Appeal No: SN/10/2014
Hearing Date: 22 October 2014
Date of Judgment: 08 December 2014

**SPECIAL IMMIGRATION APPEALS COMMISSION**

Before:

**SIR STEPHEN SILBER**
**UPPER TRIBUNAL JUDGE GOLDSTEIN**
**SIR BRIAN DONNELLY**

**"AA"**

APPELLANT

and

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

RESPONDENT

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# RULE 38 OPEN JUDGMENT

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| For the Respondent: | Steven Gray |
| Instructed by: | The Treasury Solicitor for the Secretary of State |
| Special Advocate Representative: | Martin Goudie |
| Instructed by: | Special Advocate's Support Office |

**Sir Stephen Silber:**

**Introduction**

1. On 23rd November 1995, AA, who is a national of Algeria, entered the United Kingdom. On 3rd March 2010, he applied for naturalisation. By a letter dated 8th June 2010, the UKBA refused his application for British citizenship on the grounds that: -

> "The Home Secretary is not satisfied that you can meet the statutory requirement to be a good character. It would be contrary to the public interest to give reasons in this case. The decision to refuse your application has been taken in accordance with the law and prevailing policy".

2. On 8th September 2011, AA's representatives requested that the decision to refuse his application should be reconsidered. On 21st October 2011, a response was made to that request upholding the refusal decision. The decision was duly certified under s2 D(1) (c) of the Special Immigration Appeals Commission Act 1997 ("SIAC Act").

3. AA now seeks to challenge that decision and the certification. The basis of the application is that the decision refusing AA's application for naturalisation is flawed so that it should now be quashed for a number of reasons, including AA's contention that no reasonable Secretary of State properly directing herself as to the law and the facts would have been entitled to conclude that the AA was not of "good character". It is also contended by AA that the Secretary of State acted unlawfully in refusing first, to disclose sufficient information, second, to give AA a reasonable opportunity to make representations, and third, to answer the case against him. AA also places emphasis on the general significance of a refusal of an application for citizenship as well as its impact on the life and reputation of the individual concerned as was explained by Lord Phillips in *R v Secretary of State for Home Department, ex parte Al Fayed* [1998[1 WLR, 763 at 787 F-G.

4. The Secretary of State opposes the challenge to her decision and certification and she wishes to rely on closed material to support her case. The present application relates to applications by the Special Advocate for further disclosure and further information as well as for one closed matter to be gisted so that it could be disclosed to AA.

5. There was a closed oral hearing, but no open hearing on 22 October 2014. This was followed by helpful written submissions from counsel for the Secretary of State and the Special Advocate. Many of the submissions of Counsel centred on the recent decision of this Commission in *AIK and others v Secretary of State for the Home Department* (Appeals SN/2/2014, SN/3/2014, SN/4/2014,and SN/5/2014) (" AHK").

6. There is a closed judgment to accompany this judgment.

**The statutory landscape**

7. AA's application for discretionary naturalisation was made pursuant of s.6 (1) of the British Nationality Act 1981 which provides that:

> "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".

8. Schedule 1 of the British Nationality Act 1981 as amended provides that:

> "Subject to paragraph 2, the requirements for naturalisation as a British citizen under section 6(1) are, in the case of any person who applies for it—
>
> (a) the requirements specified in sub-paragraph (2) of this paragraph, or the alternative requirement specified in sub-paragraph (3) of this paragraph; and
>
> (b) that he is of good character; and
>
> (c) that he has a sufficient knowledge of the English, Welsh or Scottish Gaelic language; and
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> (ca) that he has sufficient knowledge about life in the United Kingdom; and
>
> (d) that either—
>
> (i)his intentions are such that, in the event of a certificate of naturalisation as a British citizen being granted to him, his home or (if he has more than one) his principal home will be in the United Kingdom; or
>
> (ii)he intends, in the event of such a certificate being granted to him, to enter into, or continue in, Crown service under the government of the United Kingdom, or service under an international organisation of which the United Kingdom or Her Majesty's government therein is a member, or service in the employment of a company or association established in the United Kingdom"

9. There were originally difficulties in challenging any decision refusing permission to be naturalised because prior to its repeal by s7(1) of the Nationality, Immigration and Asylum Act in 2002, s.44 (2) of the British Nationality Act 1981 provided that the Secretary of State:

> ". . . shall not be required to assign any reason for the grant refusal of any application under this Act the decision on which at his discretion; and the decision . . . on any such application shall not be subject to appeal to, or reviewing, any court".

