Appeal No: SN/56/2015
Hearing Date 11 October 2016
Date of Judgment: 24 November 2016

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE FLAUX
UPPER TRIBUNAL JUDGE KOPIECZEK
SIR ANDREW RIDGWAY

AFA

APPLICANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Applicant:	Mr S Saeed
Instructed by:	Aman Solicitors
Special Advocate:	Mr J Johnson QC and Ms S Rhaman
Instructed by:	Special Advocates Support Office
For the Respondent:	Mr Steven Gray
Instructed by:	Government Legal Department

OPEN JUDGMENT

JUDGMENT

The Honourable Mr Justice Flaux:

Introduction and factual background

1. The applicant, to whom we will refer as "AFA" is a national of Somalia who entered the United Kingdom on 7 March 2007. He claimed asylum and was granted indefinite leave to enter on 6 May 2009. On 16 March 2010, he applied for naturalisation pursuant to section 6(1) of the British Nationality Act 1981 which provides:

> "(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. Schedule 1 to the 1981 Act, as amended, provides that the requirements for naturalisation as a British citizen include that, inter alia, "he is of good character".

3. The applicant completed a naturalisation application form, section 3 of which addressed the requirement of good character and provided detailed notice of areas of potential concern to the Secretary of State. The introduction provided:

> *"In this section you need to give information which will help the Home Secretary to decide whether he can be satisfied that you are of good character. Checks will be made with the police and possibly other Government Departments, the Security Service and other agencies."*

4. Questions 3.10 and 3.11 in particular asked specific questions about involvement in terrorist activities. 3.10 asked: *"Have you ever been involved in, supported or encouraged terrorist activities, in any country? Have you ever been a member of, or given support to an organisation which has been concerned in terrorism?"* 3.11 asked *"Have you ever, by any means or medium, expressed views that justify or glorify terrorist violence or that may encourage others to terrorist acts or other serious criminal acts?"* 3.12 was then a general catch-all question: *"Have you engaged in any other activities which might indicate, that you may not be considered a person of good character?"* The applicant answered all these questions: *"No"*.

5. At the end of those questions was an italicised passage which specifically referred the applicant to the AN Guide: *"For the purposes of answering questions 3.9 to 3.12 please refer to the AN Guide which provides guidance on actions which may constitute war crimes, crimes against humanity, genocide or terrorist activities."*

6. The AN Guide which was extant at the time of the application and which the applicant would have been able to access had been revised in February 2009. It contained specific warnings about the need to fill in the application form carefully and truthfully:

> *"To be of good character you should have shown respect for the rights and freedoms of the United Kingdom, observed its laws and fulfilled your duties and obligations as a resident of the United Kingdom. Checks will be carried out to ensure that the information you give is correct.*
>
> *If you are not honest about the information you provide and you are naturalised on the basis of incorrect or fraudulent information you will be liable to have British citizenship taken away (deprivation) and be prosecuted. It is a criminal offence to make a false declaration knowing that it is untrue."*

7. In the section dealing specifically with questions 3.10, 3.11 and 3.12 in the application form, the Guide gave clear guidance in these terms:

> *"3.7 – 3.12 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 this was… If you are in any doubt as to 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.*
>
> *You must also say here whether you have had any involvement in terrorism. If you do not regard something as an act of terrorism but you know that others do or might, you should mention it…If you are in any doubt as to whether something should be mentioned, you should mention it."*

8. Later in the same Section under the heading Terrorist Activities, the Guide said:

> *"Any act committed, or the threat of action, designed to influence a government or intimidate the public and made for the purpose of advancing a political, religious or ideological cause and that involves serious violence against a person, that may endanger another person's life; creates a serious risk to the health or safety of the public; involves serious damage to property; is designed to seriously disrupt or interfere with an electronic system."*

9. Under the heading "Organisations concerned in terrorism" the Guide said:

> *"An organisation is concerned in terrorism if it:*
>
> *a. commits or participates in acts of terrorism;*
>
> *b. prepares for terrorism;*
>
> *c. promotes or encourages terrorism (including the unlawful glorification of terrorism), or*
>
> *d. is otherwise concerned in terrorism."*

10. The applicant was afforded every opportunity to bring to the attention of the Secretary of State any matters which were relevant to the question whether he was of good character. The applicant signed the declaration at section 6.1 of the application form, which was in these terms:

> *"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."*

11. Upon receipt of the application, the UK Border Agency ("UKBA") wrote to the applicant on 20 January 2011 asking for original documents providing alternative evidence of residence to fully cover the period from 5 January 2008 to 16 March 2010 because his self-assessment tax accounts did not give sufficient information. The letter stated:

> *"These documents are required in order to demonstrate to the Secretary of State that you satisfy the requirements for naturalisation; specifically that you meet the residence requirements for naturalisation."*

12. The applicant responded on 7 February 2011, providing a voluntary employment letter from his previous employer and original acceptance letter covering the period from 14 July 2008 to 4 October 2010. He also enclosed three tax credit letters from HMRC covering the relevant tax periods.

