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Appeal No: SN/56/2015
Hearing Date 4 November 2016
Date of Judgment: 15 December 2016

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE FLAUX
UPPER TRIBUNAL JUDGE McGEACHY
SIR STEWART ELDON

NA

APPLICANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Applicant:	Ms Amanda Weston
Instructed by:	TKD Solicitors
Special Advocate:	Mr Angus McCullough QC and Mr Ben Collins QC
Instructed by:	Special Advocates Support Office
For the Respondent:	Mr Steven Kovats QC and Ms Claire Palmer
Instructed by:	Government Legal Department

JUDGMENT

The Honourable Mr Justice Flaux:

Introduction and factual background

1. The applicant, to whom we will refer as NA" is Palestinian in origin and a national of Jordan (having been born in the West Bank in 1966 when it was part of the Hashemite Kingdom of Jordan). He entered the United Kingdom in 1994 and sought asylum. He was granted exceptional leave to remain on 13 December 1999 and indefinite leave to enter on 9 January 2004. His children are registered as British citizens, having been born in the United Kingdom. On 16 December 2004, he and his wife made applications for naturalisation, pursuant to section 6(1) of the British Nationality Act 1981 which provides:

> "(1) 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 to him a certificate of naturalisation as such a citizen."

2. Schedule 1 to the 1981 Act, as amended, provides that the requirements for naturalisation as a British citizen include that, inter alia, "he is of good character".

3. The applicant completed a naturalisation application form, section 4 of which addressed the requirement of good character and provided detailed notice of areas of potential concern to the Secretary of State. The introduction provided:

> *"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 your referees will also be asked later on in this form to confirm that you are of good character."*

4. Questions 4.8 and 4.10 in particular asked specific questions about involvement in terrorist activities. 4.8 asked: *"Have you ever been concerned in the commission, preparation, organisation or support of acts of terrorism, either within or outside the United Kingdom or have you ever been a member of an organisation which has been involved in or advocated terrorism in furtherance of its aims?"* 4.10 asked *"To your knowledge have you ever been under investigation for any offence relating to terrorism…"* 3.12 was then a general catch-all question: *"Have you engaged in any other activities which might be relevant to the question whether you are a person of good character?"* The applicant answered all these questions: *"No"*.

5. The applicant would also have had access to the AN Guide which was extant at the time of the application, which had been revised in December 2003. It contained specific warnings about the need to fill in the application form carefully and truthfully:

> *"To be of good character you should have shown respect for the rights and freedoms of the United Kingdom, observed its laws and fulfilled your duties and obligations as a resident of the United Kingdom. Checks will be carried out to ensure that the information you give is correct."*

6. In the section dealing specifically with questions 4.7 to 4.11 in the application form, the Guide gave clear guidance in these terms:

> *"4.7 – 4.11 You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago this was… If you are in any doubt as to whether you have done something or it has been alleged that you have done something which might lead us to think that you are not of good character you should say so.*
>
> *You must also say here whether you have had any involvement in terrorism. If you do not regard something as an act of terrorism but you know that others do or might, you should mention it…If you are in any doubt as to whether something should be mentioned, you should mention it."*

7. The applicant was thus afforded every opportunity to bring to the attention of the Secretary of State any matters which were relevant to the question whether he was of good character. The applicant signed the declaration at section 7.1 of the application form, which was in these terms:

> *"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 other 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."*

8. His application was then considered by a caseworker in the UK Border Agency ("UKBA"). The evidence is that the caseworker applied the relevant guidance contained in the UKBA Staff Instructions current at that time. Annex D to Chapter 18 of those Instructions provided specific guidance on how to assess whether an applicant satisfies the requirement to be of "good character".

9. Paragraph 1.2 provided:

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

- *enquiries of other departments and agencies do not show fraud / deception has been perpetrated by the applicant in their dealings with them;*
- *there are no unspent convictions;*
- *there is no information on file to cast serious doubts on the applicant's character…"*

10. Paragraph 2.1 provided that:

"We would not normally consider a person to be of good character if, for example, there is information to suggest:

• They did not respect and were not prepared to abide by the law (i.e. were, or were suspected of being, involved in crime or

• their financial affairs were not in order…or

• their activities were notorious and cast serious doubt on their standing in the local community…or

• they had practiced deceit, for example, in their dealings with the Home Office …or

• they have assisted in the evasion of immigration control…"

11. The caseworker concluded that the Secretary of State could not find that the applicant met the requirement to be of "good character", so the decision was taken to refuse the application. That decision was communicated to the applicant in a letter to his solicitors dated 25 September 2008 ("the refusal letter") which stated, inter alia:

"The grant of naturalisation is at the discretion of the Home Secretary and subject to a number of statutory requirements being met; one such requirement is that the applicant be of good character. Whilst good character is not defined in the 1981 British Nationality Act, we take into consideration the activities of an applicant, when assessing whether this requirement has been satisfied.

