Appeal Number: SN/2/2014
Hearing Dates: 23, 24, 25 & 26 March 2015-06-10
Date of Judgment: 3rd July 2015

SPECIAL IMMIGRATION APPEALS COMMISSION

Before :

THE HONOURABLE MRS JUSTICE NICOLA DAVIES
UPPER TRIBUNAL JUDGE PETER LANE
SIR STEPHEN LANDER, KCB

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Between :

FM **Appellant**

- and -

The Secretary of State for the Home Department **Respondent**

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Mr R De Mello (instructed by **Broudie Jackson Canter**) for the **Appellant**
Mr R Phillips QC & Ms C Callaghan & Mr J Blake (instructed by **The Government Legal Department)** for the **Respondent**
Special Advocates: Ms J Farbey QC & Mr M Goudie (instructed by **The Special Advocates Support Office**)

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JUDGMENT

MRS JUSTICE NICOLA DAVIES :

Introduction

1. This is a judgment of the Commission to which we have all contributed. I am particularly grateful to Upper Tribunal Judge Peter Lane for his contribution upon the issue of discrimination.

2. This is a claim for statutory review pursuant to section 2D of the Special Immigration Appeals Commission Act 1997 ("SIAC Act 1997") of the refusal of the Secretary of State for the Home Department ('SSHD') to grant naturalisation as a British citizen to the appellant pursuant to Section 6 of the British Naturalisation Act 1981 ("the 1981 Act"). The refusal was upon the ground that the SSHD was not satisfied that the appellant was of good character.

3. This case has a significant history. The challenge began in the Administrative Court as one of four lead cases in determining whether a closed material procedure was permissible in judicial review proceedings. This issue was considered in two judgments of Ouseley J: *AHK & Others v Secretary of State for the Home Department [2012] EWHC 1117 (Admin) and [2013] EWHC 1426 (Admin*). The lead cases were subsequently certified pursuant to s2 D of the SIAC Act 1997, and an appeal to the Court of Appeal was stayed pending determination of an application to SIAC or further order: Richards LJ [2014] EWCA Civ 151.

4. In the course of this lengthy history the Administrative Court, the Court of Appeal and latterly SIAC have considered aspects of this and similar applications. Issues before the court include whether Special Advocates should be appointed, what disclosure should be given, whether and in what circumstance the Administrative Court could hold a closed material procedure. In the proceedings before SIAC the nature of the hearing, the approach to a statutory review and the obligations of disclosure by the SSHD were considered. The issue of disclosure, in particular, was subsequently determined by the Divisional Court [2015] EWHC 681 (Admin).

5. On 18 July 2014 the Commission gave its first judgment in this and the other lead cases ("the Preliminary Issues Judgment"). The Commission identified the approach in principle, to statutory judicial reviews in naturalisation cases namely:

    a) It is obliged by s2D(2) of the Special Immigration Appeals Commission Act 1997 as amended by the Justice and Security Act 2013("JSA 2013") to apply a conventional judicial review approach to naturalisation challenges ;[14]

    b) In the absence of an arbitrary or discriminatory decision, or at the very least some other specific basis of fact, refusal of naturalisation will not engage ECHR rights. It will be for the appellant to lay the groundwork for such a claim, on the basis of

specific fact. Even if ECHR rights are engaged, the exercise is an adjudication of proportionality of the decision not a full merits review; [22] and [24]

c) As a matter of common law or ordinary public law the existence of facts said to justify the denial of nationality is not a condition precedent and fact-finding is not necessary to determine whether the procedure is fair; [23]

d) The factual basis for the judgment exercised by the Secretary of State must be scrutinised very carefully or "anxiously"; [30]

e) It is a review not an appeal on the facts. If a close and anxious review of the evidence produces the outcome that the facts or factual inferences reached by the Secretary of State were reasonable, then there should be no interference on that ground, even if the Commission would reach different conclusions; [31]

f) In consideration of a judgment based on the reviewed fact, public law principles do support a degree of deference to the decision of the Secretary of State… the task of the Commission is to interfere when and if the Secretary of State has been unreasonable, allowing for due deference to be paid;[32]

g) Agreeing with Ouseley J in *AHK and others* (above) *[2013] EWHC 1426 (Admin)*, it will be very rare that there will be a breach of Article 8 rights such that interference with private or family life will be disproportionate given the level of public interest in enforcing a legitimate immigration policy. [33]

The Law

6. British Nationality Act 1981 ('the 1981 Act')

Section 6

"(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 appellant 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) If, on an application for naturalisation as a British citizen made by a person of full age and capacity who on the date of the application is married to a British citizen or is the civil partner of a British citizen, the Secretary of State is satisfied that the appellant 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."

Paragraph 3 of Schedule 1 to the 1981 Act, as amended by section 2(1)(a) of the Nationality, Immigration and Asylum Act 2002, provides:

> "Subject to paragraph 4, the requirements for naturalisation as a British citizen under section 6(2) are, in the case of any person who applies for it – (a) that he was in the United Kingdom at the beginning of the period of three years ending with the date of the application, and that the number of days on which he was absent from the United Kingdom in that period does not exceed 270; and (b) that the number of days on which he was absent from the United Kingdom in the period of 12 months so ending does not exceed 90; and (c) that on the date of the application he was not subject under the immigration laws to any restriction on the period for which he might remain in the United Kingdom; and (d) that he was not at any time in the period of three years ending with the date of the application in the United Kingdom in breach of the immigration laws; and (e) the requirements specified in paragraph 1(1)(b),(c)and (ca)."

The requirements of paragraph 1(1)(b), (c) and (ca) of Schedule 1, as inserted by section1(1) of the 2001 Act, are as follows:

> "(b) that he is of good character; and (c) that he has a sufficient knowledge of the English, Welsh or Scottish Gaelic language; and (ca) that he has sufficient knowledge about life in the United Kingdom…."

7. The burden of proof is on the appellant to satisfy the SSHD that these requirements are met on the balance of probabilities. If this test is not satisfied the SSHD must refuse the application. An appellant for naturalisation seeks a privilege not a right. The 1981 Act vests the SSHD with considerable discretion: *R v. Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 736 at 776A.

8. The SSHD 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."

In *Secretary of State for the Home Department v. SK Sri Lanka* [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."

9. A decision regarding character in the context of citizenship is at the political (rather than legal) end of the spectrum: *A v. Secretary of State for the Home Department* [2005] 2 AC 68 Lord Bingham at [29].

Guidance

10. Nationality Instructions. Annexe D to Chapter 18 ("The Staff Instructions"):

"The Good Character Requirement.

1. Introduction

There is no definition of Good Character in the British Nationality Act 1981 and therefore no statutory guidance as to how this requirement should be interpreted or applied……

1.2 The Secretary of State must be satisfied that the appellant is of good character on the balance of probabilities……..

2. Aspects of the requirement

2.1 Caseworkers should not normally consider appellants to be of good character if, for example, there is information to suggest……

2.2 Caseworkers should normally accept that an appellant is of good character if:

(a) Enquiries of other government departments and agencies do not show fraud/deception has bee perpetrated by the appellant in their dealings with them;

(b) There are no spent convictions;

(c) There is no information to cast serious doubts on the appellants character; and

(d) Where the appellant is a business person or is self- employed or a person of independent means or a sole representative- there is a written confirmation from HM Revenue and Customs that their business affairs are in order."

European Convention of Human Rights
Article 8

11. Right to respect for private and family life.

1. Everyone has the right to respect for his private and family life, his home, and correspondence.
2. There shall be no interference by a public authority with the exercise of this right except as such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9
Freedom of thought, conscience or religion.

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest ones religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedom of others.

Article 10
Freedom of expression.

1. Everyone has the right to freedom of expression. The right should include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

12. In *R (Lord Carlile of Berriew and others) v. Secretary of State for the Home Department [2014] UKSC 60* Lord Sumption JSC at [34] identified the approach of the court in a case where the Convention rights were adversely affected by an executive decision as follows:

> "… The court must test the adequacy of the factual basis claimed for the decision: is it sufficiently robust having regard to the interference with the Convention rights, which is involved? It must consider whether the professed objective can be seen to be necessary in the sense that it reflects a pressing social need. It must review the rationality of the supposed connection between the objective and the means employed: is it capable of contributing systematically to the desired objective, or its impact on the objective arbitrary? The court must consider whether some less onerous alternative would have been available without unreasonably impairing the objective. A court is the ultimate arbiter of the appropriate balance between two incommensurate values: the convention rights engaged and the interests of the community relied on to justify interfering with it. But the court is not usually concerned with remaking the decision-maker's assessment of the evidence if it was an assessment reasonably open to her. Nor, on a matter dependant on a judgment capable of yielding more than one answer, is the court concerned with re-making the judgment of the decision-maker about the relative advantages and disadvantages of the course selected, or of pure policy choices…. The court does not make the substantive decision in place of the executive. On all of these matters, in determining what weight to give the evidence, the court is entitled to attach special weight to judgments and assessments of a primary decision – maker with special institutional competence".

Lord Neuberger at [67, 68] stated:

> "67… where human rights are adversely affected by an executive decision, the court must form its own view on the proportionality of the decision or what is sometimes referred to as the balancing exercise involved in the decision. That was made clear by all members of the appellate committee in *Belfast City Council v. Miss Behavin' Limited [2007] WLR 1420*, paras 13,24,31,44 and 97, applying *R (SB) v. Governors of Denbigh High School [2007] 1 AC 100*. More recently the point was illuminatingly discussed by Lord Reed JSC *in Bank Mellat v. Her Majesty's Treasury (*No 2) [2014] AC 700, para 68-76. As Lord Reed JSC made clear in para 71, while proportionality is ultimately a matter for the court, it "does not… entitle [domestic] courts simply to substitute their own assessment for that of a decision-maker", and he went on to say " the degree of restraint practised by [domestic] courts in

> applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision-maker, will depend on the context and in part reflect national traditions and institutional culture…….
>
> 68 Accordingly, even where, as here, the relevant decision-maker has carried out the balancing exercise, and has not made any errors of primary fact or principle and has not reached an irrational conclusion, so that the only issue is the proportionality of the decision, the court cannot simply frank the decision but it must give the decision appropriate weight, and that weight may be decisive. The weight to be given to the decision must depend on the type of decision involved and the reasons for it. There is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence and where only exceptional circumstances would justify judicial interference, in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account relevant material or irrationality."