10. Even after the repeal of that provision but before the Justice and Security Act 2013 ("JSA") came into force, there were still difficulties in challenging decisions refusing naturalisation where, as in the present case, there was a closed procedure in operation. These difficulties arose because of a deficiency which was identified by Ouseley J in *AHK* [2012] EWHC 1117 Admin and which was described by Richards LJ in *Ignaoua* [2014] 1 WLR 651 [24] as being:

> "the impossibility or improbability of a claimant succeeding in a judicial review of this kind in the absence of a closed procedure".

11. The way in which the JSA dealt with this difficulty was by including in s15 a procedure for the "review of certain exclusion decisions" and "certain naturalisation and citizenship decisions". This inserted a new ss. 2C and 2D in the SIAC Act. These sections apply where, as has happened in the case of AA, the decision refusing naturalisation is:

> "certified by the Secretary of State as a direction that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, 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."

12. After AA's claim was certified, he invoked the provisions in s.2C(2) and 2(D)(2) of the SIAC Act, which enabled a person to whom a naturalisation decision related to apply to SIAC to set it aside. On 31st March 2014, AA's representatives submitted such an application for review to this Commission.

**The Approach to Challenges to Decisions to Refuse Naturalisation**

13. In deciding such an application, SIAC "must apply the principles which would be applied in judicial review proceedings", and it may make any order or grant any such relief as would have been available in such proceedings: ss2(C) and (4), ss2D (3) and (4). A feature of applications to challenge refusals of applications for naturalisation and certification procedure is that a person challenging naturalisation decision refusals, unlike an individual subject to control orders, has no right to:

> "be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations as was the position in control orders" (see *Secretary of State v AF (No 3)* [2010] 2 AC 269 per Lord Phillips -paragraph 59).

14. There are a number of important consequences of this and the fact that the challenge by AA has to be on judicial review grounds. such as that:

i) This Commission has to review the lawfulness of the decision under challenge at the time it was taken, but not its merits, as the challenge is not an appeal on the facts. A challenge on judicial review grounds can be for a variety of reasons such as that a material factor had not been considered by the decision-maker especially if that factor was or might have been crucial;

ii) The Commission does not need to determine for itself whether the facts said to justify the decision are actually true. As a matter of ordinary public law, the existence of facts said to justify the refusal of naturalisation are not conditions precedent;

iii) The factual basis for the judgment exercised by the Secretary of State "must be scrutinised very carefully or 'anxiously' by the Commission"(*AHK* paragraph 30);

iv) There is a special problem in these proceedings because even the basic aspects of the closed information are being withheld from the Appellant. So the Special Advocates will have difficulties in obtaining information and in consequence in the words of *AHK* at paragraph 30, it was considered that "the responsibility on the Commission to review the act with care as clear." The investigation of the case against an Appellant by the Special Advocate is much harder and more demanding in the naturalisation cases than in cases where the individual must be, and indeed is, told the basic allegations against him or her;

v) As long as the clear and anxious review by the Commission leads to a conclusion that the facts or the factual inferences reached by the Secretary of State were reasonable, the Commission should not interfere even if it would have reached different conclusions. No deference should be allowed to the Secretary of State at this stage;

vi) If the Commission has concluded that that the factual or evidential conclusions reached by the Secretary of State are found to be reasonable, the next step for the Commission is to review the judgment made by the Secretary of State based on those facts, but at this stage the Secretary of State is entitled to deference on the basis of his or her democratic responsibility of being answerable to Parliament, and of his or her entitlement to formulate and implement policy; and

vii) The deference owed at this stage to the Secretary of State means that the Commission will only interfere in the words of *AHK* at paragraph 32 "when and if the Secretary of State has been unreasonable, allowing for due deference paid".

15. In *AHK*, it was held that the Commission must ensure that it has "all the material needed to reach a just conclusion" (paragraph 34). The Commission confirmed its previously held view that to review the substance of the SSHD

decision "can only be done if the Commission reviews the material available to the writer of the summary" (paragraphs 35 and 36). This decision has been the subject of a judicial review application recently brought by the Secretary of State on the basis that the disclosure should not go beyond the documentation and information before, or considered by, the decision maker. I gather that this application has not been determined. We were asked by both Counsel to decide the present application on the basis that *AHK* was correct, and we will do so.

**Orders for Further Disclosure**

16. It is well established that the general rules governing disclosure of documents in civil litigation in England and Wales do not apply to applications for judicial review because "Disclosure is not required unless the court orders otherwise" (CPR PD54A Paragraph 12.1.).