Your client's application for British citizenship has been refused on the grounds that the Home Secretary is not satisfied that he can meet the requirement to be of good character. It would be contrary to the public interest to give reasons in this case.

The decision on your client's application has been taken in accordance with the law and our prevailing policy. There is no

right of appeal against this decision, but if you believe it is incorrect, you should write to us stating which aspect of the law and/or our policy has not been applied correctly. Only if these details are provided can the application be reconsidered."

12. At the time of the refusal letter, a refusal was only susceptible of challenge by way of judicial review. The applicant commenced judicial review proceedings on 13 November 2008. His claim was stayed behind the *AHK* test cases. In those cases, it was determined that, when a decision was made wholly or partly on material which it would be contrary to the public interest to disclose, a claim for judicial review, even on procedural grounds, was doomed to failure absent an error on the face of the record, since the Secretary of State could not be required to forego reliance on the sensitive material, there being at that time no CLOSED material procedure available: see *R (AHK and others) v SSHD* [2012] EWHC 1117 (Admin) at [5], [52]-[53] and [58]-[64] and *R (AHK and others) v SSHD* [2013] EWHC 1426 (Admin) at [29].

13. In those circumstances, Parliament enacted section 15 of the Justice and Security Act 2013, inserting, so far as relevant, section 2D (review of certain naturalisation and citizenship decisions) into the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"), giving the Commission jurisdiction to review a decision which the Secretary of State has certified was made wholly or partly in reliance on information which, in her opinion, should not be made public (i) in the interests of National Security, (ii) in the interests of the relationship between the United Kingdom and another country, or (iii) otherwise in the public interest.

14. On 1 July 2015, the Secretary of State wrote to the applicant's solicitors informing them that she was certifying this case under section 2D of the 1997 Act. On 10 July 2015, the applicant made the present application to set aside the decision to refuse his application for naturalisation.

15. In Amended Grounds for Review dated 15 January 2016 and in her written and oral submissions before us, Ms Amanda Weston on behalf of the applicant, put forward a number of grounds for contending that the decision to refuse the application for naturalisation should be set aside, but in essence they came down to three broad points:

    (1) That there was procedural unfairness in the decision-making process, because the Secretary of State had failed to identify areas of concern in advance of making the decision and failed to give NA a reasonable opportunity to address or rebut any such concerns before she made her decision;

    (2) That the decision to refuse naturalisation on the ground that NA was not of good character was unsustainable in that it was flawed by material misapprehension and/or failure to take relevant matters into account;

    (3) That Articles 8 and 10 of the European Convention on Human Rights ("ECHR") were engaged, so that the Commission should engage in a

particularly rigorous audit of the correctness of the decision of the Secretary of State.

16. Before considering those grounds in more detail, we propose to set out some of the legal framework against which this application is to be considered.

The legal framework

17. The burden of proof is on the appellant to satisfy the SSHD that the requirements of Schedule 1 to the British Nationality Act including that of good character are met on the balance of probabilities. If this test is not satisfied the Secretary of State must refuse the application. An appellant for naturalisation seeks the grant of a privilege not a right and the 1981 Act vests the Secretary of State with considerable discretion to refuse an application: see *R v. Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 736 per Lord Woolf MR at 776A and the decision of the Commission in *FM v SSHD* [2015] UKSIAC SN/2/2014 at [7].

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

> "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."

19. Likewise, in *R (SK (Sri Lanka)) v SSHD* [2012] EWCA Civ 16 Stanley Burnton LJ observed [31]:

> "It is for the appellant to so satisfy the Secretary of State. Furthermore, while the Secretary of State must exercise her powers reasonably, essentially the test for disqualification from citizenship is subjective. If the Secretary of State is not satisfied that an appellant is of good character, and has good reason not to be satisfied that an appellant is of good character, and has good reason not to be satisfied, she is bound to refuse naturalisation."

