SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SN/46/2015
Hearing Date: 12th July 2016
Date of Judgment: 30th September 2016

BEFORE:

SIR BRIAN KEITH
UPPER TRIBUNAL JUDGE FREEMAN
MR WILLIAM FELL CMG

BETWEEN:

AQH

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR.N.AHMED (instructed by SH & Company Solicitors) appeared on behalf of the Applicant.

MR.S.GRAY (instructed by The Government Legal Department) appeared on behalf of the Respondent.

MR.C.CORY-WRIGHT QC (instructed by the Special Advocates' Support Office) appeared as Special Advocate.

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OPEN JUDGEMENT

AQH v Secretary of State for the Home Department

Introduction

1. The applicant applied for naturalisation as a British citizen. The application was refused because a caseworker in the Home Office's Nationality Team was not satisfied that the applicant had met the requirement that he was of good character. The applicant is now challenging the refusal to grant him a certificate of naturalisation by using the new procedure created by section 2D of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"), namely by making an application to the Special Immigration Appeals Commission ("SIAC") to set aside the decision. An order has been made for the applicant to be anonymised, and he has been referred to in these proceedings as AQH. In accordance with SIAC's usual practice, we do not say whether those are his initials or whether they have been chosen at random.

2. One important feature of the case should be noted at the outset. Section 2D of the 1997 Act only applies where the Home Secretary has certified that the decision not to grant someone a

certificate of naturalisation was made, in part at least, in reliance on information which the Home Secretary concluded should not be made public in the interests, amongst other things, of national security. This was such a case, and so with the help of a special advocate, we have considered the basis on which the caseworker concluded that AQH had not satisfied the requirement that he was of good character, as well as the underlying documents which informed the assessment on which that conclusion was based. Such a procedure – known as a closed materials procedure – is, of course, not uncommon in SIAC. It was that feature of SIAC's jurisdiction – unlike that of the High Court on claims for judicial review in which a closed materials procedure is not permitted – which resulted in the enactment of section 2D. That has meant that, in addition to this open judgment, there is a closed one as well.

3. With that exception, the procedure created by section 2D of the 1997 Act incorporates the principles which would apply in claims for judicial review. The nature of judicial review always depends on its context, and the context here is that AQH and his legal team have not seen the materials which informed the

assessment on which the caseworker based her conclusion that AQH had not satisfied the requirement that he was of good character. Moreover, although the materials have been seen by the special advocate, he cannot take AQH's instructions on them. It was things like that which led Sir Brian Leveson, when giving the judgment of the Divisional Court in *Secretary of State for the Home Department v Special Immigration Appeals Commission* [2015] EWHC 681 (Crim), to say at [28] and [29]:

"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 … It is the reason why it is not appropriate to look at the principles … which apply in other areas of judicial review where the claimant will be able to challenge in full the reasons advanced for the decision not only as to relevance but also accuracy and completeness."

We have borne that in mind throughout the case, and we have considered the issues which the case raises with the heightened level of scrutiny which the Divisional Court had in mind, bearing in mind that Parliament must be taken to have intended the new procedure provided for by section 2D to provide an effective forum for the determination of the lawfulness of a decision to refuse someone a certificate of naturalisation.

The relevant facts

4. AQH comes from Somalia. We do not state how old he is or what his domestic circumstances are for fear of identifying him. He first came to this country sometime after 2000. It is unclear whether he was actually granted asylum here, but in due course he was granted indefinite leave to remain in the UK. His application for naturalisation as a British citizen was received by the Home Office in July 2008. It was made under section 6(1) of the British Nationality Act 1981. The requirements for naturalisation as a British citizen under section 6(1) are set out in para 1(1) of Schedule 1 to the Act. They include the

requirement that the applicant must be of good character. It is for the applicant to satisfy the Home Secretary that he or she is of good character, and if the Home Secretary is not satisfied of that, the application has to be refused: see, for example, *Secretary of State for the Home Department v SK (Sri Lanka)* [2012] EWCA 16 (Civ) at [31].

5. It took some time for AQH's application to be considered. Whether there was any information about AQH on the Police National Computer had to be checked. There was no such information, but a number of other inquiries had to be made as well. As we have said, AQH's application was not considered by the Home Secretary personally but by a caseworker in the Home Office's Nationality Team. The caseworker had to consider the application in the light of the guidance given to caseworkers about how they should go about their task of assessing whether someone satisfies the requirement to be of good character. The caseworker's conclusion was that AQH had not satisfied the requirement that he was of good character, and accordingly the caseworker, acting in the name of the Home Secretary, refused to grant AQH a certificate of naturalisation.

