SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No. SN/63, 64, 65 and 67/2015
Date of hearing: 2nd 3rd and 4th July 2018
Date of Judgment: 24th October 2018

BEFORE:

THE HONOURABLE MRS JUSTICE ELISABETH LAING
UPPER TRIBUNAL JUDGE KING
SIR A RIDGWAY

- - - - - - - -

LA, MA, RA, SAA

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - -

MS A WESTON QC, and MR A VAUGHAN (instructed by Fernandez Vaz Solicitors) appeared on behalf of the Applicants LA and MA.

MR D LEMER (instructed by Fernandez Vaz Solicitors) appeared on behalf of the Applicant – RA

MR M FORDHAM QC and MR S TAGHAVI (instructed by Article 1 Solicitors) appeared on behalf of the Applicant SAA - written submissions only

MR N SHELDON (instructed by the Government Legal Department) appeared on behalf of the Respondent.

- - - - - - - -

OPEN JUDGMENT

Introduction

1. This is our OPEN judgment in the applications for statutory review of decisions refusing the applications to be naturalised as British Citizens made by LA, MA, RA and SAA. We will refer to them collectively as 'the Appellants'.

2. We have not prepared a CLOSED judgment. The Secretary of State relied on no CLOSED material in this case and there was no CLOSED hearing.

3. LA and MA were represented by Ms Weston QC and Mr Vaughan. RA was represented by Mr Lemer. SAA was not represented at the hearing. On 12 June 2018 his legal representatives sent an email to the Commission. The legal representative was at that stage acting pro bono. SAA's instructions were that he wished to proceed with his appeal but that he did not plan to attend the hearing or to instruct representatives to attend. He wished to rely on his amended grounds of appeal and on his witness statement, and, to the extent that they were not inconsistent with those, on the other appellants' grounds of appeal, skeleton arguments and oral submissions.

4. The Secretary of State was represented by Mr Sheldon.

5. We are grateful to all counsel for their written and oral submissions.

The facts in outline

The Appellants

LA

6. LA was born on 25 May 1955 in Homs, Syria. Her parents were born in Syria and have dual French/Syrian nationality. On 25 May 1973, she married Refaat Al-Assad in Damascus. At the date of her application for naturalisation, he lived in Paris. He was a Grenadian citizen.

7. She has dual Syrian and Grenadian nationality. She obtained the latter in 1998. She has not been to Syria since 1998. She is one of Refaat Al-Assad's four polygamous wives. She was given indefinite leave to remain ('ILR') on 9 August 2012.

8. LA applied for naturalisation under cover of a letter dated 12 September 2013. She used her maiden name in the application form for naturalisation. According to her application, she first arrived in the United Kingdom on 7 December 2006. She had

entry clearance as an investor. She declared, in section 6 of the form, beneath a warning that to give false information on the form knowingly or recklessly was an offence, that the information she had given in the form was, to the best of her knowledge and belief, correct. She acknowledged that she would be liable for prosecution if she had knowingly or recklessly provided false or incomplete information.

9. The form asked her to give her address for the past five years. She said that she had lived at her current address since 11 April 2007 (answer 1.17). On her application form she said that she intended to have her main home in the United Kingdom if she were naturalised. She gave her occupation as investor, 'investing in bonds, hedge funds etc'. After section 5 of the form there is a blank page headed 'Further information not covered in other sections'. LA left it blank.

10. At the date when LA applied for naturalisation, the Nationality Instructions ('the NI') did not provide that the Secretary of State might refuse an application for naturalisation on public interest grounds. The NI were amended on 25 March 2015, during the period between the date when LA applied for naturalisation and the date of the decision on her application, so as to make it clear that a certificate of naturalisation could be refused on grounds relating to the public interest. We say more about the terms of the NI below.

11. On 2 October 2015, the Secretary of State replied to an email from LA and MA's MP which asked about her application for naturalisation. The letter said that checks were still being done. On 20 November and 21 December 2015, LA's solicitors wrote to the Secretary of State about her application. In the former letter, they referred to correspondence and calls inquiring about the progress of the application. They asked when a decision was likely to be made, and for the reasons for the delay. They invited the Secretary of State to contact them if she had any questions. On 21 January 2016, the Home Office replied. In short, the Home Office was carrying out checks about the good character requirement, and they were not complete.

12. LA and MA sent a pre-action protocol letter to the Secretary of State dated 9 March 2016. At paragraph 28(h) their solicitors said that the public law duty of fairness required the Secretary of State to give them at least the gist of any concerns which she might have about their applications and to give them an opportunity to address those.

LA and MA then applied for judicial review, challenging the delay in making a decision on their cases. They repeated the point made at paragraph 28(h) of the pre-action protocol letter in their grounds for judicial review. Permission to apply for judicial review was granted on 5 October 2016. On 24 November 2016, the Secretary of State signed a consent order. That order recited the Secretary of State's 'agreement' to make a decision within six weeks of the date on which the order was sealed. On 3 January 2017, the Secretary of State refused LA's application. We will refer to the decision in each of the four cases as 'the decision', and to those decisions collectively as 'the decisions'.

13. The decision referred to the relevant statutory provisions. It then referred to chapter 18 (paragraph 18.1.4) of the NI, which provides that the Secretary of State may refuse to grant a certificate of naturalisation 'where the applicant meets the statutory requirements, but it would not be in the public interest to grant citizenship'. The decision went on,

> *'You are the wife of Refaat Al-Assad, the uncle of President Bashar Al-Assad of Syria. Although widely reported as estranged from Bashar Al-Assad, Refaat is the brother of Hafez Al-Assad (the late former president of Syria). Refaat was a well-known and prominent member of his brother's regime during the 1970s and 1980s – a regime that is widely held to have committed crimes against humanity.*
>
> *Although it is not possible to assess the exact nature of your current relationship with Bashar Al-Assad and the Syrian regime, it is noted that the regime has become inextricably linked over the last few decades with the extended Assad family.*
>
> *The UK plays a prominent and leading role in Syria. It is a key member of the Syria Support Group and leads at the UN Security Council and Human Rights Council to secure resolutions that condemn regime activity against civilians.*
>
> *In light of the above the Home Secretary has determined that to grant you a certificate of naturalisation would have an adverse impact on the UK's international relations and therefore it would not be in the public interest to grant you British Citizenship.'*

14. The letter said that the Secretary of State had certified the decision under section 2D of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act'). It was open to LA to apply to the Special Immigration Appeals Commission ('the Commission') to set the decision aside.

MA

15. MA was born on 22 August 1996 in France. He is a son of Refaat Al-Assad, and thus a nephew of Hafez Al-Assad and a first cousin of Bashar Al-Assad. He has dual Syrian and Grenadian nationality. He obtained the latter in 1998. He has not been to Syria since 1998. He has no memories of Syria.

16. According to the application form in his case, his father, Refaat Al-Assad, was born in Syria and lives in Paris.

17. His mother, who signed the form, gave the date of his first arrival in the United Kingdom as 10 December 2006. She declared, in section 6 of the form, beneath a warning that to give false information on the form knowingly or recklessly was an offence, that the information he had given in the form was, to the best of her knowledge and belief, correct and acknowledged that she would be liable for prosecution if she had knowingly or recklessly provided false or incomplete information.

18. MA was given ILR on 9 August 2012.

19. LA applied on his behalf, under cover of a letter dated 12 September 2013, for him to be registered as a British Citizen.

20. His mother said on his application form (question 2.4) that he would live in the United Kingdom if the application were granted. At the date of the application he was a student at Portland Place School. Despite this, a tax office was dealing with his tax affairs (answer 4.4).

21. Both his parents signified their consent to his application (answers 6.1 and 6.2).

22. The page after section 5 was left blank. It follows that MA did not suggest to the Secretary of State that there were any factors relating to his best interests which were material to his application for registration, or that a refusal of the application would have any particularly adverse effect on him.

23. Nor did he suggest that he had spent most of his life in the United Kingdom. It was apparent from the application form that, at the date of the application, he had not done so. He was just over 17 years old and had spent about six years and nine months in the United Kingdom. Nor, from the information on the form, was it apparent that, by the

date of the decision, he had done so. He was about 21 years and four months old and had spent, giving him the benefit of any doubt, just under ten years and a month in the United Kingdom. While the Secretary of State did not know it when she made the decision, this point is even clearer from his witness statement. Although offered places at universities in England (by Bristol and Queen Mary Universities) he had decided to study comparative law at a university in Spain (between 2014 and June 2018).

