Appeal No: SN/53/2015
Hearing Date 14 July 2016
Date of Judgment: 30th September 2016

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE FLAUX
UPPER TRIBUNAL JUDGE KEBEDE
SIR STEWART ELDON KCMG OBE

MNY

APPLICANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Applicant:	Ms S Haji and Mr R Ahmed
Instructed by:	Marks & