SPECIAL IMMIGRATION APPEAL COMMISSION

Appeal Nos: SN/23/2015 & SN/24/2015
Hearing Date: 10th -11th December 2015 and 11 February 2016
Date of Judgment: 20th April 2016

BEFORE:

SIR JOHN ROYCE
UPPER TRIBUNAL JUDGE J PERKINS
MR H WARREN-GASH

Between:

ZG and SA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - -

Mr S Kovats QC & Ms J Thelen Counsel (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State.

Ms J Farbey QC & Mr Z Ahmad Counsel (instructed by the Special Advocates Support Office) appeared as Special Advocate.

Mr E Grieves & Mr R Halim (instructed by Ronald Fletcher Baker LLP & Wilson Solicitors LLP) for the appellants

- - - - - - - - -

OPEN JUDGMENT

- - - - - - - -

Sir John Royce:

Introduction

1. As long ago as the 25th February 2000 ZG applied under s. 6 (1) of the British Nationality Act 1981 for naturalisation as a British citizen. On the 11th September 2000 SA similarly applied for naturalisation.
   It was not until 2007 that they were informed that the Secretary of State was refusing their applications on the ground that they were not of good character. Why the decision making process took that length of time has not been satisfactorily explained.
   It is no fault of theirs that it is not until now that their applications to set aside the Secretary of State's decisions come before SIAC.

2. By amended grounds of review dated 10th November 2015 (ZG) and 11th November 2015 (SA) the appellants contend that the decisions were flawed in law and should be quashed for reasons which can be summarised as follows :

   (a) The Secretary of State acted unfairly in failing to identify areas of concern in advance of the decisions and give them a reasonable opportunity to address those concerns before the decisions were made.
   (b) The Secretary of State acted unfairly in failing to give adequate reasons for the decisions so as to enable representations to be made.
   (c) The Secretary of State acted unfairly in failing to put in place effective procedures for providing at the outset or subsequently relevant material or information by gist, redaction or summary to enable them to deal with areas of concern.

3. The Secretary of State contends, in summary:
   (a) The appellants were given fair notice of areas of concern before their applications were determined
   (b) Adequate reasons for the decisions were given
   (c) Nothing was submitted subsequently to require her to reconsider the decisions.

Facts

ZG

4. ZG is a citizen of Turkey, born on 8th May 1957. He and his family arrived in the UK on 16.12.91 and claimed asylum. On 3.3.94 he was granted refugee status as a person at risk of persecution in Turkey. On 24.6.98 he was granted indefinite leave to remain.

5. On 25th February 2000 he applied for British citizenship. In March 2003 he attended an interview with the police in connection with his citizenship application. On 2.4.04 the Home Office reported that enquiries, which included activities outside the UK, were ongoing.

6. On 8.3.05 ZG's wife and two children were informed of their successful applications for citizenship. ZG was informed that enquiries were still ongoing. On 3.7.05 the Home Office wrote to ZG assuring him his application was still under consideration. A similar letter was sent on 24.2.06. On 19.7.06 a letter before action was sent to the Home Office regarding a possible judicial review of the failure to make a substantive decision, which was acknowledged on the 21.7.06. On 25.7.06 the Home Office wrote to Wesley Gryk, solicitors, saying that until the "wide range of enquiries" were complete a firm date for decision could not be given.

7. By letter dated 7th June 2007 the Home Office wrote to ZG refusing his application:

   "Your application for British citizenship has been refused on the grounds that the Home Secretary is not satisfied that you meet the requirement to be of good character. This is because of your past activities on behalf of Devrimi Sol (Dev Sol) and its successor, Devrimi Halk Kurtulus Partisi-Cephisi (DHKP), which is proscribed under the terms of the Terrorism Act (2000)."

