SPECIAL IMMIGRATION APPEALS COMMISSION

APPEAL NUMBER: SN/97/2023

DATE OF HEARING: Friday, 23 February 2024 and Monday, 26 February 2024

DATE OF JUDGMENT: 4 July 2024

BEFORE:

THE HONOURABLE MR JUSTICE SWIFT
UPPER TRIBUNAL JUDGE KEBEDE
SIR STEWART ELDON

BETWEEN:

KU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

MR DAVID CHIRICO (instructed by Birnberg Peirce Ltd) appeared on behalf of Appellant.

MS RACHEL TONEY and MS ANITA GUHA (instructed by the Special Advocates' Support Office) appeared as Special Advocate.

MS JENNIFER THELEN (instructed by the Government Legal Department) appeared on behalf of the Respondent.

MR JUSTICE SWIFT

A. Introduction

1. The Applicant seeks a review of a decision made by the Home Secretary on 31 January 2023, refusing her application for naturalisation as a British citizen. The material part of the decision letter was as follows:

> "The grant of naturalisation is at the discretion of the Secretary of State and subject to a number of statutory requirements being met; one such requirement is that the applicant be of good character. Whilst good character is not defined in the British Nationality Act 1981, we take into consideration, amongst other things, the activities of an applicant, both past and present, when assessing whether this requirement has been satisfied.
>
> The Secretary of State will not naturalise a person for whom she cannot be satisfied that the good character requirement has been met.
>
> The Home Secretary has refused your application for citizenship on the grounds that you do not meet the requirement of good character. This is because of your association with the proscribed organisation, the Revolutionary Peoples' Liberation Party-Front (DHKP-C) in the UK."

2. The reference to the good character requirement is to provisions in the British Nationality Act 1981 ("the 1981 Act"). By section 6(1) of that Act, the Home Secretary may grant a certificate of naturalisation "if … he is satisfied that the applicant fulfils the requirements of Schedule 1" to the Act. By para.1(1)(b) of Schedule 1, one of those requirements is that the applicant "is of good character". Good character is not further defined in the 1981 Act. However, that requirement is the subject of guidance issued by the Home Secretary, most recently on 31 July 2023. The Home Secretary certified the decision under section 2D of the Special Immigration Appeals Commission Act 1997, hence the application to this Commission.

3. The Applicant originally applied for naturalisation on 27 April 2017. The decision on that application was not made until 9 November 2021. However, that application, too, was refused on the ground that the Applicant did not meet the good character requirement. That decision was the subject of an application to the Commission. Shortly before that application was due to be heard, the Home Secretary withdrew his decision and agreed to reconsider the matter. That reconsideration resulted in the decision that is now challenged.

4. The Applicant's grounds of challenge to the January 2023 decision may be summarised as follows. Grounds 1 and 2 are that the Home Secretary acted unfairly by failing to give the Applicant the opportunity to respond to the reasons why he considered she did not meet the good character requirement. Further, the submission for the Applicant is that in this case, fairness required the Home Secretary to address each of the following matters (taken from para.56 of the Applicant's Skeleton Argument).

> "Whether …
>
> (a) he considers that the proceedings against A were wrongly stayed as an abuse of process (in other words, whether he considers that, in reality, association with the DHKC amounted to association with the DHKP-C at that time, and the Home Office and trial Judge were wrong to conclude otherwise); and if so on what basis;
>
> (b) he considers that, even though those proceedings were correctly stayed, A herself was in fact involved with DHKP-C at the time which was the subject of those criminal proceedings, and again if so the basis on which he reaches that conclusion;
>
> (c) he accepts that A was not involved in DHKP-C at the time of that prosecution, but considers that A has become involved in DHKP-C since then; and if so, when R considers that A was involved and/or associated with DHKP-C and the nature of her alleged involvement;
>
> (d) he bases his conclusion about A's character wholly or in part upon allegations made against A by the Turkish authorities … ;
>
> (e) he bases his conclusions about A's character wholly or in part upon A's attendance at a community wedding in Belgium in February 2013 or association

with the people with whom she travelled to and from the wedding … ;

(f) he bases his conclusion about A's character wholly or in part upon A's association with her friend Ayfer Yildiz …"