20. The proper approach of the Commission to statutory review of refusal of naturalisation was established by the Preliminary Issues Judgment of the Commission in *AHK and others v SSHD* (SN/2/2014, SN3/2014 SN4/204 and SN5/2014) :

(1) The Commission 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. In that part of the review there is no place for deference to the Secretary of State: see [14] and [32].

(2) The Commission does not need to determine for itself whether the facts said to justify a naturalisation decision are in fact true. As a matter of common law and 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].

(3) Once the facts and inferences of fact have been reviewed, and if the factual or evidential conclusions drawn by the Secretary of State are found to be reasonable, the Commission should proceed to review the judgments made by the Secretary of State based on that factual picture. In that part of the review: "public law principles do support a degree of deference to the Secretary of State, for well-established reasons. The Minister has democratic responsibility and answers to Parliament; the Minister is entitled to formulate and implement policy; the Minister has expert advice to assist her conclusions. Here the task of the Commission is to interfere when and if the Secretary of State has been unreasonable, allowing for due deference paid": [32].

(4) In the absence of an arbitrary or discriminatory decision, or at the very least some other specific basis in fact, refusal of naturalisation will not engage ECHR rights. 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 a full merits review by the Commission: [22] and [24]. It would be very rare in this context for there to be a breach of Article 8 rights, in other words that interference with private or family life will be disproportionate, given the level of public interest in enforcing a legitimate immigration policy: [33].

21. The Preliminary Issues Judgment was the subject of an application by the Secretary of State to the Divisional Court for judicial review, specifically of the level of disclosure required in these cases of statutory review. The Divisional Court emphasised the importance of a careful review by the Commission of the facts said to justify the decision of the Secretary of State and the findings of fact by the decision-maker in circumstances where there was a closed material procedure. At [28] of his judgment, Sir Brian Leveson P said:

> "What is required is a complete understanding of the issues involved and a recognition by SIAC that the inability on the

> part of the Special Advocates to take instructions from the interested parties on the material covered by the closed procedure heightens the obligation to review that material with care. In that regard, the possibility that other (potentially innocent) explanations might be available to rebut it (or the inferences drawn from it) has to be considered."

22. He went on to say at [29] that this limitation on the ability to have a complete understanding of the position from the perspective of the applicant to contrast with the arguments of the Secretary of State was also of importance when it came to what material should be disclosed by the Secretary of State pursuant to the closed material procedure. At [38] he rejected the contention of the Secretary of State that disclosure should be limited to the summary prepared for the decision maker and any other document considered by the decision maker:

> "I agree with SIAC that it is not sufficient for CLOSED disclosure to be limited to the summary prepared for the Home Office official (or Secretary of State) plus any other documents not before the summary writer but taken into account by the official or the Secretary of State). On the other hand, if SIAC intended to require the SSHD to disclose everything that the report or summary writer might have been able to access in the preparation of advice for officials or the Minister, in my judgment, it was in error. 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 in existence at the date of decision. An appropriate declaration should be agreed by the parties accordingly."

The applicant's witness statements

23. In support of his application for review, the applicant has produced four witness statements. The first is dated 10 July 2015 and sets out details of the applicant's background, his career as a journalist and writer and the history of his application for naturalisation. In his second statement dated 20 April 2016, he describes his involvement with the Association of the Palestinian Community in the UK, his pro-peace activities in the UK, his trips to Israel and his interview of Ghassan Said, who was imprisoned for attempted murder of the Israeli Ambassador.

24. The third statement dated 15 May 2016 was produced following an inadvertent but unauthorised disclosure by the Special Advocates Support Office to the applicant's solicitors. He describes a business trip to Beirut in June 2004 in relation to a proposal for an Arabic travel show and various Lebanese people he met. He also describes an incident outside the Israeli Embassy in Dakar, Senegal in October 2004, when he involved in an

altercation with some security guards. He exhibits a full copy of his passport from 2000 to 2004 to that statement. In a fourth statement dated 23 May 2016, the applicant says that, on reflection, he cannot think of anything else than what he has mentioned in his statements which could impact on his character.