That decision was brought to AQH's notice by a letter from the Home Office dated 4 September 2009. That is the decision which AQH is seeking to have set aside.

6. No reasons were given for the caseworker's conclusion that AQH had not satisfied the requirement that he was of good character. The letter of 4 September 2009 said that it would be contrary to the public interest to do so. AQH's solicitors wrote to the Home Office asking what those reasons were. That letter was treated as a request for AQH's application for naturalisation to be reconsidered, but by a letter dated 8 October 2009 the original decision was maintained. It looks as if a different caseworker made that decision, as the letter was written by another member of the Home Office's Nationality Team.

7. AQH lodged a claim for judicial review of the original decision. The claim was stayed along with many other similar claims in which the Home Secretary had declined to give reasons for refusing applications for naturalisation as a British citizen on the basis that to do so would be harmful to national security. They

were all to await the decision of the courts about whether a closed materials procedure applied to such claims. Eventually, the courts decided that such a procedure could not be adopted in these claims even with the parties' consent, save for such closed hearings as were necessary to determine claims for public interest immunity. The solution to the problem was the creation of the new procedure provided for by section 2D of the 1997 Act. That came into force on 25 June 2013. In due course, the Home Secretary certified that the decision not to grant AQH a certificate of naturalisation was made, in part at least, in reliance on information which the Home Secretary concluded should not be made public in the interests, amongst other things, of national security. AQH's solicitors were notified of that by letter dated 1 September 2015, and that enabled AQH to apply to SIAC to set aside the decision to refuse his application for naturalisation. This is SIAC's judgment following the hearing of that application.

8. AQH filed a witness statement in support of his application. It was dated 8 June 2016. In it he claimed that he had no idea why the Home Secretary had concluded that he had not satisfied the

requirement to be of good character. He said that he could only think that it had been something to do with what had happened following his return from a holiday in Bangkok during which he had lost his travel document. When he had arrived at Heathrow Airport, he had been questioned about his visit to Thailand at some length by an immigration officer. Shortly afterwards he had been approached by a woman claiming to work for MI5. She had asked him whether he supported any Islamic groups or whether he knew anyone in the Somali community who was "against the UK Government or related/supporters of the Islamic group". She had also asked him whether he would be prepared to provide any information of that kind to her. He had told her that if he heard anything, he would provide the information to her. He talked of other conversations with the woman along similar lines until there came a time when he had decided not to help her any more. He did not say so in so many words, but you get the impression that he was hinting that he thought that his application had been refused because he had refused to continue to be a source for MI5.

9. By then consideration had been given to what information could be given to AQH and his legal team about why he had not been regarded as having satisfied the requirement of good character. On 14 June 2016, the Government Legal Department wrote to AQH's solicitors. The letter stated that AQH's application for naturalisation as a British citizen had been refused "because he was considered to be an Islamic extremist". AQH has not since then said what he understood that to mean, but we proceed on the assumption that it would, or at least should, have been understood by AQH to mean that he was considered to support the use of violence to achieve the objectives of Islam. But whatever he thought it meant, it prompted him to file a second witness statement dated 28 June 2016. In it he denied that he had done anything to give rise to such a belief, or that he had said anything which could be regarded as showing that he held extremist views. He acknowledged that he had supported the Islamic Courts in Somalia in the past, as had most Somalis, since they had been seen as a positive influence in bringing some relief from the civil war which had been waged in Somalia for so long. In this statement, he articulated in terms his belief that "the refusal of [his] application for British Citizenship is

nothing more than MI5's way of punishing [him] for refusing to carry out further work for them".

