SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SN/40/2015
Hearing Date: 5th July 2016
Date of Judgment: 28th October 2016

BEFORE:

THE HONOURABLE MR JUSTICE MITTING
UPPER TRIBUNAL JUDGE COKER
MS J BATTLEY

BETWEEN:

JJA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME OFFICE

Respondent

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MR.T. BULEY (instructed by Duncan Lewis Solicitors) appeared on behalf of the Appellant.

MR. STEVEN GRAY (instructed by the Treasury Solicitor for the Secretary of State) appeared on behalf of the Respondent.

MR. Z. AHMAD (instructed by the Special Advocates' Support Office) appeared as Special Advocate.

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OPEN JUDGMENT

MR JUSTICE MITTING :

1. The appellant is a Kurdish Iraqi citizen born on 1 July 1961. He travelled by air to the United Kingdom and claimed asylum on arrival on 14 July 2002. His application for asylum was refused. An appeal against refusal was dismissed by an adjudicator in a determination promulgated on 11 August 2003. Nevertheless, like many other Iraqi asylum claimants, he was granted indefinite leave to enter, on 9 July 2007. He applied for naturalisation on 17 July 2008. By a letter dated 7 August 2009, the Secretary of State notified him of his decision, taken by an official, to refuse his application. The grounds of refusal were laconic:

> "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 appellant brought judicial review proceedings, which were stayed behind the lead naturalisation cases of *AHK and Others*. On 1 September 2015, the Secretary of State notified the appellant that pursuant to s2D Special Immigration Appeals Commission Act 1997, she had certified the naturalisation decision made in respect of him. This is the open judgment on

his challenge to the decision to refuse naturalisation. There is also a closed judgment.

2. The Secretary of State's reasons for the decision, beyond the bare statement that the appellant did not satisfy the good character requirement of Schedule 1 to the British Nationality Act 1981, are entirely set out in the closed material, which we have scrutinised, deployed by her in these proceedings. On 6 June 2016 a hearing took place under rule 38 of the SIAC (Procedure) Rules 2003, the outcome of which was that no further disclosure should be made to the appellant and his open representatives. The decision was made by a panel presided over by the President. We have not been invited by Mr Ahmad, the special advocate appointed to represent the interests of the appellant, to revisit it. It was made in compliance with the general duty of the Commission set out in rule 4(1),

> "When exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."

The Commission has, therefore, decided that it would be contrary to one or more of the interests set out in rule 4(1) to make any further disclosure of the underlying reasons for the decision to the appellant.

3. Mr Buley, for the appellant, makes a principled challenge to the Secretary of State's decision: it is unlawful to refuse an application for naturalisation without giving the applicant an opportunity to meet the Secretary of State's

concerns about his good character before the decision is made. The challenge is brought under both domestic law and under the law of the European Union.

4. In a case not involving the interests set out in rule 4(1) of the SIAC (Procedure) Rules, the law is uncontroversial. Reference need only be made to the judgment of Lord Woolf MR in *R v Secretary of State for the Home Department Ex parte Fayed* [1998] 1WLR 763 at 773G-H,

> "The fact that the Secretary of State may refuse an application because he is not satisfied that the applicant fulfils the rather nebulous requirement of good character or "if he thinks fit" underlines the need for an obligation of fairness. Except where non-compliance with a formal requirement, other than that of good character, is being relied on, unless the applicant knows the areas of concern which could result in the application being refused in many cases, and especially in this case, it would be impossible for him to make out his case. The result could be grossly unfair. The decision-maker may rely on matters as to which the applicant would have been able to persuade him to take a different view."

5. Lord Woolf went on at p776H – 777B to deal with situations in which disclosure might not be in the public interest. Having established the principle that in the ordinary case the Secretary of State was required to do no more "than to identify the subject of his concern in such terms as to enable the applicant to make such submissions as he can", he qualified even that limited obligation,

> "In some situations even to do this 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. The courts are well capable of determining public

> interest issues of this sort in a way which balances the interests of the individual against the public interests of the State."

