SPECIAL IMMIGRATION APPEALS COMMISSION

APPEAL NUMBERS: SC/73/2018

DATE OF HEARING: 12 April 2019

DATE OF JUDGMENT: 25 June 2019

BEFORE:

THE HONOURABLE MR JUSTICE LANE
UPPER TRIBUNAL JUDGE KOPIECZEK
MR P NELSON CMG

BETWEEN:

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Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MS M. GHERMAN (instructed by Salam Immigration Solicitors) appeared on behalf of the applicant.

MR Z. AHMAD QC (instructed by the Special Advocates' Support Office) appeared as Special Advocate.

MS N. BARNES (instructed by the Government Legal Department) appeared on behalf of the respondent.

OPEN JUDGMENT

MR JUSTICE LANE:

1. This is an application brought under section 2D of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"). It concerns a challenge by the applicant to the respondent's decision of 21 June 2018 to refuse to naturalise the applicant as a British citizen, pursuant to section 6(1) of the British Nationality Act 1981. The decision was certified pursuant to section 2D of the 1997 Act.

2. The applicant was born on 17 May 1985. He is a citizen of Somalia, who arrived in the United Kingdom on 23 February 2003 and claimed asylum. In August 2006, the applicant's asylum claim was allowed, on appeal, with the result that he was granted five years leave to remain in the United Kingdom. On 26 October 2011, the applicant was granted indefinite leave to remain.

3. On 17 October 2013, the applicant applied for naturalisation as a British citizen. The application form told the applicant he needed to give information which would help the respondent to decide whether the latter could be satisfied that the applicant was of good character. Checks would be made with the police and "possibly other Government Departments, the Security Service and other agencies".

4. Section 3.16 of the form asked "Have you ever engaged in any other activities which might indicate that you may not be considered a person of good character?" The applicant answered "No" to this question.

5. At section 6 of the form, the applicant signed a declaration, in which he declared that, to the best of his knowledge and belief, the information given in his application was correct and that he knew of no reason why he should not be granted British citizenship. He confirmed that he understood information given by him would be treated in confidence but might be submitted for checking against records held by other Government departments, the Security Service and other agencies, local authorities and the police.

6. On 21 June 2018, the respondent informed the applicant of the decision to refuse the application. This was "on the grounds that you do not meet the requirements of good character. It would be contrary to the public interest to give reasons in this case."

Legal framework and approach

7. Section 6(1) and (2) of the British Nationality Act 1981 ("the 1981 Act") provide 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.
>
> (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 applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen."

8. Paragraph 1(b) of Schedule 1 to the 1981 Act provides that the requirements for naturalisation as a British citizen include, amongst other things, that the person concerned "is of good character".

9. It is well established that an applicant for naturalisation seeks a privilege not a right and that the 1981 Act vests the respondent with considerable discretion: see R v. Secretary of State for the Home Department ex parte Fayed [1998] 1 WLR 763 at 776A; FM v. respondent SN/2/2014 at [7].

10. The burden of proof is on the applicant to satisfy the respondent that these requirements are met on the balance of probabilities. The respondent must refuse the application if the test is not satisfied and the good character requirement cannot be waived. An applicant may seek to persuade the respondent that he is of good character, but if he or she does not satisfy the respondent that the good character requirement is met, any grant of naturalisation would be *ultra vires*.

11. The respondent is able to set a high standard for the good character requirement. Thus, in R v. Secretary of State for the Home Department ex p. Fayed (No 2) [2001] Imm. A.R. 134, Nourse LJ stated [at 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 adapted. 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." [Emphasis added]

12. Similarly, in Secretary of State for the Home Department v. SK Sri Lanka [2012] EWCA Civ. 16, Stanley Burnton LJ observed at [31]:

> "It is for the applicant 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 applicant is of good character, and has good reason not to be satisfied, she is bound to refuse naturalisation."

The Proper Approach of the Commission

13. Section 2D(3) of the 1997 Act provides that, in respect of challenges to decisions to refuse naturalisation:

> "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 proper approach of the Commission in statutory reviews is now well established. The preliminary issues judgment in AHK v. Others (SN/2/3/4/5/2014) established that:

    a. The Commission is required to apply a conventional judicial review approach to naturalisation challenges. The Commission's task is to review the facts and consider whether the findings of fact by the decision-maker are reasonable: see [14]

    b. The Commission does not need to determine for itself whether the facts said to justify a naturalisation decision are in fact true. As a matter of ordinary public law, the existence of facts said to justify the denial of nationality does not constitute a condition precedent, and fact-finding is not necessary to determine whether the procedure is fair or rational: see [23] - [24].

    c. In the absence of an arbitrary or discriminatory decision, or at the very least some other specific basis in fact, refusal of naturalisation will not engage ECHR rights. See [22].

    d. The challenge to the decision is open only on grounds of rationality.

15. As to the material which the Commission should consider when conducting its review, it is also well-established that:

    a. The material that is relevant is the material that was before the decision maker: see R (Naik) v. Secretary of State for the Home Department [2011] EWCA Civ 1546 at [63].

    b. The time at which the factors governing reasonableness have to be assessed is the time of making the decision called into question: see R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2009] 1 AC 453 at [131].

    c. Accordingly, fresh evidence should not ordinarily be admitted in a judicial review: see R v. Secretary of State for the Environment ex parte Powis [1981] 1 WLR 584 at 595G, where the relevant criteria were set out.