5. The references to "the proceedings" are to a criminal prosecution of the Applicant and five others for offences under the Terrorism Act 2000. In December 2002, the Applicant and the others were arrested and charged with being members of the DHKP-C, which was (and remains) an organisation proscribed under the 2000 Act, and with having raised funds for the DHKP-C. That case came to trial in March 2004 at Kingston Crown Court. However, the prosecution was then stayed as an abuse of process. In reaching that conclusion, the trial judge relied in particular on a letter from the Home Office dated 19 July 2001 which had drawn a clear distinction between the DHKP-C, which was a proscribed organisation, and the DHKC, which was not proscribed under the 2000 Act. The judge stayed the prosecution as an abuse as it was conducted on the premise that the DHKC was part of the DHKP-C, a premise entirely at odds with the Home Office letter. One aspect of the Applicant's case on the application now before us is that the decisions taken by the Home Secretary suffer from the same defect, namely, a failure to distinguish between the DHKC and the DHKP-C. The matters referred to at para.56(e) and (f) of the Skeleton Argument are in a similar vein. On these matters, the Applicant's point is that the Home Secretary has wrongly relied on the Applicant's innocent contact with people who may be members of the DHKP-C as evidence of her association with the DHKP-C.

6. Ground 3 of the challenge is that the Home Secretary has failed to give sufficient reasons for the January 2023 decision. Grounds 4 and 5 overlap. The former is that the conclusion that the Applicant does not meet the good character requirement is irrational; the latter is that the conclusion is inconsistent with the Home Secretary's

policy. Ground 6 of the challenge is that the decision to refuse the Applicant's naturalisation application is an unjustified interference with her Article 8 rights.

7. In addition to submissions from the Applicant's counsel, we have also had the benefit of submissions from the Special Advocates by reference to CLOSED material. Those submissions have focused in particular on matters relevant to the Applicant's case on Grounds 4 and 5. These are the points that most closely concern the substantive legality of the Home Secretary's decision.

B. Decision

(1) Grounds 1 and 2. The decision-making process was unfair as the Home Secretary did not give prior notice of the matters that supported a conclusion that the Applicant did not meet the good character requirement.

8. The Applicant's submission is that when, on an application for naturalisation, the Home Secretary has concerns about whether an applicant meets the requirements in Schedule 1 to the 1981 Act, he must give that applicant the opportunity to address those concerns before reaching a final decision on the application. She relies on the principles summarised by Lord Mustill in *R v. Secretary of State for the Home Department ex.p. Doody* [1994] 1 AC 531 at p.560.

> "... (1) where an Act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the

> decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors will weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer."

The Applicant relies in particular on Lord Mustill's fifth point.

9. We have also been referred to the judgments of the Court of Appeal in *R. v. Secretary of State for the Home Department ex.p. Fayed* [1998] 1 WLR 763. That case concerned refusal of an application for naturalisation. At that time the statutory provisions were different and were interpreted by the court to mean that the Home Secretary was under no obligation to give reasons when refusing an application. (The then section 44(2) of the 1981 Act applied. This provision was repealed with effect from 7 November 2002). By a majority, the Court of Appeal concluded that, notwithstanding the exclusion of the duty to give reasons, the Secretary of State was required to inform applicants "of the case which they had to meet". Phillips LJ put the matter as follows:

> "In the light of these authorities, I am satisfied that, in the absence of section 44, an applicant under section 6 would be entitled to be informed of the nature of matters adverse to his application so as to be afforded a reasonable opportunity to deal with them. An applicant for citizenship has not at risk any vested right … The right for which he applies is, however, a right of great importance. It carries with it the rights of freedom of movement, an establishment enjoyed by members of the European Community. It exempts from visa requirements in many parts of the world. It carries a right to vote. It is a legitimate aspiration for one who has established his home in this country, the more so if he has children here, who have British nationality and if his wife is a British national."

