SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SN/71/2018**
Hearing Date: **9th October 2019**
Date of Judgment: **4th December 2019**

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING
UPPER TRIBUNAL JUDGE McWILLIAM
MR PHILIP NELSON

Between

SR

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Applicant appeared in Person

Ms J Thelen (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Mr A Underwood QC (instructed by **Special Advocates' Support Office**) appeared as Special Advocate

Introduction

1. This is our OPEN judgment after the hearing of SR's application to the Special Immigration Appeals Commission ('the Commission') for a review of the Secretary of State's decision notified in a letter dated 15 May 2018 ('the Decision') to refuse SR's application for naturalisation.

2. SR represented himself in the OPEN hearing. He had been represented by solicitors until 1 July 2019. He was helped by an interpreter, Ms Mamand. We are grateful to her for her help, and grateful to SR for the clear way, through her, in which he made the points which he wanted to make.

3. The Secretary of State was represented by Ms Thelen. SR confirmed, before the hearing, that he would rely on his original application for a review as his written argument. We are grateful to him and to Ms Thelen for their oral and written arguments. Ms Thelen made oral submissions in OPEN, which, with the able help of Ms Mamand, we did our best to explain to SR.

The facts

4. SR is from Kirkuk, Iraq. He came to the United Kingdom on 9 November 2000 and claimed asylum the same day. The Secretary of State refused SR's application for asylum. He appealed. He was given indefinite leave to remain on 7 November 2002.

5. In due course he applied to be naturalised as a British citizen. That application was refused on 6 August 2009 on the grounds that he did not meet the good character requirement. The decision letter refusing his application said 'The Nationality Instructions published on the IND website …contain (at Annex D to chapter 18) detailed guidance as to how the good character requirement is interpreted and applied in practice'. The decision letter said that his application had been refused on the ground that the Secretary of State was not satisfied that he met the good character requirement. It also said that it would be contrary to public interest for reasons to be given.

6. SR applied for judicial review of that decision. On 12 July 2012 he wrote to the Secretary of State, asking whether he could re-apply for naturalisation. The Secretary of State replied on 17 July 2012 to the effect that a new application could not be processed while he was challenging the refusal of his first application. On 8 February

2013, he re-applied for naturalisation. A consent order formally withdrawing the application for judicial review was signed on 10 July 2013.

The second application

7. SR's application was on form AN. Form AN tells applicants (in two different paragraphs) to read Guide AN and Booklet AN before they fill in the application form. SR told us in the hearing that he could say that 99% of people who have applied for naturalisation have not read all the law even if they have applied through solicitors.

8. SR answered 'Unemployed' to question 3.1 ('What is your occupation'). One of the options in question 3.2 was 'Are you…a director?'. He answered 'No' to the questions about character (3.10-3.15). Question 3.16 asked 'Have you ever engaged in any other activities which might indicate that you may not be considered as a person of good character?' SR answered 'No' to that question. On page 14 of Form AN, SR signed a declaration that to the best of his knowledge and belief, the information on the form was correct and that he knew of no reason why he should not be granted British citizenship. He authorised HMRC to provide the UK Border Agency with any information relevant to the application and with any information necessary to check the accuracy of the information he had provided. At question 6.2 he confirmed that he had read and understood Guide AN, and Booklet AN. He crossed out a declaration which would have been relevant if he had acknowledged that he did not meet all the requirements for naturalisation (question 6.6).

9. On 10 April 2017, the Secretary of State wrote to SR. He was told that he should send 'all of the following original documents to this office by 24 April 2017'. The letter referred to SR's description of himself in his application as 'unemployed'. He was asked to explain what benefits he had received and to supply evidence of those. The Secretary of State said that checks at Companies House had shown that SR had been a director of Epic Contractors since it was incorporated on 10 November 2011. SR was asked to explain this discrepancy. The documents were needed to show the Secretary of State that SR satisfied the good character requirement. SR was told that if he did not provide them, his application would be refused.

