SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SN/79/2021
Hearing Date: 17th & 18th May 2022
Date of Judgment: **11th July 2022**

Before

THE HONOURABLE MR JUSTICE CHAMBERLAIN
UPPER TRIBUNAL JUDGE ALLEN
SIR STEWART ELDON

Between

AB

Applicant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

The applicant appeared in person

Edward Pleeth (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Dominic Lewis (instructed by **Special Advocates' Support Office**) appeared as Special Advocate

Introduction

1 The applicant is a national of Pakistan. He seeks review of the decision of the Secretary of State of the Home Department ("SSHD") on 19 April 2021 to refuse his application for naturalisation as a British citizen. The decision letter said this:

> "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 in this case."

2 SSHD certified the decision under s. 2D of the Special Immigration Appeals Commission Act 1997. This Commission ("SIAC") therefore has jurisdiction to determine the application for review.

3 On 6 July 2021, following the rule 38 process, the applicant was informed that his application for naturalisation had been refused "because you have been linked to the proscribed organisation Lashkar-e-Tayyaba/Jama'at ud Da'wa". These are alternative names for the same organisation, which we refer to here as "LeT".

Background

4 There is no need to say much about the applicant's background. It is set out in OPEN and CLOSED judgments of 27 August 2020, in which SIAC gave reasons for quashing an earlier decision, of 15 February 2019, to refuse the applicant's naturalisation application ("the first refusal"): SN/79/2019.

5 SIAC's judgment followed an OPEN hearing at which the applicant had tendered a witness statement and given evidence. In his witness statement, he gave details of: his residence in Pakistan (1969 to 1992) and Saudi Arabia (1992 to 2008); his employment in the UK (2008 to date); his religious activities and his status as a *hafiz*; his family background; his categorical denial of any links with LeT; his suspicion that the information on which SSHD was relying might have come from a relative with whom he had fallen out and who had tried to affect his immigration status in 2010; his absences from the UK; his previous good character (including voluntary disclosure of some minor speeding offences); and a complaint about the excessive time taken to decide his application for naturalisation.

6 SIAC held that the first refusal was unlawful because it failed to comply with the *Wednesbury* principles. There were material considerations which had not been taken into account, irrelevant considerations which had been taken into account and an indisputable error of fact. It could not be said that the decision would inevitably have been the same but for these errors, so the decision was quashed and remitted for reconsideration. The key reasons for SIAC's conclusion were given in CLOSED. At [25] of its OPEN judgment, SIAC said this about the effect of its direction remitting the matter to SSHD:

> "The effect of this direction…is that the Applicant does not need to make a fresh application for naturalisation (or pay a further fee) because his original application remains extant. Given the length of time which has elapsed since

the Applicant made his application, he should be given the opportunity to submit further evidence in support of his application."

7 On 14 January 2021, Shabbir Merali, a barrister acting for the applicant, emailed the Home Office. The email said:

> "This communication is lodged on behalf of our client to ensure the Secretary of State has complete and updated information in respect of this matter and to provide written representations to further support the decision to be made in respect of his extant application for naturalisation as a British citizen."

8 A detailed chronology of events, a copy of SIAC's OPEN judgment and a detailed list of absences from the UK were attached.

9 There is very little OPEN documentation showing how SSHD considered the applicant's application. However, there is an OPEN gist of the "good character assessment" carried out by the Home Office decision-maker. It records that the Home Office decision-maker took into account everything submitted with the original application and certain other documents. Under the heading "Evidence submitted by the Applicant in Relation to Good Character", it says this:

> "ASIM has submitted documents in relation to payment of his household bills, payslips and immigration status in the UK. None of these documents deal with the concerns [GIST]."

10 It can thus been seen that the decision-maker (i) did not take into account the witness statement the applicant had submitted during his appeal to SIAC and (ii) proceeded on the basis that none of the documents which the applicant had submitted dealt with the concerns on which the decision was based.

The law

11 The applicable legal principles are as set out in SIAC's previous OPEN judgment, at [17]-[23], and were not in dispute before us. We apply a conventional judicial review approach to the decision before us.

OPEN grounds of challenge

12 The applicant challenges the 2021 refusal. Because he does not know on what basis his application was refused, his basis for doing so is necessarily general. He says that he is a man of good character. He has been in employment in the UK since 2008. He denies any current or previous links to LeT. He is a devout Muslim and also a *hafiz* (someone who can recite the Qur'an by heart). It is said that there is no basis for refusing his application.

13 The applicant gave evidence before us affirming his witness statements (both the one prepared for this application and the one before SIAC on the last occasion) and added that he was concerned to challenge the refusal because his reputation and good character were important to him. He was not cross-examined.

