SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No. SN/43/2015
Dates of hearing: 28th and 29th November 2016
Date of Judgment: 20th January 2017

BEFORE:

THE HONOURABLE SIR JOHN GRIFFITH WILLIAMS
UPPER TRIBUNAL JUDGE COKER
MR. STEPHEN PARKER

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KB

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR. E GRIEVES (instructed by Fountain Solicitors) appeared on behalf of the Applicant.

MR. S. GRAY (instructed by the Government Legal Department) appeared on behalf of the Respondent.

MR. S. CRAGG QC and MR. T. FORSTER (instructed by the Special Advocates Support Office) appeared as Special Advocates

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JUDGMENT

SIR JOHN GRIFFITHS WILLIAMS:

Introduction

1. KB was born on 12th April 1972. He is a national of Algeria. He arrived in the United Kingdom in August 2001. His claim for asylum made on 19th December 2001 was refused. On 22nd July 2002, he married a Lithuanian national and, when Lithuania joined the European Union, he applied for and was granted a EU Residency Card for five years. In October 2010, he was granted a permanent residence card as a family member of an EEA National.

2. On 20th December 2011, he applied to obtain British citizenship by way of naturalisation under s.6 of the British Nationality Act 1981 ("the Act") which provides:

> "(i) If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this sub-section, he may, if he thinks fit, grant him a certificate of naturalisation as such a citizen.
>
> (ii) If, on an application for naturalisation as a British citizen made by a person of full age and capacity who on the date of the application is married to a British citizen or is a civil partner of a British citizen, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation under this sub-section, he may, if he thinks fit, grant him certificate of naturalisation as such a citizen".

3. Schedule 1 to the Act, as amended, provides that the requirements for naturalisation as a British citizen under s.6(1) include that the applicant is of "good character".

4. By letter dated 16th July 2013, the decision of the Secretary of State for the Home Department ["SSHD"] to refuse the application was communicated to the applicant. The reasons given were:

> "The grant of naturalisation is at the discretion of the Home Secretary and is subject to a number of statutory requirements being met; one such requirement is the applicant be of good character. Whilst good character is not defined in the 1981 British Nationality Act 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 client's application for citizenship on the grounds that they do not meet the requirement to be of good character. It would be contrary to the public interest to give reasons in this case."

5. KB issued a claim for Judicial Review in the Administrative Court, but following the decision in *AHK & Others the Secretary of State for the Home Department* [2015] EWHC 681 (Admin.), the proceedings were stayed. On 1st September 2015, the

Home Office wrote to those representing KB to notify them, pursuant to the provisions of s.2D of the Justice and Security Act 2013, that the SSHD had certified the naturalisation decision with the consequence that KB may only apply to SIAC ("the Commission") to set aside the decision communicated by the letter of 16th July 2013.

6. On 14th September 2015, KB applied to the Commission to set aside that decision. The grounds of review included:

> "The respondent has, or may have, relied upon an unpublished policy concerning 'terrorism'."

7. Following the service of the material on which the SSHD relies in these proceedings, together with the material disclosure pursuant to the duty of candour, a Rule 38 hearing took place on 27th July 2016. The Commission made no order that any matter disclosed in CLOSED be disclosed in OPEN.

8. On 13th April 2016, judgment was handed down in *ARM v. Secretary of State for the Home Department* (SN/22/2015). In that judgment, the Commission cited previously unpublished instructions to caseworkers, the details of which will be referred to below (see paragraphs 24,25 & 26 *post*).

9. On "16th September 2016, those acting for KB asked the SSHD by email"

> "*was any part of the restricted sections in the Instructions to Caseworkers applied to the decision under challenge, which has since*

been revealed during legal proceedings in SIAC in ARM v. Secretary of State for the Home Department …".

