

SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SN/72/2019
Hearing Date: 29th to 30th June 2021
Date of Judgment: 3rd September 2021

Before

**THE HONOURABLE MR JUSTICE CHAMBERLAIN
UPPER TRIBUNAL JUDGE FRANCES
MR ROGER GOLLAND**

Between

RT

Applicant

and

**THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT**

Respondent

OPEN JUDGMENT

Mr D Chirico (instructed by **Duncan Lewis**) appeared on behalf of the Appellant

Mr S Gray (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Mr D Lemer (instructed by **Special Advocates' Support Office**) appeared as Special Advocate

Introduction

- 1 RT applies pursuant to s. 2D of the Special Immigration Appeal Commission Act 1997 (“the 1997 Act”) for review of the decision of the Secretary of State for the Home Department (“SSHD”) to refuse his application for naturalisation as a British citizen.

Background

- 2 RT is an Algerian national. He came to the UK in 1997 and claimed asylum, saying that he feared persecution both by the Algerian authorities and by the *Groupe Islamique Armée* (“GIA”). His asylum claim was originally refused but he appealed. While the appeal was pending, the SSHD reconsidered and granted him asylum.
- 3 RT has made two applications for naturalisation. The first was in June 2004. It was refused in April 2007 on the basis that the SSHD was not satisfied that RT was of good character because of his “association with prominent Islamic extremists both in the UK and overseas, including members of the... GIA”. The second application was made in October 2014. That was refused in May 2018, again on character grounds, but this time solely because of his “association with the... GIA”.
- 4 RT applied to the Commission for review of that refusal in June 2018. On 30 October 2018, the SSHD withdrew the decision and invited RT to make further representations. These were filed on 18 December 2018 and sought to address the reason given for refusal in May 2018.
- 5 On 26 March 2019, the SSHD refused RT’s application, again on character grounds, this time because he “may be supportive of acts of terrorism”.
- 6 The application for review was filed on 9 April 2019.

The law

- 7 The proper approach to statutory review under s. 2D of the 1997 Act is as set out by the Commission on 19 January 2021 in *AMA v SSHD* (SN/75/2018), at [6]-[11]. We have applied the principles identified there.

The good character guidance

- 8 The Home Office’s document *Nationality: good character requirement* (“the Policy”) at pp. 9-10 sets out a non-exhaustive list of factors that will be considered when assessing character, before adding this:

“If a person does not clearly fall into one of the categories outlined above but there are doubts about their character, you may still refuse the application.”

- 9 At pp. 32-3, under the heading “Extremism”, there is a sub-heading “Unacceptable behaviour” under which the following appears:

“Unacceptable behaviour covers any non-UK national whether in the UK or abroad who uses any means or medium including:

- writing, producing, publishing or distributing material
- public speaking including preaching

- running a website
- using a position of responsibility such as a teacher, community or youth leader

to express views which:

- incite, justify or glorify terrorist violence in furtherance of particular beliefs
- seek to provoke others to terrorist acts
- foment other serious criminal activity or seek to provoke others to serious criminal acts
- foster hatred which might lead to inter-community violence in the UK

The list of unacceptable behaviours is indicative rather than exhaustive.”

10 On p. 33, there is a further heading “National security and terrorism”, under which this appears:

“If there is information to suggest that the applicant has been involved in, or associated with, acts contrary to any state’s national security, including terrorism, they will not normally be considered to be of good character and will fall to be refused.

...

Association with individuals involved in terrorism, extremism and/or war crimes

Those who associate or have associated with persons involved in terrorism, extremism and/or war crimes may also be liable to refusal of citizenship.”

The decision letter and OPEN materials

11 The decision letter, dated 26 March 2019, says this:

“The Home Secretary has refused your application for citizenship on the grounds that you do not meet the requirement of good character. This is because you may be supportive of acts of terrorism.”

12 In the course of these proceedings, the SSHD has also disclosed an OPEN summary of the Home Office Good Character Assessment, which summarises the matters taken into consideration in making the decision and the reasons for it. This document makes clear that the documents taken into account included a large number of personal references attesting to RT’s character, many from people connected with the schools he had set up. These were unanimous in concluding that RT’s Islamic beliefs were moderate and that he had not expressed any extremist views. Nothing of the substance of the SSHD’s reasons appears in the OPEN summary.

13 The summary included the fact that RT had answered “No” to the following questions on his application form:

“3.15 Have you ever been involved in, supported or encouraged terrorist activities in any country?

...