25. At the OPEN hearing, Ms Weston made an application to call the applicant to give oral evidence, so that he could deal with whatever matters concerned the Secretary of State. Mr Kovats QC indicated that he had no cross-examination for the applicant and submitted that, in any event, his witness statements were inadmissible. The statutory review in cases under sections 2C and 2D of the 1997 Act was to be decided applying the principles of judicial review. One of those principles was that fresh evidence, such as these witness statements, is not ordinarily admissible. It is for the Commission to determine whether the procedure was fair, which is to be judged at the time of the making of the decision in question by reference to the material which was before the decision maker.

26. We ruled against Ms Weston on this question at the outset of the hearing. This Commission has determined on a number of occasions that, in cases of statutory review under sections 2C and 2D of the 1997 Act, subsequent witness evidence is not normally admissible: see for example [23] to [26] of the judgment of the Commission in *AA v SSHD* [2015] UKSIAC SN/10/2014 given by Sir Stephen Silber. Of course, the evidence may be admissible for limited purposes, such as in relation to an issue as to whether the Commission should exercise its discretion or apply section 31(2A) of the Senior Courts Act 1981 to refuse relief, but that is not relevant here.

Decision unreasonable and unlawful

27. For the reasons given in our CLOSED judgment, we have concluded that the decision of the Secretary of State to refuse the applicant naturalisation was unreasonable and unlawful and therefore must be set aside. Although the applicant's application for statutory review succeeds on that ground, we will deal with the issues raised in OPEN by Ms Weston.

No procedural unfairness

28. Ms Weston's first ground involves the submission that the Secretary of State acted unfairly by failing to identify her areas of concern in advance of making the decision and in failing to give the applicant a reasonable opportunity to address or rebut such concerns.

29. In support of this submission, Ms Weston relied upon the well-known statement of the principles of fairness in public law by Lord Mustill in his speech in *R v SSHD ex parte Doody* [1994] 1 AC 531 at 560, in particular the fifth principle, that fairness will very often require that the applicant be given the opportunity to make representations before a decision is made:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of

> the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an 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."

30. Ms Weston submitted that the duty to act fairly requires that, before a decision adverse to an individual is taken, he is informed of the proposed decision and of the nature of the matters being considered by the decision maker in sufficient detail to enable him to make effective representations as to why the decision should not be made. She accepted that section 2D of the 1997 Act provided a statutory remedy to ensure that where the procedure adopted by the Secretary of state did not adhere to those minimum requirements of fairness, the applicant was able to challenge the underlying basis for the decision through the Special Advocates. As we have held in our CLOSED judgment, in the present case, that challenge has been successful.

31. Nevertheless, Ms Weston submitted that the questions in the application form and Guide could not have alerted the applicant to whatever it was that was of concern to the Secretary of State which impacted on his character. She relied upon the decision of the Commission in *ZG and SA* [2016] UKSIAC 1; SN/23/2015 and SN/24/2015, in support of her submission that the Secretary of State should, before the decision was taken, have provided the applicant with sufficient information to enable him to focus on whatever it was that was of concern to the Secretary of State.

32. In those cases, material was disclosed by agreement in the Rule 38 process in 2015, all of which gave detailed reasons for the refusal of the applicants' applications for naturalisation in 2007. The applicants contended that fairness required that that material should have been disclosed before the decisions refusing their applications were made. On behalf of the Secretary of State it

was contended that these cases fell within the exception identified by Lord Woolf MR in *R v SSHD ex parte Fayed* [1998] 1 WLR 763, at 776H-777A, that the Secretary of State was relieved from disclosure for national security reasons. The Commission was not persuaded by that contention.

33. Having cited a passage from the judgment of Lord Sumption JSC in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700 at [31], the Commission concluded at [33] of its judgment:

> "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. In her oral submissions before us, Ms Weston did not press reliance on *ZG and SA*, no doubt recognising realistically that it would be met with the same arguments for distinguishing *ZG and SA* as were accepted by the Commission in [38] to [40] of its OPEN judgment in *MNY* [2016] SN/53/2015.

35. In resisting any suggestion that there had been procedural unfairness. Mr Kovats QC on behalf of the Secretary of State relied upon the legal framework which we have set out above, in particular that naturalisation was a privilege, not a right and the Secretary of State had a wide discretion. He submitted that there was no statutory requirement for the Secretary of State to invite representations prior to making a determination, or to give advance notice of adverse matters, so as to put the applicant in a position where he could focus on matters of concern. What fairness requires in any particular case depends on the legal and factual context, as *ex parte Doody* makes clear. In this case, the application form provided the applicant with the opportunity to make out his case as to his good character.