Phillips LJ described the obligation to inform an applicant of adverse matters as a "duty of disclosure". He then continued,

> "… I consider that the duty of disclosure is a more significant element in the

> fairness of the procedure than the duty to give reasons. The duty of disclosure is calculated to ensure that the process by which the minister reaches his decision is fair. It enables the party affected to address the matters which are significant and thus helps to ensure that the minister reaches his decision having regard to all the relevant material. The duty to give reasons is calculated to enable the party affected to see that the minister has acted fairly in reaching his decision. While this can have a salutary effect on the process of reaching the decision, it does not have such a direct effect as the duty of disclosure.
>
> For these reasons I cannot accept that the express relief from the duty to give reasons for his decision implicitly relieves the minister from the duty of disclosure during the process of reaching that decision."

10. What is significant is that the majority of the Court of Appeal considered what they termed as the obligation of disclosure, the requirement to inform an applicant of adverse matters, to be independent of any obligation to give reasons. It was an obligation that survived a statutory disapplication of the duty to give reasons. Logically, therefore, notwithstanding the repeal of section 44(2) of the 1981 Act, the obligation to identify adverse matters still survives. The conclusions reached in *Ex p. Fayed* have not subsequently been doubted.

11. The Applicant further referred us to the judgment of the Court of Appeal in *R (Balajigari) v. Home Secretary* [2019] 1 WLR 4647. Having referred to the judgments in *Ex p. Fayed*, the court then made the following observation:

> "We understand that following the decision in *Ex p. Fayed* the Secretary of State introduced a 'minded-to refuse' procedure in naturalisation cases, under which applicants were given the opportunity to address any concerns that he might have before a decision was taken."

12. All this provides significant support for the proposition that, in principle, if the Home Secretary, when considering a naturalisation application has concerns that the good character requirement is not met, he should give the applicant an opportunity to address those concerns before reaching his final decision on that matter. In light of the

observation made by the Court of Appeal in *Balajigari*, we asked counsel for the Home Secretary to take instructions on whether the "minded-to-refuse" procedure referred to in that judgment was still followed. A note provided after the hearing stated the following,

> "The Secretary of State does not, and has not ever, operated a 'minded-to' policy, whereby he issues a 'minded-to-refuse' letter in each and every case. Rather, after *Fayed*, ... it was and is only in rare circumstances such as where areas of concern may otherwise be unclear to applicants that a 'minded-to-refuse' letter may be provided."

The note continued to the effect that the Home Secretary was unable to identify the basis for the observation that had been made by the Court of Appeal.

13. The Home Secretary's submission on Grounds 1 and 2 is that, as a general rule, and in the context of the good character requirement, any obligation arising from fairness to give an applicant prior warning of matters of concern is sufficiently addressed by guidance documents he has issued. At the time this Applicant applied, there were two relevant documents: "Booklet AN"; and "Guide AN". Booklet AN states that it "summarises the requirements for applying for naturalisation". Among other matters, Booklet AN refers to the conditions at Schedule 1 to the 1981 Act. Under the heading, "War Crimes, Terrorism and Other Non-Conducive Activity", the following is stated:

> "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 crimes against humanity, war crimes or genocide. If you are in any doubt as to whether something should be mentioned, you should mention it."

14. Further information is given as to the nature of terrorist activities, and on the circumstances in which an organisation will be considered to be one that is concerned

in terrorism. Booklet AN states it must be read together with the Home Secretary's published guidance (including the guidance on the good character requirement) and with Guide AN.

15. Guide AN (which says it is to be read together with Booklet AN) is provided to assist applicants for naturalisation to fill in the application form. It addresses in turn, each part of and each question on the application form. The good character requirement is considered in section 3 of the document. So far as concerns questions 3.9 to 3.13 of the form, the following is stated:

> "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 must mention it. You must also say whether you have been involved in any crimes in the course of armed conflict, including crimes against humanity, war crimes or genocide. If you are in any doubt as to whether something should be mentioned, you should mention it."

In relation to question 3.15, the guidance given includes the following:

> "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 and your fee will not be fully refunded if you make an untruthful declaration. If you are in any doubt about whether you have done something or it has been alleged that you have done something which might lead us to think that you are not of good character you should say so."

16. With effect from October 2023, Booklet AN and Guide AN have been superseded by a single document "Guide AN - Naturalisation Booklet - the requirements and process". The part of this document concerning terrorism contains passages that are materially similar to the parts of Booklet AN and Guide AN set out and described above.