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

RT's OPEN grounds for review

14 RT advances five grounds of review:

- (a) The SSHD failed to have regard to the evidence of RT's good character submitted with his application and/or failed to give adequate reasons for rejecting it and/or relied on a reason other than that given in the decision letter (Ground 1).
- (b) The SSHD misdirected herself as to the statutory test and/or misconstrued the Policy (Ground 2).
- (c) By failing to provide even the gist of the reasons why the SSHD concluded that RT "may be supportive of acts of terrorism", she acted in a way that was procedurally unfair (Ground 3).
- (d) By refusing RT's application on grounds which differ from those given on the two previous occasions, the SSHD has acted inconsistently and/or approached the application with pre-determination (Ground 4).
- (e) The refusal is incompatible with RT's rights under Article 8 of the European Convention on Human Rights ("ECHR") (Ground 5).

Ground 1

- 15 This ground was put in two ways. First, it was said that, although the OPEN minute of the good character assessment records on its face that RT's good character evidence was taken into account, there was no attempt to grapple with it substantively and no reasons given for concluding that, despite this evidence, RT "may be supportive of acts of terrorism".
- 16 In the light of our conclusions on the CLOSED grounds of appeal, it is not necessary for us to deal other than briefly with this ground. We do not accept that the good character evidence was not taken into account. The minute states that it was and we see no reason to doubt this. The CLOSED material contains the reason why, notwithstanding RT's references, the conclusion was drawn that RT "may be supportive of acts of terrorism". We consider whether this was a good reason in our CLOSED judgment. All that matters for present purposes is that is a reason which could not be disclosed without damaging the public interests protected by r. 4 of the Special Immigration Appeals Commission (Procedure) Rules 2003.
- 17 The challenge to the SSHD's conclusion that the two letters from the Director of the Muslim World League "do not add anything further" is not, on analysis a complaint about a failure to take those letters into account. It is a challenge to the conclusion reached having taken them into account. We consider further in CLOSED the significance of these letters, and of the other material relied upon by RT as probative of his good character.
- 18 The second way in which Ground 1 was advanced was that the SSHD refused the application for a reason other than the one stated in the letter to him (i.e. that he "may be supportive of acts of terrorism"). The SSHD has made clear that she did not have any other reason. Having seen all the material ourselves, we accept that the reason was as stated.

19 The fact that the SSHD did not seek to exclude RT from the protection of the Refugee Convention does not provide any basis for impugning the challenged decision. Even if the matters now relied upon were before the SSHD then, “[t]here is nothing irrational in setting a higher standard for naturalisation than for ILR. It follows, as a matter of principle, that the grant of ILR gives rise to no presumption that naturalisation will not be refused on character grounds”: *AMA*, [23].

20 Ground 1 therefore fails.

Ground 2

21 This ground is again put on two bases. First, it is said that, by basing her refusal on the conclusion that RT “may” be supportive of acts of terrorism, the SSHD applied the wrong standard. The question was not whether RT *may* be of bad character but whether he *is* so.

22 As to that, given that (a) it is for the applicant to satisfy the SSHD that the good character requirement is met and (b) that the SSHD is entitled to set a high standard in this regard (see *AMA*, [11(1) & (2)] and the authorities there cited), there was no misdirection of law in refusing the application on the basis that RT “may” be supportive of acts of terrorism. Whether the material justified the conclusion is another matter, which can be considered only in CLOSED.

23 Second, it is said that under the Policy, the fact that a person is “supportive of” acts of terrorism is not enough, on its own, to conclude that he is not of good character. This is because the Policy “sets out in detail the range of activities which can lead to a finding that a person is not of good character. These do not include a person’s privately held beliefs”. A finding based on such beliefs would be “arbitrary (how can such thoughts be judged?), irrational (thoughts shorn of any connection with an act or even an intention to act do not demonstrate bad character) and oppressive (in the sense that it is a misuse of power, because there can be no rebuttal of an allegation about what a person ‘may’ be privately thinking)”.

24 We reject this argument. The Policy is carefully drafted to make clear that the list of factors set out “is not exhaustive”. The significance of the listed factors is that, if any of them applies, “[a] person will not normally be considered to be of good character”. It does not follow that, if none of them applies, the person will be considered to be of good character.

25 This means that the question whether a person’s beliefs could ever be a ground for refusal has to be answered from first principles. We start from the obvious proposition that, if beliefs were truly “privately held”, in the sense that the applicant had not shared them with anyone at all, it is very unlikely that the SSHD would have evidence of them. But in the unlikely event that the SSHD did have evidence of them, we do not see why they should be regarded as categorically irrelevant to an assessment of character.

