Appeal No: SN/47/2015
Hearing Date 24th & 25th November 2016
Date of Judgment: 22nd December 2016

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING
UPPER TRIBUNAL JUDGE RINTOUL
MR ROGER GOLLAND, OBE

MB

APPLICANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Applicant:	Ms S Knights & Ms T Jaber
Instructed by:	Deighton Pierce Glynn Solicitors
Special Advocate:	Mr S Cragg QC & Mr Z Ahmad
Instructed by:	Special Advocates Support Office
For the Respondent:	Mr D Mitchell
Instructed by:	Government Legal Department

OPEN JUDGMENT

MR JUSTICE MITTING :

Background and procedural history

1. MB is a 44 year old Algerian national. He arrived in the United Kingdom on 15 January 1993 and claimed asylum on 30 April 1993, on the basis that, as an active member of the Front Islamique du Salut (FIS) he feared persecution for political reasons at the hands of the Algerian State. His claim was rejected in February 1995, largely on credibility grounds. He travelled to the Balkans in mid-1995. He returned to the UK on 26 December 1995 and made a further claim for asylum on the same day. He was interviewed in August 1996, but no determination was immediately made on his claim.

2. MB married a British citizen of Moroccan extraction on 2 October 1997. On 30 October 1997, before his asylum claim had been determined, he applied for leave to remain in the UK on the grounds of his marriage to her. On 21 April 2000, his asylum claim was refused, but he was granted exceptional leave to enter until 21 April 2004. On 26 March 2002, he applied for indefinite leave to remain on the basis of his marriage. On 23 October 2003, he was granted indefinite leave to remain.

3. There are five children of the marriage, now aged 18, 16, 13, 12 and 9. He and his wife were divorced in 2012.

4. In 2006 he applied to be naturalised as a British citizen. On 26 August 2008, his application was refused on the ground that he did not meet the requirement for good character. Beyond that, no reasons were given, because it would "pose a risk to national security to give reasons in this case". He did not challenge that refusal. On 27 November 2009, he made a further application

to be naturalised as a British citizen. On 9 April 2010 his application was again refused on the ground that he did not meet the requirement for good character. Again, no reasons were given, on this occasion, because it would be contrary to the public interest to give reasons.

5. On 9 July 2010, he issued a judicial review claim form to challenge that decision. His claim was stayed behind the lead case of *AHK and others* [2009] EWCA Civ 287. It has never been determined and will not be. On 1 September 2015, the Secretary of State notified MB that the decision of 9 April 2010 had been certified under s.2D of the Special Immigration Appeals Commission Act 1997. By an application notice dated 15 September 2015, he applied for a review of that decision.

6. This is the open judgment on his application. There is also a closed judgment.

The law

7. Under s6(2) British Nationality Act 1981, the Secretary of State may grant a certificate of naturalisation as a British citizen to a person of full age and capacity who is married to a British citizen if satisfied that he fulfils the requirements of Schedule 1, including that set out in paragraph 1(1)(b) "that he is of good character". This has been authoritatively described as a "rather nebulous requirement": per Lord Woolf MR in *R v Secretary of State for the Home Department ex parte Fayed* [1998] 1WLR 763 at 773G. There is an obligation of fairness on the Secretary of State: *ibid*. In many cases, this will require that areas of concern are notified to an applicant before his application is refused: *ibid*. What is required is that the Secretary of State should identify the subject of his concern "in such terms as to enable the applicant to make

such submissions as he can": *ibid* 776H. In some situations when even to do this would involve disclosing matters which it is not in the public interest to disclose "for example, for national security or diplomatic reasons" the Secretary of State is relieved from disclosure: *ibid* 777A. Since 25 June 2013, when the Secretary of State certifies that a decision made wholly or partly in reliance on information which, in her opinion, should not be made public in the interests of national security, the applicant may apply to SIAC to set aside the decision: s2D(2) SIAC Act 1997. In determining whether the decision should be set aside, "the Commission must apply the principles which would be applied in judicial review proceedings": s2D(3). If the Commission so decides, "it may make any such order or give any such relief, as may be made or given in judicial review proceedings s2D(4)".

The applicant's case

8. In written and oral submissions of conspicuous clarity and force Miss Knights for MB, contends that the Secretary of State's decision is unlawful and/or flawed and so should be set aside, for one or more of five reasons:

1. In a case such as this, in which refusal may be founded on alleged involvement in terrorism, the scheme adopted by the Secretary of State to determine whether or not an applicant satisfies the requirement of good character lacks legal certainty and so is unlawful.

2. The failure to identify areas of concern in advance of the decision was unfair and so unlawful.

3. The Secretary of State has not provided adequate reasons for the decision.

4. In consequence of 2 the Secretary of State has failed to take into account material considerations, namely MB's own account of his adult life, supplemented as it could have been, before the decision was made, by evidence of the kind deployed in these proceedings, namely, the report of Professor Joffé of 28 June 2016 and its addendum.

