

SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SN/96/2021
Hearing Dates: 24th & 25th October 2022
Date of Judgment: 17th January 2023

Before:

**THE HONOURABLE MR JUSTICE GARNHAM
UPPER TRIBUNAL JUDGE McWILLIAM
MR R GOLLAND**

Between:

MUSTAFA ATES (MUA)

Applicant

and

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

Respondent

OPEN JUDGMENT

Natasha Barnes (instructed by the **Government Legal Department**) appeared on behalf of the Secretary of State

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

INTRODUCTION

1. The Applicant, Mustafa Ates, is a Turkish national. He applies to this Commission, pursuant to section 2D of the Special Immigration Appeals Commission Act 1997 (“SIAC Act”), for an order setting aside the decision of the Secretary of State for the Home Department (“SSHD”), dated 3 September 2021, to refuse to grant him naturalisation under section 6 of the British Nationality Act 1981 and to certify that decision under section 2D of the SIAC Act.
2. The SSHD’s letter asserts that the basis for the decision was that the Applicant did not meet the good character requirement.

THE BACKGROUND.

3. The Applicant entered the UK on 18 June 1989 and was granted Indefinite Leave to Remain sometime in or around 1995. He says he made an application for naturalisation on 5 June 2015. The SSHD says that the relevant application was made on 10 June 2015. We shall refer to it having been made on 10 June for the purposes of this decision. Nothing turns on the date of the application.
4. Section 3.13 of the form provided by the SSHD for applications for naturalisation ask the Applicant whether he has “*engaged in any other activities which might indicate that you may not be considered a person of good character*”. The accompanying Guidance notes stated that:

‘You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago it was. Checks will be made in all cases and your application may fail and your fee will not be fully refunded if you make an untruthful declaration. If you are in any doubt about whether you have done something or it has been alleged that you have done something which might lead us to think that you are not of good character you should say so’.

5. The Applicant ticked the box ‘no’ in response to that instruction.
6. Section 7.1 of the application form contained a declaration, signed by the Applicant, confirming as follows:

‘I... 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 circumstances 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 submitted for checking against records held by other Government Departments, the Security Service and other 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.’

7. At section 7.2 of the application, the Applicant also confirmed that he had read and understood the Secretary of State's guidance – "Nationality: Good character Requirement".
8. The SSHD says he contacted the National Crime Agency ("NCA") on 10 May 2019 to enquire whether the NCA held any information on the Applicant and whether they would have any objections to the approval of his application. The NCA responded to the SSHD on 24 August 2020.
9. On 16 December 2020, the Respondent issued a decision on the Applicant's application of 10 June 2015. The Respondent refused the Applicant's application on the grounds that the good character requirement in its naturalisation policy was not met. No other particulars were given in relation to either the refusal or certification.
10. On 29 December 2020, the Applicant applied to SIAC for a review of the SSHD's decision. On 07 April 2021, the Respondent withdrew the 16 December 2020 decision and indicated she proposed making a fresh decision within 16 weeks. The SSHD conducted a fresh character assessment as part of the reconsideration of the application.
11. On 8 June 2021, the NCA provided an intelligence briefing to the SSHD. It stated that the report contained intelligence collated by the NCA. A section headed 'main detail' set out three sub-headings of "Money laundering", "Importation of Class A drugs" and "Organised immigration crime". Under the sub-heading 'Importation of Class A drugs', the briefing stated:

"Reporting of ATES' involvement in the importation of Class A drugs dates back to at least 2009, when he was arrested in Turkey. The NCA has no information to indicate that ATES was ever prosecuted following his arrest."
12. No further particulars were provided under the headings "Money laundering", or "Organised immigration crime".
13. Under the heading 'Conclusion', the Intelligence Briefing stated as follows:

"The NCA objects to ATES's application for naturalisation. The NCA can agree to the following form of words being disclosed to ATES:
 'The Home Secretary has refused your application for naturalisation as a British citizen on the grounds that you did not meet the requirement of good character. This is because of your longstanding involvement in serious and organised crime, and your association with a number of London-based crime groups, involved in the Class A drugs trade'".
14. On receipt of the NCA's intelligence briefing, the SSHD's case-worker considered the good character requirement. The record of the decision-making process notes that the PNC showed convictions which were spent and therefore irrelevant. The case-worker made clear that no reliance was placed on those previous convictions. It was noted that apart from declaring his spent criminal convictions, the Applicant had ticked 'no' to the question 3.13 – *'have you engaged in any other activities which might indicate that you may not be considered a person of good character?'*