The case for the applicant

16. The applicant gave evidence. He adopted his witness statements dated 3 August 2018 and 21 November 2018.

17. In these statements, the applicant explained how he had married a lady in Uganda, following his recognition as a refugee in the United Kingdom. His wife was, however, unable to obtain entry clearance to the United Kingdom and the applicant's marriage to her eventually broke down and they divorced.

18. Following this divorce, the applicant remarried in the United Kingdom. His wife is a Somali citizen who has indefinite leave to remain. The applicant and his wife have four children born, respectively, in 2012, 2014, 2016 and 2018.

19. The applicant and his family reside in a city in the United Kingdom but he works away from home three days a week in the East Midlands.

20. The applicant said that he has never been "involved in any criminal matters and I have never committed any offences", save for an offence of driving alone, in breach of the terms of his provisional licence, for which he received three penalty points.

21. The applicant said that he had never "committed any offence in Somalia" and so was shocked to be told that his application for naturalisation had been refused on good character grounds.

22. In his second witness statement, the applicant explained that he would regularly frequent a Somali restaurant in the town in which he was working, but he "absolutely never had any issues in relation to the restaurant, nor did anyone else there as far as I am aware." People in the restaurant would not usually discuss "intense topics". Religion was never discussed. Although politics was sometimes debated, the applicant "wouldn't involve myself in such conversations, as they were simply not of interest to me. I preferred to play pool or football".

23. The applicant produced a family tree, regarding his relatives in the United Kingdom and Somalia. Only two of his sisters remained in Somalia. He said that none of his family have ever been involved with the Government, security forces, the army or the police. None of his family have any links to terrorism. The applicant continued:

> "My family and I are decent people and would never agree, support or engage with any such actions. I confirm that there is absolutely no link, to the best of my full knowledge and belief, to Al-Shabaab and/or so-called ISIS within my family".

24. The applicant's second statement also described occasions when he had had interactions with the police in the United Kingdom. One instance arose when the police arrived at the applicant's place of residence in order to look for a person with whom the applicant was sharing accommodation. On that occasion, the police had discovered amongst the applicant's possessions an identification card in his uncle's name. The applicant had procured this in order to obtain work, since he was precluded by the respondent from doing so at the time. However, the applicant realised that to have done this was wrong and, thus, although he made a "fake ID" from the identification card, he did not use it.

25. After describing the incident when the police discovered the applicant driving alone on a provisional licence, the applicant described how a police officer asked the applicant to convey to the police certain information regarding the people with whom the applicant would socialise. The applicant said that he made it clear to the police that he did not want to do that.

26. Finally, the applicant described how police attended the property in which he was residing in order to look for the owner of the property (who was not the same individual as previously described).

27. The applicant said that the refusal of his application for citizenship had had a "profound effect on me" and that he had been "completely open and honest" about everything he could think of, which might relate to the refusal of his application.

28. There was no cross-examination of the applicant.

29. The applicant also submitted a number of letters from third parties, including the applicant's younger brother. These letters, respectively, describe the applicant as "a good person within community and society"; as having "never refused to help me"; as having "led a blameless life", so far as the writer is aware; and that the applicant has been "completely integrated into UK life".

30. For the applicant, Ms Gherman submitted that the "cogent evidence of the [applicant's] good character" had not been shown to have been taken into account by the respondent in reaching his decision. The respondent had failed "to take a holistic approach". Any associations with known criminals were "so tangential to the [applicant's] so as not to materially affect his character." The applicant was a "full-time employee" and father of four who had never been charged with any criminal offence.

The "Open" Case for the respondent

31. Ms Barnes relied upon the witness statement of Ms Christine Hughes, an official of the respondent specialising in British nationality issues. Ms Hughes exhibited the "open" parts of the respondent's instructions to staff on how to apply the "good character" requirement (annex D to Chapter 18).

32. Ms Barnes submitted that the character reference letters could not be given weight, since they were not before the respondent when he reached his decision to refuse the applicant naturalisation. The same was true, she said, of the applicant's witness statements. There had been no irrationality or other illegality involved in the respondent's decision.

Discussion

33. We agree with Ms Barnes that the character references and the material in the witness statements regarding the applicant's interactions with others (including the police) cannot be employed by the applicant to mount a public law challenge to the respondent's decision. The respondent was not provided with any of this information at the time of that decision.

34. Even if that position were, in fact, otherwise, the material could not assist the applicant. As is well-established, an applicant who seeks to challenge a refusal to naturalise is not entitled to be informed of the nature of any concerns about his character where to do so would be contrary to the public interest. For the reasons explained in our CLOSED judgment, this is such a case. All that may be said in OPEN is that, even if everything that the applicant said in his witness statements had been before the respondent when the decision was taken, and even if the respondent had seen the character references, none of this could have rationally affected the decision to refuse naturalisation.

35. For the reasons explained in our CLOSED judgment, the respondent committed no public law error in refusing the application for the reason given.

Decision

36. This application is dismissed.

MR JUSTICE LANE