Appeal No: SN/1/2014
Hearing Date: 9th and 10th February 2016
Date of Judgment: 13th April 2016

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

SIR STEPHEN SILBER
UPPER TRIBUNAL JUDGE ALLEN
MR PHILLIP NELSON

AM

APPELLANT

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

RESPONDENT

OPEN JUDGMENT

For the Appellant Hugh Southey QC and Nick Armstrong of Counsel
Instructed by: Wilson Solicitors LLP

For the Respondent: Catherine Callaghan QC and Claire Palmer
Instructed by: Government Legal Department

Special Advocate Representative: Martin Goudie
Instructed by: Special Advocate's Support Office

Sir Stephen Silber

Introduction

1. AM ("the Appellant") applies pursuant to s.2D of the Special Immigration Appeals Commission Act 1997 ("SIAC Act") to set aside the decision of the Secretary of State for the Home Department ("the Secretary of State") made on 12 May 2010 to refuse to grant him naturalisation under section 6 of the British Nationality Act 1981 ("BNA").

2. The letter setting out this refusal decision does not set out any reasons as it explained that:

> "Your application for British citizenship has been refused on the ground that the Home Secretary is not satisfied that you can meet the statutory requirement to be of good character. It would be contrary to the public interest to give reasons in this case."

3. Mr. Hugh Southey QC, counsel for the Appellant, also contends that there are factual errors in the decision to refuse the application for naturalisation as either the Appellant is not the person who the Secretary of State thinks he is, or alternatively, he has not done what must have been alleged against him. This is disputed by Ms Catherine Callaghan, counsel for the Secretary of State, but it is common ground that this issue can only be dealt with in Closed proceedings. A Closed hearing was held with a Special Advocate and it was held for reasons set out in the closed judgment, in this case that the Secretary of State was entitled to refuse to grant the Appellant's application for naturalisation. Therefore, we need not deal with this issue further in this judgment, save to set out the legal principles which we used to reach that decision on the Closed judgment in the Appendix to this judgment.

4. Mr. Southey's main contentions are that the decision should be quashed as:

   (a) The decision infringes the Appellant's Article 8 rights;

   (b) It was unfair not to permit the Appellant to make representations before the decision was made to refuse his application, and then not to permit him to rely on evidence post-dating the decision; and that

   (c) There should be a full merits review of the decision to refuse to grant the Appellant naturalisation as he is making a claim for damages and this will show that there were no grounds for refusing the Appellant's application for naturalisation.

5. Ms Callaghan contends that the decision should not be quashed as:

   (a) The Appellant's Article 8 rights have not been engaged, but even if they have, they have not been infringed. In any event, any interference is justified and proportionate.

   (b) It was not unfair not to permit the appellant to make representations, and in addition, the Secretary of State was not (and is not) required to consider material which was not available to her when the decision to refuse to grant the Appellant naturalisation was taken. In any event, if she had done so, she would still have refused to grant the Appellant's application for naturalisation.

   (c) The challenge to the decision to refuse naturalisation has to be on judicial review grounds and the Appellant is not entitled to a full merits review.

The Background to this Application

6. The Appellant is a Pakistan national, who was born on 31 December 1971. He married in December 2002 and he has three children, aged 11, 5 and 9 months. His wife and his children are British citizens.

7. The Appellant entered the UK on 27 April 2006, claiming leave as the spouse of a British citizen. He was granted Indefinite Leave to Remain on 19 May 2008, which he still retains. The Appellant applied for naturalisation on 5 September 2009.

8. Section 3 of the naturalisation application form addressed the "good character" requirement. It stated (so far as is relevant):

   "In this section you need to give information which will help the Home Secretary to decide whether he can be satisfied that you are of good character. Checks will be made with the police and possibly other Government Departments, the Security Service and other agencies." [OB/C/181]

9. Section 6.1 of the application contains a declaration, signed by the Appellant, confirming that:

   "I…declare that, to the best of my knowledge and belief, the information given in this application is correct. I know of no reason why I should not be granted British citizenship. I promise to inform the Home Secretary in writing of any change in circumstances, which may affect the accuracy of the information given whilst this application is being considered by the Home Office. I understand that information given by me will be treated in confidence but may be disclosed to other

bodies, for example, other Government Departments and agencies, local authorities and the police, where it is necessary for immigration or nationality purposes or to enable these bodies to carry out their functions."

10. The application was considered by a Home Office official, who applied the relevant guidance, which was the UKBA Staff Instructions. Annex D of Chapter 18 of the UKBA Staff Instructions provided guidance on how caseworkers assess whether an individual satisfies the requirement to be of "good character". Paragraph 2.2 of the Guidance states (with emphasis added) that:

"Caseworkers should normally accept that an applicant is of good character if:

a. Enquiries of other government departments and agencies do not show fraud/deception has been perpetrated by the applicant in their dealings with them;

b. There are no unspent convictions;

c. <u>There is no information to cast serious doubts on the applicant's character</u>; …"

11. In the present case, the decision maker concluded that the Secretary of State could not find that the Appellant met the requirement to be of "good character" and so the application was refused. By a letter dated 12 May 2010, the Secretary of State communicated the decision to refuse his application in the terms which we have set out in paragraph 2.

12. On 18 May 2010, the Appellant's former solicitors sent a letter to the Secretary of State requesting a review of the refusal decision explaining first, that the Appellant has no previous convictions, second, that he was working for a PhD and third, that he worked in the security industry for which he required a Security Industry Authority licence for which checks were completed in Pakistan and the UK. We add that the Secretary of State is not responsible for the grant of Security Industry Authority licences. It was pointed out in that letter that the Appellant attended mosques whether in London or in Salford for prayer and not for any other reason, and that he had never been linked to any terrorist group.

13. In a letter in response dated 26 May 2010, the Secretary of State explained to the Appellant's former solicitors that it took account of what had been said in the letter of 18 May 2010. It explained that the writer of this letter was the manager of the team that had made the original decision and that she had reviewed the handling of the Appellant's application, and the decision that had been made to refuse his application. The writer was satisfied that the correct procedures had

been followed, and that the correct decision had been taken to refuse the application with the result that there were no grounds for reconsidering the refusal decision. It was explained that the Appellant's attendance at mosques had no bearing on his suitability for British citizenship. The Appellant has not been given reasons for the refusal of his naturalisation application. These reasons have been considered at the Closed hearing and in the accompanying Closed Judgment. It has always been accepted by the Secretary of State that the Appellant has not been subjected to any other immigration action, and that he remains free to enter, leave and remain in the United Kingdom as he wishes, because he still retains Indefinite Leave to Remain.

