

SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SN/75/2018
Hearing Date: 3-4 November 2020
Date of Judgment: 19th January 2021

Before

**THE HONOURABLE MR JUSTICE CHAMBERLAIN
UPPER TRIBUNAL JUDGE KEBEDE
MR PHILIP NELSON**

Between

AMA

Applicant

and

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

Respondent

OPEN JUDGMENT

Alasdair Mackenzie (instructed by **Duncan Lewis Public Law**) appeared on behalf of the Applicant

Jennifer Thelen (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

David Lemer (instructed by **the Special Advocates' Support Office**) appeared as Special Advocate

Introduction

1. AMA applies under s. 2D of the Special Immigration Appeal Commission Act 1997 (“the SIAC Act”) for review of a decision of the Respondent (“SSHD”) communicated by letter of 5 July 2019 to refuse his application for naturalisation as a British citizen.
2. AMA is a Libyan national. He was born in 1968. He arrived in the UK on 9 September 2004 and was granted leave to enter as a student. That leave was extended on successive occasions. He was granted indefinite leave to remain on 24 January 2015. He applied for naturalisation on 4 February 2016. On 20 July 2018, SSHD refused his application.
3. AMA applied to the Commission for review. On 14 March 2019, SSHD withdrew the refusal and invited AMA to make further representations. He took that opportunity, submitting representations and evidence on 18 March 2019. On 5 July 2019, SSHD wrote to AMA refusing his application again. The only part of the decision which communicated a reason reads as follows:

“The Home Secretary has refused your application for citizenship on the grounds that you do not meet the requirement of good character. This is because of your past links to the Libyan government under QADHAFI.”

4. The decision was certified under s. 2D of the SIAC Act.
5. The OPEN evidence consists of a witness statement of Ms Christine Hughes, who is a senior executive officer in the team that deals with applications for and removals of British citizenship in the Office for Security and Counter-terrorism. Ms Hughes does not elaborate to any significant extent on the reasons for the decision. She appends: a decision template, showing what was considered by whom and when; the Home Office’s guidance *Nationality: good character requirement* (“the Good Character Guidance”); and a document containing background on Libya which she says was taken into account by the decision-maker. Following the rule 38 process (which did not result in a hearing), the statement was amended to include the following additional information:

“5. ...It must be stressed that the question of whether an applicant is considered a current threat to national security is not the Secretary of State’s only consideration.

6. The decision maker concluded that there were sufficient grounds to conclude that [AMA] did not meet the good character requirement. The decision template shows that the decision was referred to me, and I considered and agreed with the decision as recorded at the end of the document. I also considered that [AMA] has not provided any explanation for his support nor shown any remorse for it. In the light of this I decided that this case should be refused and certified in line with Home Office guidance.”

The law

6. Section 6(1) of the British Nationality Act 1981 confers on SSHD power to grant an applicant a certificate of naturalisation as a British citizen if SSHD is “satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection”. By paragraph 1 of Schedule 1, these include “that he is of good character”.
7. On an application for naturalisation under s. 6(1), SSHD has “a wide discretion to refuse an application”: *R v SSHD ex p. Fayed* [1998] 1 WLR 763 (“*Fayed No. 1*”), 776A (Lord Woolf MR).
8. The Good Character Guidance sets out at pp. 9-10 a non-exhaustive list of factors. If any of them is present, an applicant will not normally be considered to be of good character. They are: criminality, international crimes, terrorism and other non-conducive activity, financial soundness, notoriety, deception and dishonesty, immigration-related matters and deprivation. The Good Character Guidance makes clear, however, that the list of factors is “not exhaustive”.
9. Ordinarily, fairness requires SSHD to inform an applicant of any areas of concern, so as to enable him to make informed representations on them: see *Fayed No. 1* at 773G-H. However, that obligation does not apply where SSHD forms the view that giving the information would be contrary to the public interest: *JJA v SSHD* (SN/40/2015, 28 October 2016), [8]; *SS v SSHD* (SN/42/2015, 13 December 2016), [21].
10. Section 2D(1) of the SIAC Act empowers SSHD, in relation to (*inter alia*) a refusal to issue a certificate of naturalisation under s. 6(1) of the 1981 Act, to certify that the decision was made wholly or partly in reliance on information which, in her opinion, should not be made public in the interests of national security, in the interests of the relationships between the UK and another country, or otherwise in the public interest. Section 2D(2) confers a right of appeal. Section 2D(3) 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.
11. A useful summary of the applicable principles are set out in the Commission’s decision in *MSB v SSHD* (SN/41/2015, 1 December 2016):
 - (a) It is for the applicant to satisfy SSHD that the requirements (including the good character requirement) are met: [25], citing *Fayed No. 1*, at p.776A.
 - (b) SSHD may set a high standard for the good character requirement: [26]-[27], citing *R v SSHD ex p. Fayed (No. 2)* [2001] Imm AR 134 (“*Fayed No. 2*”), at [41] (Nourse LJ) and *SSHD v SK (Sri Lanka)* [2012] EWCA Civ 16, [31] (Stanley Burnton LJ).
 - (c) The Commission is required to apply a conventional judicial review approach, reviewing the facts and considering whether the findings of fact are reasonable. In that part of the review there is no place for deference to SSHD: [28(1)], citing the Commission’s decision in *AHK v SSHD* (SN/2/2014, SN3/2014, SN/4/2014 and SN/5/2014), [14] and [32].