8. Solicitors on his behalf sought more detailed reasons, indicating that ZG was anxious to demonstrate his good character. They sought even a summary of events relied on against him and their timing so he could respond. They were met by repeated refusals.
   On 1.5.08 ZG lodged a claim for judicial review.
   It was contended in the application that the reasons given were insufficient to "make adequate and/or material representations to address the alleged activities" or "challenge the decision making process and/or rationality of such a decision in the administrative courts ". It was also contended that the Secretary of State appeared to have made no attempt to determine whether further material could have been provided by using redaction, anonymisation or gisting.

9. On 28.6.13 ZG received a letter on behalf of the Secretary of State:
   "I have instructions to gist the following :
   The SSHD refused ZG's application for naturalisation on the grounds of good character. The decision was based upon his involvement with Devrimi Sol (Dev Sol) and its successor Devrimi Halk Kurtulus Partisi- Cephisi (DHKP-C) which is a proscribed organisation under the Terrorism Act 2000. ZG has

a history of active involvement with DHKP-C which carried out acts of violence and terrorism. When returning from a visit to Europe in January 1995, ZG told the Kent Police port unit at Ramsgate that he had been imprisoned in Turkey for a total of 9 years for his political beliefs.
ZG admitted to the Metropolitan Police that he had contributed not insubstantial funds to the rent for the Dernek community centre and to the DHKP-C. The SSHD takes the view that membership of and financial contribution to a proscribed organisation places serious doubts on the issue of good character element of the application for naturalisation. He has therefore been involved with DHKP-C both in Turkey and in the UK. Although ZG may have claimed to have become less involved in the DHKP-C affairs, the SSHD was not satisfied that he has permanently severed his links."

10. Further to a PII hearing on the 13th July 2013 in the Administrative Court proceedings, the Secretary of State inserted a new sentence in the first paragraph:
"In his police interview, ZG admitted that he had been deeply involved with "left wing organisations".

11. On 1.7.15 the Secretary of State certified under s.2D (1) (b) of the 1997 Act that her decision was made wholly or partly in reliance on information which, in her opinion, should not be made public in the interests of national security or otherwise in the public interest. On 13.7.15 the appellant lodged his appeal with SIAC.

12. On 23.10.15, following the procedure under rule 38 of the Special Immigration Appeals Commission (Procedure) Rules SI 2003/1034, the Secretary of State disclosed documentation and more detailed reasons for refusal. The disclosed documentation consisted of records of or summaries of interviews and shows:

    (i) On 8.2.93 at Gatwick Airport, where ZG attended in the course of his employment as an interpreter for a firm of solicitors, he was spoken to by Sussex police. He agreed, with some reluctance, to be interviewed about his background. He agreed he had been involved with Dev Sol while in Turkey; he described how he had been imprisoned; and how he had been tortured. They put to him that he was actively involved with Dev Sol. He did not accept that. He said he wished to forget his painful past.

    (ii) On 16.1.95 he was stopped at Ramsgate port. He was interviewed by Kent police there. He had travelled from Ostend. He said he had been imprisoned for 9 years in Turkey for his political beliefs. He would not say what he had been charged with. He worked as an interpreter for solicitors Simons Muirhead and Burton. It appeared

they represented members of the PKK and Dev Sol but he denied being actively involved with them. He said he did however support their fight against the Turkish government. He said he had been to Germany to see a business colleague but would not give more details. His attitude to the police was described as very patient.

(iii) On 11.4.2003 he was interviewed by the Metropolitan police about his application for naturalisation.
He said he had been involved with Dev Sol and related organisations in Turkey and that he did not now sympathise with DHKP-C but would be supportive of their aim of changing the way in which Turkey was governed. He denied any involvement in raising funds for DHKP-C. He said he had taken part in demonstrations in support of Turkish political prisoners in London in 1996 and 2000. He said in 1979 a friend of his had been shot by right wingers. He had gone to his aid. He was caught up in a mass arrest and convicted with 200 people of belonging to a terrorist organisation. He received 15 years imprisonment, reduced to 7 years under an amnesty. In 1987 he had been arrested at his brother's wedding and kept in custody for 19 days as his name and address had been found in books belonging to Dev Sol members. He said he had been tortured while in custody.