Procedural History

14. On 11 August 2010, the Appellant issued a claim for judicial review in the Administrative Court in which he challenged the refusal decision, and it was one of four lead cases which considered whether a Closed material procedure was permissible in judicial review proceedings. This issue was considered in two judgments of Ouseley J: *AHK & Others v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) and [2013] EWHC 1426 (Admin).

15. On 25 June 2013, section 15 of the Justice and Security Act 2013 came into force, inserting sections 2C and 2D into the SIAC Act. On 6 February 2014, pursuant to the legislation, the SSHD certified the decision in this case pursuant to s.2D of the SIAC Act, enabling the challenge to be pursued as a statutory review before the Commission. On 20 February 2014, the Appellant applied to the Commission to set aside the refusal decision. An appeal to the Court of Appeal was stayed pending determination of an application to SIAC or further order: see the judgment of Richards LJ in *AHK & Others v SSHD* [2015] 1 WLR 125.

16. In June 2014, the Commission held a directions hearing in respect of this case which was then listed alongside FM. On 18 July 2014, the Commission gave judgment in AHK and the other lead cases on various preliminary issues ("the Preliminary Issues Judgment"). This judgment sets out the proper approach of the Commission to, among other matters, a statutory review in naturalisation cases as we will explain. The Secretary of State successfully challenged in the Divisional Court aspects of the Preliminary Issues Judgment which gave guidance on the approach to be adopted to appeals like the present one: R(*Secretary of State for the Home Department) v SIAC* [2015] EWHC 681 (Admin) ("the Divisional Court Judgment").

17. The Rule 38 procedure was subsequently completed in the present proceedings. There was no Order that any matters be disclosed into Open from Closed, nor any such material disclosed save that the Appellant was provided with a single paragraph in relation to the

witness statement of Mr Larkin that a review had taken place: see Special Advocate's communication on completion of the Rule 38 process.

The Approach Required of this Commission

18. Section 2D(3) of the SIAC Act provides that, in respect of challenges to decisions to refuse naturalisation:

"In determining whether the decision should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings."

19. Rule 4 of the Special Immigration Appeals Commission (Procedure) Rules 2003 sets out the Commission's duties in respect of disclosure. Rule 4(1) provides:

"When exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."

20. The obligation to conduct exculpatory searches arising in SIAC appeals under Rules 10 and 10A is expressly disapplied in statutory reviews under section 2D: see Rules 10(A1) and 10A(A1).

21. The Preliminary Issues Judgment established that the approach of the Commission in statutory reviews is that :

(a) It is required to apply a conventional judicial review approach to naturalisation challenges. The Commission's task is to review the facts and consider whether the findings of fact by the decision-maker are reasonable: see [14].

(b) It need not determine for itself whether the facts said to justify a naturalisation decision are in fact true. As a matter of ordinary public law, the existence of facts said to justify the denial of nationality does not constitute a condition precedent, and fact-finding is not necessary to determine whether the procedure is fair or rational: see [23]-[24].

(c) The refusal of naturalisation will not engage ECHR rights in the absence of an arbitrary or discriminatory decision, or at the very least some other specific basis in fact. The challenge to the decision is open only on grounds of rationality; and even if ECHR rights are engaged, the exercise is still one of proportionality rather than merits decision-making by the Commission: see [22]-[24].

The Issues

22. As we have explained in paragraph 4 above, there are three main challenges pursued by Mr. Southey in the Open hearing. First, he contends that the Appellant's Article 8 rights have been infringed by the refusal of his application for naturalisation. The Secretary of State contends that the Appellant's Article 8 rights have not been engaged or infringed and that in any event, any interference is justified and proportionate, which is an additional reason why the Appellant's Article 8 rights have not been infringed.

23. Second, Mr. Southey contends it was unfair not to permit the Appellant to make representations before the decision was made to refuse his application and then not to permit him to rely on evidence post-dating the decision.

24. This later evidence was served more than five years after the time when the decision letter refusing the application for naturalisation was sent to him. It comprises two unsigned and undated witness statements (from the Appellant and his wife) and a psychiatric report by Dr Chiedu Obuaya dated 17 November 2015. On 18 December 2015, the Appellant served a letter from a psychiatrist in Pakistan. After the Secretary of State obtained UK GP medical records of the Appellant, further witness statements were obtained from the Appellant and his wife as well as a further report from Dr Obuaya dated January 2016.

25. The Secretary of State submits that there was nothing unfair about not permitting the Appellant to make representations before the decision was made to refuse his application, and then not permitting him to rely on evidence post-dating the decision on this application.

26. Third, the case for the Appellant is that he is entitled to a full merits review, which is appropriate as Article 6 is engaged. The Secretary of State disputes this and contends that the principle applicable to a judicial review application should govern the present application.

27. Thus the issues which have to be considered are:

    (a) Whether the Appellant's Article 8 rights were engaged and infringed by the refusal of his application for naturalisation. (Issue 1- Article 8(1) Issue);

    (b) If the Appellant's Article 8 rights were engaged and infringed, whether the Secretary of State can rely on Article 8(2) to establish that there is no interference with the Appellant's Article 8 rights as the decision of 16 February 2015 was made "in accordance with the law and is necessary in a democratic

society in the interests of … public safety… for the prevention of disorder, or for the protection of the rights and freedoms of other". (Issue 2 - Article 8(2) Issue);

(c) Whether it was unfair not to permit him to make representations before the decision was made to refuse his application and then not to permit him to rely on evidence post-dating the decision (Issue 3 - Procedural Fairness Issue); and

(d) Whether Article 6 is engaged so that a full merits review was required. (Issue 4 – Article 6 Issue).

Issue 1 -Article 8 (1) Issue

28. In answer to the Appellant's contention that by refusing his application for naturalisation his Article 8 rights were engaged and infringed, the Secretary of State contends that his rights were not engaged and that they were not infringed, and that in any event the decision was justified and proportionate. At this stage we are looking at the position without considering the third matter and therefore without taking account of Article 8(2) to which we will return when considering Issue 2.

29. There are two preliminary disputes on legal principles which we now have to resolve. First, to determine what has to be proved before the Court can find that a refusal of a naturalisation amounts to an engagement and an infringement of Article 8; and second, what has to be shown before the Appellant could satisfy this Commission that the refusal letter caused the mental illness and other adverse consequences allegedly suffered by the Appellant.

What has to be proved before the Court can find that a refusal of a naturalisation amounts to an engagement and an infringement of Article 8?

30. It is common ground that the refusal of the Appellant's application for naturalisation does not automatically mean that Article 8 is engaged, but the issue is what else has to be proved. Tuckey LJ giving the judgment of the Court of Appeal in *R (Montana) v Secretary of State for Home Department* [2001] 1 WLR 552, 559 [19] has explained that "the mere fact that citizenship is withheld cannot of itself be either a failure to respect or interference with family life".

