SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No. SN/9/2014
Hearing Date: 29th, 30th April & 1st May 2015
Additional Submissions received 3rd June 2015
Date of Judgment: 28th July 2015

BEFORE:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE GLEESON
SIR STEPHEN LANDER KCB

BETWEEN:

SN/HN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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For the Appellant:	**Ms S Naik**
Instructed by:	Birnberg Peirce and Partners
For the Respondent:	**Mr S Kovats QC** and **Mr S Gray**
Instructed by:	The Government Legal Department
Special Advocates:	**Ms J Farbey QC**
Instructed by:	The Special Advocates' Support Office

JUDGMENT

Mr Justice Irwin :

1. In this case the Applicant seeks a statutory review by SIAC of the refusal by the Secretary of State on 3 April 2013 to grant the Applicant British citizenship. The refusal was on the basis that the Applicant had failed to meet the requirement to be of good character.

2. The outline chronology is as follows. The Applicant was born in Colombia in 1957 and is currently 57 years of age. Until he left Colombia, on his own account, he was politically active in the Union Patriotica ["UP"], a political party formed in 1985 in opposition to the Colombian Government. On 17 December 1995 the Applicant arrived in the UK and claimed asylum. His asylum application was refused on 27 March 1997. He remained in the United Kingdom and in January 2001 requested refugee status. On 8 November 2002 the Applicant was granted refugee status and granted indefinite leave to remain ["ILR"] in the UK. On 29 June 2004 the Applicant and his wife applied for UK citizenship. His application for naturalisation was refused on 2 August 2006. This refusal was based on the "good character" criterion, the stated reason for refusal being that the Applicant was a member of the Fuerzas Armadas Revolucionarias de Colombia ["FARC"].

3. On 26 March 2012 the Applicant reapplied for British citizenship. On 3 April 2013 the Secretary of State refused the application. The reason for refusal was that the Applicant did not meet the requirement of good character because of his "past membership of the revolutionary armed forces of Colombia (FARC)". It is this decision which is the subject of the application for review. Judicial Review was issued in the High Court on 3 July 2013. On 17 March

2014, the SSHD certified the application pursuant to Section 2D(2) of the SIAC Act 1997. This application was lodged on 31 March 2014.

4. On 7 November 2014 a second gist was disclosed following the Rule 38 proceedings. This reads as follows:

> "Amnesty International confirm that HN was a member of the Union Patriotica Party (UP) a left wing alliance party which was created during a peace initiative with the FARC armed opposition group in 1985. Although UP was a legally recognised party with representation at local and government level, including several seats in Congress in the ten years since its creation in 1985 its leaders and members suffered a systematic campaign of persecution from the Colombian military and their parliamentary allies, in which over 3000 [people] were killed."

5. On 19 December 2014 the Special Advocate communicated a second Note to the Appellant's solicitors, which concerned information about FARC gisted from the CLOSED papers. This OPEN background information about FARC, it was made clear, contained "HMG's assessment of FARC". The information communicated is distributed across a number of the CLOSED documents but conveniently gathered together in one document for the attention of the Applicant and his OPEN lawyers.

6. The central issues in the case are first, was it reasonable on the part of the Secretary of State to conclude that the Applicant had been a member of FARC? Secondly, was it in any event reasonable to refuse naturalisation on good character grounds given the length of time the Applicant has lived in the UK and given the matters advanced showing he has made a positive contribution to society whilst here? Ms Naik for the Applicant also submits that the refusal "for the reasons given breaches the SSHD's public duty to act lawfully, reasonably and proportionately to the legitimate aim pursued", that

the Respondent has failed to give proper reasons for her decision and that the decision has breached the Applicant's rights under Article 8 and/or Article 13 of the European Convention on Human Rights "with Article 14 given the Applicant's status as a refugee".

7. The central plank of the Applicant's case on fact is that he always has been a member of the UP but not FARC, that the two are discrete and there is no basis for concluding he was ever a member of the paramilitary organisation as opposed to the political party. The Applicant of course has not been made privy to the CLOSED evidence bearing on that factual issue. On 7 November 2014 the first gist of the CLOSED evidence communicated to the Applicant read:

> "HN was reported to be a leading UK member of the revolutionary armed forces of Colombia (FARC). In the second amended witness statement of the Respondent's witness, Philip Larkin, dated 12 December 2014, Mr Larkin described how, given the history of this group of cases, a review of the material underlying the decision in this case was undertaken. A Note of that review had been provided in CLOSED pursuant to the Respondent's duty of candour in Judicial Review proceedings. The reviewer in this case concluded that the underlying material supported the assessment that the Appellant was in the past a member of FARC."

8. In the course of the information given to the immigration authorities at the time of his application for asylum in December 1995, the Applicant described how he was an office holder (President of the Civic Junta of Ansermanveva from 1986 to 1990) and an active member of the UP. He suggested that the threats to him persisted "and will continue because of my denouncement of functionaries and the police". On 28 April 2000 the Vice President of the UP wrote confirming that the Applicant had been a member of the UP for many

years and summarising the threats to UP members in Colombia. On 21 November 1995 the Colombian Red Cross confirmed that the Applicant's family had suffered ill-treatment and threat in Colombia and that therefore the family was seeking to leave Colombia for Great Britain. The Red Cross confirmed that "the persons with whom we have had contact on this matter have proven their credibility, presenting restrained and serene testimonies".