10. On 2 February 2018, SR wrote to the Secretary of State. He accepted that there was a discrepancy in the information which he had provided. He said that it was 'a sincere mistake'. He thought that because he was not receiving any benefit from the business he did not have to give any information about it. He had no ill motive and nothing to

gain from hiding the information. It would only make sense to assume that the failure to disclosure the information was intentional if he had had something to gain from it. But he had nothing to gain and it was an honest mistake. He enclosed a letter from his accountant dated 21 April 2017 which said that he did not receive 'any salary dividend or benefit in kind of any sort till 19 August 2013'. The accountant who signed this letter, Sarwar Abdulrahman, seems to be one of the two referees who supported SR's application for naturalisation. He described himself then as a 25-year old and said that SR was 'a close friend of mine'.

Guide AN

11. The cover sheet of Guide AN says that it is to be read in conjunction with Booklet AN. Section 1 tells applicants that Booklet AN gives guidance on the legal requirements. The reader is told that other information about citizenship and immigration is available at the UK Border Agency website. Section 3 is headed 'Good Character'. It refers to questions 3.12-3.16 on Form AN. It says 'If you are in any doubt as to whether something should be mentioned, you should mention it'. In relation to question 3.17, it says,

> *'You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities, no matter how long ago it was. Checks will be made in all cases and your application may fail and your fee will not be fully refunded if you make an untruthful declaration. If you are in any doubt whether you have done something or it has been alleged that you have done something, which might lead us to think you are not of good character, you should say so'.*

Booklet AN

12. Section 9 of Booklet AN is headed 'Good Character'. The first paragraph says that to be of good character, 'you should have 'shown respect for the rights and freedoms of the United Kingdom, observed its laws and fulfilled your duties and obligations as a resident of the United Kingdom. Checks will be carried out to ensure that the information you give is correct'. The second paragraph describes the consequences of giving false information. Under a heading in bold font 'What if you haven't been convicted but your character may be in doubt?' Booklet AN says that 'You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago this was. Checks will be made in all cases…If you are in any doubt about

whether you have done something or it has been alleged that you have done something which might lead us to think that you are not of good character you should say so.'

Annex D

13. The Nationality Instructions are published, with some redactions. The version which was in force when SR made his application was published on 13 December 2012. Section 2 is headed 'Aspects of the Requirement [sc of good character]'. Paragraph 2.1 says that caseworkers should not normally consider applicants to be of good character if 'for example there is evidence to suggest' followed by a list of types of activity. These include that they have not respected or are not prepared to abide by the law, that they have been involved in or associated with actions that are considered not to be conducive to the public good, that their financial affairs are not in appropriate order, or that they have been deliberately dishonest or deceptive in their dealings with the UK Government. Paragraph 2.1 continues, 'If the application does not fall into one of categories outlined in paragraph 2.1 but there are doubts about the applicant's character, caseworkers may request an interview in order to make an overall assessment'.

The Decision

14. The decision described the legal background. The third paragraph says, 'The Home Secretary has refused your application for citizenship on the grounds that you do not meet the requirement of good character. It would be contrary to public interest to give reasons in this case.' SR was told of his right to apply to the Commission to set aside the decision to refuse his application for naturalisation.

15. The decision was supported by a witness statement from Ms Hughes dated 16 November 2019 ('H1'). In paragraph 5 of H1, she said that on 4 April 2017, SR's case was referred to a caseworker who completed a Chapter 18 minute sheet. Ms Hughes said that that document was at pages 67-73. She said that the caseworker had answered 'Yes – no issues identified' to the question whether the caseworker was satisfied that the good character requirement was met. Ms Hughes added, 'Unfortunately I have not been able to speak to the caseworker who completed the minute sheet. However I have reviewed the material in this case and consider this was most likely an error as further checks were carried out that demonstrated SR had not met the requirement of good character'.