31. This approach was repeated by the Strasbourg Court on 15 January 2015 in *Petropavlovskis v Latvia* (Application no.44230/06) at paragraph 83, in which it was explained that:

> "neither the Convention nor international law in general provides for the right to acquire a specific nationality".

32. So the issue is what has to be shown over and above the fact that there has been a refusal of an application for naturalisation before Article 8 is engaged and infringed. The Appellant's case is that the question of

whether Article 8 is engaged and infringed in the context of a refusal of a citizenship application is simply one of seriousness, so that the effect of an adverse citizenship decision has to be sufficiently serious to amount to an interference with Article 8. There is authority that the threshold for bringing an Article 8 claim for refusal of citizenship is that:

> "The consequences of the refusal to recognise the applicant as a citizen of Finland, taken separately or in combination with the refusal itself, could be considered sufficiently serious so as to raise an issue under Article 8" (*Karassev v Finland* (1999) 28 EHRR CD 132 at page 12).

33. The Secretary of State contends that only an arbitrary refusal can raise and engage an issue under Article 8 and she relies on Strasbourg decisions to which we now turn. That Court explained in *Genovese v Malta* (2014) EHRR 25 that there will only be very limited circumstances in which Article 8 rights could conceivably be engaged by the refusal of an application for citizenship; it referred to one possible situation in which such rights could be engaged when it stated (with emphasis added) that:

> "30…The provisions of Article 8 do not, however, guarantee a right to acquire a particular nationality or citizenship. Nevertheless, the Court has previously stated that it cannot be ruled out that *an arbitrary denial of citizenship might in certain circumstances* raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual (see *Karassev v. Finland* (dec.), no. 31414/96, ECHR 1999-II, and *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 78, ECHR 2002-I".

34. In *AHK v Secretary of State for Home Department* [2013] EWHC 1426 (Admin), Ouseley J observed of the decision in *Genovese* that it:

> "44… proceeds on the basis that a breach of Article 8 can arise in the context of the refusal of naturalisation where there was an arbitrary or, as in that case, a discriminatory refusal. It does not support any broader potential for a refusal of naturalisation to interfere with Article 8."

In *Al-Jedda v Secretary of State for Home Department* [2013] UKSC 62; [2014] AC 253, an issue for the consideration of the Supreme Court related to the deprivation of citizenship. Lord Wilson JSC giving the judgment, with which all the other members of the Court agreed, stated (with emphasis added) that:

> "12…The European Convention on Human Rights 1950 does not identify a right to a nationality but the European Court of Human Rights recognises that the arbitrary denial of citizenship *may* violate the right to respect for private life under Article 8 of the Convention (*Karassev v Finland*, Application No 31414/96, 12 January 1999)".

35. It is noteworthy that it was not said there that an arbitrary refusal of citizenship *will in itself* lead to the engagement and infringement of Article 8. A slightly different approach was adopted more recently by Kenneth Parker J in *R (Kurmekaj) v Secretary of State for Home Department* [2014] EWHC 1701(Admin) who explained that the threshold for engagement and infringement of Article 8 "is a high one, namely that the decision has to be of an arbitrary nature" [48].

36. More recently in the Preliminary Issues Judgment, it was stated by this Commission after a review of the authorities that:

> "22. Drawing these threads together, in the absence of an arbitrary or discriminatory decision or at the very least some other specific basis in fact, we conclude that refusal of naturalisation will not engage Convention rights…".

37. We propose to adopt that approach but in the light of the statement in *Karassev* to which we referred in paragraph 31 above, we will then look to see whether a different result would be reached by applying Mr. Southey's test. We agree with Mr. Southey that this entails the Court having to decide for itself the facts which will then determine whether the Article 8 rights of the Appellant have been engaged and infringed (see *R(Al-Sweady) v Secretary of State for Defence* [2010] H.R.L.R. 12 at paragraphs18 and 29).

Can it be shown that the refusal letter caused the deterioration in the Appellant's mental condition?

38. At the Commission's request, both sides produced helpful Notes on what had to be shown before the Commission could conclude that the refusal letter had *caused* the mental illness contended for by the Appellant, so as to show an infringement of his Article 8 rights. The Appellent's case is that the appropriate test is "Did the decision possibly or probably cause or contribute (more than minimally) the relevant impact?".

39. The Secretary of State's contention is that the Appellant must show that:

> "in so far as it is permissible to rely on the consequences of a refusal (which is in any event doubtful), those consequences

> must be direct or proximate and foreseeable at the time of making the refusal decision, and those consequences must be of sufficient seriousness, before an issue arises under Article 8".

40. The difficulty is that many of the cases relied on by the Appellant's counsel do not deal with Article 8 but instead arise under Article 2, which deals with the positive obligation to protect life and investigate death. They do not deal with the very different situation where the State is said to have interfered with a person's right to a private life under Article 8.

41. The Strasbourg cases of *D v United Kingdom* (1997) 24 EHRR 423 and *Bensaid v United Kingdom* (2001) 33 EHRR 10 are both concerned with assessing the risk of *prospective* harm caused by a proposed expulsion. That entailed adopting the threshold for finding liability of showing that there was a "real risk" of the applicant suffering treatment contrary to Article 3 as a result of removal. They indicate that the Court is only concerned with the direct and foreseeable consequences of removal. Similarly in the case of *D v UK,* the Court assessed that it was inevitable that removal *would* have the consequence of hastening his death, because he *would* face lack of medication, lack of accommodation, proper diet and exposure to insanitary conditions. None of these matters were regarded as speculative or in dispute.

42. By the same token in *Bensaid*, the Court was only concerned with directly foreseeable consequences of removal, and was not concerned with "speculative" assertions about the impact of removal on his support and care: see [36]-[40]. Hence, there was no breach of Article 3. It is relevant to the present case that the Court also rejected the Article 8 claim because:

> "the Court recalls that it has found above that the risk of damage to the applicant's health from return to his country of origin was based on largely *hypothetical* factors and that it was not substantiated that he *would* suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity *would* be *substantially* affected to a degree falling within the scope of Article 8 of the Convention." (emphasis added)

43. A similar approach was advocated by Simor and Emmerson *Human Rights Practice* (Sweet & Maxwell), which states in relation to Article 8 at para 8.004 that:

> "Article 8(1) sets out four protected areas: private life, family life, home and correspondence. An individual must show that an interest falling within the scope of one of those four areas is

directly and *adversely* affected if he is to raise a complaint under Article 8". (emphasis added)

44. In accepting that approach, we have taken into account the case relied on by Mr. Southey of *R (Y) v SSHD* [2013] EWHC 4141 (Admin), which involved a judicial review challenge to bail conditions and in particular, the location of the claimant's accommodation. The challenge was on the basis that it greatly exacerbated his physical and mental condition, in breach of his Article 8 rights. Foskett J held at [62] that there was no breach of Article 8 prior to receipt of a report of a distinguished neuropsychiatrist (who had had available to him substantial background material, including previous medical and psychiatric reports, and who had assessed the claimant in person: see [28]) which contained compelling medical evidence of significant deterioration in his mental health as a direct result of the location of his accommodation. Foskett J stated at [62]: "simple assertions that his health was becoming worse without some convincing medical support would not have been enough to make a difference".

