

SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SN/93/2020
Hearing Date: 23rd & 24th November 2021
Date of Judgment: 28th January 2022

Before

**THE HONOURABLE MR JUSTICE CHAMBERLAIN
UPPER TRIBUNAL JUDGE PITT
MR ROGER GOLLAND**

Between

HARJIT SINGH

Appellant

and

**THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT**

Respondent

OPEN JUDGMENT

Ashley Underwood QC (instructed by **Khokhar Solicitors**) appeared on behalf of the Appellant

Emily Wilsdon (instructed by the **Government Legal Department**) appeared on behalf of the Secretary of State

David Lemer (instructed by **Special Advocates' Support Office**) appeared as Special Advocate

Introduction

- 1 The applicant seeks review pursuant to s. 2D of the Special Immigration Appeals Commission Act 1997 (“the SIAC Act”) of a decision of the respondent (“SSHD”) communicated by letter of 7 September 2000 to refuse his application for naturalisation.
- 2 The applicant was born in India in 1953. He came to the UK in 1988 and claimed asylum. He was granted exceptional leave to remain in 1991 and indefinite leave to remain in 1999. He first applied for naturalisation in 2002. That application was refused in 2006. The decision that is the subject of the current application was made following a second application in 2013. There was a very long delay in dealing with the application, which has not been satisfactorily explained.
- 3 The reasons for refusal in 2006 were that SSHD was not satisfied that the applicant met the requirement of good character “because of your involvement with the International Sikh Youth Federation (ISYF), a proscribed organisation”.
- 4 In 2020, the OPEN reasons given by SSHD in the letter were that the applicant did not meet the good character requirement “because of your past involvement with the International Sikh Youth Federation (ISYF), a proscribed organisation”. The letter also indicated that SSHD had certified the decision under s. 2D of the SIAC Act.

The OPEN evidence

- 5 SSHD’s OPEN evidence comes from Christine Hughes, a senior executive officer in the team that deals with applications for and removals of British citizenship in the Homeland Security Group of the Home Office. In her amended witness statement of 10 August 2021, Ms Hughes said this:

“The Good Character Assessment dated 4 September 2000 is exhibited at OPEN Exhibit 4a. The caseworker reviewed material considered to be relevant to SIN’s naturalisation application and particularly SIN’s ability to satisfy the statutory good character requirement. The caseworker’s review included material which led them to conclude that SIN had past involvement with the ISYF, a proscribed organisation. The decision maker concluded that SIN’s activities constituted sufficient grounds to conclude that he did not meet the good character requirement. The decision was referred to me, and I considered and agreed with the decision. I relied upon SIN having had past involvement with the ISYF. I considered that SIN had failed to declare this activity on his application for naturalisation, which suggested he was trying to conceal information. I considered that his case should be refused and certified in line with Home Office guidance.”

- 6 Ms Hughes exhibited a redacted version of the good character assessment, which records the contemporaneous reasons given by the caseworker who initially considered the application and by Ms Hughes herself. However, the redactions are so extensive that nothing of substance can be discerned from that document.
- 7 The applicant’s evidence is contained in a witness statement dated 17 September 2021, which includes this:

“I can categorically state that, to the best of my knowledge, I have never been a member of this organisation (ISYF) nor have I ever held any direct or indirect sympathies for this organisation. It would appear that there is some gross error in the evidence the Home Office holds or may have been misinformed by some mischievous person(s).”

- 8 The applicant goes on to say that in 1994 he was one of a group who rescued the Sri Guru Singh Sabha Gurdwara in Southall from the hands of a group that had created a politically charged environment and run up large debts. Since 1994, he has held various positions on the committee and is currently Vice-President of the Gurdwara. The applicant says that he has always been a law-abiding person, has done good works as a community leader and has never supported violence or breaking the law.

The law

- 9 The proper approach to statutory review under s. 2D of the SIAC Act is as set out by the Commission on 19 January 2021 in *AMA v SSHD* (SN/75/2018), at [6]-[11]. We have applied the principles identified there.