SA

13. He is a Turkish Kurd born on the 15th October 1960. He fled Turkey and arrived in the UK on the 26th June 1990. He applied for asylum on 23rd November 1990. On 21st September 1992 his application was refused but he was granted 12 months exceptional leave which was successively extended until 21st September 1999. He applied on 9th August 1999 for indefinite leave to remain which was granted on the 19th September 1999.

14. On 11th September 2000 he applied for naturalisation.

15. By letter dated 1st June 2007 the Home Office wrote to him refusing his application:
"Your application for British citizenship has been refused on the grounds that the Home Secretary is not satisfied that you meet the requirement to be of good character. That is because of your past association with the Kurdish Workers Party (PKK) /KADEK/KONGRA, which are proscribed under the Terrorism Act (2000)."

16. Solicitors on behalf of SA sought more detailed reasons for the decision. After repeated refusals a claim for judicial review was lodged on 16th January 2009. It was contended in the application that the reasons given were insufficient to "make

adequate and/or material representations to address the alleged activities "or" challenge the decision making process and/or the rationality of such a decision in the administrative courts ". It was also contended that the Secretary of State appeared to have made no attempt to determine whether further material could have been provided by using redaction, anonymisation or gisting.

17. On 1st July 2015 the Secretary of State certified under s. 2D (1) (b) of the 1997 Act that her decision was made wholly or in part in reliance on information which, in her opinion, should not be made public in the interests of national security or otherwise in the public interest. On 13th July 2015 the appellant lodged his appeal with SIAC.

18. On 23rd October 2015 following the rule 38 procedure the Secretary of State made much more detailed disclosure which showed:

    (i) On 2nd August 1991 SA participated in an occupation of the Turkish embassy in London by supporters of the PKK to protest against the abduction and killing of a popular Turkish / Kurdish politician. He was arrested and charged with criminal damage but it would appear from what we were told at the hearing, not prosecuted.

    (ii) On 24th March 1992 PKK supporters "attacked" the Turkish embassy in retaliation for the deaths of a number of Turkish dissidents in Turkey caused during clashes between the PKK and the Turkish government forces. SA was arrested but not charged.

    (iii) On 7th June 1998 SA and two other men were questioned by Kent police at the Dover Hoverport on their return from attending a Kurdish rally in Dortmund. One of the three, not SA, was questioned about involvement with the PKK but said he was not a member.

    (iv) On the 13th September 1998 SA and two others were questioned by Kent police at Dover Hoverport having returned from a Kurdish cultural festival in Holland. SA admitted being a PKK supporter.

    (v) On the 12th July 1999 SA was questioned by Metropolitan police at Heathrow on arrival from Düsseldorf. He stated he had been to Düsseldorf to see his mother who was there visiting his sister who lived there. He said he had recently completed a degree in Sociology at Middlesex University and his dissertation was on the oppression of the Kurdish people. He said he was not a member of the PKK, but sympathised with their aims, not their methods.

The legal framework

19. The British Nationality Act 1981 s. 6 (1) provides:
If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant him a certificate of naturalisation as such a citizen.
The requirements of Schedule 1 include at (1)(b) that the applicant “is of good character".

20. The onus is on the applicant to satisfy the Secretary of State that he is “of good character ". The Secretary of State has no power to grant naturalisation unless the applicant discharges that burden. That is the effect of s. 6 (1). It is confirmed by authority. See R (SK (Sri Lanka) v Home Secretary (2012) EWCA Civ 16 ; R (AHK et al) v Home Secretary (2013) EWHC 1426 Admin (2014) 1 AR 32.

21. What does fairness require in the decision making process?

It is well established that a decision taken by a minister under a discretion conferred on him by Parliament which affects a member of the public is required to be exercised in a manner which is fair.
Lord Mustill in his oft cited speech in R v Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at p. 560 said that fairness "is essentially an intuitive judgment". He distilled a number of principles from the authorities including:
"(5) Fairness will very often require that a person who has been adversely affected by the decision will have the opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer ".

