Appeal No: SN/2/2014
Hearing Date: 28 October 2014
Date of Judgment: 14 November 2014

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

SIR JOHN ROYCE
UPPER TRIBUNAL JUDGE P LANE
SIR STEPHEN LANDER

"FM"

APPELLANT

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT ON THE APPELLANT'S APPLICATION FOR APPOINTMENT OF LAY MEMBERS OR LAY ASSESSORS

For the Respondent:	Ms C Callaghan & Mr J Blake
Instructed by:	The Treasury Solicitor for the Secretary of State
Special Advocate Representative:	Mr M Goudie
Instructed by:	Special Advocate's Support Office
For the Appellant:	Mr R De Mello
Representative:	Broudie Jackson Canter

Sir John Royce :

Introduction

1. FM challenges the refusal of the Secretary of State to grant him British citizenship. As part of that challenge he claims under section 53 of the Race Relations Act 1976 to have been discriminated against on grounds of race.

2. Mr de Mello on FM's behalf contends that the Commission should give directions for the appointment of lay assessors or lay panel members to assist the Commission in the determination of his discrimination claim. He relies on the principles of equivalence and effectiveness required in EU Law and the fact that lay assessors are used in the County Court in discrimination claims and lay panel members can be appointed in the Employment Tribunal.

3. Ms Callaghan on behalf of the Secretary of State contends the Commission has no power to appoint lay members or assessors and that it is, in any event, competent, as constituted, to adjudicate on FM's race discrimination claim.

4. It is necessary first of all to bear in mind the genesis of the Commission. The Commission was created by the Special Immigration Appeals Commission Act 1997. It is an unusual but particular creature of statute. It has powers given to it under that Act, and under the Act as amended and under subsidiary legislation under the Act.

   Section 5 (1) of the Act provides that the Lord Chancellor may make rules for regulating the exercise of the rights of appeal conferred by section 2 or 2B, for prescribing the practice and procedure to be followed on in connection with appeals under section 2 or 2B, and for other matters preliminary or incidental to or arising out of such appeals. The power to make rules under this section is exercisable by statutory instrument and such rules must be approved by both Houses of Parliament: section 5(8) and (9). The current rules are contained in the Special Immigration Procedure Commission (Procedure) Rules 2003 as amended.

   By section 6A, section 5 applies in relation to reviews under section 2D as it applies in relation to appeals under section 2 or 2 B.

5. Under Schedule 1 to the Act members of the Commission are appointed by the Lord Chancellor (paragraph 1). The Lord Chancellor appoints one of the members to be Chairman (paragraph 2). The Commission is deemed duly constituted if it consists of three members, at least one of whom holds or has held high judicial office within the meaning of the Constitutional Reform Act 2005 or has been a member of the Judicial Committee of the Privy Council and at least one is or has been a judge of the First tier Tribunal or of the Upper Tribunal, who is assigned to a chamber with special responsibility for immigration and asylum matters (paragraph 5).

It is thus clear that the Commission itself has no jurisdiction to appoint further members. That is the province of the Lord Chancellor. Moreover, it is clear that when Parliament passed the legislation no additional members, advisers or assessors were envisaged as necessary.

In practice for understandable reasons the panel of lay members have had specialist knowledge in security matters.

6. A direction is sought by FM under Rule 9A of the Procedure Rules. Rule 9A is headed Directions Hearings.
As emphasised by Ms Callaghan the Rule itself makes no reference to such a power to appoint lay members or lay assessors.
Similarly rule 39 which is headed Directions, deals with directions about time for service of various documents and responses and the conduct of proceedings, but again does not have any reference to appointment of lay members or assessors.

   Mr De Mello realistically was driven to concede that the Act and the Rules made no provision for nor gave power to make the appointments for which he contended.

7. Mr De Mello sought to derive assistance from the legislation regarding County Court and Employment Tribunal proceedings in cases of alleged discrimination. But not only is the context of such proceedings different from those involving SIAC, the legislation regarding those two bodies is itself markedly different.

   Section 67(4) of the Race Relations Act 1976 provides:

   "In any proceedings under this Act in a designated county court or a sheriff court the judge or sheriff shall, unless with the consent of the parties he sits without assessors, be assisted by two assessors appointed from a list of persons prepared and maintained by the [Secretary of State], being persons appearing to the [Secretary of State] to have special knowledge and experience of problems connected with relations between persons of different racial groups".