36. Mr Kovats QC submitted that *ex parte Fayed* is not authority for the proposition that, as a blanket or general rule, a "minded to refuse" procedure should be adopted in applications for naturalisation. It establishes no more than that, in some circumstances, fairness can require disclosure of issues of concern before a determination. In that case, given the complexity of the affairs and backgrounds of the Fayed brothers, without an indication as to what were the areas of concern, it would have been impossible to know what information the Secretary of State wanted from them in relation to character.

37. In support of his submission that *ex parte Fayed* did not lay down a general rule that the Secretary of State should inform the applicant in advance of areas of concern, Mr Kovats QC submitted that it was notable that *ex parte Fayed* had not been followed by either a general practice of writing "minded to refuse" letters or case law suggesting, let alone requiring, that such a practice be adopted. He relied upon the summary of the effect of that case at [67] of the judgment of Sales J in *R (on the application of Thamby) v SSHD* [2011] EWHC 1763 (Admin):

> "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 in the materials available to an applicant when he makes his 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 that he can seek to deal with them by means of written representations (as eventually happened in the Fayed case). Where there is doubt about whether the obligation of fairness has been fulfilled by means of the indications given by the Secretary of State at the time an application is made, she may be well-advised to follow the procedure adopted for the second Fayed case so as to avoid the need for argument about the issue in judicial review proceedings."

38. Mr Kovats QC submitted that there was no "minded to refuse" letter, nor any challenge to the absence of one, in *R (SK (Sri Lanka)) v SSHD* [2012] EWCA Civ 16, nor was there any suggestion in the European Court of Human Rights in *IR et al v United Kingdom* (2014) 58 EHRR SE14, that Articles 8 and 13 of the European Convention of Human Rights required advance disclosure of the intention to exclude the applicants from the United Kingdom.

39. Mr Kovats QC submitted that, in the present case, sufficient notice of matters relevant to the applicant's character was given to him in the application form and the Guide. *ZG and SA* are clearly distinguishable, since in those cases, as was conceded by the Secretary of State (as recorded in [29] of the judgment) the application forms provided no guidance at all as to what information as regards good character the Secretary of State required. Mr Kovats QC relied on the same grounds for distinguishing *ZG and SA* as were identified by the Commission in *MNY v SSHD* [2016] SN/53/2015. He submitted that, where the applicant has been given appropriate guidance as to what information as regards good character the Secretary of State required, the procedure is a fair one as a matter of law, even though, in the public interest, the Secretary of State cannot give reasons for her decision.

40. Mr Kovats QC relied upon the most recent enunciation of this principle by the Commission in *JJA v SSHD* [2016] SN/40/2015, another "no reasons" case, in which judgment was handed down as recently as 28 October 2016. At [8]-[9] and [11], Mitting J, giving the judgment of the Commission, said:

> "8. We accept that, in a case in which SIAC is not the primary fact-finder, its procedures provide a less comprehensive means of ensuring that a just outcome is achieved than when it is: but it does not follow that, for that reason, an applicant must be given an opportunity to address the Secretary of State's concerns before the decision is made. She is the guardian of the public interest. She must not, and cannot be required to, act otherwise than in the public interest. If Mr Buley's submission is right, she would be required to do just that: she would have to disclose information which, in her judgment, could not be disclosed in the public interest. Those interests are the same as those set out in rule 4(1) of the SIAC (Procedure) Rules. For SIAC now to hold that the Secretary of State was in breach of a public law duty of fairness because she failed to disclose that which SIAC must ensure is not disclosed is a proposition which is self-evidently untenable. A decision, otherwise justified, cannot be held to be unlawful because based on reasons which, in the exercise of her public duty, the Secretary of State properly refused to identify, or to give any indication of, before she made the decision. We agree with, and adopt, the conclusions expressed by Ouseley J in *AHK* [2013] EWHC 1426 (Admin) at paragraph 29.
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> 9. If SIAC were to hold that, because the appellant had no opportunity to address the Secretary of State's concerns, her decision must be quashed and retaken, the same problem would arise. The Secretary of State would properly refuse to say more. SIAC could not properly require her to do so, because to do so would require her to act in a manner contrary to her duty to uphold the public interest. It is possible that the elapse of time and/or a change in circumstances might permit a Secretary of State in the future to reach a different decision and even to give some indication of her concerns to the appellant before making it; but those would be questions for the future consequent upon a further application by the appellant. They cannot call into question the lawfulness of the decision under challenge in these proceedings including the manner in which it was reached.
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> …
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> 11. For the reasons given, we are satisfied that the fact that the Secretary of State made her decision without giving the appellant the opportunity of addressing her concerns or stating her reasons for concluding that he did not satisfy the good character requirement did not make the decision procedurally unlawful."