24. In his witness statement he says that he first visited the United Kingdom 'in about August 2006' and that he started school in England in September 2006 (paragraph 8). He does not explain why the application form gives his date of arrival in the United Kingdom as 10 December 2006. We were told in the hearing that this date was a 'mistake', but there is no evidence to this effect. There is no witness statement from LA, who filled in the application form, and no evidence from MA, which explains the inconsistency between the date in his witness statement and the date on the form. We consider, in any event, that it is unlikely that the dates of arrival in both LA's and MA's forms are incorrect, given the declarations that LA signed on both forms.

25. On 13 March 2015, the Secretary of State wrote to MA saying that his application had been approved and asking for the fee for the citizenship ceremony, as MA was, by then, 18. The cheque was cleared later in March 2015. On 6 April 2015, Chapter 9 of the NI was amended to reflect the changes made to Chapter 18 to which we have already referred.

26. In late 2015, MA's solicitors wrote to the Secretary of State about the delay in making a decision (in line with the inquiries they had made about LA's application: see paragraph 11, above). In a letter of 20 November 2015, they referred to the letter dated 13 March 2015 (see the previous paragraph). Since then, nothing had happened. They wanted to know the reason for the delay, and asked the Home Office to contact them if the Secretary of State had any questions. On 21 January 2016, the Secretary of State replied in terms identical to those of the letter of that date which the Secretary of State sent to LA. Eventually, on 5 April 2016, in response to a pre-action protocol letter, the Secretary of State said that the letter of 13 March 2015 was 'an administrative error'.

27. On 5 January 2017, the Secretary of State wrote to MA. The letter said that the registration of minors was at the Secretary of State's discretion. 'Normally, minors will not be registered if neither parent is a British Citizen and that their future does not clearly lie in the United Kingdom [sic]. The application has nevertheless been carefully considered to see whether there were sufficient grounds for treating it exceptionally. However sufficient grounds could not be found to exercise discretion in this case'.

28. MA was also told that the Secretary of State would be minded to exercise her discretion to refuse any further application because he was the son of Refaat Al-Assad. The letter continued in similar terms to the letter sent to MA's mother (see above).

RA

29. RA's solicitors applied for naturalisation on his behalf under cover of a letter dated 1 July 2013. They addressed two issues in that letter. The first was RA's absences from the United Kingdom. He had been absent for 406 days in the past five years and 131 days in the previous year. He was said to be 'passionately interested in developments in Syria'. He was founder and director of the Organisation for Democracy and Freedom ('the ODF') in Syria and a regular speaker on matters relating to human rights. He was also the chairman of the IMAN foundation 'which promotes dialogue between different cultures and also involved in cultural and inter-faith exchanges between them'. Events on behalf of this organisation had led him to spend time outside the UK. The second was that they disclosed an incident in a nightclub in France in 1993. RA was questioned by the French police, but not charged in relation to it. It led him, on the advice of his father, who was then vice-president of Syria, 'to leave France for a while'. He was put by France on a list of non-admissible persons on the Schengen information system. He made a claim against the French government and won damages, but his name is still on the list. A 'final point to note' was that RA's wife and child were both British Citizens.

30. RA was born on 4 June 1975 in Damascus. His father is Refaat Al-Assad and his mother is LA. He first arrived in the United Kingdom on 21 August 2006.

31. He lived at the address from 15 September 2006 until November 2009. He is a Grenadian citizen. He was given ILR on 13 June 2011. He was employed as a

marketing director, manager and head of public relations by an Arab news network based in London. On the page after page 5, he said he was a director of the ODF and Chairman of the Iman Foundation.

32. In answer to questions in section 1 of the form, he disclosed that his wife had been born in Damascus, Syria on 17 March 1982. They married in Marbella on 22 May 2006. She had been naturalised as a British citizen on 22 April 2013. RA's application was submitted just over two months after that.

33. RA's application was refused by a letter dated 14 February 2017, in similar terms, mutatis mutandis, to LA's refusal letter.

SAA

34. The solicitors who were then acting for SAA submitted an application for naturalisation on his behalf under cover of a letter dated 22 January 2015.

35. SAA was born on 29 April 1975 in Damascus. His father was Refaat Al-Assad and his mother was Raja Al-Assad (née Barakat). He says that he left Syria when he was nine. He lived after that in France and in Spain. Since leaving Syria, he has visited Syria once, in 2014. He first entered the United Kingdom on 20 January 2010 and started living here permanently in 2011. He married his British wife in Grenada on 6 June 2011. He has three children who were all born in the United Kingdom and (because their mother is a British citizen,) are all British citizens. He was given ILR on 6 January 2014.

36. At the date of his application, both his parents were Grenadian citizens. He is a dual Grenadian and Syrian citizen. He was employed as the managing director of Biditis Limited, a business operating from an apparently adjacent unit to the unit at which RA's employer was based. The page after section 5 is missing from our bundle of documents. His case (witness statement, paragraph 4) is that he has no business or financial dealings with the Syrian government and is not in contact with the Syrian government. In paragraph 7 of his witness statement he emphasises the similarity between ILR and citizenship, asserting that any damage to foreign relations would have been caused by a grant of ILR to him, just as much as by a grant of citizenship. He specifically denies ever defending the regime of Bashar Al-Assad, let alone having done so 'repeatedly'. He has asked, instead, for an end to violence and for inclusive

negotiations, which would involve Bashar Al-Assad, as, pragmatically, it is clear that he will hang on to power if he can, and it is necessary to negotiate with him to bring suffering to an end. He says that the FCO has misinterpreted a speech he gave (witness statement, paragraph 15). He points out that the French authorities have granted citizenship to one of his brothers and to one of his half-brothers, with no visible effect on foreign relations.

37. SAA's application was refused by a letter dated 14 February 2017, in terms similar to those used in RA's refusal letter, mutatis mutandis.

The decision-making process

38. Mr Edwards explains in his witness statement dated 6 July 2017 that, after the Home Office received the applications, it asked the Foreign and Commonwealth Office ('the FCO') for advice. It asked for advice in relation to LA and MA on 25 September 2015, in relation to SAA on 27 October 2015, and in relation to all four applications on 26 May 2016. He describes the sequence of emails in which advice was given and received in paragraphs 7-9 of his witness statement. Those emails have been disclosed, with some redactions, and were in the bundle of documents for the hearing.

39. The FCO's final advice was given on 16 September 2016. It was disclosed to the Appellants, somewhat redacted, on 12 May 2017, before the rule 38 process began. It is headed 'Information to inform decision on whether to grant British nationality to relatives of Bashar Al-Assad'. It said that the FCO recommended that the applications be refused 'due to the applicants' links with the Assad regime (responsible for the majority of the 400,000 deaths in the Syrian conflict up to this point). The Assad family and regime are inextricably intertwined – both in public perceptions and in their business and political dealings. To accept the applications would harm UK interests. It would undermine our policy of seeking to put pressure on the Assad regime, and would undermine our influence and standing with opposition groups – who are crucial in delivering a lasting settlement in Syria'.

40. Under the heading, 'Applicants' current relationships with either Refaat or the regime of Bashar Al-Assad' the advice gave background information about each of the four Appellants. It said that although Refaat was later estranged from Hafez and from Bashar Al-Assad 'as a result of his own ambitions for power', he was a prominent member of the regime of his brother Hafez in the 1970s and 1980s (ie during part of

the period of his marriages to LA and to Raja Al-Assad). He is 'widely held to have committed crimes against humanity' in several (listed) Syrian cities. 'In particular, he has often been termed "the butcher of Hama" for his role in the massacre of 40,000 Syrians in Hama in 1982 in response to an uprising against the regime.' No member of the Assad regime had been prosecuted for human rights abuses, which is unsurprising, because the regime controls the judicial system in Syria.

41. None of the Appellants was listed under EU or US sanctions. EU sanctions were introduced in March 2011 after violence by the Assad regime against civilians. 'Individuals can be listed by virtue of their close family association and support for Bashar Al-Assad'. The FCO believed that there was not enough evidence to support their designation under EU sanctions.

42. The advice said that LA was believed to be Refaat Al-Assad's fourth polygamous wife.

43. SAA was 'often quoted in the media defending his father'. He had repeatedly defended his cousin's government and called on the international community to abandon efforts against the Syrian regime. Last year Refaat Al-Assad applied for a work permit to be a senior political consultant in Biditis Limited, which lists SAA as a director. The application was later withdrawn. SAA works with his father. SAA 'and members of his family have remained politically and commercially active in Syria and around the world, including through business dealings with the current Assad regime.' Similar observations were made about MA and about RA in the succeeding paragraphs of the advice.