45. We therefore conclude that in order to succeed in showing that Article 8(1) was engaged and infringed, it will have to be established that the Appellant's Article 8 rights were directly and substantially affected by the refusal decision. We will also consider if a different result would have been reached by applying the approach advocated by Mr Southey.

The Evidence

46. Mr. Southey submits that this was a case of substantial seriousness for the Appellant, his wife and family, including his children, especially because of the need to have the best interests of the children as a primary consideration in the light of s55 of the *Borders, Citizenship and Immigration Act 2009*, *Article 3 of the UN Convention on the Rights of the Child* and *ZH (Tanzania)* [2011] 2AC 166. The Appellant's case is that the Secretary of State's decision has had serious and direct impact on him as he now suffers from severe depression, which has led to self-doubt and despair on his part causing him to move to Pakistan where he has stayed, confining himself to his room under the guise of looking after his parents. The Secretary of State does not accept that conclusion and Ms Callaghan submits that the Commission should take into consideration a number of matters, including the rights which the Appellant can still enjoy in this country in spite of his failure to succeed on his naturalisation application.

47. First, she points out that the Appellant has retained his Indefinite Leave to Remain in the United Kingdom. Second, the Appellant's right to remain in this country, to enter it and to leave it have been unaffected by the failure to obtain naturalisation. Indeed, he has left the United Kingdom and returned to it on at least two occasions in July 2014 and April 2015 without being stopped or challenged since his application

for naturalisation was refused. Third, Ms Callaghan explains that the Appellant's right and ability to live with his wife and family remains unchanged as a result of his inability to be naturalised. Fourth, he retains the ability and right to do any form of work in this country. Fifth, he and his family still retain the same access to education, health and social services as any British national has, as indeed he had before his application for naturalisation was refused. Finally, there has been no threat by any official body to take away or to reduce in any way, any of these rights enjoyed by the Appellant as result of his failure to obtain naturalisation.

48. If that material was the only evidence, then the position of the Appellant would be no better than that of the Appellant in *Karassev v. Finland* (dec.), no. 31414/96, ECHR 1999-II, who failed to show a case sufficiently serious so as to raise an issue under Article 8. Indeed that claim would fail irrespective of whether the test was an arbitrary decision or whether, as Mr. Southey suggests, the decision was sufficiently serious so as to reach the threshold for liability under Article 8.

49. So it becomes necessary to see if the Appellant's evidence reveals any matters, which show that his Article 8 rights were engaged and infringed as a result of the refusal of the citizenship application. Mr. Southey tendered the Appellant, his wife and the Appellant's psychiatrist for cross examination at the start of the hearing but this offer was not accepted and we will regard their witness statements at their highest.

50. In his first witness statement made in 2015 of 24 pages, the Appellant stated that as a result of the decision to refuse him naturalisation, he feared that he would be arrested and detained if he travelled. He explained that after he was refused naturalisation, he "began to feel more and more like a failed father and a failed husband", and that he "did not want to be in the UK". The decision "has forced me to separate from my children", while "my wife and I are forced to live as though we are separated".

51. The Appellant repeatedly said that he "feels like a failure". He explained that when he went to a doctor, he told the doctor that he liked to stay alone, not to go out and not to see family and friends but that he did not know why.

52. The Appellant also said that he could not work and that he could not find work. He also contended that his life was "wonderful" before the refusal decision, but that as a result of it, he has suffered from irritation, anxiety and anger as well as various psychological problems and asthma, migraine and hypothyroidism. Nevertheless, the Appellant says that he did not tell his GP about the refusal decision.

53. The Appellant's wife made a witness statement in which she explained that she noticed no change in her husband between 2006 and 2010, but that after the refusal letter was received, she noted a change in his personality. She also stated that her husband's former solicitor had told her and the Appellant that they might be under surveillance as a result of the refusal of his naturalisation application.

54. Dr Chiedu Obuaya, a Consultant Psychiatrist, has prepared a report on the Appellant dated 17 November 2015 without seeing him face-to-face, but instead it was compiled on the basis of three Skype telephone calls lasting 110 minutes with the Appellant in which the Appellant had explained that:

> (a) "Prior to the start of problems around his UK naturalisation application, [the Appellant] had not experienced any significant psychological problems";
>
> (b) "he became depressed and increasingly despondent about the situation… he was very angry and found the situation very stressful"; and that
>
> (c) His symptoms had worsened since he had left the United Kingdom in September 2013 and he remained isolated from family and friends.

55. Dr Obuaya noted that it was not possible to attribute the onset of the Appellant's depression to any one event and he highlighted significant matters affecting the Appellant's mental health including the refusal decision, separation from his family and significant disruption to his postgraduate studies. He concluded that:

> "the decision to refuse [the Appellant's] naturalisation application at least contributed in part to the onset of his depression, and has over the medium and longer term perpetuated his depressive symptoms".

56. There is also in evidence an undated letter from Professor Abdul Shakoor, a Consultant Psychiatrist, in Lahore stating that the Appellant:

> " is suffering from depressive illness for which he has been under my treatment. He is being advised to continue it for four months to recover completely".

57. The Appellant's solicitors had explained that Professor Shakoor had *not* been told the background to the Appellant's condition and in particular about the refusal of the naturalisation application. There is also an email from the Appellant's solicitors stating that "according to my client the Pakistani doctor has no medical records".

58. The Secretary of State's legal team then obtained the UK GP medical records of the Appellant and they show many medical problems suffered by the Appellant prior to the refusal decision and which the Appellant had previously said were the consequence of that decision, such as that he suffered from:

(a) "uncontrollable anger" for long periods in 2007 and 2008 which required the services of a psychiatrist and a Clinical Psychologist. The GP records in June 2008 noted that the Appellant's "current life situation involves substantial stress which impacts on his mood/anger and without this decreasing he will find it more difficult to gain control over his anger";

(b) asthma going back to 2007 for which he had received a salbutamol inhaler in 2007 and required medical treatment; and also from

(c) migraines about which the entry on the Appellant's record for 6 June 2013 refers to "10 year h/o migraines" and "h/o" is understood to mean "history of".

59. After these medical notes were produced, there was then further evidence served on behalf of the Appellant. First, there was a further witness statement from the Appellant's wife explaining that the Appellant had consulted his GP for anger issues *prior* to the receipt by him of the refusal decision. Second, the Appellant then also made a further witness statement in which he accepted that he had failed to remember dates accurately, but significantly he accepts that he was treated for anger problems for a long time before receiving the refusal letter and that he became angry because of the stresses in his life at the time.