Baroness Hale at [87-108] identified the questions to be asked in approaching a claim such as the appellant's. The questions are:

i) Is there a Convention right involved?

ii) Has the right been limited or interfered with?

iii) Was the limitation or interference prescribed by law?

iv) Was it in pursuit of one of the legitimate aims permitted by the Convention in relation to the right in question?

v) Was it "necessary in a democratic society"?

Baroness Hale said of the final question:

> "This is what we now call proportionality. In this country we have broken this down into four sub-questions recently articulated by Lord Wilson *in R ('Aguilar Quila') v. Secretary of State for the Home Department (Aire Centre Intervening) [2012] 1 AC 621*, at para 45 and repeated in substantically identical terms by Lord Sumption and Lord Reed JJSC in *Bank Mellat v. Her Majesty's Treasury (No 2) [2014] AC 700* paras 20 and 74. In reality, however, there is considerable overlap between the four questions. Provided that (i), (ii) and (iii) are answered in the affirmative, the real question is (iv), which can be

encapsulated as "do the ends justify the means"? I have no doubt that it is for the court to make the proportionality assessment; but I have equally no doubt that on some parts of that assessment the court should be very slow indeed to disagree with the assessment made by the government.

(i) Is the objective sufficiently important to justify limiting a fundamental right?

99. This entails a qualitative judgment which the Government is much better qualified to make than is the court. This is not to say that the court will always take the Governments' word for it on this or any other of the proportionality questions. …

(ii) Are the measures which have been designed to meet it rationally connected to it...?

(iii)Are they no more than to accomplish it?.....

(iv)Do they strike a fair balance between the rights of the individual and the interests of the community?

104. This, as always is the nub of the proportionality question. It involves weighing or balancing values which many may think cannot be weighed against one another. …

105. I agree that, difficult though this is, it is ultimately a task for the court, but a court which is properly humble about its own capacities. If the court is satisfied that the Government has struck the balance in the wrong place, then the court must say so. But I also agree that the courts must be very slow to interfere with that balance in a case such as this. The court has a particular expertise in assessing the importance of fundamental rights in protecting individuals against the over-mighty power of the state or the majority. The Government has much greater expertise in assessing risk to national security or the safety of people for whom we are responsible. But the Government in a democracy such as ours should be at least as mindful of the need to strike the necessary balance between individual rights and the common good as are the courts; and if it does not protect those rights, it is accountable to Parliament in a way in which we are not. …"

In a dissenting judgment Lord Kerr at [163 to 167] stressed the importance of Article 10 of ECHR describing it as a fundamental Convention right whose importance has been endorsed in Strasbourg.

13. In *R (Williamson and ors) v. The Secretary of State for Employment*

[2005] UKHL 15 Article 9 was considered. Lord Nicholls stated:

"15. I turn to the claims based on the claimant's Convention rights. Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilised society.

Unhappily, all to often this hallmark has been noticeable by its absence. Mutual tolerance has had a chequered history even in recent times. The history of most countries, if not all, has been marred by the evil consequences of religious and other intolerance.

It is against this background that article 9 of the European Convention on Human Rights safeguards freedom of religion. This freedom is not confined to freedom to hold a religious belief. It includes the right to express and practise one's beliefs. Without this, freedom of religion would be emasculated. Invariably religious faiths call for more than belief. To agree to a lesser extent adherents are required or encouraged to act in certain ways, most obviously and directly in forms of communal or personal worship, supplication and meditation. But under article 9 there is a difference between freedom to hold a belief and freedom to express or "manifest" a belief. The former right, freedom of belief, is absolute. The latter right freedom to manifest belief is qualified. …….

23 Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of a "manifestation" arise, as they usually do in this type of case, a belief must satisfy some modest objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for example, which involves subjecting others to torture or human punishment, would not qualify for protection. The belief must relate to matters much more than trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. ……

26 More difficult is the question of whether the claimant's beliefs are compatible with today's standards of human integrity……..

30. … Article 9 is not engaged unless the complainants' activity under consideration is within the scope of the protection the article affords to the complainants' beliefs. As to this, the Strasbourg jurisprudence has consistently held that Article 9 does not protect every act motivated or inspired by a religion or belief. Article 9 does not "in all cases" guarantee the right to behave in public in a way "dictated by a belief"… *Sahin v.Turkey* ……..

> 38 … What constitutes interference depends on all the circumstances of the case including the extent to which in the circumstances an individual can reasonably be expected to be at liberty to manifest his beliefs in practice. In the language of the Strasbourg jurisdiction, in exercising his freedom to manifest his beliefs an individual "may need to take his specific situation into account" see *Kalac v. Turkey.*
>
> 39 ….. the question is whether the 1998 amendment of the law interfered materially, that is, to an extent which was significant in practice, with the claimants' freedom to manifest their beliefs in this way."

The appellant's application.

14. On 14 January 2004 the Secretary of State received the appellant's application for naturalisation as a British citizen. Section 3 of the application dealt with good character. The relevant parts of the section were completed by the appellant as follows:

Section 3: Good Character

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.

Please tell us about your occupation (if you are not in employment or have retired, write 'NONE' :

3.1 What is your occupation?

NONE
…….

You must disclose details of any activities which might be relevant to the question of whether you are a person of good character (see paras 40-41 in the Guide). You must answer 'YES', you must give full details on a separate sheet of paper.

10. 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?

Please ✓ Yes [ ] No [✓]

11. Have you ever been concerned in the commission, preparation or organisation of genocide or crimes, including crimes against humanity and war crimes, committed in the course of an armed conflict?

Please ✓ Yes [ ] No [✓]

12. To your knowledge have you ever been under investigation of any offence relating to terrorism genocide or to crimes committed in the course of an armed conflict.

Please ✓ Yes [ ] No [✓]

13. Have you engaged in any other activities which might be relevant to the question of whether you are a person of good character?

Please ✓ Yes [ ] No [✓]

Section 7: Declaration by Appellant

WARNING: To give false information on this form knowingly or recklessly is a criminal offence punishable with up to 3 months imprisonment or by a fine not exceeding £5,000 or both.
(Section 46(1) of the British Nationality Act 1981, as amended)

7.1 I, (Name of the appellant) 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 circumstance which may affect the accuracy of the information given whilst this application is being considered by the Home Office. I understand

that information given by me will be treated in confidence but may be disclosed to other bodies, for example, other Government Departments and agencies, local authorities and the police where it is necessary for immigration or nationality purposes or to enable these bodies to carry out their functions.

The appellant signed the application form, dated 22 December 2003. Two referees signed the form attesting to the good character of the appellant.

The refusal of the application and the reasons.

15. The application was considered by a Home Office official, who, it is said applied the relevant guidance, contained in the staff instructions. It is the respondent's case that the decision-maker was in possession of material which cast serious doubts on the appellant's character. On the basis of this material the Home Office official considered that the appellant failed to satisfy the good character requirement and his application was refused. The only relevant requirement for the purpose of these proceedings is the good character requirement at 2,2(c) of Annexe D of the Staff Instructions.

16. The refusal of the appellant's application for naturalisation was contained in a letter from the Home Office, Immigration and Nationality Directorate dated 12 July 2006. It contained the following:

> "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 appellant be of good character. Whilst good character is not defined in the 1981 British Nationality Act, we take into consideration the activities of the appellant when assessing whether this requirement has been satisfied.
>
> I am writing to inform you that your application has been refused on the grounds that the Home Secretary is not satisfied that you meet the requirement to be of good character. This is because you have preached extreme Muslim views."

17. By a letter dated 31 August 2006 solicitors on behalf of the appellant sought "full detailed reasons" for the refusal in order to assess whether or not a legal challenge could be mounted. In the letter the appellant's solicitors stated:

> "My client is a qualified Imam and he has worked voluntarily preaching, at one time at the ….. Mosque in ….. and subsequently, for the ….. Community Centre at ….. Street during the Friday prayers. In the circumstances my client accepts that he has preached Muslim views but in no way does he accept that he has preached "extreme" Muslim views. We believe that your explanation as to why he does not meet the requirements to be of good character is inadequate".

18. No further reasons were provided on behalf of the respondent. On 18 December 2007 solicitors on behalf of the appellant sent a letter before claim in respect of judicial review proceedings to the Home Office. By a letter dated 28 February 2007 in reply the following was stated on behalf of the respondent:

> "Having consulted fully with other Government colleagues I am writing to inform you that the decision to refuse the application still stands on the grounds that the Home Secretary remains satisfied that your client is not able to meet the requirement to be of good character. We now offer an expanded form of words after our consultation. The application remains refused on the basis that your client has openly preached anti-western views and voiced sympathy with Usama Bin Laden (UBL) at the ….. Mosque in …..."

19. For the purpose of these proceedings the respondent on 6 November 2014 provided an Open Gist which stated:

> "The Secretary of State refused FM's application for naturalisation as a British citizen because the Secretary of State received advice from relevant Government agencies that there was reporting from a number of secret and reliable sources to the effect that since his arrival in the UK, in various Mosques …… the claimant had preached extremist Muslim and anti – western views. FM has been a supporter of jihad. He has openly claimed a historic association with Usama Bin Laden and/or sympathy with him. The Secretary of State was therefore not satisfied, that on the balance of probabilities, FM was a good character. His application was refused under s 6 (1) of the British Nationality Act 1981."

The appellant's case

20. The appellant's first submission is that the refusal of naturalisation pursuant to s 6 (1) of the 1981 Act is unreasonable and incompatible with Article 8, 9 and 10 ECHR.

The appellant's evidence

21. In support of his application for naturalisation the appellant provided no evidence save for what was declared in his application form together with two character references. His solicitors, in correspondence with the Home Office, provided further personal details relating to his occupation as an Imam and a denial of any extremist activities. In these proceedings the appellant has

submitted two witness statements. The first dated 15 June 2014 provides personal information relating to himself and his family, details relating to his role as an Iman and a more detailed denial of the allegations made in respect of extremist views or activities. In a second statement, undated, the appellant provides detail relating to the record of an interview which took place between him and the police at a UK airport on 16 October 2003.