17. In *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650, HL, Lord Bingham of Cornhill observed that:

> "2...the process of disclosure can be costly, time-consuming, oppressive and unnecessary, and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary, and that remains the position.
>
> 3. In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions, as my noble and learned friends explain, for disclosure of specific documents to be sought and ordered. …But even in these cases, orders for disclosure should not be automatic. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly"

(Similar views were expressed by, for example, Lord Brown [36] and Lord Carswell [32]).

18. This restrictive approach to disclosure has been justified on the basis first, that it is undesirable to allow "*fishing expeditions*"; and second, that a public authority is subject to a duty to make candid disclosure to the court of its decision-making process: *Tweed* at [31], [46], [56]; and see *R v Lancs CC, ex parte Huddleston* [1986] 2 All ER 941.

19. In the case of SIAC, there are specific and totally different provisions which permit orders for the provision of information as Rule 4 of the SIAC Procedure Rules provides that:

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

(2) Where these Rules require information not to be disclosed contrary to the public interest, that requirement is to be interpreted in accordance with paragraph (1).

(3) Subject to paragraphs (1) and (2), the Commission must satisfy itself that the material available to it enables it properly to determine proceedings."

20. Rule 4(3) is of great importance because in the words of this Commission in *AHK* :

(a) "7…The Commission has a direct duty to ensure that it is possessed of evidence needed to do justice in a given case";

(b) "36… We bear closely in mind R4 (3) where because of the unusual procedures in SIAC, there is placed a positive duty on SIAC to satisfy itself that the material available to it enables it to properly determine the proceedings"; and also

(c) "37…Anxious scrutiny of the facts is only possible where the Commission is possessed of the evidence".

21. This requirement has to be considered in the light of two factors. First, as was explained by Sir Anthony Clarke MR when giving the judgment of the Court of Appeal in *AHK v Secretary of State for the Home Department [2009]* 1 WLR 2049:

> "10…The legal burden of establishing good character is on the applicant, as is the burden of showing that the decision of the Secretary of State is wrong in law. However, there may be circumstances in which the evidential burden shifts to the Secretary of State. All will depend upon the circumstances"

22. The significance of this is that when a refusal of nationality is being challenged, the Commission will appreciate that the individual concerned will need to be given information which might enable him or her to discharge, or to ascertain if these legal burdens can be discharged.

23. Second, the grounds for granting a judicial review application are well-known, but it is worth stressing that they include a failure by the decision-maker to take into account relevant considerations.

24. The Commission has a great deal of discretion in using its power under Rule 4(3), and it seems that when faced with an application, it may or might be prudent for it in respect of each item of information;

i) To consider initially if the request has to be refused on the grounds set out in Rule 4(1) that the disclosure of the information sought would be "contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest". If the answer to that inquiry is in the positive, the application has to be refused, but if the answer is in the negative, it is necessary to proceed to sub-paragraph(ii);

ii) To consider then if the answer to the inquiry set out in (i) above is in the negative, whether the request is relevant to the grounds put forward for opposing the naturalisation application. If the answer to that inquiry is in the positive, it is necessary to proceed to sub-paragraph (iii), but if the answer is in the negative, the application must be refused; and

iii) To consider next whether the information sought could or would assist the Commission in determining the application bearing in mind all relevant matters including the grounds for granting judicial review and the burden of proof on the applicant as has been explained in paragraph 19 above.

**Disclosure of Closed Material**

25. After the closed material has been served on the Special Advocate, he or she may request directions from the Commission authorizing him or her to communicate with the Appellant. The Commission has to notify the Secretary of State of the request and she can then object to the request to notify the Appellant. In that event, a hearing is fixed and in the absence of agreement, the Commission has to decide at a hearing whether to uphold or overrule the Secretary of State's objection but Rule 37 provides (insofar as is material) that:

> "(7) The Commission must uphold the Secretary of State's objection under rule 37 where it considers that the disclosure of the material would be contrary to the public interest.
> (8) Where the Commission upholds the Secretary of State's objection under rule 37, it must—
> (a) Consider whether to direct the Secretary of State to serve a summary of the closed material on the appellant; and
> (b) approve any such summary, to secure that it does not contain any information or other material the disclosure of which would be contrary to the public interest."

26. When dealing with an application for disclosure, it must not be forgotten, as has been explained in paragraph 11 above, that a person challenging a refusal of naturalisation has no right to be given sufficient information about the allegations against him to enable him to give effective instructions. In addition, there is no minimum level of disclosure required and it is not for the Commission to conduct a balancing exercise.

**Conclusion**

27. For the reasons set out in the accompanying closed judgment, two of the applications for further information have been granted, but the application for a matter to be gisted and then disclosed in open has to be refused.