10. On 26th September 2106, those representing the SSHD responded as follows:

"*The Home Secretary has refused your client's application for citizenship on the grounds that they do not meet the requirement to be of good character. It will be contrary to the public interest to give reasons in this case".*

There has been no subsequent disclosure.

11. In the light of that response, the applicant's replacement grounds for review are:

"(a) it is argued that the SSHD acted unlawfully by failing to provide the appellant (sic) certain parts of the CLOSED guidance to caseworkers, specifically in relation to association with individuals or groups involved in extremist/terrorist (or related) activities; and

(b) the appellant (sic) reserves his position as to whether or not SIAC has correctly identified the OPEN/CLOSED divide in this case in its r.38 hearing."

12. The second of these replacement grounds was, effectively, abandoned by Mr. Grieves, unsurprisingly, as the Special Advocates had not appealed the Rule 38 ruling. The issue in OPEN is simply stated:

"Did the Secretary of State err, prior to making the decision, and does she continue to err, in failing to publish those parts of the restricted policy which were revealed in *ARM*?"

13. The SSHD's position is also simply stated: it is submitted there was no procedural unfairness in relation to the process. The application form itself, together with the terms of Form AN and Guide AN, gave fair notice of the matters which may be treated as adverse to his application and for the need for candour in respect of the same.

The Application

14. Section 3 of the application form relates to the Good Character Requirement. In bold print it is stated:

"**In this section you need to give information which will help the Home Secretary to decide whether he can be satisfied that you are of good character. Checks will be made with the police and possibly other Government Departments, the Security Service and other agencies.**"

15. The following questions are material:

"3.9 In times of peace or war, have you ever been involved in or suspected of involvement in, war crimes, crimes against humanity or genocide?

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?

3.11 Have you ever, by any means or medium, expressed views that justify or glorify terrorist violence or that may encourage others to terrorist acts or other serious criminal acts?

3.12 Have you engaged in any other activities which might indicate that you may not be considered a person of good character?"

16. For the purposes of answering those questions, the application form makes clear that the applicant should refer to Booklet AN, which provides guidance on actions which may constitute war crimes, crimes against humanity, genocide or terrorist activities. The introduction to Booklet AN provides:

"This Guide summarises the legal requirements for applying for naturalisation. Naturalisation is not an entitlement. It is a matter of law as set out in the British Nationality Act 1981. The Home Secretary may exercise his discretion to naturalise you only if you satisfy a number of statutory requirements. He may disregard the extent to which you are unable to fully satisfy certain requirements but he cannot do this in all cases. The way that he exercises his discretion is described throughout this Booklet.

This is further described in the Nationality Staff Instructions which may be accessed on the UK Border Agency website at WWW.UKBA.HomeOffice.Gov.UK (emphasis added)."

17. Booklet AN provides definitions of "terrorist activities" and "organisations concerned in terrorism", the details of which are not material for the purposes of this judgment. The Guide AN, which is expressed to be read in conjunction with Booklet AN, gives guidance as to questions 3.9-3.11 above. That guidance reads …

> "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 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.
>
> For the purposes of answering questions 3.9 to 3.11, the Booklet AN provides guidance on actions which may constitute genocide, crimes against humanity and war crimes.
>
> This guidance is not exhaustive. Before you answer these questions you should consider the full definition of war crimes, crimes against humanity and genocide which can be found in Schedule 8 of the international Criminal Court Act 2001 …"

18. Question 3.12 in the application form is in these terms:

> "Have you engaged in any other activities which might indicate that you may not be considered a person of good character?"

19. The guidance provides

> "you must say whether you have been involved in anything that 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."

20. The applicant answered each of those specified questions in the negative. He completed a declaration in these terms:

> "6.1 I, KB, declare that, to the best of my knowledge and belief, the information given in this application is correct. I know of no reason why I should not be granted British citizenship. I promise to inform the Home Secretary in writing of any change in circumstances that may affect the accuracy of the information given whilst this application is being considered by the Home Office. I understand that information given by me will be treated in confidence and may be submitted for checking against records held by other Government Departments, the Security Service and other agencies, local authorities and the police, where it is necessary for immigration or nationality purposes or to enable those bodies to carry out their functions …
>
> 6.2. I confirm that I have read and understood the Guide AN and the Booklet AN."