44. The advice noted that as a Grenadian citizen, RA did not need a UK visa when entering as a visitor for a period of six months or less.

45. The advice said that the FCO did not have enough information to assess 'the exact nature of the applicants' current relationships with Bashar Al-Assad and the regime'. It was, however, important to understand that 'the extended Assad family and the regime have become inextricably intertwined over a period of decades since Bashar's father took power'. Examples are then given (although in later correspondence, the Secretary of State accepted that these examples did not apply to the Appellants). The advice said that the EU sanctions regulation 'stipulates that family members can be presumed to be supporting the regime'. Throughout the conflict the UK had taken a

strong stance on sanctions against the Assad regime and had been at the forefront of EU sanctions against several prominent people and companies linked to the regime.

46. The advice said that 'We are keen to avoid sending signals to the regime that we are seeking to normalise relations by granting UK citizenship to members of the Assad clan, especially when most of these individuals are free to visit Syria or reside elsewhere as they appear to hold dual nationality. Relations of Refaat Al-Assad continued to visit, or to live in, Syria and Refaat owns a property in Damascus. One house in particular was in constant use by Refaat's children during the first year of the uprising'. The FCO did not know if those included the Appellants.

47. The FCO's assessment of the 'potential negative impact on the UK' began by saying that 'based on considerations of international relations, we recommend that the subjects should not be granted British citizenship. The Foreign Secretary agrees'. The advice summarised the UK's response to the Syrian crisis. A key pillar of the policy had been the severance of diplomatic relations with the Assad regime 'due to the atrocities for which it is responsible'. Instead, the FCO has tried to put pressure on the Assad regime and worked with the moderate opposition 'to help them build a credible alternative vision' for political transition in Syria. A launch in London on 7 September was mentioned. 'A decision to grant UK citizenship to Bashar Al-Assad's relatives would undermine this policy. It would be interpreted as a softening stance towards the regime and of faltering commitment to the opposition'. It would attract 'considerable negative media, parliamentary, NGO, and international criticism, including, potentially, by contrasting [that decision] with HMG's perceived approach to Syrian refugees more widely'. It would undermine the FCO's 'forward leaning position in the EU on sanctions against those linked to the Assad regime. Overall, therefore, granting citizenship could have significant negative implications for our Syria policy at a delicate time – when we are working hard to keep the opposition committed to the process and to help to secure a settlement'.

48. Under the heading, 'What would it prevent us delivering?' the answer was 'It would undermine our efforts to secure a lasting political settlement in Syria, both by signalling a reduction in pressure on Assad and a reduction in commitment to the opposition's vision of political transition'. Under the heading, 'Who would it damage our relationship with?' the advice said that a grant of citizenship 'to any member of

the Assad family' would be seen publicly, and particularly by the Syrian opposition, whom the FCO supported, as undermining 'our strong stance against the Assad regime'. The opposition would be likely to criticise any decision to grant citizenship to 'members of the Assad clan, and it would undermine their trust in the UK'. If they lost their trust in the UK, those opposed to 'the regime/the Al-Assad clan' would be less likely to engage with the UK or the peace process itself'. The UK's credibility would be damaged as it would be seen to be hypocritical. More widely, there could be damage to the UK's relations with the EU and other states including ISSG members, with which the UK had worked in building up 'tough measures designed to pressurise the Assad regime and family'. The final heading was 'Would it result in retaliation?' The advice said that granting citizenship to any of the Appellants might also further encourage extremism targeted at the UK, and/or a potential backlash from people who live in the UK, 'given the centrality of the Assad regime to the extremist narrative in Syria'. The FCO acknowledged that these were not the only considerations which the Secretary of State would take into account. The FCO asked to be told of any decision before any action to grant or deny citizenship was taken.

The submission to the Secretary of State

49. The author of the submission was Mr Edwards. It was dated 3 November 2016. Annex A was the FCO's advice. The issue was 'consideration of applications for British citizenship from 'the family members of Refaat Al-Assad, brother of the former Syrian President Hafez Al-Assad and uncle to the current Syrian President Bashar Al-Assad'. Some passages have been redacted from the submission. As there was no CLOSED hearing, we do not know what is in those passages.

50. The recommendations were that the Secretary of State

    a. note the FCO's concerns about applications from 'those linked to the Assad regime' ('outlined at paragraph 3 and fully at Annex A'),

    b. note that officials intended to refuse citizenship to MA and to SAA because they did not meet the statutory criteria (paragraph 4),

    c. agree to exercise her discretion to refuse to grant citizenship to LA and RA because it would not be in the public interest due to the potential damage to UK international relations (paragraph 6),

d. agree that officials should notify MA and SAA that even if they met the requirements, she would not exercise her discretion to grant them citizenship as it would not be in the public interest (paragraph 6), and

e. note that LA had begun judicial review proceedings over the delay taken in deciding her and her son's applications.

51. The submission said that four members of the extended family of Bashar Al-Assad had applied for citizenship. All were 'the immediate family' of Refaat Al-Assad, Bashar's uncle, and brother of the former President. They were one of his wives, her two sons and another son from another marriage (paragraph 1). Paragraph 2 summarised the legal framework, expressly referring to the then current version of Chapter 18 of the NI. The submission said that in the light of the Appellants' links to the Assad regime, officials had consulted the FCO. The submission reported that the FCO had recommended that all four applications be refused 'based on their assessment of the detrimental impact granting citizenship would have on the UK's international relations (see Annex A)'. The submission also reported the FCO's recognition that they did not have enough information 'to assess the exact nature of the Appellants' current relationship with the Assad regime, and the FCO's recommendation that the applications be refused 'due to the [Appellants'] perceived links to the Assad regime'. The FCO's advice was that it was generally accepted that the Al-Assad family and the regime are inextricably intertwined – both in public perceptions and in their business and political dealings. The submission then summarised the harm which a grant of citizenship to any of the Appellants would cause, in three sub-paragraphs. The submission reported that the previous Foreign Secretary had agreed the recommendation and that the current Foreign Secretary was to be updated about the cases. The Home Office intended to let the FCO know of the decisions before any action was taken to implement them.

52. Under the heading 'Consideration', the submission said that officials' 'initial assessment' was that MA and SAA did not meet the statutory requirements but that LA and RA did. MA and SAA would be refused citizenship on that basis. Despite 'allegations and concerns' about their links to the Assad regime, there was not enough evidence to decide that the Appellants did not meet the good character requirement.

53. In paragraph 5, the submission referred to other factors which should be considered. Officials' assessment was that the impact of a refusal would be limited, because the Appellant's connections to the United Kingdom were 'relatively recent'. They all held ILR. They held passports as dual Syrian/Grenadian citizens. Officials considered that the decisions did not engage the European Convention on Human Rights ('the ECHR') or any of the United Kingdom's international obligations. Before they came to the United Kingdom, they all lived in France. Refaat Al-Assad lived in France and was banned from leaving France.

54. Paragraph 6 of the submission recommended 'on balance' that LA and RA be refused citizenship and that MA and SAA be told that even if they met the requirements, they would not be granted citizenship. The FCO's 'firm recommendation' was based on their assessment of the 'damage likely to be caused to the UK's foreign policy aims, credibility and international relations due to the predicted reaction of the Syrian opposition and other international partners to the [Appellants] receiving British citizenship'. Officials' view, based on the FCO's assessment that granting citizenship 'to any relatives of the Assad regime would be detrimental to the UK's international relations' was to agree that the Appellants were 'likely to be perceived as close associates of the Assad regime'. Granting them citizenship would 'not be in the public interest, due to the signal this would send to the Syrian opposition and other international partners, resulting in damage to the UK's international relations'.

55. Officials' view was that there were no grounds to revoke ILR (paragraph 7). They would keep the cases under review and provide further advice if revocation became a 'credible option'. The likelihood of litigation was flagged up in paragraphs 7 and 8 of the submission. Paragraph 8 referred to the existing application for judicial review and explained the delay in making the decisions by reference to the need to carry out checks and to get advice from the FCO. Paragraphs 9-13 of the submission are redacted.

The law

The relevant statutory provisions

56. If an application is made, while a person is a minor, for his registration as a British citizen, section 3 of the British Nationality Act 1981 ('the BNA') gives the Secretary of State a power, 'if he thinks fit', to cause him to be registered as a British citizen.

57. Section 6(1) of the BNA gives the Secretary of State power, 'if he thinks fit', and if he is satisfied that the applicant meets the requirements of Schedule 1 to the BNA, to grant a certificate of naturalisation as a British citizen. On its face, this is a wide discretion.