10. Although AQH and his legal team have not been told the reasons why he was considered to be an Islamic extremist, AQH's subsidiary argument relates to the correctness of that view. It is contended that in arriving at that conclusion, the caseworker must have ignored relevant matters (such as the guidance given to caseworkers when considering applications for naturalisation), or relied on irrelevant matters, or reached a conclusion which was not reasonably open to her on the material before her. The arguments advanced in support of that contention were in effect based on two things: (a) AQH's own denial that he was an Islamic extremist, and (b) the absence of any reasons at the time for the conclusion that he had not satisfied the requirement that he had to be of good character. As for (a), AQH's denial that he was, or had at any time been, an Islamic extremist came after the decision not to grant him a certificate of naturalisation, and could not normally be taken into account in challenging the decision on its merits: see, for example, *R (on the application of Naik) v Secretary of State for*

the Home Department [2011] EWCA 1546 (Civ) at [63]. As for (b), the fact that AQH was not informed of the grounds on which it had been concluded that he had not satisfied the requirement that he had to be of good character is really the basis of the principal attack on the decision to refuse his application for naturalisation – namely procedural unfairness.

11. That argument has two strands. First, it is contended that AQH should have been informed, before the decision to refuse his application for naturalisation was made, that the caseworker was minded to refuse the application, and to tell him why in broad terms, so that he had the opportunity to address the caseworker's concerns. Secondly, once the decision had been made, he should have been told, again in broad terms, why that was, so he could address the caseworker's concerns with a view to persuading her to change her mind. If he could be told in 2016 that he was considered to be an Islamic extremist, why could he not have been told that in 2009?

The requirement of good character

12. The Home Secretary can set the bar high when it comes to determining whether an applicant for naturalisation has satisfied the requirement that they must be of good character. As Nourse LJ said in *R v Secretary of State for the Home Department ex p Fayed (No 2)* [2001] Imm AR 134 at [41]:

> "In *R v Secretary of State for the Home Department ex p 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."

It goes without saying that it would be open to a decision-maker acting in the name of the Home Secretary to conclude that someone who is considered to be an Islamic extremist had not satisfied the requirement that they must be of good character. The issue therefore is whether her decision was reached by a process which was procedurally flawed.

The requirements of procedural fairness

13. *The legal framework*. The legal framework is well established. In *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531 at p 560, Lord Mustill described the requirements of fairness as "essentially an intuitive judgment". He noted that where Parliament had conferred an administrative power on a decision-maker, there was a presumption that the

power would be exercised fairly. It was not enough, he said, for the person affected "to persuade the court that some procedure other than the one adopted by the decision-maker would [have been] better or more fair". What he had to show was that the procedure actually adopted had been unfair, though what fairness required in a particular case depended on the context in which the decision was made. "Fairness", he said in a memorable passage, "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". He added that 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".

14. An application for naturalisation is an application for a benefit which the applicant has not previously enjoyed. It has sometimes been said that where the decision which the decision-

maker has to make relates to the grant of a benefit which the applicant for it has not previously enjoyed, the courts may be less ready to afford the applicant the sort of opportunity to make representations which would have been appropriate if the decision had related to the revocation of an existing right. Thinking of that kind found its most articulate expression in the judgment of Laws LJ in *London Borough of Newham v Khatun and ors* [2004] EWCA 55 (Civ) at [31], and although this thinking has been referred to in cases involving applications for naturalisation (see, for example, SIAC's decision in *ZG and SA v Secretary of State for the Home Department*, SN/23/2015 and SN/24/2015, at [22]), it has not featured in the reasoning in such cases.

15. So what does fairness require in the context of an application for naturalisation? That question was addressed by Lord Woolf MR (as he then was) in *R v Secretary of State for the Home Department ex p Fayed* [1998] 1 WLR 763. The applicants, the Al Fayed brothers, had a high public profile, and the refusal of their applications for naturalisation not only deprived them of the significant benefits of citizenship, but also had a damaging

effect on their reputations. Indeed, what Lord Woolf described as the "rather nebulous" requirement of good character underlined in his view the need for the obligation of fairness. But when it came to what fairness actually required, he said at p 776H that it did not require the Home Secretary to do anything more than "to identify the subject of his concern in such terms as to enable the applicant to make such submissions as he can", though he added at p 777B that this applied only to cases

" … where an applicant would be in real difficulty in doing himself justice unless the area of concern is identified by notice. In many cases which are less complex than that of the Fayeds the issues may be obvious. If this is the position notice may well be superfluous because what the applicant needs to establish will be clear. If this is the position notice may well not be required."

16. Finally, at pp 776H-777A, Lord Woolf noted that there might be some situations where even

" … to identify the subject of his concern in such terms as to enable the applicant to make such submissions as he can … could involve disclosing matters which it is not in the public interest to disclose, for example, for national security or diplomatic reasons. If this is the position then the Secretary of State would be relieved from disclosure and it would suffice if he merely indicated that this was the position to the applicant who if he wished to do so could challenge the justification for the refusal before the courts."