21. Those representing KB wrote to the Home Office on 24th September 2013 by way of a Judicial Review pre-action protocol letter. The Home Office replied by letter dated 9th October 2013, the material parts of which are as follows:

"We are treating your letter of 24th September as a letter before claim, produced in accordance with the procedures that are set out in the pre-action protocol for judicial review …

Your client's application for citizenship has been refused on the basis the Secretary of State did not consider that your client could meet the statutory requirement to be of good character. It was also confirmed that it would be contrary to the public interest to give reasons in this case …

The Nationality Instructions which are the guidance used by Home Office staff when deciding applications for citizenship state at Chapter 18 Annex D para.1.3 -

> *The decision maker will not consider a person to be of good character if there is information to suggest*
>
> > (a) they have not respected and/or are not prepared to abide by the law, for example, they have been convicted of a crime or there are reasonable grounds to suspect (i.e. it is more likely or not) that they have been involved in crime … or
> >
> > (b) they have been involved in or associated with war crimes, crimes against humanity or genocide, terrorism or other actions that are considered not to be conducive to the public good …

It is in accord with this policy that the Secretary of State has concluded that she cannot be satisfied that your client meets the requirement to be of good character.

The Secretary of State possesses information which causes her not to be satisfied that your client meets the requirement to be of good character. The Secretary of State remains of the view that it would not be in the public interest to provide your client with further reasons in this case. It therefore is the position of the Secretary of State that the correct decision was taken on 16th July, in accord with policy and nationality law, to refuse your client's application for British citizenship."

22. At the date of the applicant's application, parts of the Instructions to Caseworkers were withheld; these included the instructions on Terrorism.

23. On 13th April 2016, judgment in *ARM v. Secretary of State for the Home Department* (SN/22/2015) was handed down. ARM, who had applied for naturalisation under s.6 of the Act, was unable to satisfy the SSHD that he was of "good character", because of his close associations with known Islamist extremists. Following further representations by those acting for ARM, the refusal decision was reviewed and a letter sent in which the SSHD maintained the refusal decision, but gave additional reasons, saying that ARM's close associates included a named individual whose extremist views and practices ARM knew. ARM then provided a partial acceptance of his association with that named individual. In what became a very protracted process, there was some dispute about the approach which caseworkers should take to naturalisation applications based on association by an applicant with extremists. In order to resolve that dispute, the SSHD served a witness statement in which it was

stated that the current CLOSED Home Office Guidance entitled *Chapter 6 Terrorism* has, since September 2009, set out how caseworkers should consider applications where association with individuals or groups is in issue in respect of somebody known to associate, or to have associated, with individuals or groups involved in extremist/terrorist (or related) activities.

24. The witness summarised the procedure by explaining that the Guidance informed caseworkers that they should give careful consideration to any application from somebody known to associate with, or to have associated, with individuals or groups involved in extremist/terrorist (or related) activities. Caseworkers were directed to ask themselves the following questions:

> "● Is there strong evidence to suggest the applicant associated with such individuals whilst unaware of their background and activities? If so, did the applicant cease that association once the background and nature of these individuals came to light?
>
> ● Is there strong evidence to show the applicant associated with such individuals in an attempt to counter or moderate their extremist views?
>
> ● Are there any suggestions that the applicant's association signals their implicit approval of the views and nature of these individuals' extremist activities/background?
>
> ● How long has this association lasted? The longer the association, the more likely that the applicant is aware of/approves of the activities and views.
>
> ● How long ago did such association take place?"