41. In our judgment, that analysis is entirely correct and we cannot improve upon it. There was no requirement by way of procedural fairness in the present case for the Secretary of State to provide the applicant with further information about matters of concern or to provide him with an opportunity to make representations before considering his application or, for that matter, before considering any request for reconsideration. Contrary to the submissions being addressed to the Commission by applicants in a number of these naturalisation cases, the decision of the Commission in *ZG and SA* is not intended to erode that principle. Those were cases turning on their own peculiar facts and not intended by the Commission to establish some general principle, as is clear from [41] of the judgment:

> "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."

42. Not only are those cases not authority which provides any basis for concluding that the process adopted in the present case was unfair or required the Secretary of State to disclose, at the time of the refusal letter in September 2008, information about the matters which were of concern, but they are clearly distinguishable. In those cases, the application forms provided no guidance at all as to what information as regards good character the Secretary of State required. In contrast, both the application form and the Guide in the present case provided the applicant with sufficient assistance as to the sort of matters which would be of concern to the Secretary of State and afforded him the opportunity to set out, before the decision was taken, his case as to his character and to disclose any matters adverse to his application. In our judgment, there was no requirement in the present case for the Secretary of State, before considering his application, to provide to the applicant any further information or to give him the opportunity to make representations.

43. For these reasons, we do not consider that there was any procedural unfairness in the present case.

Articles 8 and 10 of the ECHR

44. The principle which we have set out at [20(4)] above derived from the Preliminary Issues Judgment in *AHK* that, save in cases where a decision is arbitrary or discriminatory, Article 8 of the ECHR is not engaged in cases of refusal of naturalisation, is well-established.

45. This principle was recognised by the European Court of Human Rights in *Karassev v. Finland* [1999] EHR 200; (1999) 28 EHHR CD 132 where the Court stated the law as follows (citations omitted):

> "Although right to a citizenship is not as such guaranteed by the Convention or its Protocols…the Court does not exclude that an arbitrary denial of a 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…Therefore it is necessary to examine whether the Finnish decisions disclose such arbitrariness or have such consequences as might raise issues under Article 8 of the Convention.
>
> The Court therefore concludes that the decision of the Finnish authorities not to recognise the applicant as a citizen of Finland was not arbitrary in a way which could raise issues under Article 8 of the Convention.
>
> As to the consequences of the denial to regard the applicant as a citizen, the Court notes that the applicant is not threatened with expulsion from Finland, either alone or together with his parents. His parents have residence permits and alien's passports, and similar documents could also be issued to the applicant at their request. The applicant also enjoys social benefits such as municipal day care (as from 1 June 1996) and child allowance (as from 28 May 1997). His mother also receives unemployment allowance, in the calculation of which the applicant is taken into account. Although the applicant did not enjoy these benefits from the outset, the Court does not find 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 of the Convention."

46. That case was followed and applied in *Genovese v Malta* [2012] FLR 10; (2014) 58 EHRR 25, where the European Court of Human Rights stated the principle as follows at [30] of the majority judgment (the same point was accepted at [OI-3] of the dissenting judgment):

> "The Court also reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity (see *Dadouch v. Malta*, no. 38816/07, § 47, ECHR 2010 ... (extracts)). 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-II)."