17. All of this raises the question as to what needs to be done to bring to the applicant's notice "the subject of the [Home Secretary's] concern as to enable the applicant to make such submissions as he can". That was the issue addressed by Sales J (as he then was) in *R (on the application of Thamby) v Secretary of State for the Home Department* [2011] EWHC 1763 (Admin). Sales J rejected the contention that fairness ordinarily required an applicant for naturalisation to be given a personal interview relating to such concerns as the Home Secretary may have about whether the applicant had satisfied the requirement of good character. But at [67] Sales J considered how the Home

Secretary might afford the applicant for naturalisation an opportunity to deal with those things which might result in the Home Secretary concluding that he had not satisfied the requirement of good character. Sales J said that the obligation to afford the applicant such an opportunity

" … 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."

18. We make two comments about this passage. First, the reference to Form AN was a reference to the form to be used by people who apply for naturalisation, and the reference to Guide AN was a reference to the guide issued to them to help them complete the form. We shall come to the form completed by AQH and the guide in a moment. Secondly, the reference to the second ***Fayed*** case was a reference to the case referred to in [12] above, namely the unsuccessful challenge to the Home Secretary's decision following the first case to refuse the application of one of the Al Fayed brothers for naturalisation. That decision had followed a "minded to refuse" letter which had been sent to the Al Fayed brothers after the conclusion of the first case.

Form AN and Guide AN

19. AQH's application for naturalisation was made on Form AN. The nature of the form has changed over the years. We have not seen the forms which would have been completed in 1993 and 1994 when the Al Fayed brothers applied for naturalisation, but when their challenge to the Home Secretary's decision came before the Court of Appeal in 1996, Lord Woolf said at p 767G that the forms requested "very little information" from them. We have seen the forms which would have been completed in 2000 by ZG and SA when they applied for naturalisation, but SIAC in its judgment at [29] recorded the concession made by leading counsel on behalf of the Home Secretary that there had been nothing in the forms which would have given them a "steer" about the concerns which the Home Secretary had.

20. The form which AQH used in 2008 when he applied for naturalisation had a section devoted to the good character requirement. It was section 3. It began:

"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."

It then asked whether the applicant had any criminal convictions (or been charged or indicted with a criminal offence) in the UK or elsewhere or whether any civil judgments had been entered against him. It asked whether he had ever been involved (or suspected or accused of involvement in) war crimes, crimes against humanity or genocide. The questions most relevant for present purposes were whether he had ever been "involved in supporting acts of terrorism" or "engaged in any other activities which might be relevant to the question of whether [he was] a person of good character".

21. Anyone reading this section would have realised that the Home Secretary wanted to know whether the applicant for

naturalisation harboured extreme views of the kind which amounted to support for the use of violence to achieve one's political or religious goals.[1] But the important point is that there was, of course, nothing in this section which would have alerted AQH to the fact that *he* was considered to be an Islamic extremist, or which told him what it was which had caused him to be considered to be an Islamic extremist. The same is true of Guide AN – at any rate the form the guide took in 2008. It contained a section giving guidance on how to complete section 3 of the application form. It said that applicants must disclose any involvement in terrorism, whether their own involvement or that of others. But it was silent on what applicants should do if they were not involved in terrorism, but *supported* terrorism. Again, there was nothing in the Guide which would have alerted AQH to what the concerns about him were. So the fact that he was considered to be an Islamic extremist and the Home Secretary's brief reasons for that view were things which should have been disclosed to him when his application for naturalisation was received, so that he could address them, unless, of course, there were compelling national security or

[1] You would not expect an applicant to confess to that unless they wanted to make an ill-advised joke. One is reminded of the humorist who, on being asked in the application form for a visa to enter the United States whether it was his intention to overthrow the Government of the United States by force, wrote: "Sole purpose of visit."

other reasons for not disclosing those things to him. It is to such reasons that we now turn.