13. His application was then considered by a caseworker in the UKBA. The evidence is that the caseworker applied the relevant guidance contained in the

UKBA Staff Instructions. Annex D to Chapter 18 of those Instructions provides specific guidance on how to assess whether an applicant satisfies the requirement to be of "good character". Paragraph 2.1 provides that:

> *"Caseworkers will not normally consider a person 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…or*
>
> *b. they have been involved in or associated with war crimes, 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…or*
>
> *d. their activities were notorious and cast serious doubt on their standing in the local community…or*
>
> *e. they had practiced deceit in their dealings with the UK government…or*
>
> *f. they have assisted in the evasion of immigration control or*
>
> *g. they have previously been deprived and are seeking to re-acquire citizenship within a prescribed period."*

14. Paragraph 2.2 provides:

> *"Caseworkers should normally accept that an applicant is of good character if:*
>
> *(a) enquiries of other 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 on file to cast serious doubts on the applicant's character …"*

15. The caseworker concluded that the Secretary of State could not find that the applicant met the requirement to be of "good character", so the decision was taken to refuse the application. That decision was communicated to the applicant in a letter dated 21 February 2011 ("the refusal letter") which stated, inter alia:

> *"Whilst good character is not defined in the 1981 British Nationality Act, we take into consideration, amongst other things, the activities of an applicant, both past and present, when assessing whether this requirement has been satisfied.*

> *The Secretary of State will not naturalise a person for whom he cannot be satisfied that the good character requirement has been met.*
>
> *Your application for British citizenship has been refused on the grounds that the Home Secretary is not satisfied that you can meet the requirement to be of good character. It would be contrary to the public interest to give reasons in this case.*
>
> *The decision on your application has been taken in accordance with the law and our prevailing policy. There is no right of appeal against this decision, but if you believe it is incorrect, you should write to us stating which aspect of the law and/or our policy has not been applied correctly. Only if these details are provided can the application be reconsidered."*

16. On 8 March 2011, the applicant's then solicitors wrote to the Home Office requesting that his application be reconsidered stating, inter alia, that since arrival in the UK he had been engaged in part-time employment, first at a mosque in Mile End and, since January 2008, as a self-employed Arabic tutor teaching children at Poplar Mosque. They stated that he regularly filed his self -assessment tax returns with HMRC. He had also obtained an enhanced disclosure showing that he had no adverse criminal record.

17. The Home Office did reconsider the application, but maintained the refusal, confirming in a letter dated 13 March 2011 that:

> *"Your client's application was considered under section 6(1) of the British Nationality Act 1981. An individual, applying under this section, is required to meet a statutory [legal] requirement to be of good character. Good character is not further defined in nationality law, and a broad view has to be taken when judging whether this requirement is satisfied. We take into consideration, amongst other things, the openness and honesty of a prospective citizen when assessing whether this requirement has been satisfied.*
>
> *The Secretary of State* ***will not naturalise*** *a person for whom she cannot be satisfied that the good character requirement has been met."*

18. At the time of the refusal letter and this subsequent confirmation of the refusal of naturalisation, a refusal was only susceptible of challenge by way of judicial review. When a decision was made wholly or partly on material which it would be contrary to the public interest to disclose, a claim for judicial review, even on procedural grounds, was doomed to failure absent an error on the face of the record, since the Secretary of State could not be required to forego reliance on the sensitive material, there being at that time no CLOSED material procedure available: see *R (AHK and others) v SSHD* [2012] EWHC 1117 (Admin) at [5], [52]-[53] and [58]-[64] and *R (AHK and others) v SSHD* [2013] EWHC 1426 (Admin) 1426 at [85].

19. In those circumstances, Parliament enacted section 15 of the Justice and Security Act 2013, inserting, so far as relevant, section 2D (review of certain naturalisation and citizenship decisions) into the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"), giving the Commission jurisdiction to review a decision which the Secretary of State has certified 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.