60. Dr Obuaya produced a further report dated January 2016 after he had considered the UK GP medical records of the Appellant and after a further interview by Skype but again without seeing the Appellant. He concluded five and a half years after the refusal letter that:

(a) He then noted the presence of "significant anger issues and other cognitive biases which brought [the Appellant] to the attention of mental health services in 2007";

(b) "Whilst the presence of these symptoms warranted a course of psychological therapy (but not medication), it is not my opinion than he is likely to have met the criteria at the time for a depressive disorder or another mental disorder";

(c) "It is however, my opinion that the presence of residual maladaptive personality traits of this nature are likely to

have hampered his ability to tolerate distress in the context of his subsequent unsuccessful naturalisation applications in the U.K" and that

(d) his recommendations "regarding the appropriate treatment of the Appellant's depressive illness as well as his prognosis, remains unchanged".

Conclusion on the Effect of the Refusal Letter

61. First, the medical records show that the initial evidence of the Appellant was seriously inaccurate (including the fact that he had told Dr Obuaya that he had not experienced significant psychological problems before he received the refusal decision) because as we have explained in paragraph 60 above as prior to receipt of the refusal letter, the Appellant had pre-existing mental health problems as well as suffering from asthma, migraine and hypothyroidism. We are more than surprised by these inaccuracies, which undermine our confidence in the Appellant's reliability as a witness even after considering his explanations which we have no reason to disbelieve. So we have concluded that we must be careful about accepting his evidence unless corroborated by medical evidence.

62. Second, we have considered with care whether the evidence served on behalf of the Appellant establishes that he has suffered depression or other mental illness as a result of the refusal decision. In our view, the contemporaneous medical records establish that many of his mental health issues arose in about 2007 prior to the refusal decision, and were therefore unconnected to it.

63. Third, the medical records do not establish that the Appellant sought medical treatment in the UK for any mental health condition after the refusal decision. To the extent that the Appellant is now suffering from any mental health condition, that appears to have arisen several years after the refusal decision, and we are not satisfied that it is directly affected by it, especially as many of his most significant concerns such as that he will be arrested and detained have no connection with the refusal decision. They are based on his own misconceptions for which the Secretary of State cannot be responsible.

64. Fourth, although the Appellant went to Pakistan voluntarily in September 2013, there are no medical records of any treatment he received there or details of what the doctor discovered there.

65. Fifth, the Appellant and his wife have given evidence about warnings received from his previous solicitors such as that they might be under surveillance. In our view to the extent that any mental health condition of the Appellant has been caused by this misleading or inaccurate information about the legal effect or implications of the decision to refuse naturalisation by his previous solicitors, that is not a matter for

which the Secretary of State can be held responsible and it is not the consequence of the decision to refuse naturalisation.

66. Sixth, in so far as the Appellant complains about separation from his family, we consider that this state of affairs is solely attributable to the Appellant's voluntary decision to move to Pakistan in 2013 and to remain there. The Secretary of State cannot be held responsible for it as it is not the consequence of the decision to refuse naturalisation. It is noteworthy that the Appellant has subsequently made two trips back to the United Kingdom since 2013 as well as returning for the present hearing.

67. Seventh, the Appellant contends that the refusal decision caused him reputational damage. Any alleged damage is minimal and is not sufficient to engage Article 8. The refusal decision was provided to the Appellant on a confidential basis and, further, the Appellant has been granted anonymity in all proceedings. There is no evidence that he has actually suffered any reputational damage

68. Eighth, the refusal decision has not interfered with the Article 8 rights of the Appellant's wife or children. Any adverse impacts on them are the result of the Appellant's decision to move to Pakistan. The Appellant's right to continue to live with his wife and children in this country had not been impaired or affected in any way by the decision to refuse his application for naturalisation. In any event, the Appellant's family circumstances were considered when the decision was reviewed in May 2010 and August 2010: see Home Office letters dated 26 May 2010 and 9 August 2010.

69. For the sake of completeness, we should add that insofar as the Appellant's case is that the Commission procedures themselves give rise to a breach of Article 8, that submission is precluded by the judgment in *IR v United Kingdom* (2014) 58 EHRR SE14, which held that the SIAC procedures are compatible with the requirements of Articles 8 and 13 ECHR.

70. Pulling the threads together, the refusal letter was not arbitrary for the reasons explained in the Closed Judgment, but one which the Secretary of State was entitled to reach. In addition, we are quite satisfied that the Appellant's case is not sufficiently serious as to amount to an infringement of his Article 8 rights bearing in mind the rights he still has as set out in paragraph 49 above, and the fact that his fears about surveillance and that he might be arrested or detained were not caused by the refusal decision but by bad advice or his imagination. Similarly his belief that he was a bad father, husband and could not work could not be regarded as caused directly or at all by the refusal decision or that it even possibly caused or contributed to these matters which the Appellant says were the consequence of the refusal decision.

71. We are fortified in reaching this conclusion by the comments of Ouseley J in *AHK, AM, AS and FM v Secretary of State for Home Department* [2013] EWHC 1426 (Admin) that:

> "48 I am not persuaded that the Article 8 rights of AM, AS or AHK are interfered with either. In no case has it led to any threat to their existing status or ability to live with their family, or any reduction in their ability to travel. They continue to be subject to the uncertainties and problems which apply to those who do not have UK passports when they return to the UK or travel abroad with family members who are British citizens. They may feel less secure in their future. That means no more than that the status quo continues, a state of affairs, which does not of itself involve any interference with Article 8 rights. The apprehension of reputational damage from the risk or fact that the refusal has or will become generally known or known to friends, community and others, allied to the problems of putting forward evidence to refute them, cannot add much to the more direct effects of the refusal of the benefits of naturalization. I find it very difficult to see that the reasons for a decision can of themselves constitute an interference with Article 8 rights, if the decision does not. All in all, these factors do not seem to be of any real significance such as to amount to an interference with Article 8 rights. If there is interference, it is of a quite modest kind".

Issue 2 – Article 8(2) Issue

72. In case we are wrong and the refusal decision letter engaged and interfered with the Appellant's Article 8 rights, we must consider if any such interference was justified and proportionate. Article 8(2) provides (with emphasis added) that :

> "There shall be no interference by a public authority with the exercise of this right except such as is in *accordance with the law* and is *necessary in a democratic society in the interests of national security, public safety… for the prevention of disorder or crime,*. …or for the protection of the rights and freedoms of others."