The good character guidance

- 10 The applicant filled in his application form in 2013. Section 3 included questions relevant to the good character requirement. Questions 3.12 asked whether the applicant had ever been involved in, or been suspected of involvement in, war crimes, crimes against humanity or genocide. The questions continued as follows:

“3.13 Have you ever been involved in, supported or encouraged terrorist activities in any country?

3.14 Have you ever been a member of, or given support to an organisation which has been concerned in terrorism?

...For the purposes of answering questions 3.10-3.16 please refer to the Booklet AN which provides guidance on actions which may constitute war crimes, crimes against humanity, genocide or terrorist activities.

- 11 Guide AN (*Naturalisation as a British citizen – a guide for applicants*), published in December 2012, said this:

“3.12-3.16 You must also say here whether you have had any involvement in terrorism. If you do not regard something as an act of terrorism but you know that others do or might, you should mention it. You must also say whether you have been involved in any crimes in the course of armed conflict, including any crimes against humanity, war crimes or genocide. If you are in any doubt as to whether something should be mentioned, you should mention it.

For the purpose of answering questions 3.12 to 3.16 the Booklet AN provides guidance on actions which may constitute genocide, crimes against humanity and war crimes.

...

3.17 You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago it was. Checks will be made in all cases and your application may fail if you make an untruthful declaration. If you are in any doubt about whether you have done something which might lead us to think that you are not of good character you should say so..."

- 12 Booklet AN says this, under the heading "What if you haven't been convicted but your character may be in doubt?":

"The following information provides guidance on actions which may constitute genocide, crimes against humanity and war crimes."

There are then five headings, each with text underneath: "Genocide", "Crimes against humanity", "War crimes", "Terrorist Activities" and "Organisations concerned in terrorism". The text under the last two of these is as follows:

"Terrorist Activities

Any act committed, or the threat of action, designed to influence a government or intimidate the public and made for the purpose of advancing a political, religious or ideological cause and that involves serious violence against a person; that may endanger another person's life; creates a serious risk to the health or safety of the public; involves serious damage to property; is designed to seriously disrupt or interfere with an electronic system.

Organisations concerned in terrorism

An organisation is concerned in terrorism if it:

- a. commits or participates in acts of terrorism,
- b. prepares for terrorism,
- c. promotes or encourages terrorism (including the unlawful glorification of terrorism), or
- d. is otherwise concerned in terrorism."

- 13 The policy applicable at the time the decision was made was contained in the Home Office document *Nationality: good character requirement*, published on 14 January 2019. The OPEN version of that document includes the following

"National security and terrorism

If there is information to suggest that the applicant has been involved in, or associated with, acts contrary to any state's national security, including terrorism, they will not normally be considered to be of good character and will fall to be refused.

...

Association with individuals involved in terrorism, extremism and/or war crimes

Those who associate with or have associated with persons involved in terrorism, extremism and/or war crimes may also be liable to refusal of citizenship.

...

The following questions will be relevant when considering an application from someone known to associate with, or to have associated, with an individual (or individuals) involved in terrorism, extremism and/or war crimes:

- Is there evidence to suggest the applicant's association with the individual was not of their own free will? This is particularly relevant for family associations.
- Is there evidence to suggest that the applicant associated with the individual whilst unaware of their background and activities?
- If so, what action did the applicant take once the background and nature of the individual came to light?
- Are there any suggestions that the applicant's association signals their implicit approval of the views and nature of the individual's illegal activities?
- How long has this association lasted? The longer the association, the more likely it may be that the applicant is aware of or accepts the activities and views.
- How long ago did such association take place?
- How long ago was the individual's involvement in the war crime and is there evidence that the individual has rehabilitated since?"