22. In R v (Khatun and Others) v Newham London Borough Council [2005] QB 37 the Court of Appeal considered whether an applicant who had been homeless had a right to be heard about the suitability of housing allocated to him by the local authority. Laws LJ said at paragraph 31.
"That the courts may in the name of fairness insist on the conferment upon affected persons of a right to be heard in the administration of a statutory scheme, itself silent as to such a right, cannot be doubted. But it is not the law that they will always do so. The court is more likely to feel constrained to "supply the omissions of the legislature" where the decision in

question is one which may diminish or extinguish an established right or interest already belonging to the affected person, rather than one which will grant or withhold a benefit or bounty not previously enjoyed, and for which there is merely an entitlement to apply. This is the distinction between "forfeiture" (or deprivation cases) and "application" cases drawn by Megarry J in McInnes v Onslow Fane [1978] 1 WLR 1520. It is not hard and fast. There may be cases where the refusal of the application (for example, the refusal of a passport) will carry adverse implications for other rights or interests which the applicant may expect to enjoy. But in general the distinction possesses much force. In an "application" case there is likely to be legal space for the decision maker to exercise a discretion whether or not to accord a right to be heard. In doing so, he will of course have regard to the practicalities of the scheme's operation. A perceived need in the general interest to process applications speedily, against a background of many applicants and scarce resources, may be a legitimate and important factor".

23. The leading authority on fairness in the context of an application for naturalisation is R v Secretary of State for the Home Department ex parte Fayed [1998] 1 WLR 763. The majority of the Court of Appeal (Lord Woolf MR and Phillips LJ, Kennedy LJ dissenting) held that the Secretary of State was required to disclose to the Fayed brothers adverse matters before determining their applications for naturalisation.

At p 768 G in reciting the facts Lord Woolf said "Neither of the brothers has ever been informed of what were the aspects of their applications which have given rise to difficulties or reservations about their applications. Without information as to this it would in practice be impossible for them to try to volunteer information which would support the applications which they have made or any fresh applications they might want to make in the future."

At p 773 E to H Lord Woolf said :

"Apart from the damaging effect on their reputations of having their applications refused the refusals have deprived them of the benefit of citizenship. The benefits are substantial.....The decisions of the Minister are therefore classically ones which but for s 44 (2) would involve an obligation on the Minister making the decision to give the Fayeds an opportunity to be heard before that decision was reached.

The fact that the Secretary of State may refuse an application because he is not satisfied that the applicant fulfils the rather nebulous requirement of " good character" or " if he thinks fit" underlines the need for an obligation of fairness. Except where non-compliance with a formal requirement, other than that of good character, is being relied on, unless the applicant knows the areas of concern which could result in the application being refused in many cases, and especially in this case, it will be impossible for him to make out his case. The result could be

grossly unfair. The decision maker may rely on matters as to which the applicant would have been able to persuade him to take a different view.....This is therefore a case where, ignoring s. 44 (2) the courts would intervene to achieve fairness for the Fayeds by requiring the minister to identify the areas which were causing them such difficulty in reaching their decision".

Section 44(2) of the British Nationality Act 1981, now repealed, provided that:

The Secretary of State...shall not be required to assign any reason for the grant or refusal of any application under this Act the decision on which is at his discretion; and the decision of the Secretary of State...shall not be subject to appeal to, or review in, any court ".

The majority held that notwithstanding that provision fairness required that there should be such disclosure to the Fayed brothers as to enable them to make appropriate representations before a decision was made.

