Appeal No: SN/57/2015
Hearing Dates: 24th April and 5th September2017
Date of Judgment: 4th October 2017

# SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

**THE HONOURABLE MR JUSTICE SINGH**
**UPPER TRIBUNAL JUDGE O'CONNOR**
**MRS J BATTLEY**

**MWH**

APPLICANT

and

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

RESPONDENT

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| For the Applicant: | Mr H Southey QC and Mr N Armstrong |
| Instructed by: | Lawrence Lupins Solicitors |
| Special Advocate: | Mr C Cory-Wright QC & Mr Z Ahmad |
| Instructed by: | Special Advocates' Support Office |
| For the Respondent: | Mr D Mitchell |
| Instructed by: | Government Legal Department |

OPEN JUDGMENT

## Introduction

1. This is an application brought under section 2D of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"). The decision under challenge was taken on 29 November 2011. By that decision the Secretary of State refused the applicant's application for naturalisation as a British citizen.

2. The applicant, who was born on 10 November 1977, is an Iraqi national of Kurdish ethnic origins. He is also a Sunni Muslim. He first entered the United Kingdom on 21 October 2002 and applied for asylum on the following day. His application for asylum was refused but on 11 December 2002 he was granted exceptional leave to remain for a period of 4 years. On 18 December 2006 he was granted indefinite leave to remain.

3. The applicant made an earlier application for naturalisation as a British citizen, which does not directly concern the Commission in the present proceedings but forms part of the background. He made that application on 31 March 2008. That application was refused by a letter dated 13 August 2009. The letter explained that the application had been refused on the ground that the Secretary of State was not satisfied that the applicant could meet the requirement to be of 'good character'. The letter went on to state that: 'it would be contrary to the public interest to give reasons in this case.'

4. On 13 May 2011 the applicant made a further application for naturalisation, which resulted in the decision which is now under challenge in these proceedings.

5. In that decision, dated 29 November 2011, the Secretary of State gave the following reasons:

> 'The Home Secretary has refused your application for citizenship on the grounds that you do not meet the requirements to be of good character. It would be contrary to the public interest to give reasons in this case.
> The decision on your client's application has been taken in accordance with the law and our prevailing policy.'

6. In a further letter, dated 1 September 2015, the Secretary of State certified the decision refusing naturalisation in accordance with section 2D of the 1997 Act. Accordingly the applicant could not bring an application for judicial review in the Administrative Court but rather must apply to this Commission to set aside that decision in accordance with section 2D(2) of the 1997 Act.

7. Although the applicant has not been given any reasons for the decision under challenge, there are in the open documents before this Commission two documents which indicated to him that a security check had found 'no trace on 20/05/11' [page D97] and that there was a PNC (Police National Computer) check which showed 'no trace on 02/11/11' and security checks showed 'no trace on 02/11/11' [page D135].

8. Further disclosure was made in two letters from the Government Legal Department, dated 8 November 2016 and 15 May 2017. Those letters

summarise earlier police reports and also a port report when the applicant had returned from holiday to Bristol Airport.

**Material Legislation**

9. Section 6 of the British Nationality Act 1981 ("the 1981 Act"), as amended, provides as follows:

> '(1) If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen…'

10. Paragraph 1 of Schedule 1 to the 1981 Act provides:

> '(1) Subject to paragraph 2, the requirements for naturalisation as a British citizen under section 6(1) are, in the case of any person who applies for it – … (d) that he is of good character'.

11. It is common ground that the Secretary of State has no power to waive the requirement of good character.

12. Where the Secretary of State certifies that her refusal to grant naturalisation under section 6 of the 1981 Act was made wholly or partly in reliance on information which in her opinion, should not be made public (i) in the interests of national security, (ii) in the interests of the relationship between the United Kingdom and another country or (iii) otherwise in the public interest, the applicant may apply to this Commission to set aside the decision: section 2D(2) of the 1997 Act.

13. Section 2D(3) of the 1997 Act provides that:

> 'in determining whether the decision should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.'

14. The procedure of this Commission is governed by the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003 No 1034) ("the Procedure Rules"), as amended.

15. The general duty of this Commission is set out in rule 4 of the Procedure Rules, as follows:

> '(1) When exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security, international relations of the United Kingdom, the detection and prevention of crime, or any other circumstances where disclosure is likely to harm the public interest.
> (2) Where these rules require information not to be disclosed contrary to the public interest, that requirement is to be interpreted in accordance with paragraph (1).
> (3) Subject to paragraphs (1) and (2), the Commission must satisfy itself that the material available to it enables it properly to determining proceedings.'