The interests of national security

22. The interests of national security have of necessity had to be considered in our closed judgment. For the reasons set out there, we are quite sure that it was not appropriate for *the grounds* on which AQH was considered to be an Islamic extremist to be disclosed to him. But what about the mere *fact* that he was considered to be an Islamic extremist? As we have said, that was disclosed to AQH's legal team a month or so before the hearing of this application. It was not suggested that what could be disclosed in 2016 could not have been disclosed in 2009 when the caseworker considered AQH's application for naturalisation. The argument on behalf of AQH therefore is that prior to making her decision the caseworker should have caused the fact that AQH was considered to be an Islamic extremist to be disclosed to him. Failing that, the fact that he was considered to be an Islamic extremist should have been disclosed to his

solicitors when, following the letter informing him that his application had been refused, they had requested to be informed of the reasons for the conclusion that he had not satisfied the requirement of good character.

23. The Home Secretary's response is that the closed materials procedure available in SIAC gave AQH far greater scope to challenge the assertion that he was considered to be an Islamic extremist than merely informing him that that was what he was considered to be, without at the same time telling him what the reasons for that were. That may or may not be so, but even if it is, it is beside the point. The fact that there exists what is contended to be a more advantageous process for challenging a decision once it has been made than the process by which the original decision was made does not mean that the original process should be absolved from complying with the requirements of fairness.

24. In our view, the fact that it has not been suggested that AQH could not have been told in 2009 that he was considered to be an

Islamic extremist makes all the difference. Fairness required that this fact should have been disclosed to him after he had applied for naturalisation and before the decision refusing his application had been made. All the more so for this to have been disclosed to him once his solicitors had asked for the reasons why he was considered not to have satisfied the requirement of good character. The arguments considered by SIAC in paras 32-37 of its judgment in *ZG and SA* were not advanced on this occasion on behalf of the Home Secretary, but if they had been, we would have found them unpersuasive for the reasons which SIAC did.

Would that have made a difference?

25. But that is not the end of the matter. What if the outcome of the application would have been the same if the requirements of fairness had been complied with, and AQH had been informed that he was considered to be an Islamic extremist so that he could have addressed that concern? The answer is that the grant of relief in claims for judicial review is discretionary, and the

Administrative Court will usually refuse to grant relief if it concludes that the same decision would have been reached if it had not been infected by any procedural unfairness. That applies to applications under section 2D of the 1997 Act because, as we have said, the procedure created by section 2D incorporates the principles which would apply to claims for judicial review: see section 2D(3).

26. The Home Secretary goes further. It is submitted on her behalf that SIAC would be *required* to dismiss the application under section 2D if it concluded that AQH's application for naturalisation would have been refused had it been considered fairly. In other words, it is not a matter for SIAC's discretion: SIAC is *bound* to dismiss the application if the procedural unfairness had made no substantial difference to the eventual outcome. That is said to be the effect of section 31(2A) of the Senior Courts Act 1981, which provides that the High Court must refuse to grant relief on a claim for judicial review if it appears to the court to be likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred. Section 31(2A) does

not apply to claims for judicial review commenced before 13 April 2015, but AQH's application to SIAC was made on 14 September 2015. Having said that, in ***ZG and SA***, it was argued that section 31(2A) does not apply to applications under section 2D of the 1997 Act. It applies only to claims for judicial review in the High Court, and does not sit easily with the express power conferred on SIAC by section 2D(4) of the 1997 Act, which *empowers* SIAC to make any order or give any such relief "as may be made or given in judicial review proceedings", but does not *require* it to do so.

27. SIAC did not have to resolve this issue in ***ZG and SA*** because it was not satisfied in that case that it was highly likely that the outcome would not have been substantially different. We too do not have to resolve this issue, but that is because, assuming in AQH's favour that SIAC has a discretion in the matter, we are satisfied that no relief should be granted since AQH's application for naturalisation would still have been refused if he had had an opportunity to address the concern that he was considered to be an Islamic extremist. We know what he would have told the Home Secretary had he been notified of that

concern from the two witness statements he has filed in these proceedings, and his counsel, Mr Nazir Ahmed, did not identify anything else which AQH would have said in 2009 had he been told then what his solicitors were subsequently told in 2016. For the reasons given in our closed judgment, we are sure that (a) the decision would still have been to refuse his application for naturalisation, (b) it would have been reasonably open to the caseworker, looking at what AQH would have said and the other material before her, to conclude that he was (or had been) an Islamic extremist, and (c) she neither ignored relevant matters nor took into account irrelevant matters when reaching her decision.

Conclusion

28. For these reasons, this application to set aside the decision refusing AQH's application for naturalisation as a British citizen must be dismissed.