Lord Woolf in dealing with the s. 44 issue at 774 F said "English law, at least until recently, has not been so sensitive to the need for reasons to be given for a decision after it had been reached. So to exclude the need for fairness before a decision is reached because it might give an indication of what the reasons for the decision could be is to reverse the actual position. It involves frustrating the achievement of the more important objective of fairness in reaching a decision in an attempt to protect a lesser known objective of possibly disclosing what will be the reasons for the
decision"

24. The Court in Fayed went on to examine some consequences of its decision. At 776 H to 777A Lord Woolf 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 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 interests of the state.

I appreciate there is also anxiety as to the administrative burden involved in giving notice of areas of concern. Administrative convenience cannot justify unfairness but I would emphasise that my remarks are limited to cases where an applicant would be in real difficulty in doing himself justice unless the area of concern is identified by notice. In many cases which are less complex than that of the Fayeds the issues may be obvious. If

this is the position notice may well be superfluous because what the applicant needs to establish will be clear."

25. Phillips LJ as he then was concluded that in the absence of s. 44 (2) there would have been a duty to give reasons. He however considered that the duty of disclosure was more important. At p. 789 E "I consider the duty of disclosure is the more significant element in the decision making procedure than the duty to give reasons. The duty of disclosure is calculated to ensure the process by which the minister reaches his decision is fair. It enables the party affected to address the matters which are significant and thus helps to ensure that the minister reaches his decision having regard to all relevant material. The duty to give reasons is calculated to enable the party affected to see that the minister has acted fairly in reaching the decision. While this can have a salutary effect on the process of reaching the decision, it does not have such a direct effect as the duty of disclosure ".

26. More recently in R (Thamby) v Secretary of State for the Home Department [2011] EWHC 1763 Sales J considered an application for judicial review of a decision to refuse a naturalisation application by a Tamil national from Sri Lanka who came to the UK in 2000.

At paragraph 67 he said " In considering an application for naturalisation, it is established by the first Fayed case that the Secretary of State is subject to an obligation to treat the applicant fairly, which requires her to afford him a reasonable opportunity to deal with matters adverse to his application. In my view, that obligation may sometimes be fulfilled by giving an applicant fair warning at the time he makes the application (e.g. by what is said in Form AN or Guide AN) of general matters which the Secretary of State will be likely to treat as adverse to the applicant, so that the applicant is by that means afforded a reasonable opportunity to deal with any such matters adverse to his application when he makes the application. In other circumstances, where the indication available to an applicant when he makes the application does not give him fair notice of matters which may be treated as adverse to his application, and hence does not give him a reasonable opportunity to deal with such matters, fairness will require that the Secretary of State gives more specific notice of her concerns regarding his good character after she receives the application, by means of a letter warning the applicant about them, so he can deal with them by means of written representations (as eventually happened in the Fayed case)."

And then at paragraph 69 "So far as concerns the first basis of refusal (involvement in war crimes etc.) the Claimant was given a certain amount of warning by the terms of Form AN and Guide AN about the sort of matters which would be of concern to the Secretary of State in respect of the applicant's good character in relation to any application for naturalisation under s. 6(1). However I do not consider that the Claimant was

given fair warning about the extended notion of involvement in war crimes etc. that the Secretary of State was proposing to employ. The Claimant did not therefore have a reasonable opportunity to make representations in his application to seek to deal with his involvement in war crimes by reason of his support for the LTTE. This would have been sufficient to justify quashing the first basis of refusal in the Secretary of State's letter of 15th January 2009. "

27. In another context in Bank Mellat v HM Treasury (No. 2) [2014] AC 700 Lord Neuberger emphasised the difference between consultation before a power was exercised and challenge afterwards. At paragraph 188 he said "A right to be consulted before a power is exercised is very different in its nature and in its potential effect from a right to challenge it after it has been exercised. The former involves representations to the intending exerciser of the power in relatively informal and flexible circumstances with a variety of possible outcomes, whereas the latter involves arguing against the exerciser in a formal, forensic context, where the court's powers are relatively constrained. In an era where mediation is increasingly supported, not least by the executive, the desirability of prior consultation, even where subsequent challenge through the courts is possible, is at least as great as it ever was."