The authorities

The nature of the discretion conferred by section 6

58. We say more about *R v Secretary of State for the Home Department ex p Fayed* [1998] 1 WLR 763 below, as it deals with fairness in this statutory context. The majority of the Court of Appeal also referred to the nature of the discretion conferred by section 6(1). At p 776, Lord Woolf said of section 6(1), '….here [by contrast with the position under the Bahamas Nationality Act 1973, which entitled a person to be registered as a citizen if he met the statutory criteria] in addition to the statutory criteria, the Secretary of State also has a wide discretion to refuse an application, so the Fayeds are not basing their application on a right but seeking the grant of a privilege'. Phillips LJ (as he then was) said, at p 785D, that, by contrast with the position in the Bahamas, 'Under section 6, the applicant has no more than a hope of a grant of naturalisation in the discretion of the Secretary of State'.

59. In *R (MM) v Secretary of State for the Home Department* [2015] EWHC (Admin) 3513; [2016] 1 WLR 2858 the Secretary of State refused an application for naturalisation by the wife of a man, who, in the assessment of the Secretary of State, was an Islamist extremist and listed by the UN Sanctions Committee as associated with Al Qaeda. The Secretary of State refused the application in August 2014, before the NI were amended. The amendment is referred to in paragraph 18 of the judgment. The applicant was of good character, and otherwise satisfied the statutory requirements for naturalisation. The Secretary of State refused the application in her discretion on the grounds that refusal would deter potential extremists from their activities, because they would know that if they engaged or persisted in extremism, applications for naturalisation by members of their families would be refused.

60. The Judge and counsel for the claimants described the Secretary of State's discretion in negative terms. The Judge said of section 6 (judgment, paragraph 12) that 'This provision therefore creates a discretionary power to refuse naturalisation to those who meet the statutory conditions…'. He referred to 'the adverse exercise of discretion' in

paragraph 27. The discretion conferred by section 6 was referred to by counsel as 'a power of discretionary refusal' (judgment, paragraph 19).

61. The Judge considered the rationale for the exercise of the discretion in that case in paragraphs 27-28. In paragraph 29, he said that 'The scope and purpose of the existence of this statutory discretionary power…is however unclear'. He said that 'The statutory discretion is not to be exercised on what are essentially good character grounds simply because the evidence on good character does not support refusal on that ground'. The Judge's view was that the focus of the tests in the BNA and in the NI 'is on the individual's merits for naturalisation' (paragraph 30).

62. The Judge accepted (paragraph 31) that this focus did not mean that 'the discretion' (which must mean, 'the discretion to refuse an application') 'cannot be used for some more general purpose connected to the Act'. He continued, however, 'the very difficulty of discovering some general or individual purpose for the discretionary power demonstrates to my mind that it was not intended to provide a very large and wide ranging discretion to refuse naturalisation in the public interest, and rather was there as a backstop to cover the unforeseen eventuality'. He concluded that, in the light of the Secretary of State's broad express power to formulate good character requirements, 'I do not consider that Parliament conferred the discretionary power for the pursuit of broad and general policy objectives'.

63. The deterrent purpose on which the Secretary of State relied did 'not come within the scope of a limited backstop discretion' (paragraph 32). In paragraph 33, he reasoned that whatever the nature of the discretion, the purpose of this exercise of discretion was 'so far removed from the individual and indeed the individual's family, that an individual can be refused naturalisation to deter people whom they need not know or be aware of, from actions over which the applicant has no control. There is a real unfairness, on the face of it, in refusing naturalisation to someone who qualifies in all other respects, in order to provide a general deterrent to others, over whom the applicant has no control. Such a use of a discretionary power is so far beyond the range of those which Parliament might have been anticipated would be taken into account that Parliament should not be taken to have intended so extensive a discretion' (paragraph 33). At the end of paragraph 40, after considering issues that were raised by the amended NI, the Judge said 'The SSHD has simply not grappled

with the issues which her policy creates. Her position lacks internal logic, and is for that reason irrational'.

Fairness

64. We were referred to many authorities about fairness. The question in *R v Home Secretary ex p Doody* [1994] 1 AC 531 was (under the legal framework which then applied) whether a prisoner serving a mandatory sentence of imprisonment for life was entitled to make written representations before his tariff was set by the Secretary of State, and whether he was entitled to be given information about the views of the judiciary. The issue was whether the existing scheme fell 'below the minimum standard of fairness' (per Lord Mustill at p 560D). He described six principles.

    a. There is a presumption that a power will be exercised in a way which is fair in all the circumstances.

    b. The standards of fairness may change over time.

    c. They are not to be applied by rote. What fairness demands depends on the context.

    d. The relevant statutory scheme is an essential part of that context.

    e. Fairness will very often require that a person who may be adversely affected by a decision will have an opportunity to make representations either before the decision is made, or afterwards, 'with a view to procuring its modification'.

    f. Fairness will very often require that he be told the gist of the case he has to answer (and see page 563 E-G).

65. In *Fayed* the Secretary of State refused two applications for naturalisation without giving reasons for the refusal. Section 44(2) of the BNA did not require the Secretary of State to give reasons for a decision (but did not prevent him from giving them). We note that section 44(2) was repealed with effect from 7 November 2002. Lord Woolf MR, in the majority (Kennedy LJ dissented), observed, at p 768G, that since neither applicant had been told about what had given rise to reservations or difficulties, it was impossible for them to volunteer information to allay any concerns. Lord Woolf described the implications of the refusals at p 773D-F. He said that the decisions were

'therefore classically ones which, but for section 44(2) would involve an obligation …to give [the applicants] an opportunity to be heard before that decision was reached'.

66. Lord Woolf added, 'The fact that the Secretary of State may refuse an application because he is not satisfied that the applicant fulfils the rather nebulous requirement of good character, or "if he thinks fit" underlines the need for an obligation of fairness'. Unless an applicant knows the areas of concern (in those cases where the statutory requirements other than the good character requirement are met) 'it will be impossible for him to make out his case. The result could be grossly unfair. The decision maker may rely on matters as to which the applicant would have been able to persuade him to take a different view' (p 773G-H). Absent section 44(2), the courts would achieve fairness by requiring the minister to identify areas of concern (p773H-774A).

67. At p 776, after the passage we cited in paragraph 58, above, Lord Woolf said that the fact that Fayeds were seeking a privilege did not mean that they were not entitled to be heard. At p 777B-C Lord Woolf referred to the administrative burden that could be created by this approach. His remarks 'are limited to cases where an applicant would be in real difficulty in doing himself justice unless the area of concern is identified by notice'. If 'what the applicant needs to establish' is 'clear…notice may well not be required' (p 777C).

68. The reasoning of Phillips LJ was similar. He held (p 787D) that, absent section 44(2), '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'.

69. Sales J (as he then was) considered what fairness requires in a naturalisation case in paragraph 67 of *R (Thamby) v Secretary of State for the Home Department* [2011] EWHC (Admin) 1763. He considered that the obligation of fairness might sometimes be met by giving fair warning to an applicant, in Form AN and Guide AN, 'of general matters which the Secretary of State is likely to treat as adverse'. Where no such indication is given in the materials available to the applicant when he makes his application, and thus, he has no reasonable opportunity to deal with them, 'fairness will require that the Secretary of State gives more specific notice of her concerns regarding his good character after she receives the application, by means of a letter

warning [him] about them, so that he can seek to deal with them by means of written representations…'.

70. We have been referred to the decision of the Commission in *ZG v Secretary of State for the Home Department* (SI No/23/2015). In that case, the Secretary of State accepted that there was nothing in the materials available when the appellants applied for naturalisation to give them 'a steer' about the issues which led, in the event, to the refusal of their applications. The Commission held that the procedure was unfair, and quashed the decisions. The Commission's view was that there was no reason why the material disclosed in the proceedings (or a gist) could not have been disclosed to the appellants before the decisions were made. We have also been referred to the decisions of the Commission in *AQH* (SI No/46/2015) and *KB* (SI No/43/2015), which are also cases in which the Commission held that the Secretary of State had acted unlawfully by not giving an applicant an opportunity to address her concerns, but was, nevertheless, satisfied that she would have made the same decisions had she acted lawfully, and so did not quash the decisions.