20. On 1 September 2015, the Secretary of State wrote to the applicant's solicitors informing them that she was certifying this case under section 2D of the 1997 Act. On 10 September 2015, the applicant made the present application to set aside the decision to refuse his application for naturalisation.

21. Following service of material on which the Secretary of State relies in these proceedings and material disclosed pursuant to the duty of candour there was a Rule 38 process, following which, on 28 June 2016, the Secretary of State wrote a letter to the applicant's solicitors in the following terms:

> "Pursuant to Rule 38 of the Special Immigration Appeals Commission (Procedure) Rules 2003, we are now able to provide the following information in respect of the above matter: *"You were refused naturalisation due to your association with Zaki, who was involved in Islamist extremist activity in Somalia. This association was of interest to the Security Service".*
>
> The following is a summary of the relevant guidance applied in this case:
>
> *"The paragraphs in question informed the caseworkers that they should give careful consideration to any application from someone known to associate, or have associated, with individuals or groups involved in extremist/terrorist (or related) activities. Caseworkers were directed to ask themselves the following questions:*
>
> ● *Is there strong evidence to suggest the applicant associated with such individuals whilst unaware of their background and activities? If so, did the applicant cease that association once the background and nature of these individuals came to light?*
>
> ● *Is there strong evidence to show the applicant associated with such individuals in an attempt to counter or moderate their extremist views?*
>
> ● *Are there any suggestions that the applicant's association signals their implicit approval of their views and nature of these individuals extremist activities/background?*

● How long has this association lasted? The longer the association, the more likely that the applicant is aware of/approves of the activities and views.

● How long ago did such an association take place?

Caseworkers were informed that this list is not exclusive.

The relevant paragraphs go on to inform caseworkers that it is impossible to set 'rehabilitation' periods in this type of case and that each application will need to be considered on its own merit.

Caseworkers were instructed that an application may be able to satisfy the good character requirement if they:

● Were associated with an individual or group whilst being unaware of their backgrounds, even if their association was recent.

● Ceased such association as soon as they became aware of the background of the individuals.

● Presented strong evidence of choosing such associates with the aim of trying to moderate their views and/or influence over others.

Caseworkers were also instructed that they should normally refuse an application where:

● The applicant was associated for a significant length of time with such individuals; and/or

● Associated whilst being aware of their extremist views; and/or

● Provided little or no evidence to suggest they were seeking to provide a moderating influence.

One exception to this may be where association ceased many years ago. Caseworkers are reminded by the guidance that they will need to assess each application individually.""

22. In Amended Grounds for Review dated 26 July 2016 and in his submissions before us, Mr Saeed, the solicitor advocate for the applicant, put forward four grounds for contending that the decision to refuse the application for naturalisation should be set aside:

(1) That there was procedural unfairness in the decision-making process, because the Secretary of State had failed to identify areas of concern in

advance of making the decision and failed to give AFA a reasonable opportunity to address or rebut any such concerns before she made her decision;

(2) That the Secretary of State failed to give any adequate reasons for her decision, or indeed any reasons at all, in breach of a duty to give reasons for refusing AFA's application for naturalisation;

(3) That the decision to refuse naturalisation was *Wednesbury* unreasonable or irrational, specifically in saying that association with another person can lead to a decision that a person is not of good character.

(4) That for the same reasons as under Ground 3, the Secretary of State unlawfully fettered the discretion afforded to her in her policy.

23. Before considering those grounds in more detail, we propose to set out some of the legal framework against which this application is to be considered.

The legal framework

24. The burden of proof is on the applicant to satisfy the SSHD that the requirements of Schedule 1 to the British Nationality Act including that of good character are met on the balance of probabilities. If this test is not satisfied the Secretary of State must refuse the application. An applicant for naturalisation seeks the grant of a privilege not a right and the 1981 Act vests the Secretary of State with considerable discretion to refuse an application: see *R v. Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 736 per Lord Woolf MR at 776A and the decision of the Commission in *FM v SSHD* [2015] UKSIAC SN/2/2014 at [7].

25. The Secretary of State is able to set a high standard for the good character requirement. In *R v. Secretary of State for the Home Department ex p Fayed (No 2)* [2001] Imm. A.R. 134, Nourse LJ stated [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 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."

26. Likewise, 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."

27. The proper approach of the Commission to statutory review of refusal of naturalisation was established by the Preliminary Issues Judgment of the Commission in *AHK and others v SSHD* (SN/2/2014, SN3/2014 SN4/204 and SN5/2014) :

(1) 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. In that part of the review there is no place for deference to the Secretary of State: see [14] and [32].

