SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SN/37/2015

Hearing Date: 27th & 28th June 2017

Date of Judgment: 7th August 2017

Before:

THE HONOURABLE MRS JUSTICE ELISABETH LAING

UPPER TRIBUNAL JUDGE CRAIG

MR N JACOBSEN OBE

AH

APPLICANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Applicant: Mr E Grieves
Instructed by: CLP Solicitors

Special Advocate: Mr A Underwood QC and Ms J Carter-Manning
Instructed by: Special Advocates Support Office

For the Respondent: Mr J Blake
Instructed by: Government Legal Department

OPEN JUDGMENT

AH open

1. A person may apply for naturalisation as a British Citizen. If the Secretary of State is satisfied that the person meets the requirements of Schedule 1 to the British Nationality Act 1981 ('the 1981 Act') the Secretary of State may grant that application (see section 6 of the 1981 Act). By paragraph 1(b) of Schedule 1, one of the requirements is that the applicant be of good character.

2. This is our open judgment on an application to the Special Immigration Appeals Commission ('the Commission') for a review of a decision of the Secretary of State for the Home Department ('the Secretary of State') to refuse an application by the applicant, AH, for naturalisation. The Secretary of State refused that application on the grounds that AH was not of good character. She said that the application had been refused for reasons which it was contrary to the public interest to disclose. As a result, much of our consideration of the decision and of the challenges to it is in our closed judgment, which supplements this open judgment. Our overall decision is that the challenges fail, but we are able only to deal with part of the reasons why in this open judgment.

3. AH was represented by Mr Grieves and the Secretary of State by Mr Blake. Mr Underwood QC and Ms Carter-Manning were the Special Advocates. We thank all the advocates for their helpful written and oral submissions.

A brief summary of the relevant legal principles

4. The burden is on an applicant to show that he is of good character. If the Secretary of State is not satisfied that an applicant is of good character and has good reason not to be satisfied of that, she is bound to refuse the application: *R (SK (Sri Lanka)) v Secretary of State for the Home Department* [2012] EWCA Civ 16 at paragraph 31.

5. The 1981 Act confers a wide discretion on the Secretary of State: *R v Secretary of State for the Home Department ex p Fayed* [1998] 1 WLR 763 at p 776A. The

Secretary of State is entitled to set high standards, subject to *Wednesbury* principles (see *R v Secretary of State for the Home Department ex p Fayed (No 2)* [2001] Imm AR 134 at paragraph 41). Because the Secretary of State is democratically accountable to Parliament for her policy and decisions in this field, the Commission has held that 'due deference' will be given to her decisions: see *AHK v Secretary of State for the Home Department* (SN/2-5/2014) Preliminary Issues Judgment 18 July 2014.

6. The Secretary of State issues, and periodically amends, guidance to caseworkers who make decisions on behalf of the Secretary of State whether the Secretary of State is satisfied that an applicant for naturalisation is of good character. In *SK (Sri Lanka)*, at paragraph 36, the Court of Appeal also considered the role of that guidance. The guidance consists of 'practical instructions' to decision makers to help them to make decisions. Because the Secretary of State cannot waive the statutory requirement that an applicant be of good character, the guidance 'cannot require her to accept the good character of an applicant who could not sensibly be regarded as such'.

7. The courts have considered what fairness requires of the Secretary of State before she makes such a decision. The requirements will vary from case to case, as Lord Woolf noted in *R v Secretary of State for the Home Department ex p Fayed* [1998] 1 WLR 763 (at pages 776H, 777B, 776H-777A). In some cases, the Secretary of State should identify any concerns she may have in order to enable an applicant to deal with them. However, if to do so would involve the disclosure of material which it is not in the public interest to disclose, she will not be required to give advance notice of those concerns. What reasons, if any, the Secretary of State is required to give for her decision will also depend on the extent to which explaining the decision will involve the disclosure of material which it is not in the public interest to disclose.

8. In *R (Thamby) v Secretary of State for the Home Department* [2011] EWHC 1763 (Admin) Sales J (as he then was) rejected the argument that fairness ordinarily required the Secretary of State to interview an applicant personally. At paragraph 67 he considered how the Secretary of State might give applicants an opportunity to deal with her concerns. One way is by means of published guidance to applicants which tells them what general points the Secretary of State may take into account. The application form gives some help, and a document is published with it which gives

applicants a general steer. Sales J said that where fair notice has not been given in that way and an applicant has not had a reasonable opportunity to deal with the Secretary of State's concerns, she may be required to write to him and warn him about her concerns. That case was not a case in which the Secretary of State argued that it was against the public interest for her to disclosure information to the applicant about her concerns.