16. Rule 7(1A) provides that an application for review under the 1997 Act must be made by giving notice of it in accordance with the Rules.

17. Rule 8 lays down short time limits for the making of an application for review. However this is subject to the certification procedure under section 2D(1) of the 1997 Act, as amended, as is made clear by rule 8(4A).

18. Rule 11 provides, so far as material, that an applicant may vary the grounds for an application for review only with the leave of the Commission.

**The legal approach to be adopted by the Commission**

19. The legal framework was helpfully set out by Mr Justice Flaux (as he then was), when he was chair of this Commission, in MSB v Secretary of State for the Home Department (SN/41/2015), at paragraphs 25-30. Since that passage is familiar to the parties there is no need for us to set out the text or the citations in it in full. However, by way of summary:

(1) An applicant for naturalisation is seeking the grant of a privilege, not a right and the 1981 Act vests the Secretary of State with considerable discretion.

(2) The burden of proof is on the applicant to satisfy the Secretary of State that the requirements of Schedule 1 to the 1981 Act are satisfied, including that of good character.

(3) The standard of proof is the balance of probabilities.

(4) If the statutory test is not satisfied the Secretary of State must refuse the application. She does not have a discretion then to grant it.

20. Turning to the proper approach which should be taken by the Commission in statutory review cases such as the present, Mr Justice Flaux referred to the principles established in the preliminary issues judgment of the Commission in AHK and Others v Secretary of State for the Home

Department (SN/2/2014, SN/3/2014, SN/4/2014 and SN/5/2014) and summarised those principles as follows:

(1) The Commission is required to apply a conventional judicial review approach to naturalisation challenges. Its task is to review the facts and consider whether the findings of fact made by the decision-maker are reasonable. In that part of the review there is no place for deference to the Secretary of State.

(2) The Commission does not need to determine for itself whether the facts which are said to justify a refusal of naturalisation are in fact true. As a matter of common law and ordinary public law, the existence of facts said to justify the denial of nationality does not constitute a condition precedent, and fact-finding is not necessary to determine whether the procedure is fair or rational.

(3) Once the facts and the inferences of fact have been reviewed, and if the factual or the evidential conclusions drawn by the Secretary of State are found to be reasonable, the Commission should proceed to review the judgments made based on that factual picture. In that part of the review public law principles do support a degree of deference to the Secretary of State. Here the task of the Commission is to interfere if the Secretary of State has been unreasonable, allowing for due deference.

21. For those reasons we would not be inclined to accept the analogy suggested on behalf of the applicant by Mr Hugh Southey QC, in reliance on the decision of the High Court in Secretary of State of the Home Department v EB [2016] EWHC 1970 (Admin), paragraphs 9-11. That

was a decision under the Terrorism Prevention and Investigation Measures Act 2011 by Mr Justice Mitting.

**Relevant Policies**

22. Guidance is given to case workers as to the determination of the good character requirement in annex D to chapter 18.

23. As paragraph 1.2 makes clear, in order to facilitate the Secretary of State's decision making function, applicants must answer in full all questions asked of them on the application form for naturalisation to inform the assessment of good character. They must also inform the nationality group of any significant event (such as a criminal conviction) that could have a bearing on the good character assessment.

24. Paragraph 2.1 gives case workers examples of situations where they should not normally consider applicants to be of good character, if, for example, there is information to suggest:

'a) they have not respected, and/or are not prepared to abide by the law (eg they have been convicted of a crime or there are reasonable grounds to suspect (ie that it is more likely than not) they have been involved in crime)…; or
b) they have been involved in or associated with war crimes, or crimes against humanity or genocide, or other actions that are considered not to be conducive to the public good…
c) their financial affairs were not in appropriate order (eg failure to pay taxes for which they were liable)…
d) their activities were notorious and cast serious doubt on those standing in the local community…
e) they had practised deceit in there dealings with the UK government…
f) they have assisted in the evasion of immigration control…

g) they have previously been deprived and are seeking to reacquire citizenship within a prescribed period…

25. Paragraph 2.2 of the guidance provides that caseworkers should normally accept that an applicant is of good character if:

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

26. "Paragraph 2.3 states that", if the application does not clearly fall into the one of the categories outlined in paragraph 2.1 but there are doubts about the applicant's character, then caseworkers may request an interview in order to confirm their final assessment of the applicant's character.

27. "Paragraph 3.7.1 states that" 'in some cases information may be disclosed if an applicant is known or strongly suspected of some criminal activity, but for various reasons has neither been charged nor convicted. Caseworkers should take into account the nature of the information and the reliability of the source. If, on the balance of probabilities there is firm and convincing information to suggest that an applicant is a knowing and active participant in serious crime (eg drug trafficking), the application should normally be refused.'