73. In this case, the refusal letter was "in accordance with the law" because for the reasons explained in the Closed Judgment, the Secretary of State was entitled to reach that refusal letter pursuant to s6 of the BNA and the relevant Staff Instructions. The decision to refuse the Appellant's naturalisation application was made for the legitimate aim of public safety and/or the prevention of disorder or crime and/or the protection of the rights of others. It was also necessary in a democratic society, or in other words a proportionate measure on the facts of this case. The State has the right to control the granting of naturalisation and is able to set a high standard of "good character". Ensuring that citizens of this country are of good character is plainly an important objective in the light of the rights that nationality confers.

74. The Secretary of State's decision is based on a policy, the legality of which has not been challenged other than on grounds of discrimination, which is now not pursued in front of this Commission. The conduct of the Appellant has, when taken as a whole, been such as to fail the good character requirement. The measure adopted - refusing his application for naturalisation – is far less intrusive than, for example, a decision revoking his leave to remain in the country and ordering deportation.

75. We have no hesitation in concluding that the Secretary of State's refusal of the Appellant's application for naturalisation was justified and proportionate. Indeed even if we were wrong and if we should have held that the Appellant's Article 8(1) was engaged and infringed, then we would have no hesitation in concluding that the matters to which we have referred in respect of Article 8(2) would have meant that the ultimate conclusion would have been that there was no breach of the Appellant's Article 8 rights.

Issue 3 –Procedural Fairness Issue

76. Mr. Southey contends that it was unfair of the Secretary of State first not to permit the Appellant to make representations before the decision was made to refuse his application, and then second not to permit him to rely on evidence post-dating the decision. Ms Callaghan disagrees and she submits that there has been no such procedural unfairness.

Pre-Decision Representations

77. The case for the Appellant was that he did not know that a national security concern or similar issues were raised against him and so he has had no opportunity to put forward any evidence. It is said that this is contrary to the approach adopted in *R v Secretary of State for Home Department ex parte Fayed* [1998] 1WLR 763. In that case, it was decided that fairness meant that before reaching his decision the Secretary of State was obliged to inform an applicant of the nature of the matters weighing against the grant of the application so as to afford him an opportunity of addressing them.

78. Lord Woolf MR with whom Phillips LJ agreed said (with emphasis added) at pages 776H to 777B that:

'It remains for me to deal with the practical consequences of applying the Ryan approach. 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 the position then 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".

79. A similar approach was adopted in *Tariq v Home Office* [2012] 1 AC 452 when the Supreme Court by a majority set aside a declaration that a claimant was entitled to be provided with sufficient detail of the allegations made against him so as to enable him to make an effective challenge to them. The declaration was set aside because the disclosure of this material could not be allowed on grounds of national security.

80. We consider that the correct position in relation to the right of the Secretary of State not to disclose matters of national security when refusing an application for naturalisation was that expressed by Ouseley J in concluding in *AHK* [2013] EWHC 1426 (Admin) at [29] that:

> "The duty not to grant naturalisation unless the SSHD is satisfied, among other matters, that the applicant 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 reasons, or of evidence for the areas of concern or reasons. Such duty as is implied cannot conflict with the express duty to reach a decision on that issue, a decision that clearly requires to be taken on all 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 national security at risk when the Act requires her to refuse naturalisation for that very reason. The latter would require her to ignore relevant 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 R v SSHD ex parte Fayed (No 1) [1998] 1 WLR 763."

81. For the reasons set out in the Closed Judgment, there were good reasons for not disclosing the reason why it was considered that the Appellant was not of "good character".

82. We consider that to be a just and fair procedure bearing in mind that:

> (a) there is no express legislative requirement for advance notice of adverse matters to be disclosed to the party refused naturalisation;

(b) there is instead a detailed scheme set up by Parliament with the use of Special Advocates for the open and closed disclosure of material after the relevant decision has been taken, and for the consideration in the rule 38 procedure of material that the Secretary of State considers it would be contrary to the public interest to disclose;

(c) by completing an application form, the Appellant was entitled to refer to matters that he considered relevant. Thus the application itself is the applicant's opportunity to make his case known. Sales J explained in *R (Chockalingam Thamby) v Secretary of State for the Home Department* [2011] EWHC 1763 (Admin) at [67] that the obligation of fairness can be met by giving an applicant fair warning at the time he makes the application (by what is said in the form and accompanying guide) of the general matters which the Secretary of State is likely to treat as adverse to the applicant so that he is afforded an opportunity to deal with them in the application form. In this case, the Appellant was given the opportunity to make any representations he wished to make regarding his character; and that

(d) this is not a case in which a statutory power is being exercised which deprives a person of an existing right, but instead it is the refusal of an application made for a privilege, namely British nationality.

83. The combination of these factors means that we are unable to accept Mr. Southey's criticism.

Consideration of Post-Decision Material

84. Mr. Southey contends that in deciding whether the refusal of the Appellant's application for naturalisation was fair, this Commission should consider the extensive material which came into being after the decision was made and which we have described in paragraphs 24, 52 to 59 and 62 above, especially as the Appellant was unable to make proper representations before the decision was made as he did not know the matters which ultimately caused the Secretary of State to refuse the application.

85. Ms Callaghan submits that a basic principle in judicial review proceedings is that the legality of a decision has to be considered in the light of the material before the decision maker and so other material available or produced subsequently should be disregarded.

86. Mr. Southey relies on the statement of this Commission in *FM Secretary of State for the Home Department* (SN/2/2014) to the effect

that post-decision evidence adduced by an Appellant was to be considered by the Commission, but it then added that:

> "23….The weight to be attached to [this evidence] being a matter for the Commission".

87. No authority was relied on in support of either of these conclusions by the Commission in FM, but our attention has been drawn to the powerful contrary authority, which establishes that:

> (a) The material that is relevant is the material that was before the decision maker: see *R (Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546 at [63].
>
> (b) The time at which the factors governing reasonableness have to be assessed is the time of making the decision called into question: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 at [131].
>
> (c) Accordingly, fresh evidence should not ordinarily be admitted in a judicial review: see *R v Secretary of State for the Environment ex parte Powis* [1981] 1 WLR 584 at 595G where the relevant criteria were set out but none of which would have led to the admission of the post-decision evidence relied on by the Appellant.

88. These principles have been applied by this Commission in a number of recent naturalisation challenges. In *SN/9/HN v SSHD* SN/9/2014 ("SN/HN"), the Commission held that there may be narrow circumstances which could arise where 'after-coming' material could be relevant (for example, if such material demonstrated a suppression of relevant information at the time, or when considering remedy), but that the "fundamental point" is that "in the preponderance of cases such material cannot be taken into account by the Commission because it cannot be said to affect the decision taken at the time." [22] See also *AHK v SSHD* SN/5/2014 at [50]; *AA v SSHD* SN/10/2014 at [24]-[25]; *FM v SSHD* SN/2/2014 at [23].