(2) 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 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: see [23]-[24].

(3) Once the facts and inferences of fact have been reviewed, and if the factual or evidential conclusions drawn by the Secretary of State are found to be reasonable, the Commission should proceed to review the judgments made by the Secretary of State 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, for well-established reasons. The Minister has democratic responsibility and answers to Parliament; the Minister is entitled to formulate and implement policy; the Minister has expert advice to assist her conclusions. Here the task of the Commission is to interfere when and if the Secretary of State has been unreasonable, allowing for due deference paid": [32].

(4) 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. The challenge to the decision is open only on grounds of rationality; and even if ECHR rights are engaged, the exercise is still one of proportionality rather than a full merits review by the Commission: [22] and [24]. It would be very rare in this context for there to be a breach of Article 8 rights, in other words that interference with private or family life will be disproportionate, given the level of public interest in enforcing a legitimate immigration policy: [33].

28. The Preliminary Issues Judgment was the subject of an application by the Secretary of State to the Divisional Court for judicial review, specifically of the level of disclosure required in these cases of statutory review. The Divisional Court emphasised the importance of a careful review by the Commission of the facts said to justify the decision of the Secretary of State and the findings of fact by the decision-maker in circumstances where there was a closed material procedure. At [28] of his judgment, Sir Brian Leveson P said:

> "What is required is a complete understanding of the issues involved and a recognition by SIAC that the inability on the part of the Special Advocates to take instructions from the interested parties on the material covered by the closed procedure heightens the obligation to review that material with care. In that regard, the possibility that other (potentially innocent) explanations might be available to rebut it (or the inferences drawn from it) has to be considered."

29. He went on to say at [29] that this limitation on the ability to have a complete understanding of the position from the perspective of the applicant to contrast with the arguments of the Secretary of State was also of importance when it came to what material should be disclosed by the Secretary of State pursuant to the closed material procedure. At [38] he rejected the contention of the Secretary of State that disclosure should be limited to the summary prepared for the decision maker and any other document considered by the decision maker:

> "I agree with SIAC that it is not sufficient for CLOSED disclosure to be limited to the summary prepared for the Home Office official (or Secretary of State) plus any other documents not before the summary writer but taken into account by the official or the Secretary of State). On the other hand, if SIAC intended to require the SSHD to disclose everything that the report or summary writer might have been able to access in the preparation of advice for officials or the Minister, in my judgment, it was in error. I would require disclosure of such material as was used by the author of any relevant assessment to found or justify the facts or conclusions expressed; or if subsequently re-analysed disclosure should be of such material as is considered sufficient to justify those facts and conclusions and which was in existence at the date of decision. An appropriate declaration should be agreed by the parties accordingly."

The applicant's witness statements

30. In support of his application for review, the applicant has produced two witness statements. The first is dated 31 May 2016, in fact before the letter of 28 June 2016 and the second soon after it was sent, dated 19 July 2016. In those statements, the applicant gives evidence about how he knew Zaki at

university in Islamabad, that he had never heard him express extremist views and that they had only communicated once since the applicant had come to the UK, in an inconsequential exchange by email in 2007 or 2008.

31. Mr Gray submitted on behalf of the Secretary of State that the statutory review in cases under sections 2C and 2D of the 1997 Act was to be decided applying the principles of judicial review. One of those principles was that fresh evidence, such as these witness statements, is not ordinarily admissible. It is for the Commission to determine whether the procedure was fair, which is to be judged at the time of the making of the decision in question by reference to the material which was before the decision maker.

32. In any event, even if we were to admit this evidence, it is of limited assistance, and to be fair to Mr Saeed, he did not seek to make much of it. The only area where it was of some significance is in relation to a point made by Mr Gray, that the statements demonstrate that no evidence was served after the disclosure in the letter of 28 June 2016 which could not have been served before the disclosure, a point to which we return below.

No procedural unfairness

33. Although there were four grounds for review, at the outset of his oral submissions, Mr Saeed made it clear that the argument really centred upon the first and fourth grounds and accepted that if he could not succeed on those grounds, he would not succeed on his third ground. The first ground involves the submission that the Secretary of State acted unfairly by failing to identify her areas of concern in advance of making the decision and in failing to give the applicant a reasonable opportunity to address or rebut such concerns.