9. Before 25 June 2013, challenges to refusals of naturalisation applications were made by an application for judicial review in the Administrative Court. There was much litigation about how those challenges could be conducted in cases in which the Secretary of State refused naturalisation for reasons which it was not in the public interest to disclose. Ouseley J decided in *AHK v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin), following the decision of the Supreme Court in *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, that the common law did not permit a closed material procedure in such cases. At that stage 40 such applications for judicial review were stayed. He went on to decide in *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin) at paragraph 79 that in the absence of full disclosure (which the Secretary of State was not bound to provide) and a closed material procedure, the claimants were bound to lose.

10. In due course, Parliament permitted a closed material procedure in such cases. Section 2D of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act') confers jurisdiction on the Commission to review refusals of naturalisation by the Secretary of State if the Secretary of State certifies that the relevant decision was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public on various grounds. The Commission must apply the principles which would be applied on an application for judicial review of the decision (section 2D(3)).

11. In *AHK v Secretary of State for the Home Department* (18 July 2014) the Commission decided some issues about the procedure to be followed in such cases. There are three principles which are relevant to this case.

    i. It is not for the Commission to decide issues of fact for itself.

ii. The Commission must not stray into substituting its own view of the facts for that of the Secretary of State.

iii. The onus is on the Secretary of State to give full disclosure to the Commission: the scope of obligation was defined by the Divisional Court in *R (Secretary of State for the Home Department) v SIAC* [2015] EWHC 681 (Admin); [2015] 1 WLR 4799. At paragraph 28 the Divisional Court said it was important for the Commission to have a full understanding of the issues involved and that it must recognise that because the Special Advocates could not take instructions from their clients on the closed material, the Commission has a heightened obligation to review that material with care, and should bear in mind that there could be an innocent explanation for it. The Divisional Court explained the scope of the disclosure obligation in paragraph 34. In paragraph 38 it summarised its conclusions about that obligation.

12. The Guidance to caseworkers was revised at some stage in 2014. It says that it applies to all decisions made on or after 11 December 2014. It says that to enable the Secretary of State to decide if applicants are of good character, they must 'answer all questions asked of them in the application process honestly and in full'.

13. Among other provisions, paragraph 4.6 is headed 'Association with Known Criminals'. Decision makers are to weigh up the extent of the applicant's connections with the criminal(s) concerned and the known impact of their activities. It is not enough that person simply knows a known criminal.

The facts

14. On 23 November 2003 AH applied for naturalisation. He had at that stage been in the United Kingdom since 1994.

15. When he filled in his application form the Guidance AN, which was given to applicants for naturalisation, said in paragraph 33 that the Secretary of State 'must be satisfied that you are of good character. You should disclose any information which may be relevant to this question'. Examples were then given, such as criminal convictions, civil judgments, payment of tax and NIC, and 'other activities which may

indicate that you are not a person of good character'. The Guidance went on (paragraph 40), 'You must say whether you have ever been engaged in any activities which may indicate that you are not a person of good character. You must give this information no matter how long ago this was. If you are in any doubt about whether something you have done or are alleged to have done would be regarded as relevant to whether you are a person of good character, you should mention it'. The onus was clearly on AH to disclose any material that might be relevant to whether he was of good character, and to disclose such material even if he doubted its relevance to that issue.

16. The rubric to AH's completed application form said 'IMPORTANT: Before completing this form, please read the enclosed guide'. Above question 3.10, a text box said, 'You must disclose details of any activities which might be relevant to the question of whether you are a person of good character (see paragraphs 40-41in the Guide). You must answer 'YES' or 'NO' to the following questions. If you answer 'Yes', you must give full details on a separate piece of paper'. Question 3.13 was 'Have you ever engaged in any other activities which might be relevant to the question of whether "you are a person of good character" AH ticked the 'No' box. He declared in Section 7 that to best of his knowledge and belief, the information he had given in the form was correct. He promised to tell the Secretary of State if there was any change in his circumstances. Under the heading for Section 7 was a warning that it is a criminal offence to give false information on the form.

17. On 22 May 2004 AH was told that his application had been successful. On 7 July 2004 he was told that that was a mistake. His application was eventually refused on 23 April 2008. The letter referred to the good character requirement and said that 'For reasons which it would not be in the public interest to disclose, the Home Secretary is not satisfied that the requirement is met. Your application is therefore refused'. AH asked for a review of that decision. The refusal was maintained on 24 July 2008. AH lodged an application for judicial review on 5 December 2008. His main ground for that application was, in effect, a reasons challenge.

