SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No. SN/51/2015
Date of hearing: 11th January 2017
Date of Judgment: 10th February 2017

BEFORE:

SIR JOHN ROYCE
UPPER TRIBUNAL JUDGE SOUTHERN
MS J BATTLEY

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RS

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR. E GRIEVES (instructed by Wilson Solicitors) appeared on behalf of the Applicant.

MR. S GRAY (instructed by the Government Legal Department) appeared on behalf of the Respondent.

MS. J.FARBEY QC & MR. D LEWIS (instructed by the Special Advocates Support Office) appeared as Special Advocates

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JUDGMENT

1. The applicant is a national of Syria. She entered the UK on 9th August 2005.It is agreed she will be referred to as RS. She was granted indefinite leave to remain on 28th March 2011. On the 30th March 2012 she applied for naturalisation pursuant to section 6(1) of the British Nationality Act 1981, which provides:

> "(1) If, on any 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. "

Schedule 1, as amended, provides that the requirements for naturalisation as a British citizen include that "he is of good character ".

2. The application was considered by a case worker together with material which had been gathered in response to the application. A conclusion was reached that the Applicant did not meet the good character requirement.

3. By letter of 24th April 2013 the SSHD communicated the decision to refuse the application. The ground were succinctly stated:

"Your application for British citizenship has been refused on the grounds that you do not meet the statutory requirement to be of good character. It would be contrary to the public interest to give reasons in this case"

4. On 5th June 2013 those representing the applicant wrote to the Home Office requesting further information regarding reasons for refusal. On the 17th June the Home Office responded saying that the correct decision had been taken and it would not be in the public interest to provide further reasons.

THE PROCEEDINGS

5. On 23rd July 2013 RS filed proceedings for judicial review. Those proceedings were subsequently stayed behind the lead naturalisation cases of AHK and Others.

6. On the 1st September 2015 the SSHD notified the Applicant that pursuant to section 2D of the Special Immigration Appeals Commission Act 1997, the SSHD had certified the naturalisation decision in respect of her. On 13th September 2015 the Applicant applied to SIAC to set aside the decision.

7. On 21st September 2016 as part of the rule 38 procedure there was provided to the Applicant's representatives further material including the following:
"RS is believed to be associated with the PKK, now known as Kongra Gel (KG). In 2009, RS was travelling in a car with two men when the car was stopped by traffic police. The police searched the car and found material which they suspected was likely to be PKK propaganda material. All three occupants of the car were arrested. One of the occupants was sentenced to 16 months imprisonment for the possession of, and intention to use false identification documentation; a forged identity card was found in his possession by the police on 19th February 2009. RS was arrested under the Terrorism Act but not prosecuted due to insufficient evidence. Nevertheless, the Secretary of State believes RS has been associated with the PKK ".

THE GROUNDS

8. Ground 1 is that the SSHD “failed to provide the Applicant with a fair opportunity to address matters that have been held adverse against her."

It is contended that the SSHD "acted unlawfully and in breach of natural justice in failing (a) to publish relevant CLOSED guidance to caseworkers and (b) to identify her concerns to the Applicant, as revealed in the rule 38 material, prior to making the adverse decision which would have provided notice of matters of concern that were relevant to the SSHD's decision making, so as to place the Applicant fairly on notice of those concerns."

Ground 2 is that the SSHD “erred in failing to provide reasons for the refusal of the application for naturalisation "

We will return to the Grounds in detail later.

THE LEGAL FRAMEWORK

9. It is well established that naturalisation is a privilege and not a right. It is for the Applicant to satisfy the SSHD that the requirements are met, on the balance of probabilities.The SSHD has no power to grant naturalisation unless the Applicant discharges that burden.
As Stanley Burnton LJ observed in Secretary of State for the Home Department v SK Sri Lanka (2012) EWCA Civ 16 at 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.

PROCEDURAL FAIRNESS

10. 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 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 ".

11. 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 what were the aspects of their applications which have given rise to difficulties or reservations about their application. 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."
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> At p 773 E to H Lord Woolf said :
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> "Apart from the damaging effect on their reputation of having their application refused the refusal has 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.
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> 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 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, however, "English law, at least until recently, has not been so sensitive to the need for reasons to be given for a decision after it has 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 objective of possibly disclosing what will be the reasons for the decision"

12. 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 the concerns the Secretary of State might have regarding 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. "

13. More recently the Commission has considered what is required in a series of cases:

ZG and SA v SSHD SN/ 23 and 24/ 2015 20th April 2016

AQH v SSHD SN/46/2015 30th September 2016

MNY V SSHD SN/53/2015 30th September 2016

JJA v SSHD SN/ 40/2015 28th October 2016

AFA v SSHD SN/56/2015 24th November 2016

MSB v SSHD SN/41/2015 1st December 2016

NA v SSHD SN/56/2015 15th December 2016

MB v SSHD SN/ 47/2015 22nd December 2016.

What these authorities clearly underline is that each case is fact specific.

In ZG and SA procedural unfairness was found and was of such a nature as to cause the Commission to quash the decisions. The facts there were very significantly, perhaps uniquely, different from those in other cases.

As the Commission made clear :

"We are however satisfied on the evidence and arguments advanced before us that the process in these two cases was unfair and the decisions should be quashed. The Secretary of State should reconsider the applications after giving the appellants a reasonable time to make representations.

We make it clear that we have reached this conclusion on the unusual history and facts of these two cases."

In AQH procedural unfairness was found but the Commission concluded that it would have made no difference to the result and accordingly refused the application.

In KB SN/43/2015, a case decided recently on 20 January 2017, the Commission found (for reasons set out in CLOSED) that the SSHD acted unlawfully but that relief should be refused because the decision would have been the same but for that.