The applicant's OPEN grounds for review

- 14 The applicant's amended OPEN grounds for review were set out in a document dated 2 September 2021 and were expanded upon in a skeleton argument and in oral submissions by Mr Underwood QC. They may be summarised in this way:
- (a) The decision involved a material error of existing or established fact, namely, that the applicant had a past involvement with the ISYF. He had no such involvement and the conclusion that he did vitiates the decision (Ground 1).
 - (b) The process by which the decision was made was unfair. Natural justice requires that matters material to the outcome be put to an applicant. SSHD's belief that the applicant had past involvement with the ISYF, and had sought to conceal that involvement, was such a matter. There was no national security or other public interest basis for failing to give the applicant an opportunity to answer this point before making the decision. If such an opportunity had been given, the applicant could have pointed out that he had political opponents who may have sought to mislead SSHD and adduced statements from persons disputing his association with the ISYF. He could have attended an interview and might have persuaded the interviewer that the allegations were false (Ground 2).

- (c) The OPEN reasons given were inadequate in that they do not indicate when and to what degree it is said that the applicant was involved with the ISYF, nor what weight was given to his otherwise impeccable behaviour (Ground 3). Given that there has been a r. 38 hearing in this case, which did not yield any further OPEN disclosure, Mr Underwood accepted that this ground could only be pursued if after the CLOSED hearing we considered that there was further material which ought to have been made OPEN.
- (d) Given that the applicant had no criminal record, had a long and distinguished history of serving the community, had been granted ILR in 1999 (which had not been revoked) and that ISYF had been deproscribed in 2016, the decision was irrational. Reliance was placed on SSHD's failure to consider the factors identified by the Supreme Court in *R (JS) v Sri Lanka* [2010] UKSC 15, [2011] AC 184 at [30] as relevant to assessing whether an individual should be excluded from the protection of the Refugee Convention under its Article 1F(1) by reason of his participation in an organisation which has committed war crimes. In addition, Mr Underwood submitted orally that SSHD had acted irrationally in the light of Booklet AN, which suggested that terrorist activities should be encompassed under genocide, crimes against humanity and war crimes or at least considered as falling under the same genus of wrongs (Ground 4).

Ground 1

- 15 Mr Underwood readily accepted that the question whether the decision was vitiated by a material error of fact depended on whether the information before SSHD was sufficient rationally to justify the conclusion that the applicant has in the past been involved with the ISYF. It did not matter whether the decision was framed as disclosing a material error of existing or established fact or as irrational. In either case, the question whether SSHD's conclusion was sustainable depended on an analysis of the CLOSED material. In the absence of any particulars as to the applicant's involvement, Mr Underwood could do little more than assert, on the basis of his instructions and of the applicant's own evidence, that the material could not have justified the conclusion.
- 16 In our view, it is not helpful to characterise this kind of challenge as involving a "material error of existing or established fact". As the Divisional Court made clear in *R (Institute of Chartered Accountants in England and Wales) v Lord Chancellor* [2019] EWHC 461 (Admin), at [77]-[79], for a material error of fact to vitiate a decision the error must be "established in the sense that it is uncontentious and objectively verifiable": see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, at [66].
- 17 In this case, whether the applicant was involved with the ISYF is not uncontentious. Whether it was open to SSHD to answer it in the affirmative depends – as Mr Underwood correctly accepted – on whether the materials available to her enabled her rationally to reach that answer. Answering that question requires us to apply a conventional judicial review approach. At this stage of the analysis, that means we must consider, without according deference, whether SSHD's findings of fact are reasonable: see *AMA*, [11(c)].
- 18 As Mr Underwood also accepted, the materials which supported the conclusion that the applicant was involved with the ISYF are CLOSED. For reasons set out in our CLOSED

judgment, we consider that the materials before SSHD enabled her properly to conclude that the applicant was in the past involved with the ISYF. The finding of fact was reasonable given the material before the decision-maker and the other evidence we have seen. It follows that, notwithstanding the evidence adduced by and on behalf of the applicant, we conclude that Ground 1 is not made out.