71. In *R (Khatun) v Newham London Borough Council* [2004] EWCA (Civ) 55; [2005] QB 37, the Court of Appeal considered a challenge to the appellant's policy concerning applicants for housing to whom it had accepted that it owed a duty under section 193 of the Housing Act 1996 ('the 1996 Act'). The policy did not permit applicants to view a property before they were required to accept it. The Judge accepted the respondents' argument that the policy was unlawful. Laws LJ, giving the judgment of the Court, considered that the Judge's reasoning was not clear. Laws LJ examined two potential sources of a duty to allow the applicants to view the property. He said, first, that there was a distinction between a statutory scheme which conferred a right to be heard, and a statutory scheme under which an applicant was merely entitled to a lawful decision (albeit the duty to take into account relevant considerations might mean that the decision maker had to take into account the applicant's views). His clear conclusion was that Part VII of the 1996 Act did not expressly confer a right to be heard on an applicant (paragraph 29). Nor could such a right be implied into the statutory scheme (paragraph 32).

72. The next question was whether, even if the statutory scheme did not, expressly, or by implication, confer a right to be heard, the appellant's duty to take into account

relevant considerations required the appellant to allow the applicant to view the property before requiring the applicant to accept it. The issue was the scope of inquiry into relevant matters. The Court could only intervene if 'no reasonable housing authority could have been satisfied on the basis of the inquiries made' (paragraph 35). Laws LJ adapted and applied that test to the appellant's policy at paragraphs 36 and 37. The respondents' argument was 'unsustainable'.

The Nationality Instructions

73. Chapter 18 of the NI is headed 'Registration at Discretion'. In the form in which the NI applied at that dates of the decisions, paragraph 18.1.4 provided that the Secretary of State might refuse to grant a certificate of naturalisation to someone who met the statutory requirements for naturalisation where it would not be in the public interest to grant it. This could be 'for reasons relating to their actions, behaviour, personal circumstances and/or associations, including family relationships'. One of the examples listed is where granting the application could 'have an adverse impact on international relations'. That paragraph continues, 'In particular, the applicant's associations, including family relationships, with those who have been or who are engaged in terrorism or unacceptable extremist behaviour…will normally warrant a refusal of citizenship. Due regard will be given to whether an association is current and/or whether family ties have been severed.'. Paragraph 18.1.18 requires caseworkers to apply the published policy as at the date of the decision. It says that 'In all cases it is important to look at the case as a whole'.

74. Chapter 9 of the NI deals with applications for registration of children pursuant to section 3 of the BNA. Paragraph 9.1.1-2 summarises the two statutory requirements. At the date of the decision, paragraph 9.13 provided, in terms similar to those of paragraph 18.1.4, that the Secretary of State could refuse a certificate on public interest grounds. Chapter 9 did not contain an equivalent provision at the date of the MA's application.

75. Paragraph 9.1.5 says that a number of factors are 'normally taken into account in deciding whether or not to register a minor…This Chapter gives guidance about how discretion should normally be used under the law'. Paragraph 9.1.6 warns that the guidance 'does not amount to hard and fast rules. It will enable the majority of cases to be dealt with, but because the law gives a complete discretion, each case must be

dealt with on its merits. All relevant factors must be taken into account, together with any representations made to us. If we do not, we are open to criticism for not exercising our discretion reasonably' (original emphasis). Paragraph 9.1.7 says that it is 'possible' to register a minor in circumstances which would normally lead to a refusal of the application, 'or to refuse when normally a child might be registered' if this is justified in the particular circumstances.

76. Section 9.2 gives guidance about how to use Chapter 9. Paragraph 9.2.4 says that 'the full list of criteria which we would normally expect minors to meet is set out in paragraph 9.17'. Paragraph 9.2.6 suggests the order in which issues should be approached so as to decide applications efficiently. Paragraph 9.17.1 says that it sets out, 'broadly in order of importance' criteria which minors who do not qualify under any of the earlier provisions should meet.

77. The first heading is 'Future intentions'. This is 'the most important criterion'. The child's future should 'clearly be seen to lie in the UK' (original emphasis). 'A reliable indicator should be the applicant's and/or the family's past behaviour. If that suggests an established way of life in the UK, and we have no reason to think that this will not continue, we should accept at face value that the child intends to live here'. If there is any reason to doubt that (such as that one or both parents lives abroad), 'we should write to clear up the point. If our doubts are serious, and we are still not satisfied that this criterion is met, the application should be refused'. Further, under the heading 'Children in the United Kingdom', paragraph 9.17.4 provides that in most cases the child's future is straightforward and self-evident. 'We should normally accept the child meets this criterion if future intentions are confirmed on the application form, and the residence criteria in 9.17.17-29 are met, and the child has an established home here'.

78. Under the heading 'Citizenship and immigration status of the parents' paragraphs 9.17.9 and 10 set out the 'normal' expectations; in short, that one or other parent is, or is about to become, a British citizen. Paragraph 9.17.9 adds that 'if the parent's application is to be refused, we should normally refuse the minor's application as well'.

79. Paragraph 9.17.11 provides that 'It will rarely be right to register a child neither of whose parents is or is about to become a British citizen. However, each case should

be considered on its merits, and there may be exceptional circumstances to justify registration in a particular case'. Examples are given: 'older teenagers who have spent most of their life here', and whose future can 'clearly be seen to lie in the UK'. Paragraph 9.17.1 provides that an application which falls outside those criteria 'should not normally be approved, even if there are British citizen siblings or siblings with *entitlements* to registration as a British citizen, unless we are satisfied that registration would be in the child's best interests' (original emphasis).

80. In short, if neither parent is, or is about to become, a British citizen, it will be 'rarely' right to register a child, unless (if parents are divorced or separated) the parent with day-to-day responsibility for the child is settled here and there are good reasons to register the child, taking account of the examples given in paragraph 19.17.11.

Section 55 of the Borders, Citizenship and Immigration Act 2009

81. Section 55(1) of the Borders, Citizenship and Immigration Act 2009 provides that the Secretary of State must make arrangements for ensuring that immigration functions are discharged 'having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'. 'Children' means 'persons who are under the age of 18' (section 55(6)). At first sight this is an organisational or administrative duty, but the Supreme Court recorded in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 that the Secretary of State accepted that the duty applied to 'immigration decisions themselves'. That approach has been adopted in subsequent authorities. The best interests of a child are to be considered first, as 'a (not the) primary consideration' but they can be outweighed by other considerations.

82. Section 11 of the Children Act 2004 applies to local authorities, among other public bodies. It is similar in terms to section 55 of the 2009 Act. In *Hertfordshire County Council v Davies* [2018] EWCA (Civ) 379; [2018] HLR 21 the Court of Appeal considered an argument that in deciding to take possession proceedings against a family, a local authority had breached section 11 of the 2004 Act. The Court of Appeal held that the duty to promote and safeguard the welfare of the licensee's children had been breached, because their best interests had not been taken into account when the local authority decided to take possession proceedings, and that breach was, in principle, a defence to a claim for possession. No special factors had

been put before the decision maker when it decided to issue proceedings for possession. There were none before the Court of Appeal. The result would inevitably have been the same, if the decision maker had complied with the duty when the decision was made. The Court of Appeal did not interfere with the possession order.

Discussion

83. We consider that there are five issues.

    a. Is the public interest policy lawful?

    b. Were the decisions rational?

    c. Did the Secretary of State act unfairly?

    d. Did the Secretary of State act unlawfully in MA's case?

    e. What relief, if any, should be given?

Is the public interest policy lawful?

84. This depends on the scope of the discretion conferred by section 6(1) of the BNA. It requires us to consider the decision in *MM*, on which the appellants relied for the proposition that the policy was not lawful, or, that if it was lawful, something cogent and specific was required to invoke it. We consider that the ratio of *MM* emerges from the last sentence of paragraph 40 of the judgment. The aspect of the Secretary of State's policy which led to the refusal of naturalisation in that case lacked internal logic and was therefore irrational. We consider that that is so, whether that aspect of the policy was considered before the amendment to the NI, or afterwards. We agree with that analysis.

85. If and in so far as the ratio of *MM* is that the discretion conferred by section 6(1) is a narrow, back-stop discretion, we respectfully consider that it is clearly wrong. It is not consistent with the view of section 6(1) of the majority of the Court of Appeal in *Fayed* (see above). Section 6 does not confer a narrow discretion to refuse applications made by those who satisfy the statutory criteria. The starting point is that no-one is entitled to be naturalised. Parliament has given the Secretary of State, instead, a wide discretion ('may…if he thinks fit') to naturalise those who meet the statutory criteria. To analyse section 6 as a narrow discretion to refuse naturalisation to those who meet the statutory criteria is to approach the discretion from the wrong

end. We consider that the language of section 6(1) is wide enough to enable the Secretary of State to devise a policy which, provided that is rational, permits her to refuse, on public policy grounds, which are not confined to issues of good character, applications for naturalisation from those who meet the statutory criteria. We consider that the amended NI, as they apply to these cases, are a policy which, in the respects which are material to these cases, is authorised by section 6(1).