22. The respondent objects to the admission of both statements on the grounds that neither was before the decision-maker. During the course of these proceedings the respondent has sought to rely on alleged inconsistencies in the appellant's statements relating to his knowledge and/or activities in support of contentions that the appellant was not honest in his original application.

23. We accept that the statements and the detail contained therein were not before the decision-maker. However, although the initial refusal of naturalisation was contained in a letter dated 12 July 2006, in February 2007 and in the Open Gist dated November 2014 the respondent provided further details as to the reasons for the refusal. The matters contained in the first witness statement of the appellant provide information relevant to the subsequent and more detailed reasons for refusal. Further the respondent seeks to rely on parts of the appellant's statements and a record of interview at a UK airport in 2003. The second witness statement addressed this point. Given the need to respond to details provided by the respondent subsequent to the initial refusal and the reliance which the respondent now seeks to place upon parts of the appellant's statements it is our view that the proper approach is to admit the statements into evidence. The weight to be attached to their content being a matter for the Commission.

24. The appellant is a Yemeni national born in October 1964. He is a Sunni, his forefathers were Imans. The appellant arrived in the United Kingdom in November 1995 and applied for asylum in December 1995. He married his wife in November 1996 in the United Kingdom. There are four children of the marriage and at the time of the original proceedings a fifth child was expected. The appellant and his family live in Northern England, his wife's parents live nearby he describes them as a close knit family. The appellant has no family residing in the UK. The appellant and his family are devout Muslims. The appellant's children speak English and attend local schools. On 11 April 2003 the Home Office granted the appellant indefinite leave to remain under the terms of the Legacy policy. He subsequently withdrew his claim for asylum. The appellant has travelled to Yemen on his Yemeni passport and retains ties with Yemen.

25. The appellant identifies himself as being jointly responsible as the Imam of a Mosque. He jointly leads the five daily prayers seven days a week. He teaches and preaches the Quran and Sunnah and plays an active role as an Imam in the local community. The appellant's role includes preaching and giving sermons which centre upon Muslim values and expound the six main beliefs**.** His sermons are given in the Arabic language which, on occasion, will be translated into other languages. It is his core belief that as a Muslim religious group they should not advocate violence against others, this is forbidden. The appellant has always spoken of how it would be contrary to

the principles of Islam to perpetuate violence against others, however, in his religious duties as an Imam, he is required to defend his faith when it is being unfairly criticised. At the Mosque the Imans teach the congregation to respect the law and to tolerate all not belonging to their faith. The Mosque would not encourage sermons which use threatening, insulting or abusive words or behaviour or any written material containing the same. He has never openly preached anti- western views or voiced any sympathy with Usama Bin Laden. He may have referred to Usama as a close companion of the Prophet in his teachings and sermons during 1998 – 2004. This was not a reference to Usama Bin Laden. The appellant believes that he may have mentioned Usama Bin Laden in the context of answering questions from one of the members of the congregation, beyond that he does not recall mentioning him. He may have spoken of the over-reaction of members of the public and press towards Muslims in their associating all Muslims with the words of Usama Bin Laden. Neither the Mosque nor the appellant were supporters of Usama Bin Laden or sympathetic to his encouragement of violence. The appellant has not recruited nor sought to radicalise any young persons to train abroad to fight and attack western or other interests. The assertion that the appellant has openly claimed historic association with Usama Bin Laden is 'mystifying' to him. He has sided with Muslims and Islam against unfair reaction towards Muslims.

26. It is the belief of the appellant that rival Imams who sought to oust him from a previous Mosque may have made false accusations against him. Committee members from the Mosque, for their own reasons attempted to move him and supported the false accusations that he was responsible for preaching extreme anti-western and Muslim views. The Imams wanted to take control of the Mosque and to this end spread rumours about him and subsequently sent persons to his present Mosque to spy upon him.

27. The appellant's home has been searched by the police and/or Special Branch and items seized. He has been stopped pursuant to the Terrorism Act at the airport four or five times. No charges have been brought. On the contrary, the appellant as the Imam of a large Mosque, attends regular meetings with the Police Home Security Forces and the Home Office Department to ensure that the Mosques do not harvest or support terrorist groups.

28. The refusal of naturalisation on the ground that he sympathised with Usama Bin Laden has caused the appellant much anxiety and shame. His referees are disappointed to learn of the refusal, he has not been able to hide from them the reasons given by the Home Office. A number of Imams and some Mosques have learnt of the refusal which has damaged the appellant's reputation amongst the Imams and members of the congregation who attend the Mosques.

29. In his second statement which was unsigned by reason of the appellant's commitments as an Imam he confirms that it was read over to him by his legal representative. The appellant responds to the record of interview by the police at an unidentified airport in the UK on 16 October 2003. He states that he cannot remember exactly what he said during the interview over 10 years ago. He says that he does not like being asked about different branches of Islam because a person who raises this is usually trying to cause a division. At the

The respondent's unreasonable refusal/ Article 10 ECHR.

30. The appellant accepts that the respondent is able to set a high standard for good character however, the Commission is entitled to evaluate the facts against the definition and criteria of good character. It is entitled to substitute its opinion for that of the decision-maker if the decision is so aberrant that it cannot be classed as rational or is ultra-vires. This is one such case. The measures taken pursuant to section 6 (1) of the 1981 Act are not rationally connected to its objectives. As the Commission understands the appellant's case, it is his contention, in respect of the allegedly unreasonable nature of the refusal and interference with his Article 10 ECHR rights, that refusal of naturalisation is not a rational way of avoiding the risk of impinging upon national security. There is no evidence that radicalisation has been taking place in the Mosques as a result of what the appellant has said. The preaching is confined to those attending the Mosque. The measures taken pursuant to section 6 (1) of the 1981 Act are not necessary to accomplish the objectives. The appellant's indefinite leave to remain has not been revoked. Granting him British citizenship now would not prevent the appellant from preaching extreme views in the Mosque in the future. The apparent objective (national security including preventing radicalisation) is not sufficiently important to justify limiting the freedom of a preacher to express core religious views to members of his congregation which do not seek to advocate violence or radicalisation or to limit freedom to express anti- western views providing he does not call for attack on British forces. The decision to refuse naturalisation has no wider impact on members of the public. It is confined to an individual and should not be used to penalise or censor a preacher for saying things which the government does not like providing what he said does not incite violence or hate.

31. In his evidence to the Commission the appellant has challenged the primary findings of fact and inferences drawn by the person who refused the application for naturalisation. He has provided an explanation as to why the respondent has misinterpreted and misunderstood his sermons and words used by him. Considerable reliance is placed upon the fact that since 2006 no further evidence has been adduced which is adverse to the appellant. If the Commission concludes that the open and/or closed material cannot be interpreted in the manner done on behalf of the SSHD then the decision should be set aside on the grounds of mistake or irrationality.

32. Article 10 is clearly engaged because the refusal is based upon what the appellant has said and preached as a preacher in that he has expressed certain views. The threshold for engagement of Article 10 is not "especially high": *Attorney General (Eritrea) Secretary of State for the Home Department [2007] 801* [28].

33. The respondent has not considered the impact of Article 10 upon the refusal. Rather than remit the matter for further consideration, the Commission is requested to apply Article 10 to the refusal decision it being in as good a position as the respondent to conduct such an exercise. The appellant accepts that he did preach sermons in the Mosque and that he has his own core religious beliefs as to what "jihad" means. The refusal of naturalisation limits the appellant's freedom to express his core religious view openly and freely to members of his congregation in the Mosque.

Article 9 ECHR

34. The decision amounts to an interference with the appellant's Article 9 rights because it penalises him for exercising the freedom granted by this Article. The appellant's concept of "jihad" is part of his core religious belief as is his strong religious belief to criticise what he sees as an attack upon his religion. These beliefs are made in good faith and with strong conviction. He is an Imam who has expressed his religious views in a Mosque addressed to a small congregation. There was little or no scope for the appellant's views being transmitted to the wider members of the public, these events took place at a time when social media did not affect our lives in the way that it does today. In the evidence there is no suggestion that the words of the appellant went beyond the Mosque. His expressed views on religious matters have not caused distress or anxiety to the members of the congregation albeit that some have maliciously reported the appellant to the authorities in order to oust him from the Mosque. His views have a religious dimension, no violence was incited or glorified, no hate speech was made. This is not a case where it is suggested that the appellant has incited violence such as would permit the state to enjoy a wider margin of appreciation when examining the need for interference with freedom of expression. *Karratis v. Turkey APP 23168/94* [50]. It cannot be said that the religious belief held by the appellant is fictitious or capricious. If others can react unreasonably to a peaceful religious sermon it is they and not the appellant who are to blame. In any event, the Commission is in as good a position as any to judge whether an adverse reaction by the public to the grant of naturalisation to the appellant or

to the preaching of extreme Muslim views by the appellant in the Mosque would be sufficiently likely and a danger to national security issues.

Article 8 ECHR.

35. The appellant contends that his Article 8 ECHR rights are engaged in light of the continued immigration controls to which he (as opposed to his British family) would be subject and the effect of refusal of naturalisation on his family and his reputation. He relies on the words of Blake J at a directions hearing of 10 cases which challenged refusals of naturalisation, one of which was the appellant's: [2008] EWHC 2525. At[55] the judge stated:

> "In the present cases, the grounds for refusing naturalisation that the claimants would otherwise qualify for, have an adverse impact on social reputation, render it more difficult, and leave the claimants in a vulnerable state of statelessness as refugees, or unable to obtain future security as to their continued residence here. Although it is not possible to penetrate too deeply in the facts of the individual cases on a directions hearing, I consider that cumulatively these factors may be said to affect the enjoyment of private and possibly also family life in the United Kingdom. Article 8 is therefore engaged, and justification of interference with the right of respect for the values protected by Article 8 (1) requires a measure of procedural fairness in accordance with convention norms."