15. The decision-maker noted that the NCA briefing referred to the Applicant's involvement in money laundering, organised immigration crime and drug distribution and concluded that *'Ates should have made reference to these activities on the good character part of the application form'*. He went on to note that the Applicant had not submitted any evidence *'to negate the activities noted by the NCA in their assessment letter'*. The case worker pointed out that the Home Office's Good Character Guidance states that an application is normally refused when an applicant has concealed information during the citizenship process and noted that this applied to the Applicant. The Good Character guidance also referred to unacceptable behaviour which includes fomenting serious criminal activity. The case worker considered that this applied to the Applicant's activities. The case worker referred to the fact that:

'the guidance states that where there is firm and convincing evidence that an applicant has been a participant in serious crime, for example, drugs trafficking, an application will normally be refused. No convictions have been brought against ATES for his activities, but the current NCA reporting illustrates that ATES is strongly suspected of participating in organised crime and drugs trafficking.'

16. It was said that there was no evidence that the Applicant had shown any remorse or intended to stop his criminal activity. The case worker concluded:

'As set out in the consideration above, I cannot accept that ATES satisfies the requirement of good character due to the content of his association and involvement in organised crime groups, transportation of drug shipments & money laundering. The severity of his actions cast serious doubt upon his character. As ATES has provided no information in his application regarding those incidences reported by the NCA, it could be suggested that he intended to deceive the Home Office in relation to their 'Good Character' policy. He has also not shown any signs of wanting to change his behaviour or cease his activities. Where there is firm and convincing information to suggest that a person is a knowing and active participant in serious crime, the application should fall for refusal. ATES has been involved in unacceptable behaviours as per the good character guidance. From the above information... it is clear that ATES does not met (sic) the good character requirement and should be refused'.

17. On 27 August 2021, a senior executive officer at the Home Office, Ms Hughes endorsed the case-worker's decision and certified the decision. In summary, Ms Hughes agreed that the Applicant should not be regarded as being of good character in light of his failure to be honest on the application form and in light of his involvement in serious criminal activities.

18. On 3 September 2021, the Applicant was notified of the decision to refuse his application for naturalisation. The letter stated:

"The Secretary of State will not naturalise a person for whom she cannot be satisfied that the good character requirement has been met. The Home Secretary has refused your application for naturalisation as a British citizen on the grounds that you did not meet the requirement of good character. This is because of your longstanding involvement in serious and organised crime, and your association

with a number of London-based crime groups, involved in the class A drugs trade.”

19. The Applicant filed this application for review of the SSHD’s decision on 17 September 2021.

THE LEGAL AND POLICY FRAMEWORK

20. Section 6(1) of the British Nationality Act 1981 provides, inter alia, that if, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1, “he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.”

21. Paragraph 1(1)(b) of Schedule 1 to the 1981 Act provides that

“the requirements for naturalisation as a British citizen under section 6(1) are in the case of any person who applies for it ... that he is of good character...”.

22. Good character is not defined in the Act itself but is set out in the Respondent’s policy instructions to her decision makers. The document contains various criteria against which the Respondent assesses good character. The relevant factors to consider are said to be:

A person will not normally be considered to be of good character if there is information to suggest that any of the following apply:

Criminality

If they have not respected or are not prepared to abide by the law - for example, they have been convicted of a crime or there are reasonable grounds to suspect, meaning it is more likely than not, they have been involved in crime.

Suspected criminal activity

In some cases, information may reveal that a person is known to have committed or is strongly suspected of criminal activity, but for various reasons has not been charged or convicted, or charges have been dropped or the person acquitted. For example, cases may be settled out of court or a prosecution may be considered no longer sustainable due to insufficient or inadmissible evidence. Careful consideration should be taken of the nature of the information and the reliability of the source. Where there is firm and convincing information to suggest that a person is a knowing and active participant in serious crime, for example, drug trafficking, the application will normally be refused.