86. Ms Weston accepted orally that the section 6(1) discretion could lawfully be used for international relations purposes. She submitted, however, that there was a 'a high burden on the Secretary of State to ensure in an individual case that there was a fully substantiated underlying basis' for saying that there was an international relations imperative to refuse an individual application. There must be 'cogent and specific' evidence before an application could be refused on such grounds. She adopted the skeleton argument in the case of LA and MA (she was not its author), which relied on *MM*, among other things, for the submission that the discretion was to be construed narrowly. We reject the submission that the discretion is to be construed narrowly, for the reasons given above. We also reject the submission, if made, that the quality of evidence necessary to establish a concern about international relations has to be 'fully substantiated' in the sense of 'proved'. Such concerns, by their nature, involve expert assessment and judgment, in areas in which the Commission is either not well qualified to, or may not, adjudicate.

Were the decisions irrational?

87. We accept Mr Sheldon's submissions that the Secretary of State was reasonably entitled both to seek, and to act on, advice provided by the FCO about the likely impact on the United Kingdom's foreign relations of a grant of naturalisation to the Appellants. We also accept his submission that a rationality challenge to the Secretary of State's approach could only succeed where the expert advice relied on by the Secretary of State was manifestly inadequate or misconceived. That is not to say that issues about the quality of the FCO's advice are not justiciable, but simply to say that the Commission is not well equipped to pass any judgment on the adequacy or otherwise of the FCO's advice.

88. We accept Mr Sheldon's further submission that we should be slow to second-guess that advice, for reasons similar to those for which the courts have indicated that the

general rule is that the courts should not interfere in the conduct of foreign relations by the executive: see *R (Butt) v Secretary of State for Foreign Affairs* [1999] EWHC (Admin) 624, paragraph 12, *R (Abbasi) v Secretary of State for Foreign Affairs* [2002] EWCA (Civ) 1598, paragraphs 106, 107 and 131-132.

89. The issue in *Abbasi* was whether the Foreign Secretary owed a duty to the claimant, who was detained in a legal 'black hole' in Guantanamo Bay, to give him diplomatic assistance. The court accepted that, in principle, a refusal even to consider an application for such assistance might be amenable to judicial review, but the court 'cannot enter the forbidden areas, including decisions affecting foreign policy' (judgment, paragraph 106(iii)). It was highly likely that a decision whether to make diplomatic representations to a foreign state would be intimately connected with foreign policy, but an obligation to consider the case of a British citizen and whether to take any action on his behalf 'would seem unlikely itself to impinge on any forbidden area' (paragraph 106.iv). The claimants were not entitled to any relief because the defendant had considered the case, and had had discussions with the US authorities about the detainees. It would not be appropriate to order the Secretary of State to make any representations to the US authorities, even in the face of what seemed to be a clear breach of a fundamental right, as it was obvious that this would have an impact on foreign policy (paragraph 107.ii).

90. *Lord Carlile v Secretary of State for the Home Department* [2014] UKSC 60, [2016] AC 945 was a case in which, acting on the advice of the Foreign Secretary, the Home Secretary had decided to exclude a person from the United Kingdom. She was a dissident Iranian, and had been invited by members of Parliament to speak to them. The claimants argued that the Iranian speaker's exclusion was an unjustifiable interference with their article 10 rights. The Supreme Court held that while it was required to judge the proportionality of the exclusion for itself, it was also required to give great deference to the executive, as the potential consequences of admitting the speaker to the United Kingdom were for the executive to assess. A decision based on the advice of Foreign Secretary was one with which the court would be very slow to interfere.

91. The skeleton argument for LA and MA submitted that the Secretary of State's conclusions, based on the advice of the FCO, were 'misplaced and without

foundation'. The skeleton argument was, in effect, an invitation to us to make an assessment of the foreign policy implications of a grant of naturalisation to the Appellants, based on the report of their expert, Dr Yom. As Mr Sheldon pointed out in his oral submissions, Dr Yom is a relatively junior academic with no experience of diplomacy, or in Syria, with no links with opposition groups, and with no experience of United Kingdom foreign policy. His report is thoughtful and thorough. But we are applying judicial review principles. We are not concerned with the merits of the conclusions of the Secretary of State, or of the advice of the FCO. The question for us is whether the decisions of the Secretary of State were open to her, on the basis of the FCO's advice, bearing in mind the institutional competences of the Secretary of State and of the FCO, and bearing in mind our own institutional limitations. We consider that they plainly were open to her. We bear in mind that the emails exchanged between the Home Office and the FCO show that Home Office officials questioned and tested the FCO's responses to requests for advice.

Did the Secretary of State act unfairly?

92. Ms Weston submitted, rightly, in our judgment, that the Secretary of State's oral submissions to us tended to conflate the two distinct routes to an entitlement to be heard before a decision is made which were identified by Laws LJ in *Khatun*. In our judgment, *Fayed* shows that, unlike the provisions of the 1996 Act which were at issue in *Khatun*, section 6 of the BNA is a statutory context in which (national security considerations apart), an applicant is entitled to be told, when he makes his application, of any concerns about his application which the Secretary of State has and which the applicant has no other means of deducing at the time when he applies (such as the application form or Guide AN). We reject Mr Sheldon's argument that the reasoning in *Fayed* is somehow confined to good character cases. There is no warrant in either of the majority judgments for such an approach. It seems to us, in any event, that such an approach does not give us a principled or secure basis for departing from the reasoning in *Fayed*. We also accept Ms Weston's submission that Mr Sheldon's submissions tended to elide the issues of procedural and substantive fairness in a manner which was criticised by Beatson LJ in *R (L) v West London Mental Health NHS Trust* [2014 EWCA (Civ) 47; [2014] 1 WLR 3103, paragraphs 69-77). In that case, however, on the facts, the Court of Appeal discharged the order made by the judge in that case because the requirements of fairness, which the Court

held, applied in that case, had, in practice, been met by opportunities available to the patient and his to his solicitor to make representations. See also *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA (Civ) 1284, a case in which one of our number was involved. We will not repeat the error identified by the Court of Appeal in that case.

93. Nine factors reinforce our conclusion that the Appellants did not have, and should have been given, an opportunity to influence the Secretary of State's thinking before she made the decisions in their cases.

    a. The application form, Guide AN and the then current NI did not alert them to the possibility that their relationships with the Assad regime and, more specifically, their membership of the Assad family, might lead to the refusal of their applications.

    b. That issue had not been raised with them before.

    c. Their applications were under consideration for a long time, during which NI changed.

    d. LA's and MA's solicitors asked, before any decision was made, to be told of any concerns.

    e. The Secretary of State gave brief reasons for the decisions. There was no reason why these could not have been signalled as concerns before the decisions were made.

    f. The FCO advice was available before the decisions were made. It was disclosed, somewhat redacted, before any rule 38 process. We were given no reason why it, too, could not have been disclosed before the decisions were made.

    g. We do not consider that the fact that the Appellants might not have had much to contribute on the public interest issues, which, we accept, were primarily for the expert advice of the FCO and for the assessment of the Secretary of State, can affect the obligation to act fairly, though it may be relevant to relief (cf *AQH* and *KB*). The Appellants should each have been given the opportunity to say what they wanted to say about their links with the Assad

regime and with the Assad family and about the likely effect on international relations of a grant of naturalisation to them. This consideration is reinforced by the statement in the NI that 'due regard will be given to whether an association is current and/or whether family ties have been severed'. The Appellants should have had an opportunity to make representations on these factors, so that the Secretary of State could consider them. We note the word 'due'. It seems to us that it would be for the Secretary of State to decide, on these facts, what regard, if any, was due to these factors, but she should have given the Appellants the opportunity to inform her about them.

h. Contrary to her published policy in the NI, the Secretary of State did not write to MA to clear up doubts about whether his future lay in the United Kingdom, which, according to the NI, is the most important criterion (see paragraph 77, above).

i. No process of administrative review, short of an appeal, was available to the Appellants to seek to change the decisions, once they had been made (and see paragraph 35 of *ZG*).

Did the Secretary of State act unlawfully in MA's case?