36. The decision directly affects the appellant's family life in that he is married to a British citizen and has British citizen children. He has established a family and private life in the UK. He needs a British citizen passport to travel freely and without hindrance with his family in the Member States. The appellant is a man of good character, he has no convictions yet by reason of the refusal he is made out to be a person who is not of good character. To be told that he has been refused naturalisation amounts "to an acute disappointment and shame to his family members who would not wish to discuss this rejection openly with relatives and friends." A refusal of naturalisation on the grounds that he has made hate speeches constitutes a stigma and is an attack on his reputation as an Imam. His reputation, in the eyes of his associates and followers, will be stigmatised by the refusal of his application for naturalisation.

The respondent's case

37. What has been refused is a privilege, the refusal is neither a sanction nor a penalty. The Commission must review the OPEN and CLOSED material including that disclosed pursuant to the duty of candour. The respondent does not seek to rely on the material "available to" the summary writer, even though it has been disclosed and is supportive of her decision. The evidential basis of the decision is contained in the material which was provided to the statutory decision-maker, who drew conclusions and reached a judgment on the factual picture. It is accepted that the appellant may properly rely on information disclosed pursuant to the duty of candour e.g. to suggest a failure

to take into account a relevant consideration but the respondent cannot rely on material of which she or her duly authorised official was not aware. The material that is relevant is the material that was before the decision- maker. It is not necessary for every point of detail to be drawn to the attention of the decision-maker. It is for the decision-maker to make rational judgments about what is taken into account and to determine the extent of the enquiry to be undertaken in making any particular decision. *R v.(Naik) v. SSHD [2011] EWCA Civ 1546.*

38. As to irrationality or unreasonableness of the refusal, the appellant's case is narrow. The appellant is not contending that if the decision-maker had material available to her, the effect of which was that the good character provision was not met, the matters could not found a decision to refuse. The appellant relying upon his own evidence, states that the reports are wrong. Thus, the real question is was there such material available to the decision-maker to enable the decision to be made? If there was, the decision cannot be irrational or unreasonable. It is for the Commission to look at the full material, including the CLOSED material, and answer the question was the material available, was the decision based on that material either unreasonable or irrational?

39. In the written and oral submissions it was contended on behalf of the respondent that there are inconsistencies in the account of the appellant in his witness statement and that by reason of specific and limited content in the witness statement the appellant misled the Secretary of State. The points made are of extremely limited effect and, in reality, take the respondent's case no further.

Article 8

40. Only an arbitrary refusal of citizenship could invoke Article 8 *Genovese v. Malta (2014) 58 ERR 25*. The appellant has not submitted that this was arbitrary decision. In *AHK [2013] EWHC 1426 (Admin),* (above) Ouseley J observed at [45-47]:

> "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 be ill-founded on this ECHR 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 ECHR 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 ECt HR has held. That is not for the domestic Courts.

> 46. The provisions of the BNA are not in those categories. The 'good character' test may be very broad, guidance notwithstanding, but it cannot be regarded as intrinsically arbitrary or discriminatory. The absence of any reason in AM's, beyond the failure of the 'good character' test, cannot demonstrate the decision was arbitrary or discriminatory. The SSHD's evidence is that AM failed the 'good character' test because she was not satisfied, on the basis of material she cannot disclose, that he was of good character. The reasons given in the claims of SF, FM and AHK brief though they are, do not support any suggestion that the statutory test was applied in an arbitrary or discriminatory manner. If sound on the facts, the reasons are within the scope of the statutory test, and the contrary has not been suggested.
>
> 47. If the correct approach is broader and does not depend on the arbitrary or discriminatory nature of the decision, I conclude that the evidence of interference with Article 8 rights is exiguous and not made out in FM's case. He merely states he has a wife and children who are British nationals. There has to be a greater interference than mere continuation of the lawful status which the appellant successfully sought for the purpose of remaining in the UK."

41. The respondent contends that Ouseley J was correct in finding that the 'good character' test was not intrinsically arbitrary or discriminatory, as such Article 8 falls away. In *Al- Jeddah v. Secretary of State for the Home Department [2013] UKSC 62;* a challenge considering the deprivation of citizenship and allegations of statelessness, Lord Wilson JSC at [12] stated:

> "The European Convention on Human Rights does not identify a right to a nationality but the European Court of Human Rights recognises that the arbitrary denial of citizenship, may violate the right to respect for private life under Article 8 of the Convention: *Karassev v. Finland (1999) 28 EHRR CD*."

42. If Ouseley J was wrong in his primary analysis, there must be some sufficiently serious evidence of the impact on the private life of the individual The mere fact that citizenship is withheld cannot, without more, be a failure to respect or an interference with family life: *R(Montana) v. Secretary of State for the Home Department[2001] 1 WLR 552* at [19].

43. The appellant has a close knit family and regularly sees his extended family. He has indefinite leave to remain in the UK and is able to travel on his Yemeni passport. He has been able to retain ties with Yemen. The appellant complains of reputational damage. The reasons for the refusal are provided on a confidential basis. The appellant has been granted anonymity in these proceedings.

Article 10 ECHR

44. Refusal of naturalisation does not affect freedom of speech or Article 10 rights in the same way as exclusion from the United Kingdom: *R (Naik) v. SSHD (above)*. An appellant who is refused naturalisation may continue to shock, offend or disturb. Their followers and supporters are also free to attend any forum where the appellant is in attendance, irrespective of location.

45. Ouseley J described what is said to be the height of the appellant's argument in *AHK [2013] EWHC 1426* (above) at [50]:

> "I accept that on the evidence the refusals of naturalisation can, and here did, interfere with the rights of FM under Articles 9 and 10…. They have been excluded from a potential benefit of what they said. They have not been prevented by the refusals, however, from speaking to people or practising their religion in the way they were; they have merely not been accorded a benefit, for which the Secretary of State for the Home Department was not satisfied they qualified. *Naik* is an illustration of that. The degree of interference is however, markedly less than in *Naik*".

46. The evidence produced by the appellant confirms that he leads the five daily prayers seven days a week and oversees the daily and weekly religious and educational classes. No evidence has been served to suggest any limitation or restriction on the appellant's freedom of speech resulting from a refusal of naturalisation.

Article 9 ECHR

47. Article 9 is subject to the same limitations as Article 10. The appellant denies that he has acted in the way alleged by the SSHD. It is not suggested that preaching extreme and anti-western views; supporting Jihad and claiming an historic association with Usama Bin Laden and/or sympathy with him would fall within the appellant's religious beliefs. Given the denial of the appellant it follows that refusal would not interfere with his religious beliefs or the freedom to manifest them. Any interference must be material, that is, to an extent which was significant in practice: *R (Williamson)* above at [39]. The appellant has not been prevented from practising his religion in any way.

48. Article 9 does not protect beliefs which are not compatible with today's standards of human or moral integrity: *R (Williamson)* above at [23]. If the appellant were to accept that he was preaching extreme Muslim views, or supporting Jihad or Usama Bin Laden, Article 9 would not protect such beliefs. The relevant belief must satisfy the minimum threshold requirement of being worthy of respect. Whatever adverse effect the refusal has had upon the appellant it has not impaired his ability to practise his religion.

Breach of the Appellant's Convention rights.

49. It is the respondent's case that, if any interference is found by the Commission, it was prescribed by law, s 6 of the 1981 Act and the relevant instructions. It was for the legitimate aim of public safety and/or prevention of disorder or crime and/or the protection of the rights of others. In a democratic society it was a necessary and proportionate measure on the facts of this case in that:

    a) The State has the right to control the granting of naturalisation and is able to set a high standard of "good character". Ensuring that citizens of this country are of good character is plainly an important objective;

    b) The respondent's decision is based on a policy, the legality of which has not been challenged other than on grounds of discrimination, which requires a prior determination to justification. The conduct of the appellant, when taken as a whole, has been such as to fail the good character requirement;

    c) The appellant has not been restricted from practising his religion, leading prayers or speaking freely. The measure adopted – refusing his application for naturalisation – is far less intrusive than, for example, revoking his leave to remain in the country and deportation.

Procedural fairness

50. In his original grounds of review the appellant raised the issue of procedural fairness and sufficiency of reasons. The argument was not pursued in his skeleton argument but the respondent has invited the Commission to determine the issue. The reasons provided to the appellant in the original refusal and leading to the Open Gist are set out in paragraphs 16 to 19 above. It has been the respondent's case that these are the only reasons which can be given to the appellant without causing damage to the public interest. Undisputed is the principle of common law that the requirement to disclose areas of concern is subject to the inhibitions of national security or other public interest militating against disclosure. In *R v Secretary of State for the Home Department ex parte Fayed (1) [1990] (1) WLR 763* the court observed that whilst an appellant for naturalisation was entitled to be informed of the nature of matters adverse to his application it was stated (Lord Woolf at p 776 H):

> "It does not require the Secretary of State to do more than to identify the subject of his concern in such terms as to enable the appellant to make such submissions as he can. In some situations even to do this could involve disclosing matters which is not in the public interest to disclose, for example for national security or diplomatic reasons. If this is the position then the Secretary of State would be relieved from disclosure and it would suffice if he merely indicated that this was the

> position to the appellant who if he wished to do so could challenge the justification or the refusal before the court. The courts are well capable of determining public interest issues of this sort in a way which balances the interests of the individual against the public interest of the State."

51. This case involves the refusal of an application. The application itself is the appellant's opportunity to make his case known. In *R Chockalingdam Thamby v. the Secretary of State for the Home Department [2011] EWHC 1763 (Admin)* Sales J at [67] stated:

> "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 appellant 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 appellant fair warning at the time he makes the application (e.g. by what is said in F 4 AN or Guide AN) of general matters which the Secretary of State will be likely to treat as adverse to the appellant, so the appellant 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 the appellant when he makes his application does not give him fair notice of matters which may be treated as adverse to his application does not give him a reasonable opportunity to deal with such matters, fairness will require the Secretary of State gives more specific notice of her concerns regarding his character after she receives the application, by means of a letter warning the appellant about them, so that he can seek to deal with them by means of written representations …"

In *AHK [2003] EWHC 1426 (Admin*) Ouseley J at [29] stated:

> "The duty not to grant naturalisation unless the SSHD is satisfied, among other matters, that the appellant is of good character, requires her to refuse naturalisation if the material she has leaves her unsatisfied on that point. That duty is not subject to any express disclosure duty, either of areas of concern or of reasons, or of evidence for the areas of concern or reasons. Such a duty as is implied cannot conflict with the express duty to reach a decision on that issue, a decision which clearly requires to be taken on all relevant material. The duty cannot require the decision to be taken only on the basis of the material which she has to or is willing to disclose. The former would require her to put formal national security at risk when the Act requires her to refuse naturalisation for that very reason. The latter would require her to ignore the material,

> contrary to her duty to refuse naturalisation if she is not satisfied as to good character. She would have to see what she would not disclose, and then put it out of her mind. There is no scope for some duty to disclose the gist or sufficient to enable a response to be made, where PII has required that material not to be disclosed. That would conflict with *R v. SSHD ex parte Fayed (1) [1998] 1WLR 763*."