17. The Home Secretary has also referred us to the judgment of Ouseley J in *AHK v. Secretary of State for the Home Department* [2013] EWHC 1426 (Admin.), and the

judgment of Sales J in *R (Thanby) v. Secretary of State for the Home Department* [2011] EWHC 1763 (Admin.). Both these judgments considered the requirements of fairness in the context of applications for naturalisation. We have further been referred to a number of decisions of the Commission which consider the same matter: *ZG and SA v. Secretary of State for the Home Department* (SN/23/2015), judgment 20 April 2016; *JJA v. Secretary of State for the Home Department* (SN/40/2015), judgment 28 October 2016; *MSB v. Secretary of State for the Home Department* (SN/41/2015), judgment 1 December 2016; *LA v. Secretary of State for the Home Department* (SN/63/2015) judgment 24 October 2018; *SS v. Secretary of State for the Home Department* (SN/42/2015) judgment 13 December 2018; *AMA v. Secretary of State for the Home Department* (SN/75/2018) judgment 19 January 2021; *Dogan v. Secretary of State for the Home Department* (SN/91/2020) judgment 26 July 2021; and *Singh v Secretary of State for the Home Department* (SN/93/2020) judgment 28 January 2022.

18. Drawing this case law together, the position can be summarised reasonably shortly. The judgments in *Ex p. Fayed* remain authority for the proposition that, on consideration of the good character requirement on an application for naturalisation, the common law obligation to act fairly does require that the Home Secretary ensures that matters of concern, those that may cause him to refuse the application on the ground that the good character requirement is not met, are identified and notified to the applicant. This is subject to one general qualification: that the common law obligation of fairness will not require the Home Secretary to reveal any information that it is not in the public interest to reveal. For present purposes, fairness will not require the Home Secretary to disclose information when such disclosure would harm the interests of national security. That apart, how the requirement of fairness identified in *Ex p. Fayed* is met will depend on the circumstances of each case. It is possible that in some cases that general guidance such as previously set out in Guide AN and Booklet AN, and now

published in Guide AN - Naturalisation Booklet, could be sufficient. However, there can be no certainty that generic information will, in every case, be sufficient. The general guidance will, in the words of the Commission in its judgment in *Dogan,* give an applicant "a fair opportunity to declare" anything he knows about matters the guidance says will be taken into account when applying the good character requirement. However, on the facts of a particular case, that opportunity may not be sufficient. In *AMA*, the Commission put the point in this way at paragraph 33 of its judgment:

> "We do not think that the availability of the Good Character Guidance or of Guide AN: Naturalisation as a British citizen - a guide for applicants to naturalisation, is any answer to this point. Those documents help to identify some of the matters which may be relevant to an application. But, in a case where SSHD has a particular concern relating to character, these generic documents would go no way to satisfying SSHD's duty as a matter of natural justice, to give notice of his concerns, to afford a proper opportunity to the applicant to respond to them and then to give proper reasons for any adverse decision. If there were no valid public interest for withholding further detail, we have no doubt that [the grounds of challenge in that case] would both succeed".

19. The circumstances of the present case provide a case in point. Here the Applicant accepted that she had supported the DHKC (at the material time, not an organisation covered by any designation under the Terrorism Act 2000) but did not consider she had acted in support of or associated with the proscribed organisation DHKP-C. Confusion arising from an elision of these two organisations in the mind of a prosecutor had been the reason why the prosecution of the Applicant and others arrested in 2002 had been brought to an end, the court concluding a prosecution conducted on that basis to be an abuse of process. Circumstances such as these are a pertinent example of circumstances in which anything in general guidance will not be sufficient. In this case, given the previous conflation of DHKC and DHKP-C, fairness required the Home Secretary to go further than simply rely on the generic statements made in Guide AN

and Booklet AN. No doubt, there will be many other instances where the observations of the Commission at para.33 of the judgment in *AMA* will apply.