94. We remind ourselves of the succinct reasoning in MA's case (see paragraph 27, above). It turned on MA's parents' immigration status, on the view that his future did not clearly lie in the United Kingdom, and the on the lack of exceptional factors warranting the exercise of discretion in his favour. The Secretary of State also relied on the public interest reasons as a reason to refuse any further application, and at the end of decision letter, said that in the light of the material in the letter, the Secretary of State had decided that to grant a certificate of naturalisation would not, in short, be in the public interest.

95. MA's skeleton argument, as supplemented by Ms Weston's oral submissions, raises four further principal issues in his case.

a. Does the decision interfere with MA's article 8 rights? If so, is the decision disproportionate? Has the Secretary of State breached the procedural requirements of article 8 in his case?

b. Did the Secretary of State breach the duty imposed by section 55?

c. Did the Secretary of State err in law in her application of the NI to MA's case? This raises a further sub-issue, which is whether the Secretary of State erred in law in concluding that MA's future did not clearly lie in the United Kingdom.

d. It is the decision vitiated by statements in the submission that

   i. MA's ties to the United Kingdom were 'relatively recent', and

   ii. MA had been politically active and commercially active in Syria and in the world and/or had had business dealings with Assad regime?

   iii. a refusal of naturalisation would have a limited effect on him?

Article 8

96. Ms Weston accepted that the article 8 issue is one for us, not for the Secretary of State. It is for us to consider, on the facts as we now know them to be, whether the decision is an unlawful interference with MA's article 8 rights. We do not consider it arguable that, on the facts of this case, the decision to refuse naturalisation was an interference with MA's article 8 rights. He is an adult now, but even supposing that it is right to judge matters as at the date of his application, the refusal of naturalisation did not interfere with his private or family life as a 17-year old. As SAA points out in his witness statement, there is a significant practical overlap between the rights conferred by ILR and by citizenship. Since MA has ILR, he can continue to enjoy his family and private life in the United Kingdom, and to nurture his ambitions for a career in the United Kingdom. He is a dual citizen of two other states. We note what he says in his witness statement about the importance to him of a British identity; but he nevertheless chose to go to university in Spain. We also note that in *Genovese v Malta* (2014) 58 EHRR 25, while not excluding the possibility that an arbitrary denial of citizenship could raise an issue under article 8, the European Court of Human Rights indicated that article 8 does not guarantee a right to citizenship (judgment, paragraph 30); see also the analysis of this issue by Ouseley J in *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin). In the light of our conclusions about the scope of section 6(1) and the lawfulness of the relevant public interest policy in the NI, we reject the submission that the mere application to MA of that policy supplies the element of arbitrariness to which the European Court of Human Rights referred in *Genovese*.

97. If we are wrong, and the decision does interfere with MA's article 8 rights, then, adopting the approach in *Lord Carlile's* case, we consider that the decision was plainly proportionate, for reasons similar to the reasons for which we held that the decisions in these cases were not irrational.

98. We do not consider, in the light of our conclusion that the Secretary of State acted unfairly in making the decisions, that it is necessary for us to decide any question about the procedural obligations which are implicit in article 8. When asked, Ms Weston found it difficult to explain what any such procedural protection could add to the common law. It seems to us, in any event, that our conclusion that there was no unlawful interference with article 8 is likely to mean that there was not, in the event, any breach of any procedural obligations implicit in article 8. It was not clear to us, further, what any such procedural obligations would add to common law fairness.

Did the Secretary of State breach section 55?

99. Ms Weston's position was that she only had to show that the Secretary of State did not consider MA's best interests, contrary to section 55. We accept her submission that section 55 applies to the functions of devising of policy and of making decisions in individual cases. However, we also agree with the analysis of the Deputy Judge in *R (SA) v Secretary of State for the Home Department* [2015] EWHC 1611 (Admin) (at paragraphs 63 and 64.e), which is that section 55 does not apply to function of making a decision in a person's case, if, at the time of the decision, the person is no longer a child. Section 55 might be relevant, however, if and to the extent that a past breach of section 55 could be a relevant factor in the making of the decision after the person reaches the age of 18.

100. We do not consider that there was any breach of section 55 by the Secretary of State while MA was still a child. By the time MA was 18, there had been some delay in making the decision on his application, but no actionable delay. For what it is worth, we are unable to see what material in the case, other than MA's own aspiration to be a British citizen, shows, however, that a refusal of citizenship would not be in his best interests. He put no such material to the Secretary of State. Even if there were such material, his best interests are 'a, not the' primary consideration, and are self-evidently outweighed by the public policy considerations which led the Secretary of State to refuse all these applications. So, even if the Secretary of State erred in law in

not expressly considering MA's best interests, and we do not consider that she did, we would have refused relief on this ground, as we are sure that the Secretary of State's decision would have been the same if she had considered them. We consider that this approach is supported (we accept, by analogy only), by the decision of the Court of Appeal in the *Hertfordshire* case.

Did the Secretary of State mis-apply the NI to MA's case?

101. We start with some obvious legal propositions. The NI are the Secretary of State's published policy about naturalisation. It is an error of law for a decision maker to fail to follow a published policy unless he articulates a good reason for departing from it. He may of course depart from it for good reason, as the terms of the NI make clear, because the NI are a policy, not a legislative instrument. It is an error of law to have an inflexible policy. But a published policy should be followed, if there is no good reason for departing from it, both in the interests of legal certainty, and of fairness, since the one purpose of the policy is to ensure that caseworkers treat similar cases consistently. The correct construction of the policy is for the court, not for the decision maker.

102. There is an issue about whether the NI should be interpreted on the footing that their effect is that a person who applies for registration as a child should be treated as if he is still a child when the decision is taken in his case, even if he is, by then, an adult. We do not consider that that is the correct construction of the policy. It is true that the policy uses the words 'child' and 'minor' repeatedly. There is no statement in the policy, however, that caseworkers are to continue to treat applicants as if they were children irrespective of their actual ages when decisions are made. In the absence of such a statement, we consider that the use of those words is no more than a convenient way of identifying applicants, all of whom will have been children when they applied for registration (otherwise the policy would not apply to their applications). The policy is not a statute, and that seems to be the most sensible way of interpreting it.

103. Our clear view is that, on their correct construction, the NI provide that if a person applies for registration while he is a minor, and neither parent is, or is about to become, a British citizen, his application will normally be refused ('it will rarely be right'). That is the background to the criterion, said to be the most important criterion,

about where the applicant's future clearly lies. In our judgment, the drafter of the policy did not intend that criterion to override what is stated in the policy to be the normal expectation that a person who applies to be registered while he is a child will not normally be registered if neither parent is a British citizen or about to become one. The future life criterion is, however, it seems to us, potentially relevant to the exercise of the discretion, conferred by 9.17.11, to register exceptionally if the normal expectation about the immigration status of the parents is not met. We accept that the examples are just that. It may be appropriate to register in an exceptional case which falls outside the examples, as the NI expressly recognise, and the future life criterion will be an important factor in the exercise of that discretion.

104. It is convenient for us to consider two issues here. The first is whether, on the correct application of the NI, the Secretary of State was entitled to refuse to register MA. It would clearly have been better if the Secretary of State had put to MA her doubts about where his future lay. Given the terms of policy, she was not permitted to decide that issue against him without asking him to comment. But the real question, it seems to us, is, assuming in MA's favour that his future life did clearly lie in the United Kingdom, whether there was anything in the material which MA submitted which began to show that his case was an exceptional case in which she should exercise her discretion to register him despite the immigration status of his parents. His case did not fall within the terms of either of the examples in paragraph 19.17.11: see above. For reasons which resemble our reasons for holding that article 8 was not engaged on these facts, and for reasons which resemble our reasons for holding that either, there was no breach of section 55, or, in the alternative, that if there was, it was immaterial, we do not consider that there was anything exceptional in this case which called for the exercise of that exceptional discretion (contrast the facts of *SA*, a decision on which Ms Weston relied heavily; in particular, the claimant in that case did not have ILR). The Secretary of State was therefore, on the correct construction of the NI, entitled not to register MA. We consider, nevertheless, that her failure to inform herself about MA's future life was a material error which would have vitiated the exercise of that discretion, had she been exercising that discretion in the absence of the public interest factors.

105. But the factors identified in paragraph 19.7 are not the only factors which were in play in this case. The decision was, in terms, also, that it would not be in the public

interest for the Secretary of State to register MA as a British citizen. In the overall context of Chapter 9, our clear view is that the Secretary of State was entitled to treat the public interest factors as overriding the factors identified in paragraph 19.7. We note the prominence given to the public interest factors in the version of Chapter 9 which was in force at the date of the decision: they are referred to in paragraph 9.1.3, just below the summary of the statutory requirements.