52. An unsuccessful appellant is not barred from making further representations and asking for reconsideration following the refusal of the application. On 18 December 2006 the appellant sought a reconsideration of the original decision. However, at no stage prior to instigating proceedings, did the appellant seek to submit details of evidence to support his contention that he was of good character.

53. In our view the reasoning provided by the respondent in open correspondence or within these proceedings has been sufficient to enable the appellant to respond within the constraints imposed by disclosure.

Conclusion

54. The refusal of naturalisation is the refusal of a privilege and not a right. In practical terms its effect is contained. The appellant is not entitled to a British passport which could lead to increased immigration controls. The State could, in certain circumstances, seek the deportation of the appellant. The appellant is able to continue his work as an Imam. There is no interference with the grant of leave to remain.

55. The test of 'good character' is broad. It allows for a considerable measure of discretion which must be exercised in a manner that is both rational and reasonable. In its CLOSED hearing the Commission considered the material available to the decision-maker. Adopting the approach propounded by the respondent, it took account of only that material in deciding whether the decision to refuse was irrational or unreasonable. That said, it did review additional material, together with consideration of what was said by the Special Advocate and on behalf of the respondent, in order to ensure that there was nothing which undermined the evidential basis of the refusal or the rationality of the decision. Having reviewed the material and for the reasons given in the CLOSED judgment, the Commission is of the view that the decision to refuse naturalisation to the appellant on the ground that he did not meet the 'good character' requirement was neither irrational nor unreasonable.

Did the refusal interfere with the rights of the appellant pursuant to Articles 8, 9 or 10 ECHR?

Article 8.

56. There is no evidence to begin to found a contention that the refusal of naturalisation was an arbitrary decision. The relevant statutory provision and guidance were followed, the discretion was properly exercised. The observations of Blake J, [2008] EWHC 2526 above at [55] were made at a

directions hearing at which the issue of Article 8 was not explored on a case by case factual basis. The appellant has applied for and been granted indefinite leave to remain, he is not stateless. He is able to remain in this country with his immediate family, his children can continue their education. The appellant is able to travel on his Yemeni passport. He visits the Yemen to see his extended family.

57. If there is damage to the reputation of the appellant it cannot logically be said to have been caused by the respondent who in her original decision, and in these proceedings, has observed rules of confidentiality and preserved the anonymity of the appellant.

58. The Commission agrees with the view of Ouseley J in *AHK* (above) *[2013] EWHC 1426 (Admin)* [45-47] namely that the effect of a refusal of naturalisation without some further quality of arbitrariness or discrimination does not suffice to engage Article 8. Further, even if it did, there is no good evidence of interference with Article 8 rights in this appellant's case. As Ouseley J stated at [47]:

> "There has to be a greater interference than the mere continuation of the lawful status which the Appellant successfully sought for the purpose of remaining in the UK."

Article 10

59. It appears to be common ground between the parties that Article 10 is the Article which has the greatest relevance in the context of this application. The appellant's case is unequivocal; given that what is being challenged and has led to the refusal is the right of the appellant to freely express himself, hold opinions and impart information, Article 10 is engaged. The reality of the respondent's case in respect of both Articles 9 and 10 is that in view of the Appellant's denial of any of the alleged extremist preaching or alleged support, the rights are not infringed because he can continue to preach and speak as he has previously done.

60. It appears to the Commission that the words of Ouseley J in AHK (above) [2013] EWHC 1426 (Admin) at [49-50] are particularly relevant:

> "49 The relevant ECtHR Jurisprudence in relation to Article 10 has been reviewed recently by the Court of Appeal in *R (Naik) v. SSHD [2011] EWCA Civ 1546*. This was an immigration case, concerned with whether the SSHD acted lawfully in refusing an alien leave to enter the UK on the grounds that his exclusion was conducive to the public good, because of the views that he expressed at times which were, put broadly, justifying terrorism and fostering hatred. Her decision was upheld, Gross and Jackson LJJ approaching Article 10 on the

> assumption that it was engaged for the benefit of an alien overseas, while Carnwath LJ approached it on the basis of the Article 10 rights of Naik supporters. But importantly the decision proceeds on the basis that indirectly or directly Article 10 rights were interfered with by that refusal. The Court of Appeal accepted that views that offended, shocked or disturbed were covered by the rights in Article 10 and exceptions and restrictions needed to be construed strictly. At paragraph 48 in *Naik* above Carnwath LJ summed up the role of the Court in a national security case involving Article 10 in this way:
>
> "Ministers, accountable to Parliament, are responsible for national security; judges are not. However, even in that context judges have a duty, also entrusted by Parliament, to examine Ministerial decisions or actions in accordance with the ordinary tests of rationality, legality, and procedural irregularity, and where convention rights are in play, proportionality. In this exercise great weight will be given to the assessment of the responsible Minister. However, where rights under Article 10 are engaged, given the special importance of the right to free speech, it is for the court looking at the interference complained of "in the light of the case as a whole", to determine whether the reasons giving to justify the interference were "relevant and sufficient". This will involve a judgment where the measure taken was proportionate to the legitimate aims pursued, based on "an acceptable assessment of the relevant facts", and in conformity with the principles embodied in Article 10 (see *Cox* above). A range of factors may be relevant, including whether the speaker occupies "a position of influence in society of a sort likely to amplify the impact of his words" (par 42 above). The supervision must be "strict", because of the importance of the rights in question, and the necessity for restricting them must be 'convincingly established."
>
> 50. I accept that on the evidence the refusals of naturalisation can, and, did interfere with the rights of FM under Articles 9 and 10, and AS under Article 10. They have been excluded from a potential benefit because of what they said. They have not been prevented by the refusals, however, from speaking to people or practising their religion in the way they were; they have merely not been accorded a benefit, for which the SSHD was not satisfied they qualified. *Naik* is an illustration of that. The degree of interference is however markedly less than in *Naik*."

61. The Commission agrees with Ouseley J namely that the appellant has been excluded from a potential benefit because of what he said. Thus, it follows that Article 10 is engaged, there is interference with the rights of the appellant. This is subject to the qualifications contained in Article 10(2).

Article 9

62. The appellant's unequivocal evidence is that underlying his preaching are his religious beliefs. As his preaching and thus underlying beliefs have led to the refusal of a privilege the Commission accepts that Article 9 is engaged, interference has occurred but this is subject to the qualifications contained in Article 9 (2).

63. As to interference complained of, the question for the Commission, in respect of both Article 9 and Article 10, is whether such interference is justified? In approaching this issue account is taken of the following facts:

i) The interference is prescribed by law, s 6 of the 1981 Act. The provision is clear, it is accessible. It represents the policy of the respondent namely that citizens of this country are of good character. Save on the ground of discrimination, the legality of this policy has not been challenged (see below paragraphs 65-126);

ii) The aims of such interference are to prevent disorder and crime, (Article 10), maintain public safety (Articles 9 and 10) and the rights and freedoms of others (Article 10). These can properly be described as legitimate aims;

iii) The refusal of naturalisation by the SSHD on the grounds of a failure to satisfy the 'good character' test is rationally connected to such aims and is necessary. The refusal, of itself, will not stop the appellant preaching, expressing extremist views, fomenting disorder or encouraging crime. However it will enable the SSHD, if appropriate, to take steps to remove the appellant from the UK if the refusal does not achieve the aims;

iv) Inviting the appellant (as proposed by his Counsel) to give an undertaking or pledge not to preach hate or incite violence or radicalise young men will not afford the same protection in the event that the appellant breaches the undertaking;

v) The refusal of naturalisation is a less intrusive measure than, for example, revoking the appellant's leave to remain and deportation. The appellant can continue in his role as a Imam preaching to and caring for the community;

vi) The decision lies at the political end of the spectrum, as such respect is accorded by the Commission to the opinion of the decision-maker.

64. The Commission is satisfied that in taking account of matters set out in paragraph 62 above the refusal of naturalisation represents a proportionate and justified interference with the rights of the appellant pursuant to Articles 9 and 10 ECHR.

Discrimination

65. In the appellant's notice of application to the Commission, filed on 20 February 2014, to set aside the decision of the respondent to refuse him naturalisation, he asserted that the refusal was incompatible with his rights under Articles 8, 9, 10 and 14 of the ECHR. In a document entitled "Amended Grounds", dated 30 April 2014, the appellant sought to contend that the respondent's refusal to naturalise him constituted unlawful direct and indirect discrimination on grounds of race and/or religion, contrary to the Race Relations Act 1976 ("the RRA"), the Equality Act 2006, the Equality Act 2010 and Council Directive 2004/43/EC ("the Race Directive"). He also argued that the respondent had failed to comply with her public sector equality duty, contained in section 71 of the RRA and under section 149 of the Equality Act 2010.

66. On 18 July 2014, the Commission gave "directions regarding issues of discrimination under a certain legislation", affirmed by the Commission in its preliminary issue judgment in respect of *AHK and Ors* [including the appellant] *v Secretary of State for the Home Department* above at [45]. The Commission concluded that:-

(a) The appellant was not permitted to advance any claim under the Equality Act 2010;

(b) The appellant was not permitted to advance any claim that the refusal of naturalisation constituted religious discrimination proscribed by the Equality Act 2006;

(c) The appellant was permitted to advance a claim that the refusal of naturalisation constituted race discrimination contrary to the RRA, and breached the public sector equality duty under that Act;

(d) The appellant was not permitted to advance a claim solely in reliance on the Race Directive or EU law generally; and

(e) The appellant was permitted to advance a discrimination claim by reference to the ECHR where that would otherwise be relevant.