- (d) The Commission does not need to determine for itself whether the facts said to justify the refusal are true: [28(2)], citing *AHK*, [23]-[24].
- (e) Once the facts and inferences of fact have been reviewed, and if the factual or evidential conclusions 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 SSHD: [28(3)], citing *AHK*, [32]. Further support for the breadth of SSHD's area of judgment on character issues may be derived from the decision of the Supreme Court in *R (Lord Carlile of Berriew) v SSHD* [2015] AC 945, [33] (Lord Sumption).
- (f) In the absence of an arbitrary or discriminatory decision, a refusal of naturalisation will not engage ECHR rights and the challenge lies only on the basis of rationality: [28(4)], citing *AHK*, [22] and [24].
- (g) The Commission has a particular obligation to review the CLOSED material with care, given the inability of the SAs to take instructions from the appellant on that material: [29].

AMA's evidence

12. In a statement dated 13 February 2020, AMA explains that he comes from a middle class family. He completed his formal education in Libya. He qualified as a pharmacist and worked in a pharmacy attached to a doctor's surgery. Pharmacies in Libya were at the time regulated by the Libyan health ministry. He says that he has "no connections with Qadafi or his government". Since arriving in the UK in 2004, he has travelled to Libya twice, once in 2017 to visit his sisters and once in April 2019 to be with his mother when she had a heart operation. He spent most of these visits at home with his mother and sisters.
13. In 2007, while studying at Nottingham University, AMA was elected President of the Libyan Society. He remained in that post for 2 years. The activities of the Society were cultural and had nothing to do with politics. He wanted to share his knowledge with other students and assist them in their scientific assignments. In 2008, 2009 and 2010, he attended gatherings in different universities. These would be attended by around 100 to 200 students.
14. In 2011, during the Libyan uprising, the students split into two groups, one of which supported the uprising. The other was in favour of "peace for the public". He was an adherent of the second group. In 2011, he attended around six demonstrations outside Downing Street "against the war and foreign intervention". Some were organised by a group called "Hands Off Libya" with which AMA says he has no connection. AMA accepts that some people present at these demonstration held up photographs of Qadafi, but he was not there to support Qadafi. On one occasion he was interviewed by Press TV. His message was that it was necessary to bring to an end what was happening in Libya and "liberate our people".

15. AMA believes someone in the Libyan community must have spread false information about him. He identifies one person who he believes may have done so. At one of the demonstrations, he was targeted by pro-Qaddafi supporters and verbally abused. Although he had from time to time come across supporters of Qaddafi, he had "tried to put my head down and concentrate on my PhD and did not engage in politics". He describes himself as being "in favour of peace and democracy".
16. AMA accepts having spoken at these demonstrations. He says that he "usually talked about social system in Libya such as structure of Libyan society for instance tribal system".
17. AMA says that he worked hard on his PhD and used to stay in his lab for more than 12 hours a day, sometimes all night. He did not have time to work with the Libyan government.
18. AMA describes an occasion in May 2011 when someone knocked on his door in Nottingham and delivered a box with a phone in it. The phone started to ring. A female voice asked him to identify himself and invited him to a meeting at Beaston Police Station. There he met a woman and a man, who claimed to be from MI5. He was asked questions about his personal and professional life and about his views on the political situation in Libya. He was asked whether he supported Qaddafi and said that he did not: he supported peace. The woman showed him photographs of Libyan students. He said that he recognised some of them, but they were not his close friends. He told them about his role as President of the Libyan Society. AMA says that the man and woman told him to be a good guy and stay out of trouble.
19. A month later, AMA says he was contacted by MI5, this time on his own mobile phone. He was again invited to the Police Station for a meeting with the same two individuals. The meeting lasted about an hour. The female seemed angry and asked him to co-operate with them and give them information. He said he would not work with them and wanted to concentrate on his career. She asked if he was working with Libyan intelligence. He said no.
20. Finally, AMA says that he gave a speech at a memorial gathering for Qaddafi in 2011. He addressed the things Qaddafi had done, such as providing free electricity and education.