26 Suppose, to take a hypothetical example, that the SSHD had evidence that an applicant had written entries in a private diary about his support for terrorism. If, when viewed in the light of the evidence as a whole, the entries were judged to be reflective of the applicant’s present views, we can see no reason why that should not be regarded as capable of founding a conclusion that he is or may be supportive of terrorism. Whether such a finding was justified would depend on a holistic assessment of all the evidence. The Policy would be relevant to the way that assessment is carried out.

27 We would therefore reject the submission that the SSHD can *never* take into account a person’s “privately held” views in deciding whether the good character requirement is met.

Ground 3

- 28 The complaint that the decision was procedurally unfair is put in this way. RT has applied twice for naturalisation. Each time he has supplied evidence to rebut what he understood to be the SSHD's concerns. But the reason given in the challenged decision is different from those given before. He has had no effective opportunity to respond to the case against him.
- 29 The general response to this ground is the same as was given by the Commission in *AMA* at [31]-[38]. The procedure provided for, by and under statute includes OPEN and CLOSED parts. There has been a rule 38 process. We must therefore proceed on the basis that there is a public interest reason why no further material can be disclosed. In those circumstances, the statutory scheme makes it clear that the Commission must proceed without telling RT, even in essence, why the SSHD rejected his application. This provides the complete answer to the submission that he is entitled to an opportunity to address the SSHD's reasons before the decision was made or to understand her reasons afterwards.
- 30 Insofar as specific complaint is made about the failure to give reasons for rejecting the attestations of RT's good character in the references he submitted, the answer is that the CLOSED evidence contains a reason for concluding that, notwithstanding those references, he "may be supportive of acts of terrorism". Whether it is a good reason is a matter we address in CLOSED.

Ground 4

- 31 Under this ground of appeal, RT complains that the reason for the challenged decision is inconsistent with those given previously, there being nothing to suggest that the matter or matters relied upon now have arisen since the last decision.
- 32 In our view, there is nothing in this ground. The question for us is whether the challenged decision is lawful. We accept that, if the SSHD had made a finding of fact in the course of her assessment of one application, the dictates of rationality might prevent her from deciding another application on a different factual basis without good reason (such as new evidence, whether relating to conduct before or after the earlier decision). But there is nothing to stop the SSHD from deciding one application on basis A and a subsequent application on basis B. The question will simply be whether in adopting basis B, the SSHD made a public law error.
- 33 That is not to say, however, that the chronology of decision-making will be irrelevant. The fact that the initial decision was taken on basis A, and not basis B, may be an indicator that B was not considered sufficient to sustain the decision previously. If so, the SSHD will need to explain why it is now considered sufficient. We have had careful regard to the chronology in reaching our conclusions on the CLOSED grounds of appeal.

Ground 5

- 34 Mr Chirico made clear that he accepted that, on current authority, he could not rely on Article 8 ECHR in a challenge to a naturalisation decision unless he could show that the decision was arbitrary or discriminatory: see *AHK v SSHD* [2013] EWHC 1426 (Admin), [44]-[46], where Ouseley J applied the decision of the European Court of Human Rights in *Genovese v Malta* [2012] FLR 10. Decisions taken applying the good character test are not arbitrary or discriminatory for these purposes. See, to the same effect, *R (Kurmekaj) v SSHD* [2014] EWHC 1701 (Admin), [47]. If it is necessary to consider whether the decision *in this case* (as opposed to the statutory scheme under which it was made) is "arbitrary" or "discriminatory", we would still conclude that it is not. The test cannot be so broad as to encompass every public law error. Even

though we have found two of the CLOSED grounds made out, we would not characterise the decision as either arbitrary or discriminatory.

35 If, contrary to our view, Article 8 can in principle apply to a naturalisation case which does not fall into the arbitrary/discriminatory category, we do not consider that it is engaged on the facts of this case. There are certainly some differences between the status of a British citizen and that of a refugee with ILR. But none of these differences has a sufficiently direct connection with RT's private or family life that his Article 8 rights are engaged. The fact that the denial of citizenship has led to a deterioration in his health is not enough, since many adverse administrative decisions have that effect. What is required to engage Article 8 is a real and appreciable effect on the private or family life of the person concerned. Here, there is none.

36 We therefore reject ground 5.

Closed grounds

37 Despite our dismissal of all five OPEN grounds of appeal, and for reasons contained in our CLOSED judgment, we have concluded that the decision must nonetheless be quashed and remitted to the SSHD.

Conclusion

38 For reasons given in our CLOSED judgment, the challenged decision will be quashed and remitted to the SSHD for reconsideration in accordance with our judgment.