28. Paragraph 3.7.2 states that caseworkers should not rely on old reports in deciding whether suspicions of criminality should remain a bar to the grant of naturalisation on character grounds.

**The Applicant's Open Grounds of Review**

30. The applicant advances the following five grounds of challenge in this application for review:

(1) The Secretary of State failed to comply with her own published policy.
(2) The decision was irrational/disproportionate/vitiated by a factual error given rise to unfairness/took into account irrelevant matters and breached the respondent's duty of sufficient enquiry.
(3) It was taken in breach of the respondent's duty to act in accordance with the statutory purpose and/or was taken in bad faith.
(4) It breached the applicant's rights under Article 8 of the European Convention of Human Rights.
(5) It was unfair at common law.

29. In the skeleton argument filed on behalf of the applicant permission is now sought to rely on an additional ground, based on the applicant's rights under Articles 9 and 10 of the ECHR. Objection is taken to that application by Mr Mitchell, who has appeared on behalf of the Secretary of State.

30. The Commission has a discretion to grant leave, under Rule 11 of the Procedure Rules. We bear in mind Mr Mitchell's submission that the argument based on Articles 9 and 10 could have been advanced earlier, just as the argument based on Article 8 was. On the other hand, we also bear in mind that the application for review itself was brought within time: on behalf of the Secretary of State Mr Mitchell has expressly disavowed

any objection on the ground of delay. The ground based on Articles 9 and 10 does not rely on any additional factual material. Some of the legal arguments overlap with those which would have to be addressed in the context of Article 8 in any event: in particular whether any interference with the rights invoked was in accordance with law. Finally we bear in mind that no prejudice has been asserted by the Secretary of State. In those circumstances we consider that the just course would be for this Commission to exercise its discretion in favour of granting the application to amend the grounds and we make that direction.

31. For the sake of completeness we should record that the applicant reserved his arguments concerning disclosure under European Union Law, recognising that argument is not available to him at this level.

**The first ground of challenge**

32. For the reasons set out in our Closed judgment, we have come to the conclusion that the Secretary of State did not breach her own published policy. Accordingly the first ground of challenge must be rejected.

**The second ground of challenge**

33. In this context Mr Southey QC has placed particular emphasis on the duty to make sufficient enquiries, to which reference was made by Lord Diplock in Secretary of State for Education and Science v Tameside MBC [1977] AC 1014, at 1065. However, it is important to recall that the duty as formulated by Lord Diplock is one to make "reasonable" enquiries.

Subsequent authorities have made it clear that, in assessing reasonableness in this context, the standard of review is the conventional one of rationality: see e.g. R (Khatun) v Newham LBC [2005] QB 37, at para. 35, where Lord Justice Laws summarised the relevant authorities.

34. For the reasons which are set out in our Closed judgment, we have come to the conclusion that the Secretary of State did not err in any of the ways alleged under the second ground of challenge and this ground must be rejected.

**The third ground of challenge**

35. As Mr Mitchell confirmed in his Open skeleton argument on behalf of the Secretary of State, at para. 45, it is uncontroversial that the power to confer British citizenship in the British Nationality Act 1981 should not be used to reward or encourage cooperation with the security services, or to punish what may be seen as non-cooperation (cf. para. 29 of the applicant's skeleton argument).

36. For the reasons which are set out in our Closed judgment, we have come to the conclusion that the Secretary of State did not act in bad faith or for a purpose which is not within the purposes of the British Nationality Act 1981. Accordingly the third ground of challenge must be rejected.

**The fourth ground of challenge**

37. In considering this ground we have taken into account the submissions made on behalf of the applicant under Articles 9 and 10 of the Convention rights. This is because, as we have already indicated, we give permission to the applicant to amend his grounds to include reliance on those Conventions.

38. However, we consider that the Secretary of State's decision to refuse citizenship does not interfere with the applicant's rights in Articles 9 or 10. Those rights do not include a right to citizenship. As a non-citizen he remains free to express himself and to practise his religion and to manifest his religious beliefs. Those rights have not been restricted, limited or otherwise interfered with by the decision under challenge.

39. In any event, for the reasons which are set out in our Closed judgment, any interference with the applicant's Convention rights was justified under para. (2) of Article 9 and Article 10 respectively.

40. We turn to consider the applicant's reliance on Article 8.

41. There is no suggestion that the Secretary of State's decision has interfered with the applicant's right to respect for family life, his home or his correspondence. What is relied upon is the right to respect for private life.