The CLOSED grounds of challenge

14 There is a limited amount we can say in OPEN about the CLOSED grounds of challenge. However, it is possible to say that part of the case advanced by the special advocate was that SSHD had failed to take into account relevant material. One part of this material was the applicant's witness statement prepared for the purposes of his first SIAC application. Although the argument on this aspect of the case took place in CLOSED, it is possible to say something in OPEN about why we have concluded that SSHD was obliged to take the applicant's witness statement into account.

Was SSHD obliged to take the witness statement into account?

15 We have set out above what SIAC said at the end of its judgment in 2020 and the material terms of Mr Merali's email and its attachments.

16 For SSHD, Mr Edward Pleeth submitted that, given the terms of SIAC's judgment, it was for the applicant to decide which documents he wished the decision-maker to take into account. Mr Merali's email attached certain documents, not including the witness statement. Indeed, Mr Pleeth submitted, "if the decision maker had considered the witness statement then the SSHD would have likely been criticised for tainting their decision with potentially prejudicial material arising from the previous decision". In any event, the witness statement would have made no difference.

17 We do not accept these submissions, for four reasons:

(a) In most contexts, fairness requires a decision-maker to put particular concerns to an applicant to enable him to answer them: see e.g. *R v SSHD ex p. Fayed* [1998] 1 WLR 763, 773G-H. That does not apply where it would be contrary to the public interest to disclose the concerns. But this does not matter, because, in any assessment the fairness of the regime as a whole, the procedure before SIAC must be taken into account: see e.g. *SS v SSHD*, SN/42/2015, 13 December 2018, [21]. Thus, the procedure before SIAC is properly to be regarded as an integral part of the application and decision procedure in cases where the refusal is on national security grounds. In these circumstances, an applicant who has been successful before SIAC would, we think, naturally assume that the content of that evidence was known to SSHD and would be taken into account on any reconsideration.

(b) We do not read the concluding words in SIAC's judgment of 27 August 2020 as suggesting that the applicant was obliged to resend material which was already in SSHD's possession as a result of the application to SIAC. Nor do we read Mr Merali's email as suggesting that the applicant was no longer relying on his statement. The materials being sent were updated or new materials. The statement did not need to be updated.

(c) In any event, whether or not there was a free-standing obligation to take account of the witness statement, what happened here went beyond merely failing to take account of that statement. Here, the decision-maker positively relied on the fact that

none of the documents which the applicant had submitted dealt with the concerns on which the decision was based. In our view, that was conspicuously unfair in circumstances where he had in fact "dealt with" those concerns in a witness statement, as SSHD well knew. The language we have cited from the "good character assessment" suggests that the decision-maker misdirected themselves about a material fact.

(d) The submission that, by taking into account the applicant's witness statement before SIAC, SSHD would risk "tainting" the fresh decision-making process is wholly unpersuasive, both in principle and on the facts. As a matter of principle, we have no doubt that – if an applicant had filed a witness statement in previous proceedings which contained something adverse to him – SSHD would be entitled to rely on it in any subsequent decision. The applicant could hardly complain if SSHD relied on evidence he himself had given. We do not see how any "tainting" objection could possibly have merit. On the facts, SSHD clearly did not seek to insulate the second decision from the first, because the main decision-maker for the second decision had also been involved in taking the first.

Would the error inevitably have made no difference?

18 We have considered carefully whether it can be said that the decision would inevitably have been the same even in the absence of these flaws (the test in *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306, applied by SIAC in *LA v SSHD* (SN/63, 64, 65 and 67/2015, 24 October 2018)). In our judgment, that threshold is not reached on the evidence before us. The issue before SSHD was whether the applicant was of good character. The witness statement is the only document from the applicant addressing that issue in detail. We say more about this in CLOSED.

Conclusion

19 We have concluded that the refusal decision is flawed. The decision-maker failed to take account of relevant material, namely the applicant's witness statement produced for the purposes of the previous SIAC proceedings, and proceeded on the flawed basis that the applicant had supplied no answer to the allegation that he had been linked to LeT. We are not able to conclude that, but for these flaws, the outcome would inevitably have been the same. The decision must therefore be quashed and the matter remitted to SSHD.

20 The applicant first applied for naturalisation on 25 April 2014. It took SSHD nearly 5 years to take the first refusal decision. That was shown to be legally flawed. The second refusal decision of 19 April 2021 has now also been shown to be flawed. It is most unfortunate that, more than 8 years after the application was first made, there is still no legally valid decision.

21 Because of the passage of time since the last decision, the applicant must be given another chance to make representations. We hope that, on this occasion, SSHD will ensure that the following are before both the Home Office decision makers: (i) the application materials and other documents provided by the applicant at various times; (ii) SIAC's OPEN and CLOSED judgments of 27 August 2020; (iii) the applicant's witness

statements (both as before SIAC previously and as before us); (iv) our OPEN and CLOSED judgments; and (v) any further material which the applicant wishes to submit.