106. We should mention that we were referred to the decision in *R (FI) v Secretary of State for the Home Department* [2014] EWHC 2287 (Admin) of Burnett J (as he then was). The applicant in that case was a child at the time of the decision which he challenged and expressly recognised in his application that the expectation about the immigration status of his parents was not met (judgment, paragraph 10). We do not consider that there is anything in that decision which affects our conclusions. It turned on public law defects in the decision letters (judgment, paragraph 19).

The criticisms of the submission

107. It would have been better if MA had been given an opportunity to comment on these points (although two of them are ultimately assessments of the facts which could be gathered from the application form, rather than statements of fact). The crucial point, however, in our judgment, is that even if we assume in MA's favour that these statements were erroneous, there is nothing in the terms of the decision letter which shows that they influenced the Secretary of State's decision in his case.

Relief

108. We considered the parties' rival submissions about whether section 31(2A) of the Supreme Court Act 1981 ('the SCA') applies to the Commission. In our judgment, as a matter of statutory construction, it does not, substantially for the (obiter) reasons given by the Commission (chaired by Singh J (as he then was)) in *MWH v Secretary of State for the Home Department* (SI No/57/2015).

109. We consider that we should spell out, in a little more detail, how those obiter conclusions are supported by the evolution of section 15 of the Tribunals Courts and Enforcement Act 2007 ('the 2007 Act') and by a comparison between the evolution of that provision, and the fact that section 2D of the 1997 Act has not evolved in parallel.

Section 2D of the 1997 Act confers jurisdiction on the Commission in cases like these.

110. As is well known, section 17 of the 2007 Act for the first time conferred a judicial review jurisdiction on the Upper Tribunal ('the UT'). Section 19 of the 2007 Act inserted section 31A in the SCA, which provided for the mandatory and discretionary transfer to the UT of judicial review applications issued in the High Court. On enactment, section 15(4) of the 2007 Act provided (and still provides), in terms which are very similar, albeit not identical, to the words of section 2D of the 1997 Act, that 'in deciding whether to grant relief…the [UT] must apply the principles which the High Court would apply in deciding to grant relief on an application for judicial review.' We consider that the phrase 'by the High Court' (which does not appear in section 2D of the 1997 Act) is necessary, because, by contrast with the position when the 1997 Act was enacted, by the time section 15(4) was enacted, both the UT and the High Court had a judicial review jurisdiction.

111. We now briefly describe the amendment of section 15 of the 2007 Act. When section 31 of the SCA was amended by the insertion of section 31(2A), section 15 of the 2007 Act was amended (in the way described by the Commission in *MWH*), by the insertion of section 15(5A), which provides that section 31(2A) and (2B) of the [SCA] apply to the UT 'when deciding to grant relief under subsection (1) as they apply to the High Court when deciding whether to grant relief on an application for judicial review'.

112. The words of section 15(5A) of the 2007 Act suggest that the draftsman made three linked assumptions. The first is that, as a matter of statutory construction, section 31(2A) of the SCA applies only to the High Court when it is exercising its judicial review jurisdiction. The second, which follows from the first, is that, if Parliament intended section 31(2A) to apply to the UT when it was exercising its judicial review jurisdiction, the language of section 15(4) of the 2007 Act did not, by itself, achieve that result. The third, which follows from the second, is that language similar to that enacted by section 15(5A) of the 2007 Act was necessary to achieve that result. We accept that assumptions by the draftsman do not make the law. But, having considered the words of the relevant provisions ourselves, we consider that the assumptions made by the draftsman are based on a correct construction of the relevant

provisions. It follows, in our judgment, that it is telling that Parliament did not, when it amended section 15 of the 2007 Act, see fit similarly to amend section 2D of the 1997 Act. Our construction of the relevant provisions leads us to the conclusion that the words of section 2D do not, of themselves, incorporate, by implication, section 31(2A) of the SCA. If Parliament had wished to achieve that result, it would have had to amend section 2D in parallel with the insertion of section 15(5A) in the 2007 Act.

113. Our view that section 31(2A) does not apply to the Commission means that we must consider the common law about relief in judicial review before the enactment of section 31(2A) of the SCA. The High Court had a discretion to refuse relief where the court was satisfied that, if the error which the court had found had not been made, the outcome would necessarily, or inevitably, have been the same (see, for example, *Simplex GE (Holdings) v Secretary of State for the Environment* (1988) 57 P & CR 306, 327, per Purchas LJ; and p 329, per Staughton LJ; *R (Smith) v North East Derbyshire Primary Care Trust* [2006] 1 WLR 3315, paragraph 10, per May LJ; *Secretary of State for Communities and Local Government v South Gloucestershire Council* [2016] EWCA Civ 74 at [25], per Lindblom LJ).

114. We are conscious that if a court has found that the decision maker has acted unfairly in reaching a decision, it will be a very unusual case indeed in which the court could be satisfied that, had the decision maker acted fairly in taking the decision, the decision would inevitably, or necessarily, have been the same. We bear in mind the passages from Ackner LJ's judgment in *R v Secretary of State for the Environment ex p Brent London Borough Council* [1982] 1 QB 593 at 646, and *John v Rees* [1970] Ch 345 at 402 which were cited by Purchas LJ in *Simplex* (at p 324). We must also be cautious not to be influenced by any view we may have of the merits. Any such view is not a good reason for refusing relief. What we must consider, rather, is what the decision maker would have done, had she acted fairly. Nevertheless, we are satisfied, as the Commission was in *AQH* and *KB,* that if the Secretary of State had acted fairly she would still, necessarily, or, inevitably, have reached these decisions. There are two reasons why, which coincide with the two principal reasons for the decisions, as we analyse them.

115. First, as was explained in the submission to the Secretary of State, the FCO did not have enough information to assess the exact nature of the Appellants' current

links to the Assad regime, but recommended, nonetheless, that the applications be refused due to their perceived links with the Assad regime, because of the damage that the FCO considered would flow to the United Kingdom's international relations. It was the public perception of links which mattered to the decision, not the facts of any such links. This is thus a very unusual case in which we can be satisfied that whatever representations the Appellants might have made about their actual links with the Assad regime, the result would necessarily, or inevitably, have been the same.

116. We now refer to two graphic examples of the power of perception alone. We do so not to comment on the merits, but to illustrate, in practical terms, the point to which we have just referred. The first is the incident recorded at p 229 of the core bundle. The mere fact that SAA had been invited by a think tank to speak at a congressional forum in Washington led to what was described as a 'backlash', from representatives of the Syrian opposition in Washington, causing the Congressman concerned to cancel the forum, according to the Congressman's press secretary, 'in order not to be associated with [SAA]'. One speaker quoted in the article ascribed the backlash to the fact that SAA is Bashar Al-Assad's cousin. Another person is quoted as saying 'The thought of having the cousin and son of two mass murderers speaking in the Halls of Congress is against every value we hold dear in the United States'. Page 128 of volume 1 of the Appellant's evidence contains a further graphic example of this phenomenon. It records an incident when the Qatari foreign minister refused to be in the same room as RA.

117. Second, the decision also turned on the FCO's assessment of the likely damage to foreign relations which would flow from a grant of citizenship to the Appellants. We are also satisfied that had the Appellants been given the chance to submit material similar to the material which they have now submitted (that is, Dr Yom's report, or something similar), the Secretary of State would have preferred, and would have been entitled to prefer, the FCO's assessment, for reasons similar to those given in paragraphs 87-91, above).

118. We consider, further, that, to the extent that this is relevant, there would be no point in remitting these decisions to the Secretary of State for him to re-consider them now. We accept that the factual position has changed since the decisions were made, in that Bashar Al-Assad's regime seems more secure than it was. That, however, has

no impact at all, in our judgment, on the two imperatives which we have just described. The strengthening of Bashar Al-Assad's position does nothing to change Refaat Al-Assad's history, including his own acts carried out when he was closely associated with the Assad regime, and the Appellants are either his sons, or, in the case of LA, one of his wives. Nothing was presented to us to show any change in the perception to which the submission refers. Nor does the consolidation of the regime undermine the foreign relations factors referred to in the FCO's advice and in the submission.

Postscript

119. Finally, we have considered carefully whether the fact that RA's wife was naturalised on 22 April 2013 makes any difference to our conclusions. We do not know anything about her application. Neither party showed us a copy of it. Her application was made, and granted, before the public interest policy was adopted, about four years before the decisions in this case. We do not consider that we can infer from the decision to naturalise her that the FCO was wrong to identify the concerns which it did in its advice to the Secretary of State, or that the Secretary of State erred in relying on those concerns.