42. It is true that the concept of "private life" is broader in the settled jurisprudence of the European Court of Human Rights, and in decisions of domestic courts which have followed that jurisprudence under the Human Rights Act 1998, than might be apparent at first sight. However, it is clear

that the right to respect for private life does not as such confer a right to a particular citizenship.

43. In Genovese v Malta (2014) 58 EHRR 25 the Court of Human Rights said, at para. 30:

> "The Court … reiterates that the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity. The provisions of Article 8 do not, however, guarantee a right to acquire a particular nationality or citizenship. Nevertheless, the Court has previously stated it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual."

44. On behalf of the applicant Mr Southey submits that the principle is not confined to cases of an "arbitrary" or "discriminatory" denial of citizenship. He submits that all that is required is a sufficiently serious impact and for that proposition relies on the decision in Karassov v Finland (1999) 28 EHRR CD 132. We do not consider that the decision in that case bears the weight that has been placed upon it. We note that it was an admissibility decision and that the application in that case was in fact held to be inadmissible. In any event, the way in which the Court expressed its reasoning was in similar terms to that used later in Genovese. It stated that:

> "Although right to a citizenship is not as such guaranteed by the Convention or its Protocols … the Court does not exclude that an arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual."

It was for that reason that the Court then went on to state it was:

> "necessary to examine whether the Finnish decisions disclose such arbitrariness or have such consequences as might raise issues under Article 8 of the Convention."

45. Mr Southey also relies on the formulation of the relevant principle in AN v Secretary of State for the Home Department (SN/1/2014), at para. 36: "an arbitrary of discriminatory decision *or at the very least some other specific basis in fact*." (Emphasis added) We are not persuaded that there is any foundation in the clear and constant jurisprudence of the European Court of Human Rights to warrant any such extension of the principle if that is what was intended by Sir Stephen Silber in that case.

46. We prefer the view expressed by Ouseley J in AHK v Secretary of State for the Home Department [2013] EWHC 1426 (Admin), at para. 44, in which he considered that the decision in Genovese:

> "proceeds on the basis that a breach of Article 8 can arise in the context of naturalisation where there was an arbitrary or, as in that case, discriminatory refusal. It does not support any broader potential for a refusal of naturalisation to interfere with Article 8."

47. In this context Mr Southey relied on the decision of the European Court of Human Rights in Bensaid v United Kingdom (2001) 33 EHRR 10, at paras. 46-48. At para. 47 the Court said:

> "Private life is a broad term not susceptible to exhaustive definition. … Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."

48. It is important to recall that the Bensaid case did not concern the refusal of naturalisation but rather a decision to expel a person from this country. Nevertheless, even if the principle is as stated by Mr Southey, it has to be made good by evidence. Whatever formulation of the principle one adopts, and even if Mr Southey's submission on this were adopted, a sufficiently serious impact has to be demonstrated as a matter of fact.

49. On the evidence before this Commission, we are not satisfied that the evidence does make good that submission as a matter of fact. In particular we note that no expert witness has provided a report to the Commission (with the usual declaration as to understanding the role of an expert witness in legal proceedings). This is despite the opportunity to do so not only in the period leading up to the hearing on 24 April 2017 but also in the period leading up to the adjourned hearing on 5 September 2017.

50. Further, we consider that the medical evidence that has been placed before this Commission does not deal with the crucial issue of causation, as between the Secretary of State's decision to refuse naturalisation, even if one takes into account the earlier decision in 2009, and the impact on the applicant's mental health. It may well be that the applicant suffers from underlying mental health issues in any event; or that there were other circumstances in his life, such as his estrangement from his wife, which have had impact on his mental health. These are the sort of issues which a proper expert report prepared for these legal proceedings could have addressed in order to assist this Commission. Such evidence is not before us.

51. Finally, and in any event, for the reasons set out in our Closed judgment, we have come to the conclusion that (even if Article 8 were applicable) any interference with the applicant's right to respect for private life was justified on the facts of this case under para. (2) of Article 8.

**The fifth ground of challenge**

52. The applicant contends that there has been procedural unfairness in this case, in particular because there was no indication given to the applicant before the decision was taken of the matters which might lead her to refuse his application for naturalisation; in effect no reasons were given in the decision letter itself; and there has been very limited disclosure after the decision was taken during the course of these proceedings.