67. Thus, the only discrimination claims that the appellant may advance are:

(a) The refusal to naturalise him as a British citizen constituted direct or indirect discrimination on grounds of race, contrary to sections 1(1)(a) or (b), 3 and 19B of the RRA;

(b) The respondent failed to comply with the public sector equality duty contained in section 71 of that Act; and

(c) The refusal to naturalise violated the appellant's rights under Article 14 of the ECHR, taken together with Article 8.

68. The Commission is bound by these findings, endorsed in the preliminary issue judgment of July 2014. That judgment and the directions decision of 18 July 2014 are annexed to this substantive judgment, together with the judgment dated 14 November 2014, in which the Commission held that it had no power to appoint lay members or assessors (and would not have done so, if it had). It should be noted that nothing in the judgment of the Divisional Court in *The Secretary of State for the Home Department v The Special Immigration Appeals Commission & Ors [2015] EWHC 681 (Admin)* concerns the issue of discrimination.

69. Mr de Mello has subsequently abandoned any direct discrimination claim under the RRA. In oral submissions, Mr de Mello also made it clear that the appellant was not advancing a "free-standing" claim that the respondent had breached the public sector equality duty contained in section 71; but he asked the Commission to bear that matter in mind when considering the adequacy of any reasons advanced by the respondent, should the Commission conclude that there had been indirect discrimination under that Act.

70. The Commission has approached the issue of statutory discrimination on the same basis as in any judicial review claim, in which discrimination is relied on as a ground of challenge: *European Roma Rights Centre v Immigration Officer [2005] 2 AC 1; Al-Rawi v Foreign Secretary [2008] QB 289.* The Commission's task is, thus, to determine whether the refusal of naturalisation constitutes unlawful discrimination contrary to the RRA. That, in turn, requires the Commission to determine whether each of the elements of the statutory torts created by that Act is satisfied.

RACE RELATIONS ACT 1976

(a) The relevant provisions

71. As in force at the date of the latest decision with which we are concerned (see [39] of the directions of 18 July 2014), section 1 of the RRA, so far as relevant, provides as follows:-

> "1(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if –
>
> (a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or
>
> (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but –
>
> (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

(1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but –

(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,

(b) which puts or would put that other at that disadvantage, and

(c) which he cannot show to be a proportionate means of achieving a legitimate aim.

(1B) The provisions mentioned in subsection (1A) are –

(a) Part II;

(b) sections 17 to 18D;

(c) section 19B, so far as relating to –

(i) any form of social security;

(ii) health care;

(iii) any other form of social protection; and

(iv) any form of social advantage;

which does not fall within section 20;

(d) sections 20 to 24;

(e) sections 26A and 26B;

(f) sections 76 and 76ZA; and

(g) Part IV, in its application to the provisions referred to in paragraphs (a) to (f).

(1C) Where, by virtue of subsection (1A), a person discriminates against another, subsection (1)(b) does not apply to him."

72. Section 3 defines "racial grounds", "racial group" etc.:-

"3(1) In this Act, unless the context otherwise requires –

'racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins;

'racial group' means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.

(2) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act.

(3) In this Act –

(a) references to discrimination refer to any discrimination falling within section 1 or 2; and

(b) references to racial discrimination refer to any discrimination falling within section 1,

and related expressions shall be construed accordingly.

(4) A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) or (1A) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

73. Subsection 19B concerns public authorities. It is common ground that the section applies in the circumstances of the present case:

"19B(1) It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination.

(1A) It is unlawful for a public authority to subject a person to harassment in the course of carrying out any functions of the authority which consist of the provision of –

(a) any form of social security;

(b) healthcare;

(c) any other form of social protection; or

(d) any form of social advantage,

which does not fall within section 20.

(2) In this section 'public authority' –

(a) includes any person certain of whose functions are functions of a public nature; but

(b) does not include any person mentioned in subsection (3).

(3) The persons mentioned in this subsection are –

(a) either House of Parliament;

(b) a person exercising functions in connection with proceedings in Parliament;

(c) the Security Service;

(d) the Secret Intelligence Service;

(e) the Government Communications Headquarters; and

(f) any unit or part of a unit of any of the naval, military or air forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

(4) In relation to a particular act, a person is not a public authority by virtue only of subsection (2)(a) if the nature of the act is private.

(5) This section is subject to sections 19C to 19F.

(6) Nothing in this section makes unlawful any act of discrimination or harassment which –

(a) is made unlawful by virtue of any other provision of this Act; or

(b) would be so made but for any provision made by or under this Act."

(b) Direct discrimination

74. Despite the fact that Mr de Mello now eschews any direct discrimination claim under the RRA, it is expedient to make a formal finding on this matter. Discrimination of the kind described in section 1(1)(a) of the RRA is generally referred to as direct discrimination; whereas section 1(1)(b) and section 1(1A)

are concerned with different forms of indirect discrimination. Section 1(1A) was implemented in order to give effect to the Race Directive (with effect from 19 July 2003). Where discrimination falls within section 1(1A), then section 1(1)(b) does not apply.

75. Unlawful direct discrimination consists of:-

(a) a difference in treatment between one person and another person (real or hypothetical) from a different race or group;

(b) the treatment is less favourable to one;

(c) the relevant circumstances of the two persons are the same or not materially different;

(d) the difference in treatment is on racial grounds *European Roma Rights Centre v Immigration Officer at Prague Airport [2005] 2 AC 1 at [73]*.

76. As Lady Hale said in *Roma Rights*:-

> "The Rule against direct discrimination aims to achieve formal equality of treatment; there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality or ethnic or national origin. Indirect discrimination looks beyond formal equality towards a more substantive equality of results; criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.
> …
> Direct and indirect discrimination are mutually exclusive. You cannot have both at once… The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim." [56] – [57].

77. A person who complains of race discrimination must prove, on the balance of probabilities, the facts upon which the Tribunal can conclude, in the absence of an adequate explanation, that the person concerned has suffered an act of unlawful discrimination. Where that person establishes a *prima facie* case, the Tribunal will look to the alleged discriminator for an explanation. If there is none, then it is legitimate to infer that the less favourable treatment was on racial grounds: *Roma Rights* at [73].

78. The appellant can have no direct race discrimination claim under the RRA because any such claim must be based on the appellant's Yemeni race or nationality. The relevant comparator for this purpose is a person of a different race or nationality. There is simply an absence of evidence that the appellant would have been treated any differently by the respondent if the appellant had had a different nationality (Ms Callaghan offers Pakistani and American nationalities as examples). As we see from the respondent's open gist of the reasons for refusing the appellant's application for naturalisation, the appellant was considered not to be of good character in that he had "preached extreme

Muslim and anti-western views. The appellant has been a supporter of jihad. He has openly proclaimed a historic association with Osama Bin Laden and/or sympathy with him". That is simply not direct discrimination on racial grounds.

(c) Indirect discrimination

79. We turn to the issue of indirect discrimination under the RRA. Mr de Mello seeks to make good the appellant's claim under this heading by reference to section 1(1)(b) or, in the alternative, section 1(1A). Ms Callaghan took issue with Mr de Mello's ability to advance section 1(1A), given that it was not to be found within the appellant's pleaded grounds. Section 1(1A) does, however, feature in Mr de Mello's skeleton argument, which has been before the Commission for several months. Section 1(1A) gives effect, as we have said, to the Race Directive, which is also featured in Mr de Mello's previous written and oral submissions. In all the circumstances, we consider it appropriate to deal both with section 1(1)(b) and with section 1(1A).

80. Where section 1(1)(b) or section 1(1A) is relied on, the following questions arise:-

(a) Did the respondent apply a "requirement or condition" (section 1(1)(a)) or a "provision, criterion or practice" (PCP) (section 1(1A)) to the appellant, when refusing his application for naturalisation?

(b) If yes, did this have a disparate impact on persons of the same racial group as the appellant or place them at a particular disadvantage?

(c) If yes, did it disadvantage the appellant personally because he could not comply with it?

(d) If yes, was the discriminatory policy justifiable (that is to say, a proportionate means of achieving a legitimate aim)?

(d) The evidence

81. At this point, it is necessary to refer to the evidence adduced by the parties in relation to the discrimination issue.

(i) Mr Larkin

82. Pursuant to directions issued by the Commission, the respondent filed a second witness statement of Mr Philip Larkin, dealing with the total number of applications for naturalisation made between 1 January 2006 and 31 December 2009; the total number of such applications that were refused between those dates; and the total number of refusals on good character grounds, including those referable to the public interest/national security.

83. Mr Larkin makes it clear that his evidence contains a number of limitations on the information which he was able to provide. In particular, the respondent does not ask appellants for naturalisation any question which seeks to identify the appellant's religion. Nor is there a question asked by the respondent which will automatically lead to an appellant's categorisation as a preacher or priest. In this regard, it is to be noted that the appellant, when completing his form, stated that he did not have an occupation.

The following passage from Mr Larkin's statement is also relevant:-

> "4. There is a danger in making a 'best guess' from an individual's name or original nationality. The very reason why such an individual may seek to live in this country and gain citizenship is because they are from a minority ethnicity or religion which has been persecuted within their country of birth.
>
> 5. It has not therefore been possible to split the cases into those involving adherents of the Islamic faith and those which do not. This statistical information is simply not collected in any way by the Home Office and creating the relevant information would have required a disproportionate investigation of a wholly uncertain character. However, in order to assist the appellant, through his Special Advocates, I hereby exhibit at Exhibit PL2, Tab A (CLOSED) a full list of the reasons which have been provided to individuals during the relevant time scale. Some redactions have been made to this list to prevent the identification of individual appellants. Of the reasons listed, we judge that 26% were reasons related to Islamic extremism; 27% were reasons not related to Islamic extremism; and 47% did not contain enough information to determine either way (for instance, because the appellant was told that it was not in the public interest to disclose reasons).
>
> 6. There may be several reasons why a person is refused naturalisation. In each case we have considered what the decision maker recorded as the primary reason for refusal. However, we are confident that this accurately captures all persons who have been recommended refusal on the grounds of public interest/national security, as such concerns would almost always be the primary reason for refusal."