16. When we were reading for this hearing, it seemed to us, both from the Home Office reference number on the minute sheet, and from the details of the case, that the minute sheet in the OPEN bundle did not relate to SR's case at all. The Commission sent an email to GLD about this. We were then sent a minute sheet which did seem to be about SR's case. We asked Ms Thelen in the hearing which minute sheet Ms Hughes had been describing in her witness statement. She told us on instructions that Ms Hughes was referring to 'the wrong minute sheet'. We discussed among ourselves what we should do next. We then asked Ms Thelen to provide us with an accurate witness statement explaining what document Ms Hughes was referring to in her first witness statement and exhibiting the right minute sheet. We adjourned the hearing for that to be done. We also expressed our dismay at this turn of events, reminding those in court that the Commission relies on the Secretary of State and her representatives to prepare these cases with meticulous care. It is particularly important, also, that applicants, such as SR, who are able to play only a limited part in their appeals and applications, should have complete confidence that the Secretary of State is taking every possible care in the decision making their cases, and in preparing those cases for court.

17. Over the lunch break, GLD prepared two further witness statements. Ms Hughes explained in a second witness statement ('H2') that she now realised that she had referred to the wrong minute sheet in H1. She attached the correct minute sheet to H2. She had tried to find out how the mistake was made. She did not know whether her office or GLD were responsible. She accepted that she should have double-checked this when she was finalising her witness statement and had not done so. She should have realised her mistake from her description of the minute in H1, which she found puzzling. She should have checked the Home Office reference number. She said that each witness statement would be checked by two team members in the future. She confirmed that the decision was based on the correct minute sheet. The minute sheet was signed by her colleague, Katharine McLoughlin, and is the only decision minute on SR's file.

18. The second witness statement was from Ms Laskowski, the solicitor with conduct of this case. She, too, had tried to find out how the mistake was made. She did not know whether it was made by her or by the Home Office. At the least, she failed to spot the mistake when she finalised and served H1. She apologised to SR and to the Commission. She accepted that a further witness statement from Ms Hughes was

needed when the Commission let her know, on 7 October, that the minute sheet was incorrect. She said that lessons would be learned. We hope so.

19. The correct minute sheet indicates that the decision maker had not yet reached a view on whether SR met the good character requirement. Some parts of the sheet are redacted.

The Gist

20. On 10 January 2019 GLD wrote to Anwar Law Solicitors, who were at that stage representing SR, to say that, further to paragraph 7 of the agreed directions, a gist had been agreed between the Special Advocates and the Secretary of State.

> *'When deciding whether SR met the requirement of good character, the Home Office had reason to believe that, while in the United Kingdom, he has held extremist Islamist beliefs. Further, the Home Office raised concerns about financial irregularities in his income.'*

SR's statement

21. On 9 November 2000, SR was brought into the United Kingdom on a lorry, and dropped with four or five others on a road. He was taken by the police to Dover and held there for 16 days. He was interviewed and claimed asylum. His life was in grave danger at home. The Secretary of State refused his claim but, on appeal, on 5 August 2002, he was granted ILR as a refugee by the immigration judge.

22. SR got married in Iraq in 1997. He brought his family to the United Kingdom in 2003. He and his wife now have four daughters who are 1, 6, 12 and 14 years old. His wife and children are all British citizens, as is his brother, who came with him to the United Kingdom and claimed asylum.

23. SR's case was that he used to work for 'a local party called PDK' in Kurdistan, Iraq. He did not commit any crimes or atrocities in that capacity. Nor did the people around him. He did not have any position in the party. He was an ordinary member. His family had a grocer's shop in Sulaimaniya. He used to work there, and spend most of his time there. Occasionally he would go to gatherings of the party, 'since many of my relatives and family members were part of this group'. He stopped all party activities two years before he came to the United Kingdom. Instead, he was 'fully engaged with the family business'. In 2000, the PUK kidnapped his father and brother and put them in prison. It became known 'simultaneously' that 'they' were in pursuit of SR and of one his brothers, because SR and his family were members of the PDK. He and his

brother 'strongly felt' that they would be killed if the PDK caught them. So they left Iraq.