9. On 2 June 2000 a representative of Amnesty International also wrote in support of HN's application for asylum. Amnesty International confirmed HN's membership of the UP and confirmed the continuing threats to political activists belonging to the party.

10. In June 2000 a witness called Richard Sanders lodged a letter in support of the Applicant. He described how he was a freelance TV producer and journalist who had lived in Colombia in 1995/6 and then returned in later 1998. In 1998 he met HN and his brother XY. An important section of this statement reads as follows:

> "[XY] and his brothers are members of the Union Patriotica, which might be loosely described as the political wing of [FARC] Colombia's main left-wing guerrilla movement. Professionally I have used [XY's] brother [HN] primarily as a means of contacting the FARC. In 1998 I was developing a possible Panorama programme on the Colombian civil war with the BBC producer Tom Giles. We needed to establish how easy it would be to film with the guerrillas. [HN] was able to arrange meetings in London for me first with Lucas Gualdon, who heads the FARC's offices in Switzerland and then with Olga Marin, who is based in Mexico and is head of the international side of the FARC. I met Marin at a FARC meeting at a Colombian restaurant in central London. When I arrived Marin was flanked on both sides by the ….. brothers. We were able to establish we would be able to film with the guerrillas. But in the end the programme idea was dropped by the BBC.

> Through my dealings with them it is clear to me that [XY] and his brothers are very prominent activists within the Union Patriotica with direct access to very senior figures within the movement. If they were not they would not have been of a use to me professionally."

The letter goes on to emphasise the risks to these individuals as senior UP figures.

11. Mr Sanders has subsequently made a statement in early 2015 commenting on what he said in 2000. We deal with this briefly below for the sake of completeness. However such an up-to-date statement could not of course have influenced the decision challenged in this case.

12. In the course of an interview within December 1995, the Applicant described as part of his own political history that he had been helping an organisation known as ANUC since 1977 and had also been threatened in the course of that activity. The interview note gave a wrong description to that organisation which HN corrected in a witness statement in support of his application for upgrade to full refugee status, dated 4 November 2002. In the statement he makes the correction that:

> "ANUC is translated as the National Association of Land Labourers. It was a Maoist organisation."

13. That background makes interesting reading set beside the letter of 26 March 2012, sent by the Applicant's then solicitor to the Immigration and Nationality Division of the Home Office. This was the definitive letter in support of the challenged application for naturalisation. The solicitor's letter gives a summary of the history and then states:

> "A letter signed by Sue Williams dated 2 August 2006 states that he has belong (sic) to the FARC in Colombia. This is

> certainly not the case. Our instructions are that he was originally *a Conservative trade unionist* [emphasis added] working for Colombian Telecom, he worked for 16 years with that company. He became a member of the legal party Union Patriotica in 1985 when the party was created after the "Uriba" Agreement. Although the history of the UP indicates that the party was created to bring some members of the FARC out of the arm (sic) conflict not all UP members were members of the FARC. He has never been involved with FARC and his participation with the UP was purely to campaign for democratic reform."

14. The letter goes on to make the point that the support of the Red Cross, and later Amnesty International, for the Applicant's asylum claim:

> "…would have been unlikely …. if he had been a member of FARC. He is adamant that he was never party to the FARC. In our opinion it was unfair and irrational to conclude that he was a guerrilla member."

The letter goes on to emphasise that the Applicant's family is well-settled in Britain, that his family have been naturalised, that he has been employed by the Post Office for six years and has never been in any trouble with the law. The letter goes on:

> "We would argue that he is a person of good character and has integrated well in the UK. His English is excellent and has he has provided us with a certificate showing that he has passed the life in the UK test (sic). Both him and his wife have further education (sic) by doing vocational courses. They have both participated in council schemes for adoption and the (sic) have the support of Islington Council."

15. The letter provides a number of enclosures, in large measure official documentation such as marriage certificates, naturalisation certificates and so forth. It did include a character reference letter from the Applicant's employers, the Post Office. In addition, the Border Agency was aware of a number of other matters to the appellant's credit. He had founded and run a football club which helped young people from many nationalities, as was

communicated by Harriet Harman QC MP in August 2011. This was clearly considered, since it was mentioned in the reply to Ms Harman from Andrew Jackson, a director of the Border Agency on 18 August 2011. The agency was also aware that the appellant had been approved and was acting as a foster carer for Islington Council. We accept this material taken together, represented good evidence of integration in the community and evidence in favour of good character.

16. This solicitor's letter is not an impressive document but it must have been written on instructions. We are concerned at the assertion that the Applicant was a conservative trade unionist when, by his own earlier account, he was supporting a Maoist organisation. It is possible this arose from poor drafting or mis-understanding.