Discussion

28. Mr Grieves on behalf of the appellants contends that the principles in Fayed apply equally here. He maintains that the appellants should have been given a proper opportunity to address areas of concern so as to be able to establish that they were of good character.
The material disclosed very late in each case he says could and should have been disclosed earlier either in full or at the very least by way of gist or summary.
Mr Grieves contends that the Secretary of State at the material time appears to have effectively ignored what had been determined in Fayed. The process was therefore unfair and the decisions should be quashed.

29. Mr Kovats QC for the Secretary of State contends firstly that the appellants were given notice of areas of concern before the decisions were taken.
He relied in part initially on the Form AN completed by an applicant and its accompanying Guidance. At the Hearing on 10th/11th December he accepted that this was speculative as the Guidance for applicants current in 2000 was not before the Commission. The Hearing was adjourned until February to enable further evidence to be filed on behalf of the Secretary of State on this and other matters.
The upshot is that Mr Kovats now frankly concedes that there is nothing in the Form or Guidance current in 2000 which

would give an applicant a steer about the " reasons " in the refusal letter or matters set out in the more recently disclosed documentation.
Nonetheless Mr Kovats maintains that ZG would have been aware of the matters set out in paragraph 9 to 12 above and SA would have been aware of the matters in paragraph 18 above. So he argues they would have been aware of the sort of matters they should have been addressing in their applications.

30. We do not accept that.
In the case of ZG the refusal letter of 7th June 2007 written 7 years 3 months after the application, gave as the reason "your past activities on behalf of Dev Sol and its successor, Devrimi Halk Kurtulus Partisi - Cephisi (DHHP-C), which is proscribed under the terms of the Terrorism Act (2000)."
It is noteworthy that these groups had not been proscribed at the time of ZG's alleged involvement with them in Turkey (although the letter gives no indication of when the past activities are alleged to have taken place).
The Form and Guidance at the time did not direct or steer ZG to deal with such matters. The fact that he was asked questions (not under caution) by the police at Gatwick in February 1993 when he attended as an interpreter and at Ramsgate in January 1995 (or indeed by the Metropolitan police in April 2003 after his application) does not in our judgement mean that he should have realised he should address them in his application or in any representations he might make before the decision was made. The interview at Ramsgate was too long before the application and too informal to alert the appellant to points that he should address in his application. The interview after the application was, necessarily, too late to have that effect.

31. In the case of SA the refusal letter of 1st June 2007, 6 years and 9 months after the application, gave as the reason "your past association with the Kurdish Workers Party (PKK)/KADEK/KONGRA GEL, which are proscribed under the terms of the Terrorism Act (2000)."
Again the groups had not been proscribed at the time of his alleged involvement with them (although the letter gives no indication of when the "past association" is alleged to have taken place).
The Form and Guidance at the time did not direct or steer SA to deal with such matters. The fact that he would have had knowledge of the matters in paragraph 18 above does not in our judgment mean that he should have realised he should be addressing them in his application or in any representations he might make before the decision was made.
We also found it surprising to be told by Mr Kovats at the Hearing on 10th December that after the Court of Appeal judgment in Fayed there was not any change in the procedures at the Home Office. "For all practical purposes it carried on as before ". An adjournment to enable a check to be made as to

whether that really was the position produced no evidence on this issue. There is no evidence of any attempt to analyse at that time how the process might be changed so as to ensure fairness.

32. Lord Woolf in Fayed indicated that there may be some situations where the Secretary of State would be relieved from disclosure for example for national security reasons. Mr Kovats contended that these cases fell under that exception.