AMA's grounds for review of the decision

21. AMA advances four grounds for review of the decision. Mr McKenzie elaborated on these in his skeleton argument and oral submissions. His case on each may be summarised as follows:
 - (a) There was no, or no adequate, evidential basis for the decision. AMA points to the fact that his application for ILR was not refused on character grounds. He also notes that the country background document on which SSHD apparently relied "strikingly omits any mention of the rapprochement between Libya and the UK which took place under the Blair government from approximately 2003, nor is there reference to the wider improvement in relations with the West which continued

from soon after 11 September 2011 until the Western military intervention in the Libyan civil war in 2011". Indeed, the undated document refers to no event after 1987. If SSHD's assessment of AMA's application was based on material as old as this, it was obviously flawed. A further OPEN security assessment, by Jane's Sentinel ("the Jane's Report") was disclosed in OPEN after the hearing. That document had been referred to in the footnotes to a CLOSED document considered by the decision-maker. It was dated 6 August 2007. Mr McKenzie said that this document, though post-dating the rapprochement between the UK and Libya, still provided no proper factual material to support the challenged decision.

- (b) Any links with the Qaddafi regime are not rationally sufficient to justify the decision. AMA submits that his work as a pharmacist in Libya has no possible bearing on his good character. Nor do his activities during the Libyan uprising, since these were limited to supporting peace and opposing foreign intervention.
- (c) SSHD failed to give adequate reasons for the decision. Mr McKenzie accepted in argument that, if it was contrary to the public interest for more detailed reasons to be given, there could be no common law duty to give such reasons. He nevertheless submitted that the bare statement that AMA had links to the Qaddafi regime was not sufficient to enable him to understand why his application had been unsuccessful or whether (and if so on what grounds) the decision could be challenged.
- (d) SSHD acted unfairly in failing to give AMA notice of her concerns, thereby depriving him of an effective opportunity to make representations. Mr McKenzie accepts that, if it was contrary to the public interest for further reasons to be given, the failure to give such reasons could not vitiate the decision, even if it deprived AMA of an effective opportunity to make representations. He nonetheless makes the point that what AMA was told was insufficient to enable him to understand what he should say to allay SSHD's concerns.

Our conclusions

22. We have considered AMA's grounds for review of the decision carefully. We address them in turn.

Ground 1

23. Character is a relevant consideration when considering an application for ILR under paragraph 276B of the Immigration Rules, just as it is when considering an application for naturalisation under the 1981 Act. But that does not mean that SSHD is obliged to regard every character-related matter justifying refusal of naturalisation as also requiring refusal of ILR. The question for SSHD on an application for ILR is whether "having regard to the public interest there are no reasons why it would be undesirable for [the applicant] to be given *indefinite leave to remain* on the ground of long residence, taking into account his... personal history, including character, conduct, associations". Naturalisation confers significant additional benefits over and above those inherent in a grant of ILR. As the authorities make clear (see paragraph 11(b) above), SSHD is entitled to set a high standard for the assessment of character in that context. There is nothing

irrational in setting a higher standard for naturalisation than for ILR. It follows, as a matter of principle, that the grant of ILR gives rise to no presumption that naturalisation will not be refused on character grounds.