34. In support of this submission, Mr Saeed relied upon the well-known statement of the principles of fairness in public law by Lord Mustill in his speech in *R v SSHD ex parte Doody* [1994] 1 AC 531 at 560, in particular the fifth principle, that fairness will very often require that the applicant be given the opportunity to make representations before a decision is made:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards

> both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

35. Mr Saeed submitted that questions 3.10 and 3.11 in the application form focused on involvement by the applicant in terrorism or extremism, so he answered "No" to those questions because he had never done any of those things. Likewise, the Guide focused on the applicant and whether he had had any involvement in criminal activity or terrorism or extremism, not on other people's involvement in such matters or his association with or encouragement of such people. Nowhere does it say: "If you have associated with anybody who is involved in terrorism, you should mention that". Applying the *Doody* principle, the procedure was unfair. It gave the applicant no notice that the Secretary of State was concerned about association with people who were terrorists or extremists and, therefore, no opportunity to deal with those concerns.

36. When the Home Office wrote to the applicant after receiving the application, they raised queries about evidence of residence. They did not mention his associates or conduct or character. The focus of the letter was that the Secretary of State was not satisfied that he met the residence requirement. Nothing drew his attention to any concern about his character. This was misleading and unfair. In similar circumstances in the recent case of *AQH* [2016] SN/46/2015, the Commission had found that the procedure was unfair. Mr Saeed urged the Commission in the present case to also find that the procedure was unfair.

37. The fact that, in the letter of 28 June 2016, the Secretary of State had been able to provide the information: *"You were refused naturalisation due to your association with Zaki, who was involved in Islamist extremist activity in Somalia. This association was of interest to the Security Service"* indicated that the Secretary of State could have disclosed that information, in full or in summary, at the time of his application for naturalisation. In his written submissions, Mr Saeed relied particularly on the decision of the Commission in *ZG and SA* [2016] UKSIAC 1; SN/23/2015 and SN/24/2015, which he submitted was on all fours with the present case. In those cases, material was disclosed by agreement in the Rule 38 process in 2015, all of which gave detailed reasons for the refusal of the applicants' applications for naturalisation in 2007. The applicants contended that fairness required that that material should have been disclosed before the decisions refusing their applications were made. On behalf of the Secretary of State it was contended that these cases fell within the exception identified by Lord Woolf MR in ***R v***

SSHD ex parte Fayed [1998] 1 WLR 763, at 776H-777A, that the Secretary of State was relieved from disclosure for national security reasons. The Commission was not persuaded by that contention.

38. Having cited a passage from the judgment of Lord Sumption JSC in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700 at [31], the Commission concluded at [33] of its judgment:

> "Similarly here the material recently disclosed could have been disclosed prior to the decisions being taken or at least there could have been disclosed a gist or summary. It is to be noted that the disclosures were not made by order of the Commission but after discussion between the Special Advocate and Counsel for the Secretary of State."

39. In his oral submissions before us, Mr Saeed did not press this point, recognising realistically that it would be met with the same arguments for distinguishing *ZG and SA* as were accepted by the Commission in [38] to [40] of its OPEN judgment in *MNY* [2016] SN/53/2015. No doubt it was for the same reason that Mr Saeed did not develop his second ground of review in his oral submissions.

40. In resisting any suggestion that there had been procedural unfairness. Mr Gray on behalf of the Secretary of State relied upon the legal framework which we have set out above, in particular that naturalisation was a privilege not a right and the Secretary of State had a wide discretion. He submitted that there was no statutory requirement for the Secretary of State to invite representations prior to making a determination. What fairness requires in any particular case depends on the legal and factual context, as *ex parte Doody* makes clear. In this case, the application form provided the applicant with the opportunity to make out his case as to his good character. Furthermore, the refusal letter did indicate that the issue was character, which enabled his solicitors to make further representations and for there to be a reconsideration of the position by the Secretary of State in March 2011.

41. Mr Gray submitted that *ex parte Fayed* is not authority for the proposition that, as a general rule, a "minded to refuse" procedure should be adopted in applications for naturalisation. It establishes no more than that, in some circumstances, fairness can require disclosure of issues of concern before a determination. In that case, given the complexity of the affairs and backgrounds of the Fayed brothers, without an indication as to what were the areas of concern, it would have been impossible to know what information the Secretary of State wanted from them in relation to character.