25. The witness explained that caseworkers were informed that that list was not exhaustive and that each application would need to be considered on its own merits. Caseworkers were instructed that an applicant might be able to satisfy the good character requirement if they:

> ● "were associated with an individual or group whilst being unaware of their background, even if their association was recent;
>
> ● ceased such association as soon as they became aware of the background of these individuals;
>
> ● presented strong evidence of choosing such associates with the aim of trying to moderate their views and/or influence over others."

26. The witness stated that caseworkers were also instructed that each case had to be considered individually but that (subject to a possible exception that the association ceased many years ago) they should normally refuse an application:

> "● The applicant has associated for a significant length of time with such individuals; and/or
>
> ● associated whilst being aware of their extremist views; and/or
>
> ● provided little or no evidence to suggest that they were seeking to provide a moderating influence."

27. In *AFA v. Secretary of State for the Home Department* (SN/56/2015), judgment handed down on 24th November 2016, the SSHD had given no reason for her refusal of the applicant's naturalisation but, following the r.38 process, she disclosed an association with a named individual, who was involved in Islamist extremist activity, and the relevant guidance in the same terms as those given in *ARM*.

28. On behalf of the applicant, Mr. Grieves submitted that, without an answer to the question in the email of 16th September 2016 (see paragraph 9 above), the applicant proceeds on the basis that the failure to publish the restricted Staff Instruction in the present case was material. He submitted that there was no justification for restricting the publication of the Staff Instruction at the time of the applicant's application and/or thereafter and that the SSHD simply failed to get the OPEN/CLOSED divide right concerning those restricted instructions. He submitted that, absent a genuine public interest justification, it is difficult to conceive of any argument as to why the restricted Instructions ought not to have been disclosed at the time of the applicant's application or thereafter and that there can be no justification whatsoever for continued failure to publish the restricted Instructions now that they have been revealed in the OPEN judgments in *ARM v. Secretary of State for the Home Department* and *AFA v. Secretary of State for the Home Department* (above).

29. Mr. Grieves placed reliance on the established principle that the way a discretion is exercised must be made known to those affected by it so they may make informed and meaningful representations to the decision maker before a decision is made: *Regina (Lumba) v Secretary of State for the Home Department* [2001] UKSC 12 at paras.20, 35 and 38 per Lord Dyson JSC; see also *R v. Secretary of State for the Home Department, ex parte Fayed* [1998] 1 WLR 763 at 773G-H per Lord Woolf MR.

30. Mr. Grieves submitted that the Staff Instructions are part of the combined guidance to applicants, which include the application form itself, and the Guide AN and Booklet AN, which specifically direct applicants to the Staff Instructions of the UK Border Agency (see paragraph 16 above). He submitted that the combined guidance is intended to be "the cornerstone or starting point" of the Secretary of State's duty to guide applicants as to what she may consider relevant to the application and so placing applicants on fair notice of what to address in the application form. He submitted the questions 3.9, 3.10 and 3.11 (see above), the Guide AN and the Booklet AN focus an applicant's mind as to what he/she has done and that an applicant reading them without a lawyer may not bring to mind the relevance of any association or associations with others. He submitted that the focus in the application form and the Guide AN and Booklet AN is on what the applicant has done and not on what others have or may have done, whereas the Guide to caseworkers disclosed in paragraph s.31-33 of the judgment in *ARM v. Secretary of State for the Home Department* (above) makes clear that the emphasis is not only on what an applicant has done but also on what associates of that applicant has or may have done.

31. Mr. Grieves submitted the SSHD acted unlawfully by failing to provide the applicant with the CLOSED Guidance to caseworkers and, specifically, those parts of the Guidance relating to associations with individuals or groups involved in extremist/terrorist (or related) activities. He submitted that the refusal of the naturalisation application should be set aside, the unpublished Instructions revealed in *ARM v. Secretary of State for the Home Department* and *AFA v. Secretary of State for the Home Department* (above) published and the application for naturalisation re-made in accordance with the law.