24. He was unemployed and receiving income support from his arrival in the United Kingdom until 2011. He 'finally' started his business as a builder (Epic Contractors) in November 2011. He did not have much success in building up this business. He changed careers to become a travel agent in March or April 2012, using the same company name, but trading as 'Salahuddin Hajj & Umrah'. He found it difficult to be successful until the end of 2017. He is now doing well in his business. He managed to get an agreement with the Ministry of Hajj in Saudi Arabia. He was given a licence to sell Hajj Packages. This has helped his business to flourish.

25. He tried to start a charitable organisation in 2003. He asked many people to help him but none could. So he had to abandon the idea. His aim was to help orphans in his home area of Suleimaniya in Iraq.

26. He made an innocent mistake when he filled in his application form. He thought that since he was not receiving any profits from the business at that time, he did not need to enclose information about it. He wrote to the Home Office twice about this. He replied first on 22 April 2017.

27. He was exceptionally disappointed and disheartened to learn that the Secretary of State did not believe that he met the good character requirement. He was shocked to learn that the Secretary of State believes he has held extremist views while he has been in the United Kingdom. He finds this very difficult to comprehend. He is honest, open and frank. He has done nothing in the United Kingdom or abroad from which the Secretary of State could assume that he is a person of bad character. He is fully aware of the law about extremist views and would never have anything to do with such beliefs or thoughts. His religion does not permit him to hold extremist views or thoughts. 'What can I say in my defence when I have not been told about the exact thing? It is very difficult to give a reason in my defence when I am not aware of the crime I have committed for which my application has been declined' (statement, paragraph 5). SR makes similar points in paragraph 6.

The grounds of appeal

28. The grounds of appeal contend that the Decision is irrational. SR cannot think of anything he did or could have done consciously or unconsciously 'for which he is being deprived of his British citizenship' [sic]. As his solicitors were unaware of the

reasons for the Secretary of State's decision, they provided 10 paragraphs of 'brief background' about SR to show why they believed the Decision was not reasonable.

29. They explained that SR had come to the United Kingdom hidden in a lorry. He used to work for a local democratic party (the PDK) in Kurdistan, Iraq. The explanation is a shorter version of the material set out in SR's statement (see above). Paragraph 4 adds that SR believes that it was not right to come to the United Kingdom by hiding in a lorry, but that he had only done it to save his life. He is very ashamed of having done this, and would not have done it if his life had not been in danger. In contrast to the picture painted in paragraph 1 of the section in his statement headed 'voluntary work', paragraph 5 of the grounds of appeal says 'He has been working with a local voluntary community organisation'. No details are given. Paragraph 6, without giving details, says that SR has been working since November 2011 and had paid tax regularly. Paragraph 7 says that he is law-abiding and has not committed any offences in the United Kingdom.

30. The last paragraph of the grounds of appeal contends that it is clear from the history given in the grounds of appeal that SR has done nothing wrong from which the Secretary of State could conclude that SR is not a person of good character. 'Most importantly, the Home Office is not providing any reasons for their decision and so we hold that this decision is unreasonable'.

SR's oral evidence and submissions

31. We heard evidence from SR about his involvement in Epic Contractors Limited ('ECL'). His evidence, which we accept, is that although the Companies House documents showed that Mr Yagdar Kamal Ahmmad had owned 39,9000 of ECL's issued shares in April 2012, and that SR was the sole owner of 40,000 shares in ECL as at 30 May 2014, he had been paid nothing for those shares, and had not paid anything for them, and that, up until 2016, ECL 'basically worthless'. He had secured a contract in 2017 which meant that ECL is now worth about £70-80,000.

32. He made some oral submissions. He made two main points.

33. First, he indicated that he had a letter from which he had understood that the Secretary of State had granted his application. He said that he would find the letter during the adjournment. It emerged, when he had found the relevant document, that he had understood that the Secretary of State's certification of the decision amounted to a grant of naturalisation. We explained to him that, in its context, the certification

referred to the fact that the Secretary of State was relying on reasons which could not be disclosed in the public interest, and that that did not mean that the Secretary of State had granted his application for naturalisation.