47. In *R (AHK and others) v SSHD* [2013] EWHC 1426 (Admin) Ouseley J cited and applied that principle as enunciated in *Genovese* at [44]-[45]:

> "44. The ECtHR decision in *Genovese* v *Malta* [2012] FLR 10, concerned the refusal of Maltese citizenship to a child born out of wedlock to the British mother but with a Maltese father. A child born out of wedlock could only be granted Maltese citizenship if born to a Maltese mother. The Court repeated what it had often said before to the effect that Article 8, and indeed the ECHR as a whole, did not guarantee a right to acquire a particular nationality, but "an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8". There was no family life in that case with the father and there was no breach of Article 8 in its refusal. But the decision 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.
>
> 45. A submission that the mere nature or degree of effect of a refusal of naturalisation, without some further quality of arbitrariness or discrimination, suffices to engage Article 8 seems to me ill-founded on this ECtHR jurisprudence. It has not actually held, so far as I am aware, that where the refusal of naturalisation impacts sufficiently seriously on any of the aspects of life covered by the full width of Article 8, it is then for the state to prove why it should not be granted. That would mean in effect that there would be a right to naturalisation, notwithstanding that the ECtHR has accepted that there is no such right, and notwithstanding the entitlement of a state to set the terms for and apply its tests to any application for naturalisation. To hold that a refusal of naturalisation, in the absence of an arbitrary or discriminatory decision, interferes with Article 8 rights would be to advance beyond what the ECtHR has held. That is not for the domestic Courts. That is very different from holding that interference can arise where naturalisation is refused on an arbitrary or objectionably discriminatory basis, as in *Genovese*."

48. The same principle has been followed and applied by the Commission in a number of cases: in the Preliminary Issues Judgment (Irwin J) in *AHK* at [21]-[22]; *FM v SSHD* [2015] UKSIAC SN/2/2014 at [56]-[58] (Nicola Davies J) and *MNY v SSHD* [2016] SN/53/2015 at [42]-[44] (Flaux J).

49. Notwithstanding this weight of authority, Ms Weston submitted that the principle enunciated by Ouseley J in *R (AHK and others) v SSHD* [2013] EWHC 1426 (Admin) and followed by the Commission in those cases, had been superseded by the recent decision of the Supreme Court in *R (Johnson) v SSHD* [2016] UKSC 56; [2016] 3 WLR 1267, in which the judgment, given by Lady Hale DPSC, was handed down on 19 October 2016. That case

concerned an appellant with a very serious criminal record culminating in a conviction for manslaughter in 2008, for which he was sentenced to 9 years imprisonment. He was born in Jamaica to a Jamaican mother and British father, who were not married. He was brought to the United Kingdom by his father in 1989 when he was four. If his parents had been married, he would have been a British citizen. Equally, if when he was a child, he or his father had made an application for him to be registered as a British citizen, under the policy of the Government as it then applied, that application would have been granted, but no such application was ever made. The case concerned the lawfulness of a notice of automatic deportation served on him in March 2011 on the basis that he was a "foreign criminal" under section 32(5) of the UK Borders Act 2007.

50. The issue before the Supreme Court was formulated by Lady Hale at [23]:

> "The issue, therefore, is whether an appeal against the decision that section 32(5) of the 2007 Act applies to the appellant, on the basis that to deport the appellant now would be a breach of the UK's obligations under the Human Rights Convention, is clearly unfounded. That depends upon (1) whether it is sufficiently within the ambit of article 8 of the Convention to bring into play the prohibition of discrimination in the enjoyment of the Convention rights in article 14; (2) whether the discrimination had a "one off effect" at birth or whether it has continuing consequences which may amount to a present violation of the Convention rights; and (3) whether such discriminatory effect can be justified. The discrimination complained of in this case is that he is liable to deportation whereas he would not be if (a) his mother and father had been married to one another at the time of his birth; (b) his mother and father had been married to one another at any time after his birth; (c) his mother had been British and his father Jamaican; or (d) an application had been made to register him as a citizen before he was 18."

51. The Supreme Court held that the decision to deport him was sufficiently within the ambit of Article 8 to bring into play the prohibition on discrimination in the enjoyment of Convention rights under Article 14, that the denial of citizenship by reason of section 32(5) of the 2007 Act had a current and direct effect and that it was discriminatory under Article 14 because it was based solely on the accident of birth outside wedlock for which the appellant was not responsible (see [34] of the judgment. His appeal was allowed.

52. The Supreme Court dealt with the Article 8 issue in a fairly short passage at [24] to [27] of the judgment. At [24], Lady Hale cited *Karassev v. Finland* for the principle that the European Convention did not guarantee the right to acquire a particular nationality but did not exclude: "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." At [25] Lady Hale then cited *Genovese v Malta* and, in particular,

a passage from [33] of the judgment of the European Court of Human Rights in that case:

> "While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of article 8, the Court considers that its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that article."