32. On behalf of the SSHD, Mr. Gray submitted that the applicant has been provided with no reason(s) or gist of the reason(s) why his application for naturalisation was refused, save that he has been told that his application was refused on the basis that he did not meet the requirement to be of good character. That is a lawful position: see *AHK & Others v. Secretary of State for the Home Department* [2013] EWHC 1426 (Admin) at para.29 per Ouseley J. It follows that the SSHD can neither confirm nor deny which part of the good character guidance was engaged in the decision-making process in this case. Nonetheless, it is submitted, on behalf of the SSHD, that the applicant was given fair notice in the terms of the Form AN, the Guide AN and the Booklet AN of matters which may be treated as adverse to his application and of the need for candour in respect of the same. Mr. Gray said that the Guide AN made clear that, if the applicant was in any doubt as to whether something he had done might lead the Secretary of State to think he was not of good character, he should disclose it and, if he was in any doubt as to whether something should be mentioned, he should mention it. This guidance was repeated in Booklet AN and the applicant confirmed, when making his application, that he had read and understood both the Guide AN and the Booklet AN. Mr. Gray drew the Commission's attention, in particular, to question 3.12 of the application form which was in the following terms:

> "*Have you engaged in any other activities which might indicate that you may not be considered a person of good character?"*

He submitted that that question when read with the accompanying guidance was wide enough to encompass any association with terrorists or extremists.

33. He submitted it is well established that an applicant for naturalisation seeks a privilege and not a right and that the Act vests the SSHD with considerable discretion:

see *R v. Secretary of State for the Home Department, ex parte Fayed* (above) at p.776A. The burden of proof is on the applicant to satisfy the SSHD that these requirements are met on the balance of probabilities and, if that test is not satisfied, the SSHD must refuse the application: see *Secretary of State for the Home Department v. SK (Sri Lanka)* [2012] EWCA Civ.16 at para.31 per Stanley Burnton LJ. The SSHD is able to set a high standard for the good character requirement: see *R. v. Secretary of State for the Home Department, ex parte Fayed (No. 2*) [2001] IMM.A.R.134 per Nourse LJ at para.41.

34. In determining whether a refusal decision should be set aside, the Commission must apply the principles which would be applied in Judicial Review proceedings. The proper approach of the Commission in statutory reviews was explained by the Commission in *AHK & Others v. Secretary of State for the Home Department Preliminary Issue Judgment* (Appeals SN/2/2014, SN/3/2014 and SN/4/2013) and later approved by the Administrative Court in *Secretary of State for the Home Department v. The Special Immigration Appeals Commission & Others* [2015] EWHC 681 (Admin.).

35. In summary, the Commission does not need to determine for itself whether the facts said to justify a naturalisation decision are, in fact, true; its task is to review the facts and consider whether the findings of fact by the decision maker are reasonable. In the absence of an arbitrary or discriminatory decision, or at the very least some other specific basis in fact, refusal of naturalisation will not engage ECHR rights. The challenge to the decision is open only on the grounds of rationality; a different approach is not required by the ECHR.

36. In relation to disclosure, the SSHD should disclose the underlying material upon which the caseworker actually relied to identify facts or reach the conclusion, but is not

required to disclose all the material which the caseworker could have accessed or which was known about the applicant. This obligation of disclosure is in addition to and must be distinguished from the duty of candour, which is the obligation on the SSHD to disclose any material which might undermine the evidence on which reliance is placed or otherwise assist the case advanced by the applicant. In the Administrative Court, [2015] EWHC 681 (Admin) Sir Brian Leveson P specifically stated at para.38:

> "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 the decision."