5. The decision infringed the procedural requirements of Article 8 ECHR.

Miss Knights further submitted that if, for any reason, the decision was procedurally flawed and/or unlawful, it should be quashed and the application remitted to the Secretary of State for further decision. In that context, she submitted that s31(2A) Senior Courts Act 1981, which requires the High Court to refuse to grant relief "if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" does not apply to a review under s2D of the 1997 Act by SIAC.

Grounds 1 and 2

9. Grounds 1 and 2, although legally distinct, contain common elements, of which the most important is the claimed need to provide information to an individual before and during the application process. Two categories of information are in issue: first, that which the individual must be told so as to be able to conduct himself in a manner which will not cause a naturalisation application made by him to be rejected on good character grounds; secondly, sufficient detail of the grounds upon which the Secretary of State is minded to refuse naturalisation before the decision to do so is made.

10. For the purposes of this case and the great majority of other cases in which an alleged involvement in terrorist activity is in issue, the first claimed requirement is satisfied. Since 19 February 2001, when the principal provisions of the Terrorism Act 2000 came into force, no-one can have been in any doubt about what the criminal law prohibited. Section 1(1) and (2) set out a comprehensive definition of terrorism. The principal criminal offences were spelt out in sections 11 – 13, 15 – 18 and 54 – 58. Since that date, anyone contemplating applying for naturalisation must have realised that committing any such criminal offence would be incompatible with even the most generous understanding of the requirement of good character. Before then, the position was only moderately less clear. Terrorism was defined by s20(1) of the Prevention of Terrorism (Temporary Provisions) Act 1989 as "the use of violence for political ends".

11. Miss Knights submitted that there might be cases in which an individual, exercising basic constitutional rights, such as freedom of expression and of religion might not know that, in the opinion of the Secretary of State, he might be contravening the law; and that, in one respect – association with individuals or groups involved in terrorist activity – his activities would not necessarily involve a breach of the law. If and when these issues arise on the facts of a case, they may need to be addressed. They do not arise here.

12. When he completed the application form, MB ticked the box to answer "no" to the question posed in paragraph 3.10,

> "Have you ever been involved in, supported or encouraged terrorist activities in any country? Have you ever been a

> member of, or given support to an organisation which has been concerned in terrorism?"

The note to paragraph 3.10 referred MB to guidance given to applicants in form AN. It defines terrorist activities by reference to the same words as are set out in s1(1) and (2) of the 2000 Act. Sections 2.1b and 6 of Annex D to Chapter 18 of the Nationality Instructions, which were published when MB made his application, directed that caseworkers should not normally consider applicants to be of good character if,

> "There is information to suggest…
>
> (b) they have been involved in or associated with war crimes against humanity or genocide, or other actions that are considered not to be conducive to the public good (see sections 5 and 6)."

Section 6 contains only the head note "terrorism". The text is "RESTRICTED – NOT AVAILABLE FOR DISCLOSURE".

13. This publicly available material had the effect of making it clear to MB that one of the Secretary of State's subjects of concern, upon which he was invited to make such submissions as he could, was participation in terrorist activity. MB cannot have been in any doubt that, if he had been involved in such activity, he was required to disclose it, so as to permit the Secretary of State to judge whether or not he satisfied the good character requirement.

14. Miss Knights relies on a specific feature of this case to establish that those general statements were not sufficient to discharge the duty of the Secretary of State in relation to MB's application. In the course of the SIAC proceedings, two disclosures were made during and at the end of the Rule 38 process:

> "During a police search of premises connected with Sofiane Kebiline following his arrest in May 1997 a GIA 'Certificate of Allegiance' was found in MB's name" and "MB was considered to be a member of the GIA".

15. This prompted a detailed explanation by MB in his second witness statement dated 28 June 2016 of his knowledge of and dealings with the three men arrested after the search of Sofiane Kebiline's premises, of his (legitimate) participation in the activities of the FIS and of his denial of membership of, or any involvement in, the GIA. In his report, Professor Joffé has provided well-informed and well-reasoned grounds to show that MB's account is not implausible. Miss Knights submits that if this information had been known to the Secretary of State before she made her decision, it might have been different. Accordingly, she submits that the decision-making process was flawed and unfair, on traditional *Wednesbury* grounds: the Secretary of State failed to take into account a material consideration – that the assessment that MB was a member of the GIA was open to serious question. Accordingly, on the facts, the decision should be quashed and retaken.

16. We accept that in some circumstances, the disclosure of material or a summary of material by the Secretary of State during or at the conclusion of the Rule 38 process can demonstrate that she has not fulfilled her duty to identify the subject of her concern in such terms as to enable an applicant to make submissions about it. *ZG and SA v SSHD* SN/23 and 24/2015 20 April 2016 is an example of such a case. But it does not follow that, merely because the Secretary of State has disclosed further material or the summary of material during or at the end of the Rule 38 process, it must follow that she has not discharged her earlier duty. The two situations are not necessarily, or even

often, the same: if the public interest permits it, the Secretary of State must disclose the subject of her concern etc. before making a decision about naturalisation; under Rule 38 she is exercising the right to disclose closed material or a summary of it deployed by her in SIAC proceedings, rather than elect not to rely on it under Rule 38(9). The decision to disclose may not shed light on the fulfilment of the Secretary of State's prior duty. On the facts of this case, we are satisfied that it does not. The reasons for that decision are, and can only be, set out in the closed judgment.