Ground 2

- 19 In many cases, the common law requires a decision-maker to put to an applicant a factual point which is or may be material to her decision: see e.g. *R v SSHD ex p. Fayed* [1998] 1 WLR 763, 773G-H. This is sometimes done by adopting a two-stage process. At the first stage, the decision-maker sends a “minded to” decision and invites oral or written representations from the applicant. Only at the second stage, once those representations have been received and considered, is the decision finalised.
- 20 The demands of procedural fairness at common law are, however, context-sensitive. The statutory regime under which SIAC operates is one aspect of the context. The regime allows for the withholding of reasons and evidence where disclosure would be contrary to the public interest. In those circumstances, the content of the common law obligation is moulded by the statute. There can be no obligation to put to an applicant matters which SSHD considers it would be contrary to the public interest to disclose: see *AMA*, [9], and the cases referred to there.
- 21 In our view, there is another important aspect of the context, which also shapes the content of the procedural obligation imposed by the common law. In an application for naturalisation, the applicant must satisfy the Commission that the requirements for naturalisation (including the good character requirement) are met: *MSB v SSHD* (SN/41/2015, 1 December 2016), [25]; *AMA*, [9(a)]. There may be cases where the reason for refusal is one which the applicant had no reason to consider. *LA v SSHD* (SN/63/2015, 24 October 2018) is one such case, where the application was refused not for failure to meet the good character requirement, but for reasons of international relations (because the applicant was a family member of President Bashar al-Assad of Syria). In such cases, natural justice may require the point to be put to the applicant before the decision is taken. However, where the decision-maker is considering refusal on good character grounds and the conduct said to show that the requirement is not met falls within the categories identified in Guide AN and Booklet AN, the published guidance itself will normally be “sufficient to give the Applicant a fair opportunity to declare, and explain, any past activity that might be indicative of support for a terrorist organisation”: *Dogan v SSHD* (SN/91/2020, 26 July 2021), [36].
- 22 We say “normally” because questions of procedural fairness are acutely sensitive to the facts. In this case, there is no dispute before us that the ISYF was an organisation concerned in terrorism, as defined in Booklet AN. Guide AN and Booklet AN, read together, can have left the applicant in no doubt that he was required to declare and address the circumstances of any involvement with that organisation. There was no unfairness in failing to put to him SSHD’s belief that he was involved with the ISYF.
- 23 We would have reached this conclusion even without reference to the fact that the reasons for refusal in 2006 had made express reference to the applicant’s involvement with the ISYF. Once that fact is taken into account, however, the fairness of SSHD’s procedure is put beyond doubt. When in 2013 he applied for naturalisation, the applicant must have

known that SSHD considered that he had in the past been involved with the ISYF. He had been given the clearest possible indication that he should include anything relevant to that matter in his application. The failure to repeat what had been said in 2006 did not render the process unfair. Nor did the failure to offer the applicant an interview. Even if he had been invited for interview, the opportunity to make oral representations would have been of little use, since the basis for SSHD's conclusion about his involvement with the ISYF is in CLOSED and could not have been disclosed to him.

24 Ground 2 is therefore not made out.

Ground 3

25 As we have said, Mr Underwood properly accepted that Ground 3 (which complains of a lack of proper reasons) can be maintained only if, in the course of the CLOSED hearing, we identified some new part of the reasons or evidence which should have been disclosed to the applicant. Since we have not, we must proceed on the basis that the applicant has been given disclosure of everything which he can be given consistently with r. 4(1) of the Special Immigration Appeals Commission (Procedure) Rules 2003. That being so, there can be no common law duty of disclosure: see *AMA*, [35]-[36].

26 Ground 3 is therefore not made out.

Ground 4

27 Mr Underwood accepted that the lawfulness of the decision under challenge in this case depends almost exclusively on an analysis of the CLOSED materials. Having considered those materials, in our view, it was properly open to SSHD on the materials before her to conclude that the applicant had in the past been involved with the ISYF. The nature of the involvement is a matter which we can address only in CLOSED. The reasoning contained in the redacted portions of the good character assessment contained a potentially significant flaw.