84. The total number of applications for naturalisation in the calendar years 2006 to 2009 was 462,979. In those years, 33,556 applications were refused. A spreadsheet has been provided showing breakdown by nationality.

85. In the same years, 5,492 applications were refused on good character grounds. 21 were refused due to public interest/national security concerns. 136 were refused on good character grounds by reference to terrorism and other non-conducive activity. 69 were refused without further reasoning due to public interest/national security. Further evidence is given by Mr Larkin in CLOSED.

86. Between 2006 and 2009 Mr Larkin states that the Home Office "had mandatory training for all staff who were involved in this area of casework. This included three relevant courses: unconscious bias; equality and diversity essentials; and diversity". There were also several optional equality and diversity e-learning courses available to staff at the time. An Equality Impact Assessment was undertaken in respect of a good character requirement guidance in 2009. Mr Larkin's evidence exhibits the results of the assessment.

(ii) Mr Ali

87. The appellant's discrimination evidence comprises two witness statements from Mr Ashraf Ali, who describes himself as "an immigration practitioner with over 20 years' experience in advising the community". Despite objections from the respondent in December 2014, the Commission decided to admit this evidence, particularly since, as matters transpired, the respondent had sufficient time to consider it. Mr Ali was asked to look at the evidence of Mr Larkin and "to provide from these statistics a list of countries which has (sic) (a) predominantly Muslim population and (b) predominantly Christian population". Using the Central Intelligence Agency's world factbookweb address www.cia.gov/library/publications/the-world-factbook/geos for the years 2006 and 2007, Mr Ali exhibited a list "showing 105 countries with a predominantly Christian population and 52 countries with a predominantly Muslim population". Certain countries without a majority of Christian or Muslims were omitted "from a total of 221 countries as well as British citizen, BDTC etc." 105 countries were considered to have a Christian majority and 52 countries a Muslim majority. Mr Ali contended that the total number of refusals of naturalisation "for Christian countries" for the years 2006 to 2009 was 1,285 and for Muslim countries, 3,029. A table was put forward.

88. Mr Ali's evidence in his first witness statement was roundly criticised by Ms Callaghan, when it was first presented in December 2014. Although the evidence purported to be expert evidence, there had been no attempt to comply with the letter or spirit of CPR 35; there being no statement of truth and no details of Mr Ali's qualifications. More particularly, Ms Callaghan categorised Mr Ali's evidence as meaningless, in that it attempted to draw inferences from the country of origin of appellants for British citizenship, by reference to whether those countries were "predominantly Muslim" or "predominantly Christian" when the information supplied did not indicate the religion of the appellants. Ms Callaghan submitted that given that the respondent does not seek information about the religion of applicants for citizenship, it would be dangerous to make assumptions about religion based on country of origin "as they may be seeking to gain UK citizenship because they are from a minority ethnicity or religion which has been persecuted in their country of origin" (a point made by Mr Larkin in his statement).

89. Finally, Ms Callaghan identified "multiple errors and flaws" in Mr Ali's material. This included the assertion that 105 countries had been listed as having a predominantly Christian population, when Mr Ali's exhibit contained only 61 such asserted countries. It was also unclear on what basis those

countries had been selected, given the omission of a number of Western European countries from the list. So far as "Muslim majority" countries were concerned, the list contained only 36 countries, not 52 as claimed. Again, there were obvious unexplained omissions from that list. 21% of the total "character refusals" related to countries, according to Mr Ali, that he had excluded from his calculation on the basis that they had neither a Christian nor Muslim majority, thus seriously undermining the point of the exercise. It was unclear on what basis the so-called "white" countries had been selected, particularly since they could not be a subset of "Christian" countries.

90. On 12 December 2014, Mr Ali produced a second witness statement. In this, he attempted to address some of the respondent's concerns. Mr Ali said that he had listed 61 countries, rather than 105 "with a predominant Christian population", because those 61 "have had a refusal on character". The names of the other 44 countries "were not visible due to the way that [the CIA factbook] was printed. The list does not include Austria, Belgium, Denmark, Ireland or Norway". So far as Muslim countries were concerned, "36 have been refused on character. The list does not include Bahrain, Qatar and UAE".

(iii) Analysis

91. Extrapolating relevant points from the respondent's evidence is constrained by the matters to which Mr Larkin makes reference. In particular, there is plainly a danger in seeking to use the name of an appellant in order to guess his or her religion. So far as nationality is concerned, looking at the statistical tables, the Commission notes that, during the relevant period, the percentage of Yemeni citizens refused was 11% of all refusals and that the percentage of Yemenis refused on good character grounds was 0.9% of the total of 1,170 Yemeni refusals. By contrast, the proportion of non-Yemeni appellants refused on good character grounds, as a percentage of total refusals of non-Yemenis, was 1.2%. Accordingly, the proportion of Yemenis refused on good character grounds was smaller than the proportion of non-Yemenis so refused.

92. The Commission has great concerns about the evidence of Mr Ali. Even leaving aside the fact that his evidence is not expert evidence, Ms Callaghan has identified a number of serious flaws in it, with which Mr De Mello was understandably unable to deal. Besides those to which we have already made reference, paragraph 5 of Mr Ali's first witness statement contends that the total number of refusals for Muslim countries in the period was 3,029. But if one looks at the figures, that number is plainly wrong. So far as paragraph 7 of the same statement is concerned, Mr Ali contends that the number of appellants refused on good character grounds from Muslim countries during the period was 4,314, when the correct calculation is 3,029.

93. Quite apart from these matters, the exclusion of over 20% of countries on the basis that there is said to be no Christian or Muslim majority itself hobbles Mr Ali's exercise. So too does the lack of clarity as to how Mr Ali has categorised countries as "white".

94. On any basis, it is not appropriate to give Mr Ali's statements any material weight. This is particularly so where, as here, the Commission is concerned with judicial review proceedings concerning discrimination. At [48] and [49] of Roberts v Commissioner of the Metropolitan Police [2012] EWHC 1977 (Admin), the Divisional Court highlighted the danger of relying in such proceedings on disputed statistical information.

(d) The appellant's indirect discrimination claim

(i) Section 1(1)(b)

Requirement or condition

95. The appellant's position is that the respondent applied a requirement or condition to applications for citizenship in such a way that, in order to meet the good character test, applicants are required not to preach or express extreme Muslim and anti-western views and/or be a supporter of jihad. For convenience, we will refer to this as "EMV".

96. The appellant's indirect discrimination claim under the RRA falls, we find, at the first of these hurdles for the reason that the evidence does not disclose that the respondent has a requirement or condition that requires appellants not to have preached or otherwise espoused EMV. The statutory requirement is to be of good character, which is a broad and wide-ranging concept, to be decided holistically and involving a significant value judgment. Neither in the "good character" guidance (chapter 18, Annex D) nor anywhere else in the materials before the Commission is there to be found a mandatory condition concerning EMV. That fact that, as Ms Callaghan accepts, a person espousing EMV is unlikely to be granted British citizenship is, we find, insufficient.

97. In *Meer v London Borough of Tower Hamlets [1988] IRLR 399*, a solicitor of Indian origin with local government experience applied to be head of LBTH's legal department. LBTH used twelve criteria for "long-listing" candidates, of which one was "Tower Hamlets experience". Mr Meer did not have such experience and contended that this indirectly discriminated against him and others of Indian origin, contrary to section 1(1)(b).The Court of Appeal upheld an Industrial Tribunal and the EAT, both of which had found that the criterion of having Tower Hamlets experience was not a "must" and was, accordingly, not a "requirement or condition" within the meaning of the enactment.

98. In the present case, the only requirement (imposed by the British Nationality Act 1981) is to be of good character. Mr de Mello asked the Commission to disregard *Meer* and/or to find the EMV criterion to be mandatory. The Commission declines to do so. We are bound by *Meer*. The relevant legislation and evidence do not compel the conclusion that the EMV criterion is mandatory. One can, for example, envisage a scenario where a person who has preached EMV may also have done some signal service to this country, as to be able to satisfy the good character requirement.

Impact/particular disadvantage

99. Even if the appellant's case had not already foundered on the first requirement, he cannot show that the EMV criterion – assuming it is a conditional requirement – requires an affirmative answer to be given to the question posed in the second requirement; namely that there is a disparate impact such as to place the appellant (and others in the same position) at a particular disadvantage.

100. The appellant's case appears to be that he is a non-white appellant from one of the Muslim majority countries identified by Mr Ali and, as such, is disadvantaged, compared with those from "white" countries.

101. The first problem with the appellant's stance is that Muslims do not constitute a racial group. Much of the problem with Mr de Mello's submissions and the analysis of Mr Ali stems from this fact.

102. In *Mandla and another v Dowell Lee [1983] 2 AC 548*, a school refused to admit a Sikh male child because neither he nor his father would consent to the son cutting his hair and ceasing to wear a turban, so as to comply with school rules as to uniform. In order to fall within section 1(1)(b), it had to be shown that the plaintiffs were members of a "racial group" defined by reference to ethnic origins, as provided by section 3 of the RRA.

103. Although, on the facts, the House of Lords held that Sikhs are an ethnic group for the purposes of the RRA, the House (at 562B) rejected a definition of "ethnic" which would have included the adjective "religious", as a discrete component. According to Lord Fraser of Tullybelton:-

> "For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups."

104. In *JH Walker Ltd v Hussain [1996] ICR 291* the Employment Appeal Tribunal upheld an Industrial Tribunal, which had found that an employer's prohibition of one of its employees taking holidays during May, June or July did not racially discriminate against Muslims, who wished to celebrate Eid. The Industrial Tribunal had held that Muslims did not fall within the RRA, which "does not mention religion" (295E). That finding was not appealed. The claimants succeeded on the basis that the prohibition indirectly discriminated against those of Asian origin.

105. Neither Mr de Mello nor Ms Callaghan was able to identify any case law that has held that Muslims *per se* constitute an ethnic or other group within the scope of the RRA.

