with known Islamist extremists." (emphasis added).

9. On 27 November 2006, the Appellant sought a reconsideration of the refusal decision on the basis he had wrongly been accused of having close associations with Islamic extremists. He referred to a newspaper article in a national newspaper which was subsequently withdrawn and a correction that had been issued by the newspaper stating that the Appellant was not the assistant to Abu Qatada, that he had not gone into hiding and that he had not been implicated in any terrorist activity.

10. The refusal decision was duly reviewed and, on 18 June 2007 the Secretary of State issued a letter informing the Appellant that she had considered his letter of 27 November and that she had maintained the refusal decision. That letter included an expanded form of words which gave additional reasons in bold emphasis added that:

> "The Home Secretary has refused your application for citizenship on the grounds of good character. This is because of your close association with known Islamist extremists in the UK, **including the extremist spiritual adviser Omar OTHMAN @ Abu QATADA, whilst knowing of his extremist views and practices**".

11. The Appellant did not volunteer his association with Abu Qatada until after receipt of the letter of 18 June 2007 when he then set out a partial acceptance of his association with him in his witness statement followed by a closer association set out in his latest statement. The use of the plural "extremists" in both decision letters made it clear that the Secretary of State was concerned with more than one association. None of the references relating to the Appellant nor either of his witness statements engage with this point.

12. A further letter was sent by the Appellant's solicitors on 10 August 2007 which was treated as a letter before claim. The Secretary of State set out the background previous decisions and reconsideration and it was confirmed that the correct procedures were followed and the correct decision taken to refuse the application.

13. The Appellant submitted a judicial review claim on 18 September 2007 which included a copy of his statement of 14 July 2007, which was made after the decision letters had been sent to him. The Secretary of State conducted a further review of the case and on 31 October 2007 he stated in a letter to the Appellant that having considered all of these issues and the supporting documents that:

> "I find no basis to suggest that we failed to make our original decision in accordance with the prevailing policy and nationality law at the time your application was determined. I remain satisfied with the

information that informed the decision to refuse the application, and that the correct decision has been taken to refuse naturalisation."

14. The Appellant sought a third reconsideration of the decision to refuse naturalisation by a letter dated 5 January 2010 on the grounds that it has been over 5 years since he attended any meetings or organisations. By letter dated 10 February 2010, the Secretary of State confirmed that a different decision was not required in the light of the information in the letter.

15. On 18 September 2007, the Appellant issued a claim for judicial review in the Administrative Court challenging the decision to refuse the Appellant's application to be naturalised, but it was stayed pending consideration of four leading cases in determining whether a closed procedure was permissible in judicial review proceedings. This issue was considered in two judgments of Ouseley J: *AHK & Others v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) and [2013] EWHC 1426 (Admin).

16. On 25 June 2013, section 15 of the Justice and Security Act 2013 came into force, inserting sections 2C and 2D into the SIAC Act. On 6 February 2014, pursuant to the legislation, the Secretary of State certified the decision in this case pursuant to s.2D of the SIAC Act, enabling the challenge to be pursued as a statutory review before the Commission. On 20 February 2014, the Appellant applied to the Commission to set aside the refusal decision.

17. The Divisional Court has explained the approach that the Commission should adopt in cases where there is a statutory review of a decision refusing naturalisation in *Secretary of State for the Home Department v SIAC* [2015] EWHC 681 (Admin) (" SIAC 1") and I will return to explain its significance.

The Issues

18. Long after the decisions under challenge were made, the Appellant served a witness statement made on 22 December 2015 and a series of letters stating that he is of good character. Consequently neither the witness statement nor the letters were before the decision maker and there is a dispute as to whether this material can be considered on this application. The Appellant contends that it can be but the Secretary of State submits that it cannot be considered. We will return when considering Issue 1 below to resolve this dispute.

19. On 29 January 2016, the Secretary of State has served some further material on the Appellant including a witness statement from one of her officials, Mr. Phillip Larkin, which includes a gist of the Restricted Guidance dealing with the approach that should be adopted by the Secretary of State in considering whether an application for naturalisation should be refused on the grounds that the applicant associated with extremists or terrorists. The Appellant contends that this material did not and does not entitle the Secretary of State to refuse the Appellant's application for naturalisation. The Secretary of State disagrees.