17. We have now summarised all of the relevant OPEN material which was before the Secretary of State at the time of the challenged decision.

After-coming Evidence

18. There was placed before us significant additional witness statement from the Applicant with a supporting letter or statement from Mr Sanders and a long report, dated March 2015, from a representative of Amnesty International. Ms Naik for the Appellant sought to persuade us that this material should be taken into account in the course of the statutory review of the relevant decision. We can accept 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. There may

well be other such circumstances. However, in our view none of the after-coming material here comes anywhere near such a basis for admission.

19. The new material represents essentially additional support for the Applicant's assertions and, in the case of the statement from Mr Sanders of 18 March 2015, a gloss on his own letter from the year 2000. Mr Sanders' later document is really an attempt to say he did not mean what is the obvious interpretation of his earlier letter. We do not take him ever to have stated directly that the Applicant was a member of FARC. However the thrust of his original letter was that the Applicant had close associations with FARC.

20. It is important to bear in mind the nature of the exercise in a review such as this. SIAC set out the approach to be followed in the Preliminary Issues Judgment in *AHK and Others v SSHD*, SN2-5/2014, 18 July 2014. On this aspect of the case, the approach we set out was approved by the Divisional Court when that decision was challenged by the Secretary of State, see: *SSHD v SIAC* [2015] EWHC 681 (Admin). Indeed in dealing with their conclusions on disclosure, Sir Brian Leveson PQBD emphasised 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*." [Emphasis added] See paragraph 38

21. A decision can normally only fairly be reviewed by reference to the material available to the decision maker, or to material which should have been available to the decision maker. It can arise in judicial review proceedings that the Court will require further information to be provided which post-dates

the relevant decision. That often arises where a party is seeking interim relief. It may also arise because remedies in the High Court are discretionary and the Court may look at after-coming information when considering remedy.

22. An Applicant in a statutory review may often choose to bring matters up to date. Even if after-coming material is not admissible, the Secretary of State may from time to time respond by taking a pragmatic view of a case and make a fresh decision if she finds after-coming material persuasive. That does not alter the fundamental point 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.

23. We do not consider that the after-coming material here is such as to mean it can alter the outcome of this review. It does not strike at the decision taken at the time.

The Policy of the Secretary of State

24. The Secretary of State relies on two witness statements from Philip Larkin, Head of the Unit dealing with applications for, and removal of, British Citizenship, within the Office for Security and Counter Terrorism. Amended versions of both statements were lodged on 12 December 2014. Mr Larkin appends to one statement the relevant OPEN passages from the Home Office Staff instructions providing guidance to officials assessing whether or not an applicant satisfies the requirement to be of "good character". Part of the policy (introduced on 16 September 2009) is subject to restricted circulation, and does not appear in the public domain. The restricted text has been

supplied to SIAC and to the Special Advocates acting for the Applicant. The guidance relating to terrorism is restricted.

25. The Commission has seen the restricted text and considered the CLOSED material set against that Guidance.

26. The overall thrust of the Guidance is set out in paragraph 1.2 and simply states:

> "The Secretary of State must be satisfied that the applicant is of good character on the balance of probabilities…"

27. The caseworker handling this case did have in mind that the Applicant had made the relevant declaration and assertion as to his good character, and that the Police National Computer had revealed no convictions. As the amended gist made clear, the ground for the decision was the past membership of FARC, and was based on CLOSED material.

Our Review of the CLOSED material

28. We have looked in detail at the CLOSED material and have reviewed the decision. We have concluded that the decision taken was reasonable and was lawful. On the material available, it was on balance, reasonable and lawful to conclude that the Applicant had been a member of FARC. We have also considered the restricted policy on Guidance on the good character requirements and on its application to this case. For the reasons set out in the CLOSED judgment, we have decided that the Policy was properly and lawfully applied in this case, despite the length of time the Applicant has lived in the UK, without any cautions or convictions, and whilst in employment, and taking into account the positive matters advanced.

Conclusions

29. For these reasons we conclude that it was reasonable and lawful to refuse to grant British Citizenship to the Applicant.

30. We reject the argument that the decision was disproportionate. In our view it is proportionate on the part of the Secretary of State to conclude that past membership of FARC, in the context of this case, should preclude the grant of citizenship.

31. Ms Naik did not seek to develop the submissions made very briefly in writing that the Secretary of State has failed to give proper reasons for her decision. In any event, we regard the reason given in OPEN is quite sufficient to satisfy the requirement of the law. The Applicant knows that it is the conclusion he was a member of FARC which has prevented his naturalisation. Indeed, he knew that in 2006, and was focussed on that issue when making this application: the letter from his solicitors quoted in paragraph 13 above makes that clear. He knows the ground on which he failed. The evidence upon which that ground was established has remained in CLOSED, but that evidence has been thoroughly reviewed. We reject any illegality on such grounds.

32. We further reject any claim based on Articles 8, 13 or 14. Insofar as those Articles are engaged, any infringement is minor and proportionate.

33. For those reasons, this application is dismissed.