89. In *the Divisional Court Judgment*, Sir Brian Leveson P judgment of the Divisional Court stated (with emphasis added) at [38] that:
"I would require disclosure of such material as was used by the author of any relevant assessment to found or justify the facts or conclusions expressed; or if subsequently re-analysed disclosure should be of such material as is considered sufficient to justify those facts and conclusions and which **was** <u>in existence at the date of decision.</u>"

90. In *SN/HN v Secretary of State for Home Department* (SN/9/2014) this Commission explained in a case concerning a challenge to a decision refusing to grant British citizenship that :
" 21. A decision can normally only fairly be reviewed by reference to the material available to the decision maker, or to material which should have been available to the decision maker. It can arise in judicial review proceedings that the Court will require further information to be provided which post-dates the relevant decision. That often arises when a party is seeking interim relief. It may also arise because the remedies in the High Court are discretionary and the Court may look at after-coming information when considering remedy"

91. In *R(A) v Chief Constable of the Kent Constabulary (2013) 135* BMLR 22, [2013] EWCA Civ 1706, the Court of Appeal had to consider whether post-decision material could be relied on when the decision was challenged, In deciding that it could not be relied on, Beatson LJ giving the only reasoned judgment of the Court explained that:
"84. For these reasons, the appropriate course in many cases is not to review the Secretary of State's decision on the basis of new material which the Secretary of State has not considered and made an assessment of its impact on a claimant's position. In general, the matter should either be remitted, or the claimant should make a further application to the primary decision-maker deploying the new material and inviting the primary decision-maker to make a new decision. That would enable the court, if the matter comes before it again, to have the benefit of the views of the person, tribunal or regulatory entity to which Parliament has given primary responsibility for the decision"

92. Beatson LJ explained [91] that the reason why he referred to the position not as a universal rule but applicable "in many cases" was that he acknowledged that there would be exceptions where the decision maker was under a continuing duty to keep the matter under review, such as when considering "fresh claims" in the immigration field. There is no such duty in relation to naturalization applications because, as we will explain, it is a one off-decision.

92A. The case for considering later evidence was much stronger in *A* than it is in the present case because the present case did not involve an issue under s6 of the Human Rights Act 1998. In contrast, in A's case, one issue specifically concerned "whether a decision interferes with a right under the ECHR and, if so, whether it is proportionate and therefore justified, it is necessary for the court to conduct a high-intensity review of the decision". Indeed, this difference between the nature of the review in A's case and in naturalisation appeal cases was referred to by the Divisional Court Judgment in paragraph 29.

93. Mr. Southey has two responses to these authorities. First, he submits that the Secretary of State was under a continuing duty by reason of the Human Rights Act 1998, which can be met (if required by Article 8) by the grant of citizenship, so, he says, that there is no reason why the fresh material cannot be considered prior to the hearing, even though

that is contrary to what the Court of Appeal advocated in *A* as explained in paragraph 93 above. Mr. Southey contends that the Divisional Court's Judgment in AHK at paragraph 37 anticipated such review. We do not agree, as the Divisional Court was referring to how material postdating a decision can be used in a subsequent application when it stated in that paragraph that:

> "the only realistic outcome of a successful challenge to any of these decisions …will be to require the SSHD to make them afresh. In that event, this material (together with any postdating the decision) would be available to be deployed to justify any new decision. Thus, ultimately the interested parties are not prejudiced by this course and continued further litigation can be avoided".

94. A further reason why paragraph 37 does not show that post-decision material has to be considered is that the Divisional Court Judgment stated that:

(a) in the words of paragraph 38 that the Secretary of State's decision has to be reached in the light of material "which was in existence at the date of decision."; and

(b) as was stated in paragraph 34 that what was required by this Commission was "a review, which is an analysis of the facts and the basis for the facts which led to the recommendation or conclusion and its reasoning". This precludes consideration of facts which did not lead to the conclusion such as matters not disclosed at the time of the decision.

95. Second, Mr. Southey also contends that when considering the Appellant's case, an intensive review is required in the light of the decision of the Supreme Court in *Pham v Secretary of State for Home Department* [2015] 1 WLR 1591, which deals with a challenge to a decision of the Secretary of State depriving the Claimant of his British nationality, and that related to the wording of Article 1(1) of the Convention relating to Stateless Persons.

96. The Supreme Court explained at paragraphs 95 and 110 of that judgment that the nature of judicial review, including the intensity of scrutiny and the weight to be given to any primary decision maker's view, depends on the context. It considered that if the withdrawal of nationality by the United Kingdom would at the same time mean the loss of European citizenship, this is an additional detriment that a United Kingdom Court could also take into account when considering whether the withdrawal was proportionate (see paragraphs [59]-[60]. [98] and [108]-[111]).

97. In our view, depriving an individual of British citizenship is a much more serious step than not granting an alien such citizenship, which is a privilege. We do not consider that the *Pham* case has any effect on

the approach to be taken to a challenge to a refusal of a naturalisation application where the consequences for the Claimant were much less drastic, and where there is clear authority in the Divisional Court judgment precluding consideration of post decision material.

98. A problem, which would arise if this Commission had to consider post-decision matters, is that there would have to be a decision of the Secretary of State in respect of each item of post-decision evidence as and when it arose. So for example in this case if there was a continuing duty to consider all post-decision evidence.

99. So in the context of the present case, there would have had to be a new decision first when the two witness statements of the Appellant and his wife as well as the psychiatric report of Dr Obuaya were served on 19 November 2015, then second when the psychiatric report of Dr Abdul Shakoor was served on 18 December 2015 was served, third on 24 December 2015 when the Appellant's GP Medical records were served and finally on 22 January 2016 when a further psychiatric report of Dr Obuya was served together with unsigned witness statements of the Appellant and his wife. Each time new evidence was supplied, there would have been the need for a decision on the application for naturalisation.

100. It is very likely that each time a decision was made which was unfavourable to the Appellant it would have been challenged with a judicial review application. In such circumstances, we wonder when this Commission would have been able to finally resolve this present application.

101. In our view, the way to deal with post-decision evidence if the Appellant is unsuccessful in his present application is, as Beatson LJ explained in A (see paragraph 93 above), to make a further application to the Secretary of State setting out the material which was then available even though not available to the original decision maker.

102. In reaching that conclusion, we have not overlooked objections from Mr. Southey to this suggestion, which is that requiring the applicant to make a further application is unfair. First, he contends that the decision would be the same as the previous decision as it would be made by the same decision maker. We could and would obtain an undertaking by the Secretary of State that a different decision maker would be involved; in the same way as if we allowed the appeal the matter would be remitted for consideration by a different decision maker.

103. Second, he says that there would be a delay, but that would be no worse than if we quashed the present decision and a new decision had to be made.