42. In support of his submission that *ex parte Fayed* did not lay down a general rule that the Secretary of State should inform the applicant in advance of areas of concern, Mr Gray relied upon the summary of the effect of that case at [67] of the judgment of Sales J in *R (on the application of Thamby) v SSHD* [2011] EWHC 1763 (Admin):

> "In considering an application for naturalisation, it is established by the first Fayed case that the Secretary of State is subject to an obligation to treat the applicant fairly, which requires her to afford him a reasonable opportunity to deal with matters adverse to his application. In my view, that obligation may sometimes be fulfilled by giving an applicant fair warning at the time he makes the application (e.g. by what is said in Form AN or Guide AN) of general matters which the Secretary of State will be likely to treat as adverse to the applicant, so that the applicant is by that means afforded a reasonable opportunity to deal with any such matters adverse to his application when he makes the application. In other circumstances, where the indication available in the materials available to an applicant when he makes his application does not give him fair notice of matters which may be treated as adverse to his application, and hence does not give him a reasonable opportunity to deal with such matters, fairness will require that the Secretary of State gives more specific notice of her concerns regarding his good character after she receives the application, by means of a letter warning the applicant about them, so that he can seek to deal with them by means of written representations (as eventually happened in the Fayed case). Where there is doubt about whether the obligation of fairness has been fulfilled by means of the indications given by the Secretary of State at the time an application is made, she may be well-advised to follow the procedure adopted for the second Fayed case so as to avoid the need for argument about the issue in judicial review proceedings."

43. Mr Gray submitted that, in the present case, the elements of good character which were required to be satisfied were clear from the combination of the application form and the Guide, so that this case was one where, as Sales J contemplated, fair warning had been given of matters which would be treated as adverse to his application and the applicant had every opportunity to deal with them. No more was required for the decision made to be procedurally fair.

44. In answer to the submission that the disclosure made on 28 June 2016, specifically the information that: *"You were refused naturalisation due to your association with Zaki, who was involved in Islamist extremist activity in Somalia. This association was of interest to the Security Service"* could and should have been disclosed before the Secretary of State made the decision to refuse naturalisation, Mr Gray made two points. First he made the point (dealt with in more detail in relation to the second ground of review below) that, if it would be contrary to the national interest to disclose some or all of the relevant material to the applicant, there is no obligation or requirement on the Secretary of State to disclose it and that *ZG and SA* are clearly distinguishable. Second, he submitted that it was striking that there was nothing in the applicant's second witness statement served after the disclosure which could

not have been served before the disclosure, as the first statement really demonstrated.

45. As set out in more detail below, we agree with Mr Gray that *ZG and SA* are clearly distinguishable from the present case, essentially for the same reasons as the Commission gave in its recent judgment in *MNY*. Unlike the application forms in *ZG and SA* which provided no guidance as to what information as regards good character the Secretary of State required, we consider that the application form and the Guide in the present case provided the applicant with detailed assistance as to the sort of matters which would be of concern to the Secretary of State and afforded him the opportunity to set out, before the decision was taken, his case as to his character and to disclose any matters adverse to his application.

46. In any event, we were unimpressed with the suggestion on behalf of the applicant that, by analogy with *AQH*, until the disclosure on 28 June 2016, the applicant could not have known that he should deal in his application form with his association with Zaki, who was involved in Islamist extremist activity in Somalia. Question 3.12 was a general catch-all question: *"Have you engaged in any other activities which might indicate, that you may not be considered a person of good character?"* That was not merely focused on whether the applicant had engaged in terrorist or extremist activity, but was wide enough to encompass association with terrorists or extremists. The Guide also made it absolutely clear that, if the applicant was in any doubt as to whether something he had done might lead the Secretary of State to think he was not of good character he should disclose it and, if he was in any doubt as to whether something should be mentioned, he should mention it.

47. Furthermore, the burden was on the applicant to satisfy the Secretary of State of his good character. In those circumstances, the applicant could and should have disclosed any association with terrorists or extremists without any further prompting in the form or the Guide. Unlike the applicant in *AQH*, this applicant did not need the disclosure made on 28 June 2016 in order to disclose any such association, as is demonstrated by the fact that, as Mr Gray submitted, there was nothing in his second witness statement which could not have been set out earlier.

48. Equally, as set out in more detail in relation to the second ground below, in our judgment, there was no requirement by way of procedural fairness in the present case for the Secretary of State to provide to the applicant, before considering his application in February 2011, the information provided to him in June 2016.

49. For those reasons and the additional reasons set out in our CLOSED judgment, we have concluded that there was no procedural unfairness in the present case.