34. Second, he expressed his surprise at the fact that Ms Hughes had attached the wrong minute sheet to her witness statement. He asked, rhetorically, how it could be that two cases were open simultaneously so that that could happen. He said, in relation to terrorism, that 'As we saw today, mistakes can happen; I know for sure a mistake could have happened'. He could explain any grey areas. He had lived in the same area for 17 years. That was enough to show his character. For example, his neighbours and the companies he had done business with as a travel agent would be happy to provide references to show what kind of a person he is.

35. He finished his observations by offering to supply the Commission with any further documents we needed.

The issues in the OPEN Scott Schedule

36. There are three issues.

    a. Did SR meet the good character requirement?

    b. Was the decision based on a mistake?

    c. Does the Secretary of State's failure to give reasons for the decision make it unreasonable?

The Law

The Commission's jurisdiction in this case

37. Section 2D of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act') applies to a decision which is a decision to refuse to issue a certificate of naturalisation under the British Nationality Act 1981 and which is certified by the Secretary of State as a decision which was made wholly or partly in reliance on information which, in the opinion of the Secretary of State should not be made public on any of the three grounds listed in section 2D(1)(b) of the 1997 Act (section 2D(1))). When section 2D applies, an applicant may apply to the Commission to set aside the decision in question (section 2D(2)). In deciding whether to set the decision aside, the Commission must apply the principles which would be applied in judicial review proceedings (section 2D(3)). If the Commission decides to set the decision aside, it

may make any such order or give any such relief as may be made or given in judicial review proceedings (section 2D(4)).

Naturalisation

38. Section 6(1) of the British Nationality Act 1981 ('the 1981 Act) gives the Secretary of State a power, if she thinks fit, to grant a certificate of naturalisation to a person who applies for one if she is satisfied that he meets the requirements of Schedule 1. Paragraph (1)(b) of Schedule 1 requires that the applicant be 'of good character'.

39. The discretion conferred by section 6(1) is a wide one; see the Commission's decision in *LA and others v Secretary of State for the Home Department* (SN/63, 64, 65 and 67/2015). The burden of proof is on the applicant to show that he is of good character. The test is essentially subjective (per Stanley Burnton LJ in paragraph 31 of *Secretary of State for the Home Department v SK (Sri Lanka)* [2012] EWCA Civ 16). Naturalisation is a privilege, not a right. The Secretary of State is entitled to set a high standard. The Commission's approach to challenges to refusals of naturalisation is set out in the decision of the Commission in *AHK v Secretary of State for the Home De*partment (SN/2/3/4 and 5/2014), and in the decision in *LA*.

40. The Secretary of State's policy about naturalisation is published in the Nationality Instructions. There are some redactions. Chapter 18 deals with the discretion to naturalise. There is guidance on the good character requirement in Annex D. Annex D gives examples of conduct which will mean that a person is not of good character. But even if the conduct is not described, and there are doubts about a person's character, his application may be refused.

Fairness

41. The requirements of fairness vary depending on the statutory context (see *R v Home Secretary ex p Doody* [1994] 1 AC 531). *R v Secretary of State for the Home Department ex p Fayed* [1998] 1 WLR 763 was a naturalisation case. The majority of the Court of Appeal considered that, in some naturalisation cases, fairness would require an applicant to be given advance notice of areas about which the Secretary of State was concerned, and an opportunity to make representations. Such cases were limited to cases in which 'an applicant would be in real difficulty in doing himself justice unless the area of concern is identified by notice'. If 'what the applicant need to establish' is 'clear …notice may well not be required (at page 777C per Lord Woolf).

42. In *R (Thamby) v Secretary of State for the Home Department* [2011] EWHC 1763 (Admin), Sales J (as he then was) considered what fairness requires in a naturalisation case. In some cases, the obligations imposed by fairness might be met by warning an applicant, in Form AN and Guide AN 'of general matters which the Secretary of State is likely to treat as adverse'. If there is no such indication in those materials, fairness will require the Secretary of State to give an applicant more specific notice of her concerns before she makes a decision on his application.