18. Permission to apply for judicial review was granted on 9 December 2008. AH's application was stayed behind *AHK*. On 21 January 2011 AH's solicitors wrote to the Administrative Court. They referred to the stay, to which they had agreed in 2009,

and again in 2010. They then said that they 'ask the Secretary of State to reconsider the decision under challenge in this claim. This is based on the opinion that the Claimants [sic] case has been wrongly classified by the Secretary of State and it is not one which requires a Special Advocate'. They also asked the case to be removed from 'the list of cases in order to avoid the risk of the parties needlessly expending resources and to avoid wasting the Courts' time and money'. They referred to attached statements from people 'with standing in society' in support of AH. They asked the Court to note that (as indeed it had) the letter had been copied to the Secretary of State.

19. There was some debate in the open hearing about the correct construction of this letter, and the accompanying letter to the Secretary of State. We consider that it is somewhat odd that the only substantive letter was addressed to the Court, and it seems to us that this may explain, and is a sufficient explanation for our purposes, why the Secretary of State did not appreciate that AH was asking for his application to be reconsidered in 2011. Nonetheless, on a fair reading of this letter, it seems to us that, albeit not very clearly, AH's solicitors were asking for this case not to be treated as a stayed case and were asking the Secretary of State to reconsider the case. It would be pointless for us to speculate about why the Secretary of State did not reconsider the case then, although it seems likely that she did not realise that AH was asking for his case to be reconsidered. We do not consider that she was obliged to reconsider the case in 2011, if for no other reason than that AH was not offering to withdraw his application for judicial review as a quid pro quo. In any event, given the procedural quagmire in which these claims were stuck, even if the Secretary of State had reconsidered and (as we consider is highly probable) had refused the application again, any further challenge (if made) would have been stayed like the other cases. In other words, we do not see what, if anything, AH has lost as a result of these events.

20. On 28 July 2011, the High Court ordered all the pending cases to be stayed. There was further litigation and in due course, as we have explained, the 1997 Act was amended so as to confer a right of statutory review on an unsuccessful applicant for naturalisation. On 1 July 2015, the Secretary of State certified the decision in this case under section 2D of the 1997 Act. The Commission then made various directions which the Secretary of State did not comply with. The Secretary of State did not apply for a stay.

21. She told AH on 21 January 2016 that she was considering withdrawing the 2008 decision, and on 5 February 2016, she did so, shortly after the date for which a rule 38 hearing had been listed (18 January 2016). The consequence, by the operation of the rules of procedure governing hearings by the Commission, was that AH's application for a review of the 2008 decision was automatically treated as withdrawn (see rule 11A(2) of the Special Immigration Appeals Commission (Procedure) Rules 2003).

22. There was a closed, and then an open, hearing by the Commission on 3 March 2016. The Commission confirmed that the application was treated as withdrawn. AH's representatives expressed concerns that the timing of the withdrawal of the decision might have deprived them of information which they might have received as a result of the rule 38 hearing. During the 3 March hearing, Flaux J said, 'If and to the extent that there had been any attempt to seek a tactical advantage by withdrawing the original decision, then it seems to me that, pursuant to the duty of candour… the Secretary of State would be obliged to disclose the reasons for withdrawing the decision'.

23. On 10 March 2016, the parties signed a consent order. It recited that the Secretary of State had withdrawn her decision, that AH had agreed to submit further evidence within six weeks, and that the Secretary of State had agreed to make a fresh decision within 14 weeks (absent special circumstances). It provided that AH had leave to withdraw his application for judicial review and that the Secretary of State would pay his costs.

24. AH made further representations on 26 April 2016, without knowing why the application had been refused in 2008.

25. In those representations, presumably drafted by his lawyers, he specifically addressed two matters which he would like to bring to the Secretary of State's attention. First, he was acquitted by a jury of a charge of as far as he recalls, causing actual bodily harm in 1998. We accept Mr Grieves' submission that AH was not obliged to disclose that in his 2003 application. As he was acquitted of the charge, there was no stain on his character to disclose. Second, he disclosed his friendship with 'Ali', between 1998 and 2002 when Ali was arrested and imprisoned for a serious criminal offence. AH said that he had dissociated himself from Ali when he became aware of that

criminality and was unaware of any criminal activities by Ali during their friendship. Neither matter, it was said, reflected adversely on his good character.

26. AH also submitted a witness statement dated 25 April 2016. In sum, he said that he worked as a club doorman to support himself through university. He described the incident which led to his criminal trial and acquittal by the jury. He had been acquitted after 20-30 minutes of deliberation.