17. For the reasons given above and in the closed judgment, we are satisfied that the Secretary of State did give adequate opportunity to MB to address the subject of her concern; and that, for proper reason, neither she nor we can say more about it than that.

18. We conclude this part of the open judgment with three observations:

(i) The GIA was not proscribed until 28 February 2001, because the 1989 Act did not permit the proscription of organisations which exclusively made use of violence for political ends abroad. Nevertheless, as Professor Joffé explains, the GIA was unquestionably a terrorist organisation: between 1992 and 1998 it conducted a campaign involving repeated and widespread killings, both of state officials and of civilians in Algeria. No-one belonging to or lending active support to it could have been under any illusion about its activities or the fact that they amounted to terrorism. This issue is academic, because MB denies that he ever belonged to or supported the GIA.

(ii) Anyone who has, while in the United Kingdom, engaged in terrorism-related activities will be faced with an uncomfortable dilemma if and when applying for naturalisation: the application form requires him to disclose details of activities which amount to a serious criminal offence. No amnesty is offered, so that he will do so at risk of prosecution. If he does not do so, he risks prosecution under s46(1) of the British Nationality Act 1981 on the basis that he has knowingly provided incomplete information, as the declaration in section 6 of the form, which he is required to sign, reminds him. The blunt reality is that an individual in that situation cannot hope to achieve naturalisation unless the Secretary of State and those advising her are ignorant of his activities or he has, by means other than accurate completion of the application form, already disclosed them to her advisers.

(iii) We did consider in the closed session whether a gist of the guidance in section 6 of Appendix D other than in association cases (of which a summary has already been disclosed) could be made public without damage to the public interest. Mr Mitchell, on behalf of the Secretary of State, stated that consideration to doing so was going to be given by the Secretary of State. Because she has not had the opportunity of taking considered advice upon the question and because we can see no inconsistency between the public guidance referred to above and the restricted directions to caseworkers in section 6 of Appendix D, (such as that in issue in *R (Lumba) v SSHD* [2012] 1 AC 245) we have concluded that it is not necessary for the just disposal of this case to await that consideration.

Ground 3

19. This ground can be dealt with shortly. For the reasons explained in *JJA v SSHD* SN/40/2015 28 October 2016 in paragraph 8, the Secretary of State was not obliged to go beyond the laconic statement in her decision letter.

Ground 4

20. For the reasons set out in the closed judgment, we are satisfied that the decision of the Secretary of State to refuse naturalisation was not flawed because she took into account considerations which she should not have taken into account or because she failed to take into account material considerations which she should have.

Ground 5

21. The procedural requirements of Article 8 add nothing material to those required by domestic public law, as Miss Knights acknowledged.

Section 31(2A) of the Senior Courts Act 1981

22. In previous cases in which this issue has been raised, SIAC has declined to answer it, on the basis that it is academic. We do intend to answer it, for two reasons,

    (i) because we believe the law is clear.

    (ii) to demonstrate why the outcome would have been no different even if we had reached a different view about the materiality of the Rule 38 disclosures.

23. Section 31(2A) provides,

> "The High Court –
>
> (a) must refuse to grant relief on an application for judicial review….
>
> if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

Paragraph 6 of Schedule 2 to the Criminal Justice and Courts Act 2015 (Commencement No. 1, Saving and Transitional Provisions) Order 2015 SI 2015 No. 778 provides that this provision does not apply,

> "to an application for judicial review where the claim form was filed before 13 April 2015."

24. MB did file a claim form in the High Court, challenging the Secretary of State's decision to refuse naturalisation on 9 July 2010. His claim was informally stayed behind the lead case of AHK. It has never been determined. The application which we have determined is that made on 15 September 2015 in form SIAC 1, consequent upon the Secretary of State's certification of the naturalisation decision, notified on 1 September 2015. For that reason, the saving in paragraph 6 of Schedule 2 to the Commencement Order does not apply.

25. Miss Knights submits that SIAC is not the High Court. Her submission is obviously correct; but it does not follow that s31(2A) has no application to applications of this kind determined by SIAC. SIAC is obliged by s2D(3) of the SIAC Act 1997 to,

> "apply the principles which would be applied in judicial review proceedings."

S31(2A) sets out a principle which the High Court must apply in judicial review proceedings, not just a practice which it may or should follow. When it appears to the High Court to be highly likely that the outcome for an applicant would not have been substantially different it must refuse to grant relief. Parliament is free to establish or alter rules of principle to be applied by the High Court in judicial review proceedings. Now that it has done so, the requirement in s31(2A) is a principle which must be applied by the High Court in judicial review proceedings. SIAC is required by s2D(3) of the SIAC Act 1997 to apply the same principle.

26. Applying it to facts of this case, the outcome for MB would not have been substantially different even if the Secretary of State should have taken into account his denial of membership of the GIA and the evidence which he has submitted to support that denial.

Conclusion

27. For the reasons given above and in the closed judgment, this application is dismissed.