No obligation to give reasons

50. As we have already noted, Mr Saeed did not develop any submissions orally in relation to his second ground for review, that the Secretary of State had failed in her duty to give reasons for her decision, no doubt recognising realistically

that, in the light of the recent decision of the Commission in *MNY*, this argument was unlikely to succeed. Nonetheless, since the ground was developed in writing and Mr Gray addressed us on it on behalf of the Secretary of State, we will deal with it, albeit more shortly than in the case of the first ground.

51. As Ouseley J pointed out in *R (on the application of AHK and others) v SSHD* [2013] EWHC 1426 (Admin) at [29] the duty not to grant naturalisation unless satisfied the applicant is of good character cannot require the decision to refuse to be taken only on the basis of material which the Secretary of State has to or is willing to disclose. The decision has to be taken on the basis of all relevant material and, if it would be contrary to the national interest to disclose some or all of that material to the applicant, there is no obligation or requirement on the Secretary of State to disclose it. This was the point Lord Woolf was making in the passage in his judgment in *ex parte Fayed* which we quoted at [28] above.

52. Accordingly, Mr Gray submitted, the Secretary of State cannot be required to disclose material to the applicant which it would be contrary to the national interest to disclose. The matter was now before the Commission, which was uniquely placed, through the closed material procedure, to ensure procedural fairness in cases falling within section 2D of the 1997 Act.

53. Mr Gray submitted that this case was clearly distinguishable from *ZG and SA.* Those were cases where the relevant applications for naturalisation dated back to 2000 when the application forms which they completed simply asked about criminal convictions and did not otherwise refer to good character. So far as the guidance then in force is concerned, it gave no assistance as to good character in general, but only provided details of what constituted previous convictions to be disclosed or spent convictions. Mr Gray also submitted that it is clear that *ZG and SA* were cases turning on their own facts and not intended to establish a general principle that procedural fairness required disclosure of a gist at the time of the application.

54. We agree with Mr Gray that *ZG and SA* were cases turning on their own peculiar facts and not intended by the Commission to establish some general principle, as is clear from [41] of the judgment:

> "We are however satisfied on the evidence and arguments advanced before us that the process in these two cases was unfair and that the decisions should be quashed. The Secretary of State should reconsider the applications after giving the appellants a reasonable time to submit representations.
>
> We make it clear that we have reached this conclusion on the unusual history and facts of these two cases."

55. Not only are those cases not authority which provides any basis for concluding that the process adopted in the present case was unfair or required the Secretary of State to disclose at the time of the refusal letter in February 2011 the information subsequently provided in June 2016, but they are clearly

distinguishable. In those cases, the application forms provided no guidance at all as to what information as regards good character the Secretary of State required. In contrast, as we have already said, both the application form and the Guide in the present case provided the applicant with detailed assistance as to the sort of matters which would be of concern to the Secretary of State and afforded him the opportunity to set out, before the decision was taken, his case as to his character and to disclose any matters adverse to his application. In our judgment, there was no requirement in the present case for the Secretary of State to provide to the applicant before considering his application in February 2011 the information provided to him in June 2016.

56. For those reasons and the additional reasons set out in our CLOSED judgment, we have concluded that there was no obligation on the Secretary of State to give reasons for the refusal of the application.

The decision was not *Wednesbury* unreasonable and there was no fettering of discretion

57. In the light of the conclusions we have already reached, the applicant's third and fourth grounds can be dealt with together and relatively briefly. So far as alleged fettering of discretion is concerned, the submissions addressed to us by Mr Saeed, both orally and in writing concerned the summary of the relevant guidance to caseworkers in relation to Terrorism provided to the applicant in the letter of 28 June 2016. The point made was essentially a repetition of the first ground, that the applicant had been unaware until recently of the concern as to his association with Zaki and, if he had known about this at the time, he could have dealt with it. In those circumstances the Secretary of State should have exercised her discretion to find that he was of good character.

58. Mr Gray pointed out that, both as a matter of good administration and pursuant to her duty of candour, the Secretary of State would always consider, in any given case, post-decision representations or evidence put forward by an applicant or appellant. If such material caused her to conclude that her original decision was or might be flawed, she could revoke that decision. Alternatively, she could set out in OPEN or in CLOSED, as appropriate, why, notwithstanding the further material, she maintained her decision.

59. Mr Gray submitted that, in the present case, the contents of the applicant's two witness statements, one served before the Secretary of State sent the letter of 28 June 2016, the other after, do not undermine the decision to refuse him naturalisation and do not provide a factual foundation for requiring her to reconsider her decision. Accordingly the decision could not be said to be *Wednesbury* unreasonable. Those submissions were developed further in CLOSED.