33. We are unpersuaded that that is so.
Lord Sumption in Bank Mellat above, at paragraph 31 considered the potential problem. "The second practical difficulty was raised by way of submission in the Court of Appeal and dealt with in the judgment of Maurice Kay LJ, who thought it had "some force". This was the supposed practical difficulty of permitting representations in a situation where there is closed material. I have to say that for my part I am not impressed with this difficulty. In justifying the direction in the course of these proceedings, the Treasury disclosed the gist of the closed material including the provision of banking facilities to Novin and Doostan and their alleged provision to Mr Taghizadeh and Mr Esbati. I cannot see why they should have had any greater difficulty in disclosing before the making of the direction the material that they were quite properly required to disclose afterwards."
Similarly here the material recently disclosed could have been disclosed prior to the decisions being taken or at least there could have been disclosed a gist or summary. It is to be noted that the disclosures were not made by order of the Commission but after discussion between the Special Advocate and Counsel for the Secretary of State.

34. Mr Kovats advances a further reason why the Secretary of State need not indicate areas of concern prior to decision. He points to the fact that an applicant can appeal to SIAC. He says the SIAC rule 10 B and rule 38 procedure is designed to ensure that there is then disclosed to the appellant material enabling the appellant to know the case against him. He can then, if he wishes, go back and submit a fresh application for naturalisation, dealing with the matters set out in the disclosed material. If he is unsuccessful he can appeal again to SIAC.

35. We find this to be an unattractive argument. SIAC has a substantial workload. The purpose of the Commission is not to relieve the Secretary of State of a responsibility which should be borne by the Secretary of State. It is common ground that the fee for a naturalisation application is about £1000. We ask rhetorically why an applicant should have to pay this twice. Mr Kovats suggested that it might be refunded or ordered to be refunded. Furthermore the history of these applications does not instil confidence in the speed of the process.

36. Mr Kovats next contended in his replacement skeleton argument that "the Secretary of State, both as a matter of good administration and pursuant to her obligation not to mislead the Commission, will consider conscientiously any post decision representations or evidence submitted by an appellant. If such material causes her to conclude that her original decision was or might be flawed, she will either revoke her decision, or she will set out in open and / or in closed as appropriate, why, notwithstanding the further material she maintains her decision to refuse to grant the appellant naturalisation as a British citizen".

37. We are unpersuaded by this. First it is not supported by any evidence. There has been nothing put before us indicating that the Secretary invited representations. The correspondence suggests the reverse. It is apparent that solicitors on behalf of the appellants made it clear they wished to make representations but without proper disclosure could not. Second so far as the Commission is concerned we have to apply judicial review principles. We have to consider what was before the Secretary of State in 2007 when the decisions were made. We are not entitled to take into account evidence submitted subsequently.

38. Lastly Mr Kovats relies on s. 31(2A) of the Senior Courts Act 1981 which provides that the High Court on a claim for judicial review must refuse relief if it appears to the court that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Subsection (2A) does not apply to an application for judicial review where the claim form was filed before 13th April 2015. See the Criminal Justice and Courts Act 2015 (Commencement No.1, Saving and Transitional Provisions) Order SI 2015/778 article 4, Schedule 2 paragraph 6. The applications for review by SIAC were he says lodged on the 13th July 2015.

39. Mr Grieves points out that Section 2 D (4) of the Special Immigration Appeals Commission Act 1997 empowers SIAC to make any order or give any such relief" as may be made or given in judicial review proceedings ". This is he maintains in conflict with s. 31 (2A) which directs mandatory action if the condition is satisfied. He submits that the SIAC clear statutory regime should prevail.
Furthermore he contends that if s. 31 (2A) did apply then the transitional provisions should also be read across and in consequence the proceedings should be regarded as having been commenced when the claims were lodged in the Administrative Court.

40. We do not need to resolve this conflict. That is because we are not satisfied that it "is highly likely that the outcome would not

have been substantially different". We do not know. It may have been. It may not.

41. We are however satisfied on the evidence and arguments advanced before us that the process in these two cases was unfair and that the decisions should be quashed. The Secretary of State should reconsider the applications after giving the appellants a reasonable time to submit representations.
We make it clear that we have reached this conclusion on the unusual history and facts of these two cases.