Involvement with gangs

Where there is reliable information that the person is involved with a gang, you must weigh up both the conduct of the person and the known impact of the gang’s activities. The more ‘senior’ or involved a person is in a gang, the more likely it is that refusal is justified. Equally, the more prominent and ‘active’ the gang is, without the

person being particularly ‘senior’, the more likely an application is to be refused.

Association with known criminals

When considering a refusal on this basis, you must weigh up the extent of the person’s connections with the individuals or group concerned and the known impact of their activities. However, the application must not be refused simply because the person knows a known criminal.

THE TEST

23. It is common ground that nationality policy instructions must be given their “*plain and ordinary meaning*”. Importantly, it is also common ground that the question for the Tribunal on a challenge concerning the application of the character policy is not “*whether the Secretary of State had established that the [applicant] was not of good character*” but rather “*whether she was entitled not to be satisfied that he was of good character*” (see *SSHD v SK* [2012] EWCA Civ 16 per Stanley Burnton LJ at [35]–[38]). An adverse character finding in a citizenship refusal may be challenged only on Wednesbury grounds.
24. It is well established that an applicant for naturalisation seeks a privilege not a right and that the 1981 Act vests the SSHD with considerable discretion: see *R v Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 763 at 776A; *FM v SSHD SN/2/2014* at [7].
25. The burden of proof is on the applicant to satisfy the SSHD that these requirements are met on the balance of probabilities. The SSHD 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 SSHD that he is of good character, but if he or she does not satisfy the SSHD that the good character requirement is met, any grant of naturalisation would be ultra vires.
26. The SSHD 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 observed (at [41]) that:

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.

27. 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 COMPETING ARGUMENTS

28. The Applicant had declared four convictions in his naturalisation application form but it is common ground that his application could not legitimately have been refused simply on the basis of that history.
29. He argues, and it is not disputed, that the Applicant has never been charged with, prosecuted for, or convicted of, any offence connected to the supply of controlled drugs, organised criminal activity, or anything of a materially similar nature.
30. The Applicant asserts that he is not aware of what evidence the Respondent considered in reaching her view because neither the decision letter nor the OPEN Scott Schedule disclose details beyond what is summarised above. However, the Applicant maintains categorically that he has not knowingly been involved in any criminality or organised crime, or associated with any such criminals or groups.
31. The only such connection that the Applicant can think might concern the SSHD is his relationship with his brother-in-law, who is currently serving a sentence for the supply of Class A drugs. However, as the terms of the Respondent's policy make clear, mere association, in the sense of an applicant merely knowing a criminal, is not a proper basis for an adverse character finding. The very nature of the Applicant's relationship with his brother-in-law discloses its involuntary nature; it was the decision of the Applicant's sister, and not the Applicant, that she would marry the Applicant's brother-in-law. Accordingly, the Applicant submits that the Respondent's decision to refuse him was Wednesbury unreasonable and/or amounted to a failure by the Respondent to adhere to her own policy guidance.
32. In OPEN the SSHD argues that the decision to refuse the Applicant naturalisation was not Wednesbury unreasonable or otherwise irrational. The SSHD properly relied upon the NCA's assessment that the Applicant had a longstanding involvement in serious and organised crime, and that he was associated with a number of London-based crime groups involved in the Class A drugs trade. On that basis, the SSHD was entitled to conclude that the good character requirement was not met and to refuse the application on that basis. That decision was fully in accordance with her Guidance which provided that an application would fall to be refused where '*there is firm and convincing information to suggest that a person is a knowing and active participant in serious crime*'. The SSHD relies upon material relied on and arguments advanced in CLOSED.

DISCUSSION

33. The OPEN material says nothing about the factual basis of the NCA's assessment that the Applicant had a longstanding involvement in serious and organised crime, and that he was associated with a number of London-based crime groups involved in the Class A drugs trade. For that, the SSHD relied on the CLOSED material. The validity of the SSHD's conclusion on that issue is the critical question in this case. Accordingly, it was necessary to examine the material and the competing arguments in CLOSED.
34. We have considered that material and those arguments closely. We have had the benefit of careful and helpful arguments from both the SSHD's counsel and the Special Advocate. We can say nothing more about that in OPEN, other than setting out our conclusion.
35. For the reasons set out in our CLOSED judgment, we grant this review, quash the SSHD's decision and remit the matter to the SSHD to reconsider in the light of our OPEN and CLOSED judgments.