In no other case was it found that the failure to give an applicant the opportunity to address the concerns of the SSHD before a decision was taken amounted to procedural unfairness.

It is not totally without interest that Mr Grieves informed us that SA has now been granted naturalisation.

THE FORM AN and GUIDANCE FOR RS

14. Was the Applicant provided with a fair opportunity to address relevant matters ?

Section 3 of the application form addresses the good character requirement and provides detailed notice of areas of potential concern to the SSHD.
The introduction to section 3 states:
" 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."

15. Section 6(1) of the application contains a declaration, signed by the Applicant confirming that the information given is correct and confirming that she has read and understood the Guide AN and booklet AN. Included in the questions at section 3 in the AN were:

Question 3.10 Have you ever been involved in, supported or encouraged terrorist activities in any country? Have you ever been a member of, or given support to an organisation which has been concerned in terrorism?

Question 3.11 Have you ever, by means or medium, expressed views that justify or glorify terrorist violence or that may encourage others to terrorist acts or other serious criminal acts ?

Question 3.12 Have you engaged in any other activities which might indicate that you may not be considered a person of good character?

The Guide at 3.12 provides " You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago it was....If you are in any doubt about whether you have done anything or it has been alleged that you have done something which might lead to us to think that you are not of good character you should say so. "

THE SUBMISSIONS

16. Mr Grieves for the Applicant argues that this was not sufficient to enable her fairly to know what she should disclose, and that parts of the guidance to case workers should have been disclosed.

He points out that at the time there was some published guidance as to how caseworkers should approach the issue of good character but the section on Terrorism was marked "Restricted - Not Available For Disclosure" .

17. The guidance on how case workers should consider applications where association with individuals or groups only came into the public domain in ARM v SSHD SN/ 22/2015 at 30 :

"Mr Philip Larkin explained in his witness statement dated 29 January 2016 that the current Closed Home office guidance entitled Chapter 6 Terrorism has, since September 2009, set out how caseworkers should consider applications where association with individuals or groups is in issue in respect of somebody known to associate, or to have associated, with individuals or groups involved in extremist/ terrorist (or related) activities. Mr Larkin stated this guidance was introduced to reflect the practice that had been built up ...
since approximately 2004."

The evidence of Mr Larkin goes on to set out in detail the questions which caseworkers should consider in relation to "association" .
Mr Grieves maintains that had this been available to RS at the time of her application she would have been able to provide a detailed response dealing with it.

He points out that the focus of the questions and published guidance was on involvement of the Applicant rather than any association with others who might be involved.

He contends further that the material disclosed as part of the rule 38 process should have been disclosed to the Applicant prior to the decision being made so that she could respond to it.

The failure of the SSHD in the above respects was he argues unlawful.

18. Mr Grieves submits in the alternative that the failure of the SSHD to provide proper reasons for refusal was unlawful.
There was, he maintains, no legitimate reason why what has now been disclosed pursuant to rule 38 should not have been disclosed prior to a decision being taken.

19. The response of the SSHD.

Mr Gray contends that as the Commission observed in MNY v Secretary of State for the Home Department SN 53/2015 the application form and guidance provided the applicant with detailed assistance as to the sort of matters which would be of concern to the SSHD and afforded him or her the opportunity to set out, before the decision was taken, his or her case as to character and to disclose any matters adverse to his or her application (see 40). The Commission has repeated these observations concerning naturalisation cases: see AFA and MSB.

20. He made the following principal points:

(1) There is no statutory requirement for the SSHD to invite representations prior to making a decision.
(2) What is fair in a particular case depends on the legal and factual context.

(3) The decision in Fayed has not been followed by a general practice of writing "minded to refuse" letters.

(4) Here, unlike in ZG and SA, the form AN and Guidance gave RS ample notice of the matters relevant to her character

(5) Question 3.12 together with the Guidance was wide enough to encompass association with a proscribed organisation.

(6) RS in fact filed a witness statement dated 23 rd July 2013 in which she purports, inter alia, to (a) explain the reasons for her arrest on 19th March 2009 and subsequent detention (b) set out her response to the police allegation that she had been collecting money for the PKK (c) set out the circumstances surrounding a police raid of her home address in or around 2011 and her denial of involvement in or support for terrorist activities and (d) explain her sympathy towards the PKK and other Kurdish parties.
There was nothing in the statement which could not have been provided by her at the time of her application and she did not need the disclosure on 21st September 2016 to address those matters in her witness statement.

21. Mr Gray further contended that even if there was procedural unfairness the result would have been the same. He amplified this submission in CLOSED.

CONCLUSION

22. We have come to the conclusion that on the particular facts of this case the Form AN and Guidance did give the Applicant sufficient notice of what she should disclose in relation to her character.
While publication of the guidance to caseworkers would have given her additional information and may have been helpful, the fact that it was not at the time in the public domain did not mean that the procedures in place were unfair. We deal in more detail with this in CLOSED.
It is of considerable significance that, without further information or reasons, she was able to produce a detailed witness statement in July 2013 dealing with matters that were subsequently disclosed in the rule 38 process.

23. While disclosure of the rule 38 material could in theory have been made at the time of the decision letter, the fact that it was not does not lead to the conclusion that the procedure was unfair.
We conclude that the Secretary of State's decision was lawful.

24. Even if we had decided there had been procedural unfairness, that would not require us to decide whether section 31(2A) of the Senior Courts Act 1981 applies to cases before the Commission. That is because applying Judicial Review principles we have a discretion to refuse relief where we conclude as we do, that the decision would have been the same.