24. If, when assessing an application for ILR, SSHD reached conclusions on factual matters relevant to an issue of character, the dictates of rationality would, no doubt, impose an obligation on SSHD not to depart from those conclusions without new evidence or other good grounds for doing so. In this case, however, we are satisfied from the CLOSED evidence that no factual findings were made when considering AMA's application for ILR which are relevant to the issues arising on the application for naturalisation.
25. For these reasons, the fact that SSHD decided to refuse naturalisation having granted ILR does not call into question the former decision, which stands or falls on its own terms.
26. Turning to that, if the OPEN material had stood alone, we readily accept that there would have been no evidential basis for the decision to refuse AMA's application. Nothing in the OPEN material comes close to establishing any fact which could rationally lead to any other conclusion than that AMA is of good character.
27. The OPEN material does not, however, stand alone. The material we have considered in CLOSED convinces us that there was a proper evidential basis on which SSHD could rationally conclude that AMA was not of good character because of his links to the Qadafi regime. In the light of r. 4 of the Special Immigration Appeals Commission (Procedure) Rules 2003 ("the Rules"), it is not possible to give further details of those links, or of the reasons why SSHD was entitled to regard them as sufficient to refuse the application, in this OPEN judgment.
28. Like Mr McKenzie, we were perplexed as to why the materials considered by the decision-maker included a background document which was obviously written in 1987 or shortly thereafter. A reason for its inclusion was given to us in CLOSED, which, for reasons given in our CLOSED judgment, we found unconvincing. We are satisfied, however, from the CLOSED material, that other relevant material was before the decision-maker and that this was sufficient to inform the decision-maker of the matters relevant to her decision.
29. For these reasons, ground 1 is not made out.

Ground 2

30. If AMA's relevant conduct had been confined to that set out in his witness statement, we would have agreed with Mr McKenzie's submission that that conduct did not provide any rational basis for refusing AMA's application on character grounds. For reasons set out in the CLOSED judgment, however, we have concluded that his conduct was not so limited. Again, however, applying r. 4 of the Rules, we are unable to give further particulars in this OPEN judgment.

Grounds 3 and 4

31. The complaints under ground 3 (failure to give adequate reasons) and ground 4 (failure to give notice of concerns/opportunity to make representations) can be taken together.
32. If SSHD had no valid public interest reason for withholding further particulars from AMA, we have no doubt that the decision would be unlawful for both of the reasons articulated under grounds 3 and 4. The reasons SSHD gave AMA for refusing his application for naturalisation would not be sufficient to enable AMA to understand why the decision was made, nor to enable him to decide whether it is properly challengeable (and if so on what grounds). Equally, it would not have been lawful for SSHD to take the decision without first setting out his concerns and giving AMA a proper opportunity to address them in his representations.
33. We do not think that the availability of the Good Character Guidance, or of *Guide AN: Naturalisation as a British citizen – A guide for applicants to naturalisation*, is any answer to this point. Those documents help to identify some of the matters which may be relevant to an application. But, in a case where SSHD has a particular concern relating to character, these generic documents would go no way to satisfying SSHD's duty, as a matter of natural justice, to give notice of his concerns, to afford a proper opportunity to the applicant to respond to them and then to give proper reasons for any adverse decision. If there were no valid public interest reason for withholding further detail, we have no doubt that grounds 3 and 4 would both succeed.
34. There was, however, a public interest reason why no further particulars or reasons could be given. In our view, that is fatal to both grounds.
35. Parliament has recognised the procedural unfairness to which the absence of OPEN particulars and reasons may give rise and, in response to it, has provided for a closed material procedure. The procedure involves the appointment of a special advocate to represent AMA's interests. There are cases, of which the present is one, where the restriction on the special advocate's ability to communicate with the person whose interests he represents means that he is limited to probing and testing the CLOSED case, which the special advocate did with diligence and persistence. The special advocate was not able to put forward an evidenced response, because in the absence of any permitted communication with AMA he had no basis to do so. In a case such as the present, it would be quite wrong to say that the presence of the special advocate fully or even substantially addresses the procedural unfairness to which the absence of OPEN reasons gives rise, though it is capable of attenuating that unfairness to some extent. Parliament has decided, however, that any remaining procedural unfairness (which may be significant) is outweighed by the public interests in decisions of this kind being taken on the basis of full information, including information whose disclosure would damage the public interest, and in ensuring that such information is not disclosed.
36. The authorities cited in paragraph 9 above establish that it would be inconsistent with this statutory scheme for the common law to impose an obligation on SSHD, before the decision is made, to inform an applicant of the matters that would be necessary to enable him to make meaningful representations if giving that information would damage the public interest. In our view, it would be equally contrary to the statutory scheme for the

common law to impose a duty to give reasons if by doing so the decision-maker were obliged to disclose information contrary to the public interest.

37. In this case, there are no further particulars or reasons which could be given consistently with the public interests protected by r. 4 of the Rules.
38. It follows that grounds 3 and 4 are not made out.

Conclusion

39. For these reasons, and those given in our CLOSED judgment, the application for review is dismissed.