43. Neither *ex p Fayed*, nor *Thamby*, was a case in which the Secretary of State relied on reasons for refusing an application for naturalisation which she considered could not be disclosed in the public interest. In *Fayed*, obiter, at page 777H-778A, Lord Woolf considered the practical impact of the Court of Appeal's approach. He said,

> *'It does not require the Secretary of State to do more than to identify the subject of his concern in such terms as to enable the applicant to make such submissions as he can. In some situations even to do this could involve disclosing matters which it is not in the public interest to disclose, for example, for national security or diplomatic reasons. If this is then the position, the Secretary of State would be relieved from disclosure and it would suffice if he merely indicated that this was the position to the applicant who if he wished to do so could challenge the justification for the refusal before the courts. The courts are well capable of determining public interest issues of this sort in a way which balances the interests of the individual against the public interests of the state'.*

44. This approach was also adopted by Ouseley J in *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin). He said

> *'The duty not to grant naturalisation unless the SSHD is satisfied, among other matters, that the appellant is of good character, requires her to refuse naturalisation if the material she has leaves her unsatisfied on that point. That duty is not subject to any express disclosure duty, either of areas of concern, or of reasons. Such a duty as is implied cannot conflict with the clearly expressed duty to reach a decision on that issue, a decision which clearly requires action to be taken on all the relevant material. The duty cannot require the decision to be taken only on the basis of material which she has to or is willing to disclose. The former would require her to put formal national security at risk when the Act requires her to refuse naturalisation for that very reason. The latter would require her to ignore the material, contrary to her duty to refuse naturalisation if she is not satisfied as to good character. She would have to see what she would not disclose, and then put it out of her mind. There is no scope for some duty to disclose the gist or sufficient to enable a response to be made, where PII has required that material not to be disclosed. That would conflict with [ex p Fayed (No 1)]'.*

45. The Commission's approach in such cases has varied. In *ZG v Secretary of State for the Home Department* (SI No/23/2015) the Secretary of State accepted that there was nothing in the materials available to the applicants when they made their applications to give them a 'steer' about the issues which led to the refusal of their applications. The Commission held that the procedure was unfair and quashed the decisions. The Commission concluded that there was no good reason why the material disclosed in the proceedings, or a gist, could not have been provided to the applicants before the decision was made. The Commission's reasoning in *AQH v Secretary of State for the Home Department* (SI No/46/2015) and in *KB v Secretary of State for the Home Department* (SI No/43/2015) was similar, but the Commission decided that the Secretary of State would have made the same decisions had she acted lawfully and did not quash the decisions. The Commission also adopted that approach in *LA and Others*.

46. However, in other cases, the Commission has adopted the approach of Ouseley J in *AHK*. Examples are *JJA v Secretary of State for the Home Department* (SN/40/2015), paragraph 8, per Mitting J; *MB v Secretary of State for the Home Department* (N/47/2015), paragraph 10, per Mitting J; *MNY v Secretary of State for the Home Department* (SN/53/2015), paragraph 36, per Flaux J (as he then was); *AFA v Secretary of State for the Home Department* (SN/56/2015), paragraph 51, per Flaux J (as he then was), and *SS v Secretary of State for the Home Department* (SN/42/2015) per Males J (as he then was).

47. A further question which has been considered in the cases is the effect on fairness of disclosure after the decision, and before, or during, the rule 38 process. *Farooq and Sharif v Secretary of State for the Home Department* (SN/7/2014 and 8/2014) was an exclusion case. In that case, there was no prior disclosure to the appellants of material on which the Secretary of State relied in making her decision in February 2016, although in August 2016, she gave further reasons for that decision. The Commission held, on the facts, that there was no reason why the reasons which were disclosed in August 2016 could not have been put to the appellants before the decision was taken, and that there was no reason why those reasons were not given at the time of the decision. The Commission quashed both decisions. In paragraph 118 of its judgment, the Commission made it clear that its reasoning was not influenced by the fact that further disclosure was made to the appellants in the rule 38 process. The Commission said