6. Parliament has now provided the means by which challenges to decisions taken by the Secretary of State for such reasons can now be determined: following the issue of a certificate under s2D of the 2013 Act, scrutiny by SIAC taking full advantage of its closed material procedures.

7. Mr Buley accepts that, in principle, those procedures permit the fair determination of SIAC appeals (for example, against decisions to deport or deprive of citizenship); but, he submits, they do not provide an adequate means of ensuring that a decision made by the Secretary of State to refuse naturalisation, challengeable only on judicial review grounds, is fair. He points out, correctly that there is no procedure for the interests of an applicant for naturalisation to be represented by a special advocate or equivalent before the decision is taken. Accordingly, he submits, the only means by which a fair decision can be made is for the applicant to be given an opportunity to address the Secretary of State's concerns, before it is made: to be told nothing before or after about the reasons is self-evidently unfair.

8. We accept that, in a case in which SIAC is not the primary fact-finder, its procedures provide a less comprehensive means of ensuring that a just outcome is achieved than when it is; but it does not follow that, for that reason, an applicant must be given an opportunity to address the Secretary of State's concerns before the decision is made. She is the guardian of the public interest. She must not, and cannot be required to, act otherwise than in the

public interest. If Mr Buley's submission is right, she would be required to do just that: she would have to disclose information which, in her judgment, could not be disclosed in the public interest. Those interests are the same as those set out in rule 4(1) of the SIAC (Procedure) Rules. For SIAC now to hold that the Secretary of State was in breach of a public law duty of fairness because she failed to disclose that which SIAC must ensure is not disclosed is a proposition which is self-evidently untenable. A decision, otherwise justified, cannot be held to be unlawful because based on reasons which, in the exercise of her public duty, the Secretary of State properly refused to identify, or to give any indication of, before she made the decision. We agree with, and adopt, the conclusions expressed by Ouseley J in *AHK* [2013] EWHC 1426 (Admin) at paragraph 29.

9. If SIAC were to hold that, because the appellant had no opportunity to address the Secretary of State's concerns, her decision must be quashed and retaken, the same problem would arise. The Secretary of State would properly refuse to say more. SIAC could not properly require her to do so, because to do so would require her to act in a manner contrary to her duty to uphold the public interest. It is possible that the elapse of time and/or a change in circumstances might permit a Secretary of State in the future to reach a different decision and even to give some indication of her concerns to the appellant before making it; but those would be questions for the future consequent upon a further application by the appellant. They cannot call into question the lawfulness of

the decision under challenge in these proceedings including the manner in which it was reached.

10. In the closed hearing, we pressed Mr Ahmad to state what, if anything could be done by the Secretary of State if we were to quash her decision and remit it to be retaken. His answer was that some further disclosure might be made so as to permit the appellant to address the Secretary of State's concerns. For the reasons explained above, that would now and in the near term be wrong in principle and futile.

11. For the reasons given, we are satisfied that the fact that the Secretary of State made her decision without giving the appellant the opportunity of addressing her concerns or stating her reasons for concluding that he did not satisfy the good character requirement did not make the decision procedurally unlawful.

12. For the reasons explained in the closed judgment, we are satisfied that the decision was not substantively unlawful.

13. We can deal with Mr Buley's submission on EU law succinctly. We are bound by two decisions of the Court of Appeal to hold that the grant or withdrawal of British citizenship is not within the competence of EU law: *R(G1) v Secretary of State for the Home Department* [2013] QB 1008 per Laws LJ at paragraphs 29 – 44 and *S1,T1, U1 and V1 v Secretary of State for the Home Department* [2016] EWCA Civ 560 at paragraphs 18 – 22.

14. For the reasons given, we dismiss the appellant's principled challenge to the decision. To the extent that they arise at all, the remaining possible factual grounds of challenge are dealt with in the closed judgment.