20. For these reasons, we reject the Home Secretary's general submission based on the general published guidance. Nevertheless, we do not consider the Applicant's submissions on Grounds 1 and 2 to be well-founded. The submission at para.56 of the Applicant's Skeleton Argument (see above at paragraph 4) significantly overstates any obligation that could possibly arise to give effect to the common law obligation of fairness. For this purpose, fairness does not require the Home Secretary to engage with an applicant's application, point by point. The only requirement is - to use the words of Phillips LJ in *Ex p. Fayed* - to inform an applicant "… of the nature of matters adverse to his application" to give the applicant a "reasonable opportunity to deal with them". What this requires will depend on the circumstances of the case in hand, but in many instances what is required is likely to be discrete.

21. In the present case, the 31 January 2023 decision was the Home Secretary's second decision on the Applicant's application. The application was first refused on 9 November 2021 when the Applicant was told that she did not satisfy the good character requirement because of her "association" with DHKP-C. That decision was challenged. In her statement (dated 28 August 2022) in support of that challenge, the Applicant responded to the point that she had associated with the DHKP-C (see her statement between paras.43 and 66). Shortly after that statement was filed, the Home Secretary agreed to withdraw the November 2021 decision and reconsider the application. The decision now challenged (made in January 2023) repeated the reason that the Applicant did not meet the good character requirement because of her association with the DHKP-C. That decision was made taking account of what the Applicant had said in her August 2022 witness statement, in response to being put on notice of the Home Secretary's view that she had associated with the DHKP-C. All this being so, before the

Home Secretary took the decision now challenged, the Applicant had had the opportunity to address the matter that was of concern to him, namely whether she had an association with DHKP-C. That was sufficient to meet the requirement of fairness identified by the Court of Appeal in *Ex p. Fayed.*

(2) Ground 3. The Home Secretary failed to provide sufficient reasons for his decision.

22. The Home Secretary's obligation to give reasons is an aspect of the requirement of fairness. There is no free-standing obligation under the 1981 Act to give reasons for decisions on naturalisation applications. The common law obligation to give reasons will not require a decision-maker to give reasons when or to the extent that doing so would require him to reveal information that it is not in the public interest to reveal.

23. In this case, the Home Secretary acted lawfully when concluding that the reasons that could be given to the Applicant were the ones in his letter dated 31 January 2023. As matters stand, we are able to reach this conclusion fortified by the fact that the Rule 38 process undertaken in these proceedings did not require the Home Secretary to reveal further reasons for his decision as OPEN evidence. That fact may, for present purposes, be considered conclusive that the reasons given by the Home Secretary in the 31 January 2023 decision letter met the legal obligation of fairness.

24. For sake of completeness we add that, had that not been so, had the Rule 38 process required the Home Secretary to reveal further matters in OPEN evidence, it would not necessarily have followed that in his decision letter he had failed to comply with the duty to give reasons. In a case such as this, where the decision on the application rests on consideration of material that may not be disclosed for reasons in the public interest, any requirement to give reasons arising at common law will recognise that the decision-

maker may in the public interest adopt a precautionary approach when deciding what reasons can be given. In this respect, the common law ought to be, and is, pragmatic, and will permit a degree of latitude to the decision-maker that corresponds to a sensible precautionary approach.

25. In any event, in this case the Applicant's Ground 3 of the challenge fails.

(3) Grounds 4 and 5. The decision that the Applicant did not meet the good character requirement was (a) irrational; and (b) not in accordance with the Home Secretary's policy on the good character requirement.

26. These Grounds are closely related and can be considered together. These Grounds were also pursued by the Special Advocates by reference to the CLOSED material. The decision in January 2023 refused the Applicant's application for naturalisation for the reason that she did not meet the good character requirement "... because of your association with the proscribed organisation Revolutionary Peoples' Liberation Party-Front (DHKP-C) in the UK".

27. It was agreed that the material part of the Home Secretary's policy on the good character requirement is the section under the heading "Association with individuals involved in terrorism, extremism and/or war crimes". That provides as follows:

> "Those who associate or have associated with persons involved in terrorism, extremism and/or war crimes may also be liable to refusal of citizenship.
>
> The association link will need careful consideration, particularly where it concerns a family member. Family association with war criminals must be disregarded in the case of minors.
>
> The following questions will be relevant when considering an application from someone known to associate, 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 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?