60. Mr Gray submitted that the Secretary of State had applied her policy properly. The decision was in accordance with that policy and was not unreasonable. Nor could the Secretary of State be said to have unlawfully fettered her discretion in her approach to that policy. Those submissions were also developed further in CLOSED. Mr Gray also pointed out the further disclosure made on 28 June 2016 which, it was submitted on behalf of the applicant,

could have been disclosed at the time of the decision and made it procedurally unfair, had not led to the applicant providing in his latest witness statement any evidence which could not have been provided earlier, before that disclosure, as demonstrated by his first statement dated 31 May 2016.

61. We consider that there is no question of the Secretary of State not having applied her policy properly and there is nothing in the applicant's witness statements which undermines her decision to refuse his application for naturalisation or which should have caused her to reconsider that decision. The Secretary of State did not unlawfully fetter her discretion. We accept Mr Gray's submission that the decision was not *Wednesbury* unreasonable. Indeed, Mr Saeed accepted that, if he could not establish any unlawful fettering of discretion, he could not establish that the decision was *Wednesbury* unreasonable. Accordingly, for those reasons and the further reasons and analysis set out in our CLOSED judgment, the applicant's third and fourth grounds are not arguable.

Section 31(2A) of the Senior Courts Act 1981

62. Mr Gray had a fall-back position on behalf of the Secretary of State that, even if the decision to refuse naturalisation had been unlawful or procedurally unfair, the Commission should refuse the application if satisfied that the same decision would have been reached, even if the Secretary of State had acted lawfully.

63. Mr Gray relied primarily upon section 31(2A) of the Senior Courts Act 1981, inserted by section 84 of the Criminal Justice and Courts Act 2015, which provides that the High Court on a claim for judicial review must refuse relief 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. The sub-section applies to claims for judicial review filed after 13 April 2015.

64. It is submitted by Mr Gray that, since section 2D(3) of the 1997 Act requires the Commission on this application to apply the principles which would be applied in judicial review proceedings, the sub-section is one of the principles which the Commission must apply. The fact that the applicant had issued judicial review proceedings at an earlier stage (before the sub-section came into force) is irrelevant, as those were not transferred to SIAC, but adjourned generally. The relevant proceedings are those before the Commission which were not commenced until 10 September 2015. Accordingly, the Commission should conclude that the Secretary of State would have reached the same decision even if, on this hypothesis, she had acted lawfully, and should refuse the application on that ground.

65. This argument was also run on behalf of the Secretary of State in *ZG and SA:* see [38]-[40] of the judgment, where the rival argument on behalf of the applicants was set out. The Commission did not find it necessary to resolve the conflict because it was not satisfied that it was highly likely that the outcome would not have been substantially different. The argument was also raised in *MNY* where the Commission did not find it necessary to decide the point in

view of its decision that the application for statutory review failed, and in *AQH*, where the Commission concluded that it too did not need to resolve the issue about the application of section 31(2A) of the Senior Courts Act 1981, because judicial review (and therefore statutory review under section 2D of the 1997 Act) is always discretionary and the Court would ordinarily refuse the relief sought if it concluded that, even though a decision or action of a public body was unlawful, the same decision or action would have been taken if the public body had acted lawfully. Since the Commission in that case considered that the application for naturalisation would always have been refused, even if the applicant had been afforded the opportunity to make representations about the matters of concern to the Secretary of State, it exercised its discretion to refuse any relief.

66. Since we have concluded that the decision of the Secretary of State was lawful and the grounds of review all fail, it is not strictly necessary for us to consider this point. Like the Commission in the earlier cases, we would prefer to leave determination of the point as to whether section 31(2A) of the Senior Courts Act 1981 applies to cases before the Commission to a case where it is critical to the decision. However, irrespective of whether the section applies or not, in agreement with the Commission in *AQH*, we consider that as a matter of discretion, the relief sought by the applicant should be refused, because, even if the Secretary of State acted unlawfully, it is quite clear that the same decision to refuse the applicant's application for naturalisation would have been made if the Secretary of State had acted lawfully.

Conclusion

67. We should add that in our CLOSED judgment we have considered with care the closed material disclosed by the Secretary of State and are quite satisfied that both the findings of fact by the caseworker at the UKBA that the applicant could not satisfy the requirement of good character and the decision as a consequence to refuse his application for naturalisation were reasonable and justified.

68. The application to set aside that decision is dismissed.