28 However, despite the rigorous and skilful submissions of the Special Advocate, we were satisfied that, when reading the decision as a whole in the light of the material before SSHD, the decision would inevitably have been the same in any event: see *Simplex GE (Holdings) v Secretary of State for the Environment* (1988) 57 P & CR 306, at pp. 327 and 329, as applied by the Commission in *LA*, at [113]. In this regard, we bore in mind that the threshold for the refusal of relief is higher than where s. 31(2A) of the Senior Courts Act 1981 applies. We have to be satisfied that the result would *inevitably* have been *the same*, not just that it is highly likely that the outcome for the applicant would not have been substantially different. For the reasons we give in our CLOSED judgment, we are so satisfied.

29 That being so, and there being no other reason to quash and remit the decision, we refuse relief in the exercise of our discretion.

30 We should, however, explain briefly why the other points made in OPEN by Mr Underwood did not affect our decision.

31 The facts that SSHD granted the applicant ILR in 1999, and has not revoked it since, do not generate any presumption in favour of naturalisation, because SSHD is not obliged to

regard every character-related matter justifying refusal of naturalisation as also justifying refusal of ILR: see *AMA*, [23].

- 32 We consider that Booklet AN makes it very clear that the passages explaining what constitutes involvement in genocide, crimes against humanity and war crimes are quite separate from that explaining what constitutes “terrorist activities” and “organisations concerned in terrorism”. We do not think these passages leave any room for doubt that an applicant who has not been involved in genocide, crimes against humanity or war crimes, but has been involved with an organisation concerned in terrorism must address the circumstances of that involvement. As we have said, the applicant was on notice of the need to do so.
- 33 We do not consider that Article 1F(1) of the Refugee Convention is directly relevant to the assessment of the quality of an individual’s connection with an organisation that is concerned in terrorism. That provision operates as a derogation from an important international law right. Not surprisingly, it falls to be narrowly construed. Even when what is at issue is involvement in war crimes, crimes against humanity or genocide, SSHD is not obliged to conclude that the good character requirement is met unless the individual would fall to be excluded from the protection of the Refugee Convention under its Article 1F(1). In this case, of course, there is no suggestion that the applicant has been involved in war crimes, crimes against humanity or genocide. What is alleged here is involvement in an organisation concerned in terrorism.
- 34 The factors identified in *JS* at [29] are (i) the nature and size of the organisation and the part of it with which the applicant was most directly concerned, (ii) whether and if so by whom the organisation was proscribed, (iii) how the asylum seeker came to be recruited, (iv) the length of time he remained in the organisation and what opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation’s activities and (vii) his own personal involvement and role in the organisation. These factors seem to us to be common indicia of the quality of a relationship between an individual and an organisation and may, on the facts of a particular case, be relevant in a case where an individual’s involvement with a group concerned in terrorism is at issue. But they are not statutorily mandatory considerations; and a failure to apply them, one by one, is not in and of itself an error of law. The only mandatory question is whether the evidence before the decision-maker was sufficient in the light of the relevant policy to justify the conclusion that the good character requirement is not met. What level of inquiry that requires will necessarily be fact-specific. As we have said, our answer in the light of the CLOSED material, is “Yes”.
- 35 It follows that Ground 4 is not made out.

Conclusion

- 36 For these reasons none of the OPEN grounds is made out. As we have indicated, in the course of our consideration of the CLOSED material, we identified a potentially significant flaw in the redacted portion of the good character assessment. But, for reasons which we can only give in CLOSED, the decision would inevitably have been the same in any event. None of the other CLOSED grounds of review is made out and there is no other reason to quash and remit the decision. We therefore refuse relief in the exercise of our discretion.
- 37 The application to set aside the challenged decision is accordingly refused.