If there is evidence that an associate or family member does not accept, tolerate or support the views or activities of a person involved in war crimes, or where they have clearly distanced themselves from those activities, their association alone will not be a reason to refuse an application for British citizenship. It may be necessary for an applicant to be interviewed to resolve the question of association and to help establish whether they are of good character."

28. Looked at in the round, this policy emphasises the need to evaluate all circumstances concerning any relevant association so that the focus is on the substance of the matter rather than the simple fact of association.

29. We are satisfied that the Home Secretary's decision in this case was consistent with the policy. The material the Home Secretary relied on to reach his conclusion on the good character requirement is CLOSED material. It has been disclosed only to the Special Advocates and not to the Applicant's OPEN representatives and has been considered only in the CLOSED sessions of the hearing of this application. It follows that there is nothing specific that can be said in the OPEN part of this judgment. However, having carefully considered the CLOSED material, we are satisfied that the conclusion on the

good character requirement is consistent with a correct application of the policy. The conclusion is consistent with an evaluation of the substance of the association and does not rest only on the bare fact of association or mischaracterise one or more associations that were entirely personal in nature.

30. The next submission, is that the conclusion that the Applicant did not meet the good character requirement was irrational. This is made by reference to the information in the Applicant's witness statement. The Applicant's OPEN submissions have covered a number of matters. In summary, the Applicant submits that any material coming from the Turkish authorities suggesting her involvement with the DHKP-C needs to be treated with suspicion since the Turkish authorities are prone to mischaracterise genuine political opposition as support for terrorist causes or groups, and are also recognised to engage in obtaining information improperly, for example, through use of ill treatment. The Applicant further submits that any information relied on by the Home Secretary needs to be carefully considered to determine whether, properly understood, it does demonstrate the Applicant's approval of the DHKP-C. The Applicant's case is that any contact she may have had with persons who are or were involved with the DHKP-C was no more than in consequence of her life within a "tightly-knit community in exile", and that nothing she did can properly be evaluated as showing her approval of or association with the DHKP-C. We have had these points well in mind when considering the CLOSED material. Having considered all the material, we do not accept that the Home Secretary misunderstood and/or overread the material available to him, or that he mistook DHKC activity for DHKP-C activity, or elided the two, such that any concern as to the Applicant rested only on information about innocent activity. There is nothing that suggests likely confusion and there is nothing to suggest to us that the evaluation of the available information was defective in this regard. Overall, therefore, we do not consider these matters reveal any legal error

in the Home Secretary's conclusion.

31. The final matter to consider so far as concerns Grounds 4 and 5 is the rationality submission. For the reasons already given, the decision that the Applicant did not meet the good character requirement is consistent with the Home Secretary's policy. The policy emphasises the need for careful evaluation of the substance of any association considered relevant. In this case, we are satisfied that a decision that was consistent with the guidance was also a rational decision. On information available, the Home Secretary was entitled to reach the conclusion that the Applicant did not meet the good character requirement. For these reasons, Grounds 4 and 5 of the challenge fail.

(4) Ground 6. Breach of Article 8

32. The premise of this part of the Applicant's case is that the refusal of the naturalisation application comprised some form of interference with her Article 8 rights. In *AHK v. Secretary of State for the Home Department* (SN/2/2014) (at para.22), the Commission, when giving guidance on the scope of the Commission's jurisdiction on applications under section 2D of the 1997 Act, did admit of the possibility that refusal of a naturalisation application might give rise to an Article 8 challenge. That observation rested on comments made by Ouseley J in linked proceedings in the Administrative Court, *AHK v. Secretary of State for the Home Department* [2013] EWHC 1426 (Admin.). At paras.44 and 45 in that judgment Ouseley J said as follows:

> "44. The ECtHR decision in *Genovese v, Malta* ... concerned the refusal of Maltese citizenship to a child born out of wedlock to the British mother but with a Maltese father. A child born out of wedlock could only be granted Maltese citizenship if born to a Maltese mother. The Court repeated what it had often said before to the effect that Article 8, and indeed the ECHR as a whole, did not guarantee a right to acquire a particular nationality, but 'an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8'. There was no family life in that case with the father and there was no breach of Article 8 in its refusal. But the decision proceeds on the basis that a breach of Article 8 can

arise in the context of the refusal of naturalisation where there was an arbitrary or, as in that case, a discriminatory refusal. It does not support any broader potential for a refusal of naturalisation to interfere with Article 8.