37. As to the material which the Commission should consider when conducting its review, Mr Gray submitted it is well established that:

> (i) the material that is relevant is the material which was before the decision maker: see *R (Naik) v. Secretary of State for the Home Department* [2011] EWCA Civ. 1546 at para.63 per Carnworth L.J;
>
> (ii) the time at which the factors governing reasonableness have to be assessed is the time of the making of the decision called into question: see *R (Bancoult*) v. *Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] 1AC 453 at p.511H per Lord Carswell;
>
> (iii) fresh evidence should not ordinarily be admitted in a judicial review and will only be admitted in prescribed circumstances, none of which apply in this

particular case: see *R v. Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584 at 595G-596A per Dunn LJ.

38. On behalf of the SSHD, Mr. Gray's fall-back position is that, even if the decision to refuse naturalisation had been unlawful or procedurally unfair, the Commission should refuse the application if satisfied that the same decision would have been reached if the SSHD had acted lawfully. Mr. Gray relied on

    (i) Section 31(2A) of the Senior Courts Act 1981, inserted by s.84 of the Criminal Justice and Courts Act 2015 which provides that the High Court on a claim for judicial review must refuse 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. This sub-section applies to claims for judicial review filed after 13th April 2015 - the applicant lodged his application for review with the Commission on 14th September 2015;

    (ii)Section 2D (Review of Certain Naturalisation and Citizenship Decisions) of the Special Immigration Appeals Commission Act 1997 as amended which gives the Commission jurisdiction to review a decision which the Secretary of State has certified was made wholly or partly in reliance on information which, in her opinion, should not be made public: (a) in the interests of national security; (b) in the interests of the relationship between the United Kingdom and another country or (c) otherwise in the public interest.

39. Mr. Gray submitted that, since section 2D(3) of the 1997 Act requires the Commission to apply the principles which would be applied in judicial review proceedings, the sub-section is one of the principles which the Commission must apply in this case. This is an argument which has been advanced on behalf of the

SSHD in other cases where refusals of naturalisation applications have been challenged: see *ZG and SA v. Secretary of State for the Home Department* (SN/23/2015 and SN/24/2015), *MNY v. Secretary of State for the Home Department* (SN/53/2015), *AQH v. Secretary of State for the Home Department* (SN/46/2015) and *AFA v. Secretary of State for the Home Department* (SN/56/2015). In *ZG and SA*, the Commission did not find it necessary to resolve the conflict because it was not satisfied that it was highly likely that the outcome would have been substantially different; in *MNY*, the Commission did not find it necessary to decide the point in view of its decision that the application for statutory review failed; in *AQH* the Commission concluded that it, too, did not need to resolve the issue about the application of s.31(2A) of the Senior Courts Act 1981 because judicial review (and therefore statutory review under s.2D of the 1997 Act) is always discretionary and the court would ordinarily refuse the relief sought if it concluded, even though a decision or an action of a public body was unlawful, the same decision or action would have been taken if the public body had acted lawfully; in *AFA*, since the grounds for review had all failed, it was not strictly necessary for the Commission to consider the point, but, like the Commission in the earlier cases, they preferred to leave determination of the point, as to whether s.32(2A) of the Senior Courts Act 1981 applies to cases before the Commission, to a case where it was critical to that decision.

40. Following the writing of this judgment in draft, the Commission handed down its judgment in *MB v. Secretary of State for the Home Department (SN/47/2015)* on 22nd December 2016. It held (paragraph 56) that while the requirement in section 31(2A) is a principle which must be applied in the High Court in judicial review proceedings, SIAC is required by section 2D(3) of the 1997 Act to apply the same principle.

41. On a consideration of the OPEN evidence and material, we are unable to reach a conclusion as to the merits of the OPEN challenge to the refusal of the naturalisation application made on behalf of the SSHD based as it is on speculation but for the reasons set out fully in the CLOSED judgment, we are persuaded that the SSHD acted unlawfully. However, we consider that, as a matter of discretion, the applicant should be refused the relief which he seeks, because it is clear to us that the same decision to refuse his application for naturalisation would have been made had she acted lawfully.

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