104. We should mention that if the approach in *FM (*supra), as set out in paragraph 88 above, is correct and we had a discretion to decide

whether to take into consideration the post-decision material, we would have refused to consider it, as no *permanen*t prejudice would have resulted from that decision as the Appellant could have made a fresh application in which the new material could have been considered and would be considered.

104A. Nevertheless, it is prudent for us to consider whether the Secretary of State would have been entitled to refuse the application for naturalisation if she had had the evidence which was adduced after the decision was taken in addition to the evidence which she had before her. We approach this issue with diffidence as this Commission is not the primary decision maker and so it would only be possible to decide that the evidence which came into being after the decision was made could not have altered the decision if no reasonable decision maker could have reached a different decision in the light of this subsequent evidence perhaps because it was irrelevant.

104B. As we have explained, there was material which is referred to in paragraphs 24, 52 to 59 and 62 which came into being after the refusal decision was made. We have considered it with care to see if we could conclude that no reasonable decision maker could have reached a different decision in the light of this subsequent evidence.

104C. In our opinion, we can so conclude as the subsequent evidence relates principally to the effect of the refusal decision and it does not undermine the cogency and probative value of the closed evidence and the reasons for refusing the naturalisation decision.

Issue 4 – Article 6 Issue

105. Mr. Southey submits that this Commission should carry out a full merits review. In support, he contends first that the nature of the proceedings determine whether or not Article 6 is engaged as Lord Hoffmann explained in *RB (Algeria) v Secretary of State* [2010] 2 AC 110 at [178]. He then submits that human rights are civil rights following the enactment of the Human Rights Act 1998 (*Re: S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 at [70]-[71] (Lord Nicholls), *R (McCann) v Manchester Crown Court* [2003] 1 AC 787 at [29] (Lord Steyn) and [80] (Lord Hope) and *RB (Algeria)* [2009] 2 WLR 512 at [88] (Lord Phillips)).

106. The next step in his argument is that when a private law action for damages is brought asserting a breach of Convention rights, then Article 6 attaches. He submits that this is decisive as the Appellant is seeking damages for breach of his Article 8 rights and that in consequence, the Commission determining the question whether there has been a breach of Article 8 must be a court of full jurisdiction.

107. Therefore, the Commission must be able to determine, for itself, whether amongst other things the decision is proportionate. A further reason why this is necessary is because there is procedural unfairness

elsewhere in the process as the Appellant has not had access to the material used to refuse his application.

108. Ms Callaghan submits that it is clear that the refusal decision has to be considered in the light of the fact that section 2D(3) of the SIAC Act provides that, in respect of challenges to decisions to refuse naturalisation:

"In determining whether the decision should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings."

109. This was the clear intention of Parliament when, as we explained in paragraph 18 above that provision came into effect and this unambiguous wording cannot be modified by an earlier court case such as in *RB (Algeria)*.

110. After the hearing, we decided to consider if the Commission had jurisdiction to award damages and we therefore asked Counsel for written submissions, which we duly received. The Appellant's case is that there is no doubt that damages can be claimed in judicial reviews in the High Court (Part 54.3(2) of the Civil Procedure Rules) because:

(a) Until the Justice and Security Act 2013, these proceedings would have been considered by way of judicial review in the High Court. The 2013 Act prevented that. It inserted section 2D (3) (as well as other provisions) into the Special Immigration Appeals Commission Act 1997. This provides that:

In determining whether the decision should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.

(b) Section 2D(4) then provides:

If the Commission decides that the decision should be set aside, it may make any such order, or give any such relief, as may be made or given in judicial review proceedings.

(c) The Applicant submits that the position is clear. SIAC can order any relief available in judicial review proceedings.

(d) He also contends that it is also of note that this is unsurprising. Were this not the case then a person would potentially be required to commence parallel proceedings. That would undermine the objectives of the 2013 Act.

111. We agree with the respondent that this is not a case in which we have held that the naturalisation decision should be set aside, and so the Appellant cannot rely on Section 2D (4) as it does not apply. It is striking that although there is that provision which entitles the Commission to grant the relief that could be given in judicial review

proceedings if the decision on naturalisation is set aside, there is no similar provision dealing with the situation if the decision on naturalisation is *not* set aside, which is the present case.

112. Thus, our view is that there is no jurisdiction to award damages where a decision on naturalisation is not set aside as in the present case and so the Appellant cannot rely on the reasoning set out above to claim a full merits review. We have not had the benefit of oral submissions on these matters. Both parties were content for us to deal with this on the basis of written submissions.

113. We therefore conclude that the Appellant is not entitled to a full merits review especially because of the matters set out in paragraph 111 and 112 above.

Conclusion

114. For the reasons set out above we dismiss this application.

APPENDIX

As explained in paragraph 4 above, the basis on which we concluded that the Secretary of State for Home Department was entitled to refuse the naturalisation application was that the appropriate legal principles were that:

a. The burden of proof is on the applicant to satisfy the Secretary of State that the requirements (including that he is of "good character") are met on the balance of probabilities.

b. If this test is not satisfied the Secretary of State must refuse the application;

c. The Secretary of State is entitled to set a high standard for the good character requirement. Thus in *R v Secretary of State for the Home Department ex p Fayed (No 2)* [2001] Imm. A.R. 134, Nourse LJ stated (at [41]) that:

> "In *R v Secretary of State for the Home Department, ex parte Fayed* [1998] 1 WLR 763, 773F–G, Lord Woolf MR referred in passing to the requirement of good character as being a rather nebulous one. By that he meant that good character is a concept that cannot be defined as a single standard to which all rational beings would subscribe. He did not mean that it was incapable of definition by a reasonable decision- maker in relation to the circumstances of a particular case. Nor is it an objection that a decision may be based on a higher standard of good character than other reasonable decision-makers might have adopted. Certainly, it is no part of the

> function of the courts to discourage ministers of the Crown from adopting a high standard in matters which have been assigned to their judgment by Parliament, provided only that it is one which can reasonably be adopted in the circumstances".

No criticism was made of a recent decision in the Administrative Court in *R (on the application of Khan) v SSHD* [2013] EWHC 1294 (Admin), in which a claimant unsuccessfully challenged a refusal to grant naturalization on the grounds that the claimant was not of "good character" which was based solely on a conviction of the claimant for an offence of using a mobile telephone whilst driving.

d. "The test for disqualification from citizenship is subjective. If the Secretary of State is not satisfied that an applicant is of good character, and has good reason not to be satisfied, she is bound to refuse naturalization." per Stanley Burnton LJ in *Secretary of State for the Home Department v SK Sri Lanka* [2012] EWCA Civ 16 [31]:

e. The good character requirement cannot be waived. An applicant may seek to persuade the Secretary of State that he is of good character, but if he or she does not satisfy the Secretary of State that the good character requirement is met, any grant of naturalization would be *ultra vires*.