> *'We do not consider that this was a case in which the Secretary of State was required to predict the view which the Commission might take after a rule 38 hearing, and to disclose material, when she made the decision, which, officials conscientiously believed, would damage national security if disclosed. The normal safeguard against inadequate disclosure which the legislative scheme provides for is the rule 38 process. The premise of that process is that there are cases in which the Commission and the Secretary of State may disagree about the damage to national security which further disclosure would cause. The margins are very fine and the judgments difficult. The premise of that process is not that the Secretary of State acts unlawfully if his officials take a different view, when a decision is made, from the view ultimately taken by the Commission, after an adversarial hearing in which CLOSED material is carefully examined by the advocates and by the Commission. That does not mean that there can never be cases, where, on the facts, the Commission decides that the material should have been disclosed earlier: see, for example, ZG v Secretary of State for the Home Department'.*

48. The effect of that reasoning is that the fact that further disclosure is ordered during the rule 38 process does not, in principle, mean that the Secretary of State should have disclosed the material either before she made the decision, or when she made the decision, and acted unfairly by not doing so. We consider that that reasoning also applies, as in this case, when, without a hearing, the Secretary of State's representatives and the special advocates agree during the rule 38 process that further disclosure should be made. It would be irrational to distinguish between cases in which disclosure is agreed and those in which it is ordered by the Commission. The Secretary of State's advocates and the Special Advocates, in their different roles, represent distinct facets of the public interest in the rule 38 process. They are experienced, and in good position to judge the decision which the Commission would be likely to make if there were a hearing. An outcome reached by agreement between adversaries is often a better-informed outcome than an outcome reached by a court. We consider that the position during the rule 38 process is in principle distinguishable from the position when the decision is made, as more information will necessarily be available to the Secretary of State and to the Special Advocates than at the time when the decision was made. There may, of course, be cases in which the Secretary of State could and should have disclosed material to an applicant either before, or at the time of a decision. *Farooq and Sharif* is such a case. But as a matter of principle, we do not consider that the fact of disclosure during the rule 38 process (whether voluntary or ordered by the Commission) necessarily shows that disclosure should have been made earlier.

49. It is important to add that, even when disclosure of further material is ordered, the Secretary of State has the option, conferred by the Special Immigration Appeals Commission (Procedure) Rules 2003 not to disclose, in short, provided that she does not continue to rely on the material in the proceedings.

Discussion

(1) Did SR meet the good character requirement?

50. The Secretary of State relies on the CLOSED material to submit that SR did not meet that requirement. For the reasons given in our CLOSED judgment, and applying the approach of a court on an application for judicial review, we consider that the Secretary of State was entitled to decide that SR was not of good character.

(2) Did the Secretary of State make a mistake?

51. If and to the extent that this ground relies on the fact that the wrong minute sheet was attached to H1, we are satisfied, for the reasons given above, that no mistake was made; but only as a result of the further witness statements produced during the hearing. There is nothing in our CLOSED judgment which undermines that conclusion.

(3) Was the Secretary of State's decision not to give reasons at the time of the decision unreasonable and unlawful?

52. We note that this is a distinct question from the question whether the Secretary of State acted unfairly and unlawfully in not giving SR notice of her concerns before she made the Decision. The Scott Schedule does not raise such an argument for us to decide.

53. The points which are relevant to fairness and to the reasons argument overlap to an extent, however. The question which is common to each is whether the Secretary of State is obliged, either before the decision, or when she makes it, to disclose to the applicant material which, in her view, it would be contrary to the public interest to disclose. The Secretary of State decided, when she made the decision that it would be contrary to public interest to disclose even the gist which she later disclosed.

54. For the reasons given in our CLOSED judgment, this argument fails.

Conclusions

55. Our conclusion is that this application for a review of the Decision fails. We have considered the three issues raised in the OPEN Scott Schedule. For the reasons given in the CLOSED judgment, the Secretary of State was entitled to decide that SR did not meet the requirement of good character, and did not act unreasonably or unlawfully in not giving SR reasons at the time of the Decision. For the reasons given in this judgment, the Secretary of State did not make a mistake.