106. Mr de Mello attempted to argue that section 3(2) enabled the appellant to bring his position as a Muslim within the RRA. However, we agree with Ms Callaghan that it is a misreading of section 3(2) to say Muslims are "a particular racial group" because Muslims are to be found in "two or more distinct racial groups". Each sub-group must still meet the requirement of being a "racial group": for instance, Asians may comprise an ethnic group, of which Indians and Pakistanis are a sub-racial group, by reason of the definition of "racial group" in section 3(1), which includes "nationality".

107. Mr de Mello sought to rely on *Orphanos v Queen Mary College [1985] 1 AC 761*. There, the appellant was a citizen of Cyprus who was found to have suffered indirect discrimination within section 1(1)(b) in relation to the payment of fees to attend university, because, whether as a non-British or non-EEC national, the number of people in his position who could comply with the residency requirement (so as to avoid paying fees at an overseas rate) would be substantially smaller than those of British or EEC nationality. However, Orphanos involved the issue of nationality which, as we have seen, is specifically within section 3(1) of the RRA. The case is thus of no assistance to the appellant in his contention that being a Muslim brings him within the ambit of the RRA.

108. In any event, even if the religious element could (contrary to our findings) be introduced, the appellant has simply failed to produce any reliable evidence to show a disparate impact by reference to anything that might be referable to being a Muslim. We refer to the findings we have made on the evidence of Mr Ali, which is frankly incoherent. If one categorises the appellant in terms of his nationality, which plainly does engage the RRA, the evidence, again, fails to disclose any disparate impact. On the contrary, as we have already observed, Mr Larkin's evidence indicates that Yemenis fared somewhat better than non-Yemenis.

109. Finally, quite apart from all this, the appellant finds himself in difficulty in demonstrating detrimental disadvantage, in that certain of his written utterances contend, in effect, that he has not espoused EMV. If so, his complaint would need to be that the respondent has mistakenly concluded otherwise. Such an argument does not, however, appear ever to have featured in the appellant's case.

Justification/proportionality

110. If the Commission is wrong about all of the above, then the respondent needs to show a justification for her indirectly racially discriminatory policy. As Mummery LJ held in *Elias v Secretary of State for Defence [2006] EWCA Civ 1293*:-

> "The standard of justification in race discrimination is the more exacting EC test of proportionality. As held by the Court of Justice in *Bilka Kaufhaus GmbH v Weber von Harz [1986] [1987] ICR 110* paras 36 - 37 the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. It is not sufficient that the Secretary of State could have reasonably considered the means chosen as suitable for attaining the aim."

111. Applying this test, the Commission is in no doubt that any refusal to grant British citizenship by way of naturalisation to a person who preaches EMV (in the sense described above) satisfies the tests of proportionality. The government of the United Kingdom has a right to control the grant of citizenship by way of naturalisation. Ensuring that those wishing to become British citizens are of good character is an important objective. It meets the legitimate aim of public safety and/or the prevention of disorder or crime and/or the protection of the rights of others. The practice goes no further than is necessary to secure that legitimate aim. Refusing the appellant's application for naturalisation is, obviously, far less intrusive than, for example, revoking his leave to remain in the United Kingdom. The appellant has not been prevented from practising his religion, leading prayers or speaking freely. All this he may do, whether or not he is a British citizen.

112. In so finding, we have had regard to Mr de Mello's submissions on the public sector equality duty under section 71 of the RRA. There has been no attempt on the part of the appellant to refute what Mr Larkin says in his second witness statement regarding the training given to relevant caseworkers at the time of the decisions with which we are concerned. We are satisfied that those caseworkers were aware of the duty under section 44 of the British Nationality Act 1981 to exercise any discretionary decision "without regard to the race, colour or religion of any person who may be affected by its exercise". The fact that an equality impact assessment was not carried out until after the relevant decisions is, in all the circumstances, immaterial. It does not (either alone or in combination with other features) render the respondent's actions disproportionate.

113. The Commission does not accept that the requirement of proportionality requires the respondent to naturalise the appellant, despite his not being of good character, on the basis that, according to Mr de Mello, if the appellant were subsequently to commit criminal offences, there are powers under the

British Nationality Act 1981 to deprive him of his British nationality. We assume that Mr De Mello has in mind section 40(2) of that Act, under which the respondent may by order deprive a registered or naturalised citizen of British citizenship if satisfied that deprivation is conducive to the public good. However, even ignoring the legislative problem this would create in terms of requiring the naturalisation of a person whom the respondent considered not of good character, the submission involves placing a wholly disproportionate burden on the respondent, representing the public interest, besides risking legitimate public revulsion.

(ii) Section 1(1A)

114. This provision, inserted to implement the Race Directive, is somewhat broader than the provision regarding indirect discrimination in section 1(1)(b). Instead of requiring there to be a "requirement or condition", section 1(1A) instead requires the application of "a provision, criterion or practice" (PCP), which puts or would put persons of the same race or ethnic or national origins "at a particular disadvantage, when compared with other persons", and which puts the person concerned "at that disadvantage".

115. The Commission finds that, for the purposes of section 1(1A), the respondent did apply a practice of refusing to naturalise on good character grounds persons who espouse EMV. To hold otherwise would, on the facts, be to collapse the distinction stemming from the different wording of section 1(1)(b) and 1(1A). A "practice" is, for this purpose, still a "practice" even though, lacking the characteristic of a requirement or condition, it may be disapplied in unusual circumstances.

116. However, this finding does not enable the appellant to succeed under section 1(1A) because the Commission finds that he has failed to make good the requirements of paragraphs (a) to (c) of section 1(1A). As we have already held, being a Muslim does not constitute a racial group for the purposes of the RRA. Secondly, notwithstanding Ms Callaghan's acceptance that, for the purposes of section 1(1A), the evidence required to show a disparate adverse impact may not need to be of the same quality as in the case of section 1(1), the evidence of Mr Ali comes nowhere near satisfying section 1(1A)(a) and (b). We refer to what we have already said in this regard. In particular, we reiterate that there is no evidence to show Yemenis have been in any way disadvantaged.

117. Finally, for the same reasons we have already given above in relation to section 1(1)(b), the respondent has plainly shown that the PCP is a proportionate means of achieving a legitimate aim. Accordingly, the appellant fails in his indirect discrimination claim by reference to section 1(1A).

C. Article 14 ECHR

118. Article 14 of the ECHR provides that:-

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

119. In *Ghaidan v Godin-Mendoza [2004] 2 AC 557* at [133] to [134] the House of Lords held that five questions arise in an Article 14 enquiry. The Commission notes that in *Carson v Secretary of State for Work and Pensions [2006] 1 AC 173*, the House warned against taking a rigidly mechanistic or formulaic approach to Article 14. Nevertheless, the Commission considers that the five questions identified in *Ghaidan* represent a useful guide in Article 14 cases of the present kind.

The five questions are:-

(a) Do the facts complained of fall within the ambit of one or more of the Convention rights?

(b) Was there a difference in treatment in respect of that right between the complainant and other persons put forward for comparison?

(c) Were the chosen comparators in an analogous situation to the complainant's situation?

(d) Is the difference in treatment based on one or more of the proscribed grounds?

(e) If so, was the difference in treatment objectively justifiable: i.e., did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

120. Ms Callaghan accepts that, for the purposes of Article 14, in this case Article 8 rights are sufficiently *engaged* (albeit that the Commission has found the respondent's decisions involved no *interference* with the appellant's Article 8 rights). Question (a) is, accordingly, answered affirmatively.

121. So far as questions (b) and (c) are concerned, the Commission reiterates the problems with the evidence of Mr Ali. Importantly, under Article 14 the appellant may rely upon religious discrimination. However, it is still impossible to extract anything meaningful from the methodology adopted by Mr Ali. We refer, in particular, to what is said at paragraphs 24 to 30.

122. Nevertheless, Ms Callaghan accepts that, leaving aside Mr Ali's evidence, to the extent that the respondent has a practice of refusing naturalisation on good character grounds to those who have espoused EMV, that practice would be more likely to affect Muslims adversely, than those who are not Muslims. The Commission is therefore prepared to find on this basis that questions (b) and (c) ought to be answered affirmatively.

123. That, however, is as far as the appellant's Article 14 case goes. For the reasons which follow, the Commission finds the respondent has shown that the difference in treatment is objectively justifiable.

124. The Strasbourg case law makes it plain that the ECtHR recognises the concepts of direct and indirect discrimination: *Timishev v Russia (2007) 44 EHRR 37*; *DH v The Czech Republic (2008) 47 EHRR 3*. Mr de Mello submitted that, so far as Article 14 was concerned, the respondent had engaged in direct discrimination against the appellant, by refusing to naturalise him. Mr de Mello was, however, unable to put forward any reasoned explanation for that submission, given that he had accepted (and we in any event find) the respondent committed no act of direct discrimination against the appellant under the RRA. The fact that a Muslim person is more likely than a non-Muslim to preach extreme Muslim and anti-western views; to be a supporter of jihad; and to claim an association with Osama Bin Laden and/or sympathy with him does not mean that the respondent's decision to refuse to naturalise that person on good character grounds is taken <u>because</u> that person is a Muslim. Mr de Mello, quite rightly, has nowhere sought to contend that the appellant's EMV (assuming he holds them) are an inherent aspect of the Muslim faith.

125. It is at this point that the warning in <u>Carson</u> against adopting a rigidly mechanistic or formulaic approach needs to be heeded. The fact that there has not been direct discrimination against the appellant in Article 14 terms is capable of having a significant bearing on the question whether the difference in treatment is objectively justifiable. So much is clear from <u>*Timishev*</u>.

126. In the present case, the fact that the respondent was concerned with the appellant's behaviour, rather than his religion, is plainly of great significance in determining proportionality. Any indirect discrimination, by reference to Article 14, was in the Commission's view undoubtedly justifiable in pursuance of the aims to which we have referred in paragraph 47. Refusing naturalisation represented a minimal intrusion on the appellant's rights. In short, the balance between appellant's rights and those of the United Kingdom community falls decisively to be struck in favour of the latter.

127. For the reasons set out in this judgment the Commission concludes that the respondent's decision to refuse naturalisation to the appellant was reasonable and represented a fair and rational exercise of her discretion.