53. Lady Hale then goes on to cite further decisions of the European Court of Human Rights at [26] of her judgment:

> "To similar effect is *Kuric v Slovenia* (2013) 56 EHRR 20, where the discriminatory erasure of the applicants' residence rights was held to be a breach of article 14 read with article 8 even though their residence had not in fact been affected. It is well established that a person's social identity is an important component of his private life, which is entitled to respect under article 8. This includes the recognition of his biological relationships, even if the refusal of recognition has no noticeable impact upon his family life. Thus, for example, in *Menneson v France, Labassee v France,* App Nos 65192/11 and 65941/11, [2014] ECHR 664, Judgment of 26 June 2014, it was a violation of the right to respect for private life for French law to deny the existence of the relationship between the biological father and the children born as a result of surrogacy arrangements in the United States."

54. She then concludes at [27]:

> "It is clear, therefore, that the denial of citizenship, having such an important effect upon a person's social identity, is sufficiently within the ambit of article 8 to trigger the application of the prohibition of discrimination in article 14."

55. Ms Weston placed particular reliance on that paragraph of the judgment in *Johnson* as deciding that in cases of denial of citizenship (which would include the present case) there was no requirement to show arbitrariness or discrimination in the decision for Article 8 to be engaged. She did not shy away from the submission that the Supreme Court had thereby impliedly overruled the decision of Ouseley J in *R (AHK and others) v SSHD* [2013] EWHC 1426 (Admin) and the decisions of the Commission which had followed it, all of which were to the effect that Article 8 would only be engaged in cases of refusal of naturalisation where the decision was arbitrary or discriminatory.

56. Mr Kovats QC submitted that *Johnson* was not a case of refusal of naturalisation but of deportation. Article 8 was only considered as the gateway to Article 14, in other words, it was simply dealing with the fact that Article 8 was sufficiently engaged to trigger the application of the prohibition of

discrimination in Article 14. The decision did not give rise to any wider applicability and, on a fair and proper reading, the judgment did not begin to cast doubt on the case law in relation to refusal of naturalisation which decides that Article 8 is only engaged where the decision was arbitrary or discriminatory.

57. We agree with Mr Kovats QC that *Johnson* does not have the wider impact for which Ms Weston contends, essentially for three reasons. First, it is not a case of refusal of an application for naturalisation under section 6 of the British Nationality Act 1981. Lady Hale noted in [3] of the judgment that such an application had not been made by the appellant and that it would not succeed because he could not demonstrate his good character given his very serious criminal record with convictions from 2003 onwards. From that paragraph, it is quite clear that the Supreme Court was not purporting to deal with the position under section 6 of the British Nationality Act 1981 at all.

58. Second, the passage cited from [33] of *Genovese* follows the earlier passage of the judgment at [30] which we set out at [46] above, to the effect that whilst Article 8 does not guarantee a right to acquire a particular nationality, an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8. In other words, the Court in that case considered that the decision was arbitrary. It also seems to us that, on a fair reading of the judgment of the Supreme Court as a whole, given the earlier citation of *Karassev*, they were not purporting to state some wider principle than those decisions of the European Court, but considered that in the particular circumstances of that case, the decision to deport the appellant was arbitrary or discriminatory and it seems to us that [27] of the judgment has to be read with that in mind.

59. Third, in our judgment, the submission that *Johnson* has in some way overruled *R (AHK and others) v SSHD* [2013] EWHC 1426 (Admin) and the subsequent decisions of the Commission is unsustainable. That case (and the subsequent decisions) were not even cited to the Supreme Court, let alone referred to in the judgment and any suggestion that those cases were overruled *sub silentio* is absurd.

60. In all the circumstances, given that there is no suggestion that the decision of the Secretary of State in the present case was arbitrary or discriminatory, article 8 is not engaged.

61. So far as Article 10 is concerned, for the reasons set out in our CLOSED judgment, that is not engaged either.

Conclusion

62. Notwithstanding that the applicant's points on procedural fairness and the ECHR have failed, we have concluded that the decision of the Secretary of State of 25 September 2008 to refuse the application for naturalisation was unlawful for the reasons given in our CLOSED judgment. That decision is set aside.