20. There are three main issues raised on this application which are:

(a) Can this Commission take into account, "in determining this application", material which was not before the decision maker namely the Appellant's witness statement and the supporting references? (Issue 1)
(b) What were the rules adopted by the Secretary of State for determining whether an application for naturalisation should be rejected on grounds of association? (Issue 2) and
(c) Can the decision to refuse the application for naturalisation be successfully challenged on the judicial review grounds? (Issue 3)

21. It is important to record that the Appellant is not raising any issue on the fairness of the closed hearing procedure adopted in this case or the extent of the disclosure given in this case to the Appellant as opposed to the Special Advocates. The Appellant also accepts that the effective cut-off date when the Secretary of State's decision was taken was 18 June 2007.

Issue 1

22. As we have explained, the Appellant seeks to rely on his witness statement and testimonials which were not before the decision maker when the Secretary of State made the decisions to refuse the application for naturalisation, that is to say 18 June 2007. Mr. Declan O'Callaghan, counsel for the Appellant, seeks to rely on the statement of this Commission in *FM v Secretary of State for the Home Department* (SN/2/2014) to the effect that post-decision evidence adduced by an Appellant was to be considered by the Commission, while noting that the Commission then added that:

> "23….The weight to be attached to [this evidence] being a matter for the Commission".

23. No authority was relied on in support of either of these conclusions by the Commission in FM, but our attention has been drawn to the powerful contrary authority which establishes that:

(a) The material that is relevant is the material that was before the decision maker: see *R (Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546 at [63].
(b) The time at which the factors governing reasonableness have to be assessed is the time of making the decision called into question: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 at [131].
(c) Accordingly, fresh evidence should not ordinarily be admitted in a judicial review: see *R v Secretary of State for the Environment ex parte Powis* [1981] 1 WLR 584 at 595G where the relevant criteria were set out.

24. These principles have been applied by this Commission in a number of recent naturalisation challenges. In *SN/HN v SSHD* SN/9/2014, the Commission held that there may be narrow circumstances which could arise where 'after-coming' material could be relevant (for example, if such material

demonstrated a suppression of relevant information at the time, or when considering remedy), but that the "fundamental point" is that "in the preponderance of cases such material cannot be taken into account by the Commission because it cannot be said to affect the decision taken at the time." [22] See also *AHK v SSHD* SN/5/2014 at [50]; *AA v SSHD* SN/10/2014 at [24]-[25]; *FM v SSHD* SN/2/2014 at [23].

25. In R*(A) v Chief Constable of the Kent Constabulary (2013) 135* BMLR 22, [2013] EWCA Civ 1706, the Court of Appeal had to consider whether post-decision material could be relied on when the decision was challenged. In deciding that it could not be relied on, Beatson LJ giving the only reasoned judgment of the Court explained that:

> "84. For these reasons, the appropriate course in many cases is not to review the Secretary of State's decision on the basis of new material which the Secretary of State has not considered and made an assessment of its impact on a claimant's position. In general, the matter should either be remitted, or the claimant should make a further application to the primary decision-maker deploying the new material and inviting the primary decision-maker to make a new decision. That would enable the court, if the matter comes before it again, to have the benefit of the views of the person, tribunal or regulatory entity to which Parliament has given primary responsibility for the decision"

26. Beatson LJ explained [91] that the reason why he referred to the position not as a universal rule but applicable "in many cases" was that he acknowledged that there would be exceptions where the decision maker was under a continuing duty to keep the matter under review, such as when considering "fresh claims" in the immigration field. There is no such duty in relation to naturalisation applications because, as we will explain, it is a one off-decision.

27. The case for considering later evidence was much stronger in *A* than it is in the present case because the present case did not involve an issue under section 6 of the Human Rights Act 1998. In contrast, in A's case, one issue specifically concerned "whether a decision interferes with a right under the ECHR and, if so, whether it is proportionate and therefore justified, it is necessary for the court to conduct a high-intensity review of the decision". Indeed, this difference between the nature of the review in *A* case and in naturalisation appeal cases was referred to by the Divisional Court SIAC 1 in paragraph 29.