   A County Court Judge has a general power under section 63(1) of the County Courts Act 1984 to appoint assessors:

   "In any proceedings [in the county court a judge of the court] may, if he thinks it expedient to do so, summon to his assistance, in such manner as may be prescribed, one or more persons of skill and experience in the matter to which the proceedings relate who may be willing to sit with the judge and act as assessors."

8. The function of the assessors is to assist and advise on matters within their expertise. It is still for the judge to make the ultimate decision. See Ahmed v University of Oxford (2003) 1 WLR 995 (CA).

It is noteworthy that immigration cases are specifically not the province of the County Court.

9. Employment Tribunals.

Section 4(1) of the Employment Tribunals Act 1996 provides that :

(1) Subject to the following provisions of this section and to section 7 (3A) proceedings before an employment tribunal shall be heard by (a) The person who, in accordance with regulations made under section 1(1), is "the chairman and (b) Two other members or (with the consent of the parties) one other member, selected as the other members (or member) in accordance with regulations so made."

Section 10 provides that employment procedure tribunal procedure regulations may make provision for the composition of the tribunal (including disapplying or modifying section 4) for the purposes of proceedings involving national security.

Detailed rules for the composition of Employment Tribunals are set out in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

By Regulation 8, there are required to be three panels of members for Employment Tribunals. A panel of Employment Judges; a panel of persons appointed by The Lord Chancellor after consultation with organisations or associations representative of employees; and a panel of persons appointed by The Lord Chancellor after consultation with organisations or associations representative of employers.

By Regulation 9, where proceedings are to be determined by a Tribunal comprising an Employment Judge and two other members, the President, Vice President or Regional Employment Judge shall select one member from each of the panels referred to in Regulation 8. However Regulation 9(4) provides that this does not apply in relation to national security proceedings.

Regulation 10 requires the President to select from each of the panels those who may act in national security proceedings.

10. Ms Callaghan makes the point that lay members of Employment Tribunals are very different from assessors appointed under section 67(4) of the Race Relations Act. The lay members participate fully in the hearing. All three members have an equal vote in arriving at a decision and take part in its formulation.

The members are appointed on the basis of their experience of employment and not discrimination. In discrimination cases selection will usually be made so as to have at least one member of either sex or as appropriate at least one member who has experience of race relations. That stemmed from an

undertaking given by the government at the time the Race Relations Act was passed in 1976. But the undertaking is not incorporated in any statute. A failure to comply with that practice does not invalidate the hearing. See Habib v Elkington and Co [1981] ICR 435.

In conclusion, not only does Mr De Mello's reliance on these other statutory regimes not assist him, it serves only to emphasise the discrete position of SIAC and it's governing legislation.

11. Mr De Mello goes on to rely on the principles of equivalence and effectiveness and Article 47 of the Charter in support of the contention that SIAC should apply similar principles to those found in the procedures of the County Court and Employment Tribunal.

    He cites ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen Direktor Na Darzhaven Fond " Zemedelie "- Razplashtatelna Agentsia Case C-93/12 [2014] 1 CMLR 3 and in particular paragraphs 35 to 38 and 48.

12. Mr De Mello relies on the European Race Directive 2000/43/EC

    Recital 19 provides that "Persons who have been who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so determine, either on behalf of or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts.
    He emphasises that Article 7 provides:
    "Defence of rights
    1 Member States shall ensure that judicial and/ or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."

13. Ms Callaghan maintains that the principles of equivalence and effectiveness and Article 47 of the Charter do not require lay assessors or lay members to be appointed to hear FM's discrimination claim. She points out that Mr De Mello has produced no authority to support his proposition for the reason there is none. FM's rights are effectively protected by his claim being heard by a Commission constituted in accordance with the Special Immigration Appeals Commission Act.

14. We have carefully considered all Mr De Mello's contentions but we are wholly unpersuaded by them. We accept Ms Callaghan's arguments which are cogent.

    The plain fact is that the Commission has no power to appoint lay members or lay assessors and any attempt to do so would be ultra vires the Act.

We note that Parliament has had very much in mind in recent years matters of immigration, deportation and who should be or remain British citizens. No amendment of the powers of the Commission has been considered necessary to deal fairly with any discrimination claim which may arise.

That is for the very good reason that the present procedures are appropriate and fair for the determination of this matter.

Therefore even if we had been persuaded that the Act did not preclude us from appointing a lay member or assessor with specific expertise in race relations we would not have done so. In our judgment such a course would be wholly unnecessary in the circumstances as they exist here.