27. He met Ali in about 1998. They became friends. Ali drove nice cars and said that his family owned a meat factory and slaughterhouse in Ireland, and that had shares in a packaging company. Ali insisted that they go clubbing together. AH never saw anything untoward about Ali. Some people used to joke that AH was Ali's body guard, which was untrue. They used to socialise together and AH was much taller than Ali.

28. AH managed to get a work placement for his sandwich course. He worked very hard and did very well. He stopped working as a doorman and saw less of Ali. Ali wanted him to work in Ali's family's meat business when he graduated but AH did not want to. Ali separated from his wife and had a new girlfriend. AH and Ali and Ali's new girlfriend socialised together, mainly in West End restaurants. In early 2002, he had a phone call from Ali's girlfriend. She told him Ali had been arrested. She said the police had found a gun at Ali's place. AH was shocked. He did not know Ali owned a gun. He then avoided calls from her.

29. Edin Hamzic, a friend of AH, who was an investigative journalist for the Sunday Times, helped Ali and his girlfriend. Edin told AH that Ali was in Brixton prison and had been charged with serious criminal offences. Edin put emotional pressure on AH, he thinks in 2002, to join Edin in a visit to Ali in prison. AH went to the prison but was not allowed to visit Ali because he was not on the list of visitors.

30. AH submitted with his representations an impressive array of statements from character witnesses. Some are dated 2016, and some 2008 and 2009.

31. AH's application was again refused, on 13 September 2016, on the grounds that AH had failed to satisfy the Secretary of State of his good character. The Secretary of State said that it would be contrary to the public interest for her to disclose the reasons

for her decision. She certified the decision and AH applied to the Commission for a review of the decision.

32. On 15 March 2017, after a rule 38 hearing, AH was given some information about the decision. He was told, 'In addition to other considerations, the Secretary of State took into account the Appellant's previous association with Ali Cevdet DILMAN, who was convicted in 2009 of offences concerning the importation of heroin and in 2002 of possession of firearms. The representations made by [AH] in support of his application have been considered and there is nothing contained within the same that casts doubt on the reliability of the assessments and information referred to in the CLOSED report'.

33. After the open and closed hearings, the Secretary of State disclosed some further material to AH from the decision-maker's closed witness statement. In her third statement dated 30 June 2017, the decision maker confirmed that 'in the CLOSED version of my second statement, I stated that the information which was provided to AH during the Rule 38 process is not a statement of the reasons for the refusal'.

AH's arguments

34. In summary AH relies on seven arguments.
    a. The Secretary of State should have given, but did not give, fair notice of her concerns; she erred in not giving the gist earlier and in not giving AH opportunity to comment on that material.
    b. There was an error in her reasons; they too should have referred to that gist, and they did not refer to all the evidence AH submitted.
    c. There was delay. The Secretary of State has not explained why there was no reconsideration in 2011, or why Ms Fuller has inferred in her witness statement that there was no such request, nor why the Secretary of State decided to withdraw the 2008 decision when she did. It seems that the Secretary of State delayed reconsidering the decision until there were more favourable instructions or in order to avoid revealing information to AH about Dilman in order to prevent AH from addressing that information.
    d. If the Secretary of State relied on restricted guidance, that should be published.
    e. The Secretary of State failed to apply the relevant guidance and/or to take into account relevant considerations. She has not weighed any potency of historic

concerns against the evidence of good character provided by AH. He has not associated with Dilman for about 15 years and has led a positively good life since then.

f. She has taken into account an irrelevant consideration: that is, Dilman's conviction in 2009 for events which took place after AH stopped associating with him.

g. It was irrational for her to rely on that association.

35. In his oral submissions, Mr Grieves concentrated on his arguments about fairness and reasons. He accepted that he could not take the arguments at sub-paragraphs c., d., f., and g. of the previous paragraph any distance in the open part of the hearing and that they would have to be explored in the closed part of the hearing. We agree with that analysis. Indeed, we cannot, in our judgment, deal properly with point e. without considering the terms of the reasoning in support of the decision, which is all in the closed material.

36. He submitted that AH had been deprived of the chance to influence the Secretary of State by submitting material he has now submitted about Dilman, including a witness statement from Dilman. He had no prior notice of what the Secretary of State was concerned about and no opportunity to deal with it. He submitted that the authorities show that in a case where there is no public interest in withholding disclosure, the Secretary of State is obliged to give advance notice of her concerns. The fact that the Secretary of State disclosed the rule 38 gist showed that the Secretary of State did not consider that the public interest required her not to disclose that material. It followed that she should have disclosed it before she made the decision, in order to enable AH to deal with it.