45. A submission that the mere nature or degree of effect of refusal of naturalisation, without some further quality of arbitrariness or discrimination, suffices to engage Article 8 seems to me ill-founded on this ECtHR jurisprudence. It has not actually held, so far as I am aware, that where the refusal of naturalisation impacts sufficiently seriously on any of the aspects of life covered by the full width of Article 8, it is then for the state to prove why it should not be granted. That would mean in effect that there would be a right to naturalisation, notwithstanding that the ECtHR has accepted that there is no such right, and notwithstanding the entitlement of a state to set the terms for and apply its tests to any application for naturalisation. To hold that a refusal of naturalisation, in the absence of an arbitrary or discriminatory decision, interferes with Article 8 rights would be to advance beyond what the ECtHR has held. That is not for the domestic Courts. That is very different from holding that interference can arise where naturalisation is refused on an arbitrary or objectionably discriminatory basis, as in *Genovese*."

33. In fact, the basis in the jurisprudence of the European Court of Human Rights for the application of Article 8 to situations where applications for naturalisation are refused is even thinner than Ouseley J suggested. So far as we can see, the furthest the ECtHR has gone is to say that it "cannot be ruled out that an arbitrary denial of citizenship might raise an issue under Article 8 because of the impact of such a denial on the private life of an individual". That is what the court said in *Genovese v. Malta* [2014] 58 EHRR 25, at para.30. That phrase was repeated in the judgment in *Usmanov v. Russia* [2021] 72 EHRR 33, at para.53. On its facts, *Usmanov* was a case that concerned a complaint about decisions that had removed the applicant's Russian nationality. *Genovese* was a case about a refusal to grant nationality to a child of a Maltese father and a non-Maltese mother who were not married at the time the child was born. However, in that case, the applicant's claim was a claim of discrimination, resting on Article 14 read with Article 8. The court accepted that the circumstances of the case fell within the ambit of Article 8. The court did not rely on Article 8 alone. Drawing this together, the ECtHR has not yet accepted that a refusal to grant nationality will involve an interference with Article 8 rights. The furthest it has gone is to refuse to

rule out the possibility that, in the circumstances of a particular case, it might.

34. The phrase used by the ECtHR in both *Genovese* and *Usmanov* referred to the need to consider the impact of the decision on Article 8 private life. This, it seems to us, should be the starting point. Even if an Article 8 claim could not succeed without demonstrating that the refusal of the application for naturalisation was arbitrary or discriminatory, an Article 8 claim ought not to be able to start at all without evidence of interference with Article 8 protected rights.

35. A refusal of an application for naturalisation will not, of itself, comprise an interference with Article 8 rights. Taking the present case as an example, the Applicant has indefinite leave to remain in the United Kingdom. The decision refusing the naturalisation application has no impact on that leave to remain. Had the application for naturalisation been granted, the Applicant's status would have been enhanced. But the decision to refuse the application has not, in any objective or quantifiable respect, adversely affected her private and family life. There is no evidence from the Applicant of any specific detriment to her Article 8 rights. We have no doubt she will have been disappointed and even frustrated at the Home Secretary's decision, but so far as the evidence is concerned the matter goes no further than that. On this basis any claim based on Article 8 fails to get off the ground at all.

36. However, even if that analysis is wrong and the Home Secretary's decision does give rise to some form of *prima facie* Article 8 claim, the furthest that the ECtHR has suggested is that refusals that are "arbitrary" or "discriminatory" could lead to successful Article 8 claims. This decision is not arbitrary. A good character condition is not arbitrary, *per se*. The application of that condition on the facts of this case was not arbitrary. That is the necessary consequence of the conclusion we have reached on Grounds 4 and 5. Thus, on this analysis, too, the Article 8 ground of challenge fails.

C. Disposal

37. The application fails on all Grounds and is, therefore, dismissed.