28. In *SIAC 1*, Sir Brian Leveson P giving the judgment of the Divisional Court stated (with emphasis added) at [38] that:

> "I would require disclosure of such material as was used by the author of any relevant assessment to found or justify the facts or conclusions expressed; or if subsequently re-analysed disclosure should be of such material as is considered sufficient to justify those facts and conclusions and which **was in existence at the date of decision**."

29. So, we are not obliged to take into consideration the material not before the decision maker and not in existence at the time of the decisions under challenge. As we will explain in the Closed Judgment, we do not consider that if this material had been taken into account, it would have had any prospect of altering the decision of the decision maker. We add that if this appeal is dismissed, there is no reason why the Appellant cannot make a further application for naturalisation relying in that further application on the witness statement and testimonials which we have refused to admit.

Issue 2

30. There was some dispute about the approach which caseworkers should take to objections to naturalisation applications based on association by an appellant with extremists. In order to resolve this dispute, Mr. Philip Larkin explained in his witness statement dated 29 January 2016 that the current Closed Home Office guidance entitled *Chapter 6 Terrorism* has, since September 2009, set out how caseworkers should consider applications where association with individuals or groups is in issue in respect of somebody known to associate, or to have associated, with individuals or groups involved in extremist/terrorist (or related) activities Mr Larkin stated this guidance was, introduced to reflect the practice that had been built up in considering these types of cases since approximately 2004 when, following a hiatus, the Home Office began to issue decisions based upon sensitive material. Mr. Larkin explained that this Guidance "sought to formalise and to build upon the practice of the team (of which he was a part) when considering such cases". We are content in the absence of any cogent objections to regard this guidance as the policy which was to be followed by the decision-maker dealing with the Appellant's application for naturalisation. Mr O'Callaghan did not seek to challenge this point.

31. Mr. Larkin summarised this procedure by explaining that Guidance informed caseworkers that they should give careful consideration to any application from somebody known to associate, or have associated, with individuals or groups involved in extremist/terrorist (or related) activities. Caseworkers were directed to ask themselves the following questions:

- "Is there strong evidence to suggest the applicant associated with such individuals whilst unaware of their background and activities? If so, did the applicant cease that association once the background and nature of these individuals come to light?

- Is there strong evidence to show the applicant associated with such individuals in an attempt to counter or moderate their extremist views?

- Are there any suggestions that the applicant's association signals their implicit approval of the views and nature of these individuals' extremist activities/background?

- How long has this association lasted? The longer the association, the more likely that the applicant is aware of/approves of the activities and views.

- How long ago did such association take place?"

32. Mr. Larkin proceeded to state that caseworkers were informed that this list was not exhaustive as the Guidance proceeded to inform caseworkers that it was impossible to set "rehabilitation" periods in this type of case and that each application would need to be considered on its own merits. Caseworkers were instructed that an applicant might be able to satisfy the good character requirement if they:

    - "Were associated with an individual or group whilst being unaware of their background, even if their association was recent.

    - Ceased such association as soon as they became aware of the background of these individuals.

    - Presented strong evidence of choosing such associates with the aim of trying to moderate their views and/or influence over others."

33. Mr. Larkin, stated that, caseworkers were also instructed that each case had to be considered individually but that (subject to a possible exception that the association ceased many years ago) they should normally refuse an application where:

    - The applicant has associated for a significant length of time with such individuals; and/or

    - Associated whilst being aware of their extremist views; and/or

    - Provided little or no evidence to suggest they were seeking to provide a moderating influence.

Issue 3

The submissions

34. The case for the Appellant is that the decision to refuse him naturalisation is deeply flawed as relying on his association with extremists and should be set aside. Mr. O'Callaghan relies principally on the following factors:

    (a) no reliance is placed by the Secretary of State on any words spoken by the Appellant or words written by him as showing that he held extremist or jihadist views;
    (b) the Appellant denies holding extremist or jihadist views or indeed any views, which would be unacceptable in a democratic multi-faith society;

(c) the Appellant accepts that he was intellectually interested in examining Abu Qatada's observations as befits an Islamic scholar but that those discussions showed the difference between his views and those of Abu Qatada;
(d) although the Appellant and Abu Qatada met, attended the same mosque and spoke on a number of occasions from 1998, these facts do not show that the Appellant supports Abu Qatada;
(e) the Appellant opposes violence and believes in peaceful co-existence and tolerance;
(f) the Appellant has publicly disagreed with the thoughts and ideas of Abu Qatada as he, that is the Appellant, is a Muslim scholar and a moderate whose main concerns were with the Iranian regime;
(g) merely associating with Abu Qatada is not criminal behaviour nor an activity not in the public interest; and
(h) association with an individual which leads to a person being refused naturalisation requires more than simple regular contact without having a common purpose.