53. In this context Mr Southey has placed particular reliance on the decision of this Commission in ZG and SA v Secretary of State for the Home Department [SN/23/2015 and SN/24/2015]. However, as he accepts, the issue of fairness is one which is fact-sensitive: see para. 36 of the applicant's skeleton argument and the decisions cited there. We note in particular that, in NA v Secretary of State for the Home Department [SN/56/2015], at para. 43, Mr Justice Flaux said that the decision in ZG and SA was one that turned on its own facts and was not intended by the Commission to set out some general principle, as is clear from para. 41 of that decision itself.

54. For the reasons set out in our Closed judgment, we have come to the conclusion that no further disclosure was required or could be given in the present case, whether before or after the decision under challenge was taken. In the circumstances of this case there has been no procedural unfairness.

**Remedies**

55. In the light of the conclusion to which we have come on the substance of this application, it is strictly unnecessary for us to address a submission that was made on behalf of the Secretary of State in the alternative. In his Open skeleton argument, at para. 66, Mr Mitchell submitted that, should the Commission find in favour of the applicant in respect of any of the grounds of review, it should nonetheless dismiss the application pursuant to section 31(2A) of the Senior Courts Act 1981, as amended by section 84 of the Criminal Justice and Courts Act 2015. We do not accept that submission and would not have refused a remedy to the applicant if we had found that any of the grounds of review had merit.

56. Section 31(2A) applies to applications for judicial review filed after 13 April 2015. The present application is dated 1 October 2015. Section 31(2A) provides:

> "The High Court –
>
> (a) must refuse to grant relief on an application for judicial review …

> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

57. For this purpose, "the conduct complained of" is "the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief": section 31(8).

58. Section 31(2A) modifies the previous position, as set out in the decision of the Court of Appeal in Simplex GE (Holdings) v Secretary of State for the Environment (1989) 57 P & CR 306 in three ways. First, the test is modified in that the court no longer needs to be satisfied that the outcome would inevitably have been the same, only that it is highly likely. Secondly, the outcome need not be precisely the same, provided it would not have been substantially different. Thirdly, the court does not have a discretion; where the conditions set out in the statutory provision are met, it is under a duty to refuse relief. This is subject to the power to disregard that requirement if the Court "considers that it is appropriate to do so for reasons of exceptional public interest": section 31(2B).

59. In support of his submission that section 31(2A) applies to this Commission Mr Mitchell relies on the view expressed by Mitting J in MB v Secretary of State for the Home Department [SN/47/2015], at paras. 22-26. In that case Mr Justice Mitting took the view that section 31(2A) does apply to the Commission because it is required (by section 2D(3) of the 1997 Act) to determine an application such as this in accordance with the principles of judicial review. As Mr Mitchell accepts, we are not bound by

the decision of an earlier decision of this Commission although it deserves respect and is of persuasive authority. We respectfully take a different view from that taken by Mr Justice Mitting in MB.

60. We do not accept that section 31(2A) applies to this Commission. On its face it applies only to the High Court. If Parliament had wished to apply it, or something like it, to the Commission it could have done so expressly. We note that that is precisely what Parliament has done in the case of the Upper Tribunal when it considers an application for judicial review.

61. Section 84(1) of the 2015 Act amended the Senior Courts Act 1981, as we have noted earlier. The very same section, in subsections (4) and (5), amended sections 15 and 16 of the Tribunals, Courts and Enforcement Act 2007, so as to introduce similar provisions in that context as were being introduced in the context of the High Court. For example, there was introduced a new section 15(5A), which provides:

> "… subsections (2A) and (2B) of section 31 of the Senior Courts Act 1981 apply to the Upper Tribunal when deciding whether to grant relief under subsection (1) above as they apply to the High Court when deciding whether to grant relief on an application for judicial review."

62. The fact that there has not been any similar amendment to the 1997 Act, which created this Commission and confers jurisdiction upon it, is telling.

63. In our view, the reference in section 2D(3) of the 1997 Act to principles of judicial review is a reference to the *substantive* law and not to the principles which apply when considering whether to grant a remedy.

64. Further, we take the view that a strict approach to the construction of section 31(2A) is appropriate, since it is an unusual provision in that it tends to restrict what would otherwise be a discretion vested in an independent court or tribunal and (where the statutory criteria are met) imposes a duty to refuse a remedy, unless the "escape clause" in subsection (2B) is available, for reasons of exceptional public interest.

65. Accordingly, we have come to the conclusion that section 31(2A) is not applicable in the present context.

66. In any event, if we had considered that it was applicable, we are not satisfied that the statutory criteria in section 31(2A) are met on the facts of this case. We would therefore not have refused a remedy on that ground.

**Conclusion**

67. For the reasons which are set out above, and in our Closed judgment, this application for judicial review is refused.