37. He submitted that the Secretary of State should not have withdrawn the 2008 decision before the rule 38 hearing because by doing that, she deprived AH of information that he was entitled to have. Once AH had the gist, he knew what the Secretary of State's actual, as opposed to 'spectral' concerns were. That material should have been provided in a 'minded-to-refuse' letter.

38. He accepted that the disclosure of information in the rule 38 gist did not automatically mean that it should have been disclosed earlier, but that it got him 'to first base'. It

enabled AH to get in contact with Dilman, whose full name he did not know; Mr Dilman's evidence is that AH did not know of his criminal activities and did not know his full name. He also accepted that the gist made it clear that the association with Dilman was not the only reason for the Secretary of State's decision: the words in the gist mean that 'there is another target'. The decision maker's third statement is relevant to this.

39. The full picture, Mr Grieves submitted, is that AH is an upstanding member of society. The full picture was that he is a very hard-working, diligent, community-oriented, family man. He had made an incredible success of his life. He worked through the night to fund his degree and became a very successful business man, who has attracted many friends and admirers, as the documents submitted with his representations show. He would expect the decision maker to address in her conclusions, in open or in closed, this wealth of evidence.

40. He made several submissions about the decision maker's approach which, we consider, are best dealt with in our closed judgment. He submitted that it was important to know
    i. what weight the decision maker had given to her historic suspicions and whether those might be wrong;
    ii. whether she had considered possible innocent explanations;
    iii. whether she had given the right weight to the historic nature of the concerns; and
    iv. whether she had given appropriate weight to the evidence of AH's witnesses, who were willing to be contacted to give further information.

An outline of our approach

41. We will say as much as we can about AH's open arguments in this judgment, but it is not and cannot be a complete picture of our reasons. This is because the reasons for the decision have not been disclosed, and the target of many of AH's arguments, in one way or another, is the content of those reasons. It is necessary, therefore, for our open judgment to be read with our closed judgment, which supplements our open judgment.

The open reasons for our decision

42. We consider that, on the facts of this case, AH fairly was put on notice by the application form and by Guide AN of all the matters he had to disclose to the Secretary of State on his application form. Mr Grieves submits that AH was deprived of an opportunity to make representations about the matters disclosed in the gist. In our judgment, he was not, as, without any prompting by the Secretary of State (apart from the 2008 refusal) AH volunteered information about Dilman in his 2016 representations. There is some correspondence between the content of those representations and the gist. AH therefore had, and took, an opportunity to influence the Secretary of State's thinking by making disclosure about Dilman in his representations. We are, frankly, sceptical about the suggestion that AH did not know 'Ali's' full name, having regard to all the information about AH's association with Dilman in AH's witness statement, and the information in that statement about AH's friend Edin, and Edin's perhaps closer association with Dilman.

43. In the light of that reasoning, we do not consider that any interview was required to give AH fair notice of the Secretary of State's concerns; and we accept, in any event, the reasons given by the decision maker in her second open statement for not interviewing AH.

44. We do not consider that the decision maker erred in not referring in the reasons for the 2016 decision to the material which is in the gist. First, it is clear from the terms of the decision that the reasons for the decision cannot be disclosed in the public interest. Second, it is clear from the decision maker's third statement that the gist does not encapsulate the reasons for the decision, and we consider that the gist is not an adequate proxy for the full reasons. On its own, it would, at best, be apt to cause confusion, and, at worst, it would be misleading. That being so, and in the light of the fact that the reasons for the decision could not be disclosed in the public interest, the decision maker did not err in law in referring to the gist in the decision.

45. We turn to ground c. We have already dealt with the argument that the Secretary of State should have reconsidered her decision in 2011 and has not explained why she did not. The remaining points in this ground in effect suggest that, by deciding to

reconsider the 2008 decision in 2016, the Secretary of State was, in effect, abusing her power. We reject any such argument for the reasons given our closed judgment.

46. We also reject any argument that she timed the reconsideration in order to avoid having to reveal information about Dilman. We have already explained why we do not consider that the Secretary of State acted unfairly, or erred in law, in not disclosing the gist to AH before, or with, the decision. Let us go along with AH's train of argument and speculate, for a moment, that the Secretary of State would have been ordered to disclose the gist at a hypothetical rule 38 hearing on a date before she withdrew the 2008 decision. We do not consider that AH has suffered any unfairness as a result of the Secretary of State withdrawing the decision when she did, with the result that there was no rule 38 hearing in January 2016 in relation to the 2008 decision. AH was able, without the gist, to make such disclosure as he chose about Dilman in his April 2016 representations.

47. That is the extent to which we are able to consider Mr Grieves' grounds of challenge in our open judgment.