35. Mr. Tim Eicke QC, Counsel for the Secretary of State, submits that the Secretary of State was entitled to refuse the Appellant's claims for naturalisation and that the Appellant can only succeed if he can show that the decision of the Secretary of State was irrational. He stresses that in so far as it is part of the Appellant's case that the Secretary of State considered that the Appellant was either "an Islamist extremist" or a follower of Abu Qatada, the Secretary of State has never made that allegation and it was not used to justify the decision to refuse the Appellant's application for naturalisation.

36. In fact, the case for the Secretary of State is that the Appellant had a close association with extremists including Abu Qatada while knowing of his extremist views and practices. So Mr. Eicke says that in the absence of compelling evidence to the contrary, the Appellant's close association with Abu Qatada was such as to enable the Secretary of State to make a decision which was not irrational that she could not be satisfied that the Appellant was of "good character" and so refuse his application for naturalisation.

The Legal Principles Applicable

37. There is no dispute as to the appropriate legal principles which are that:

(i) The burden of proof is on the applicant to satisfy the Secretary of State that the requirements (including that he is of "good character") are met on the balance of probabilities.

(ii) If this test is not satisfied the Secretary of State must refuse the application;

(iii) The Secretary of State is entitled to set a high standard for the good character requirement. Thus in *R v Secretary of State for the Home*

Department ex p Fayed (No 2) [2001] Imm. A.R. 134, Nourse LJ stated (at [41]) that:

"In *R v Secretary of State for the Home Department, ex parte Fayed* [1998] 1 WLR 763, 773F–G, Lord Woolf MR referred in passing to the requirement of good character as being a rather nebulous one. By that he meant that good character is a concept that cannot be defined as a single standard to which all rational beings would subscribe. He did not mean that it was incapable of definition by a reasonable decision-maker in relation to the circumstances of a particular case. Nor is it an objection that a decision may be based on a higher standard of good character than other reasonable decision-makers might have adopted. Certainly, it is no part of the function of the courts to discourage ministers of the Crown from adopting a high standard in matters which have been assigned to their judgment by Parliament, provided only that it is one which can reasonably be adopted in the circumstances".

(iv) No criticism was made of a recent decision in the Administrative Court in *R (on the application of Khan) v SSHD* [2013] EWHC 1294 (Admin), in which a claimant unsuccessfully challenged a refusal to grant naturalisation on the grounds that the claimant was not of "good character" which was based solely on a conviction of the claimant for an offence of using a mobile telephone whilst driving.

(v) "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 that an applicant is of good character, and has good reason not to be satisfied, she is bound to refuse naturalisation." per Stanley Burnton LJ in *Secretary of State for the Home Department v SK Sri Lanka* [2012] EWCA Civ 16 [31]:

(vi) The good character requirement cannot be waived. An applicant may seek to persuade the Secretary of State that he is of good character, but if he or she does not satisfy the Secretary of State that the good character requirement is met, any grant of naturalisation would be *ultra vires*.

(vii) A decision regarding character in the context of citizenship is at the political (rather than legal) end of the spectrum: see Lord Bingham's speech in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [29]; and Lord Sumption's speech in *R (on the application of Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 60 at [33].

Discussion

38. Our starting point has to be that we must bear in mind our role in this statutory review which was explained by this Commission in *AHK and Other v Secretary of State for Home Department* (Appeals SN/2/2014, SN/3/2014and SN/4/2014) and later approved by the Divisional Court in SIAC 1 as being that:

(i) 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 nationality does not constitute a condition precedent, and fact-finding is not necessary to determine whether the procedure is fair or rational: see [23]-[24].

(ii) In the absence of an arbitrary or discriminatory decision, or at the very least some other specific basis in fact, refusal of naturalisation will not engage ECHR rights. 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: see [22]-[24].

39. We therefore must not and indeed do not need to determine whether the facts relied on by the Secretary of State are true but only to decide if the decision taken by her is rational. We have concluded that the decision to refuse the Appellant's application for naturalisation was rational and one that the Secretary of State was entitled to take on the basis of what is stated in the accompanying Closed judgment and additionally the facts that:

a. The Appellant accepts that he had a close association with Abu Qatada whilst knowing of his extremist views;

b. The Appellant has never responded to the allegation that he has associated with extremists other than Abu Qatada. As we have explained, the Appellant made further representations after he had been told his application was refused because of his "close association with known Islamist extremists" (emphasis added);

c. The Secretary of State was entitled to conclude that the Appellant had been given an opportunity to give compelling evidence to refute these allegations but that he had failed to do so.

40. In reaching our conclusion, we have considered but rejected two further submissions made by Mr. O'Callaghan. First, he complains that the decisions under challenge were made by applying the Secretary of State's policy without proper consideration of the relevant facts: see *R (on the application of Hiri) v Secretary of State for Home Department* [2014] EWHC 254 (Admin). He points out in paragraph 38 of that case that Lang J quashed a decision refusing naturalisation on the grounds that the Secretary of State's decision showed "an excessive adherence to the terms of the policy without proper consideration of the case on its individual merits".

41. As we have explained in the accompanying Closed judgment, we are satisfied that the Secretary of State in this case did not apply her policy mechanistically or inflexibly but considered the Appellant's case on its merits before rejecting it.

42. The second submission of Mr. O'Callaghan, which we were unable to accept, was that the Secretary of State's officials should have interviewed the Appellant before refusing his application. Sales J (as he then was) rejected such an application in *R (Thamby)* v *Secretary of State for Home Department* [201] EWHC 1763 (Admin) when he explained that:

> "67 In considering an application for naturalisation, it is established by the first *Fayed* case that the Secretary of State is subject to an obligation to treat the applicant fairly, which requires her to afford him a reasonable opportunity to deal with matters adverse to his application. In my view, that obligation may sometimes be fulfilled by giving an applicant fair warning at the time he makes the application (e.g. by what is said in Form AN or Guide AN) of general matters which the Secretary of State will be likely to treat as adverse to the applicant, so that the applicant is by that means afforded a reasonable opportunity to deal with any such matters adverse to his application when he makes the application. In other circumstances, where the indication available in the materials available to an applicant when he makes his application does not give him fair notice of matters which may be treated as adverse to his application, and hence does not give him a reasonable opportunity to deal with such matters, fairness will require that the Secretary of State gives more specific notice of her concerns regarding his good character after she receives the application, by means of a letter warning the applicant about them, so that he can seek to deal with them by means of written representations (as eventually happened in the *Fayed* case). Where there is doubt about whether the obligation of fairness has been fulfilled by means of the indications given by the Secretary of State at the time an application is made, she may be well-advised to follow the procedure adopted for the second *Fayed* case so as to avoid the need for argument about the issue in judicial review proceedings.
>
> 68, In my judgment, on the basis of the formulation of the obligation in the first *Fayed* case and by Blake J in *MH*, the obligation of fairness will not require the Secretary of State to interview an applicant in relation to concerns she has about his good character, at any rate other than in exceptional cases…"

43. We are quite satisfied that in this case, the Appellant was repeatedly given the opportunity to make any representations he wished. Indeed, in the guidance to the application form for naturalisation, the Appellant was told that "If you are in any doubt whether something you have done or are alleged to have done would be regarded as relevant to whether you are of good character, you should mention it".

44. The Appellant was thereby given an opportunity to bring to the attention of the

decision maker any matter relevant to the issue of whether he was of good character. Furthermore as we have explained, the Appellant made representations on different occasions before he brought his claim for judicial review. We are quite satisfied that the Appellant was in Sales J's words afforded "a reasonable opportunity to deal with matters adverse to his application" and so there was no need to offer him an "interview" which he never requested nor was it required.

Conclusion

45. We consider that for the reasons set out in this judgment and the accompanying Closed judgment, the Secretary of State did not act irrationally and this appeal has to be dismissed because naturalisation had to be refused as, in the words of Ouseley J in AHK [2013] EWHC 1426 (Admin) at [29]:

> "The duty not to grant naturalisation unless the SSHD is satisfied, among other matters, that the applicant is of good character, requires her to refuse naturalisation if the material she has leaves her unsatisfied on that point".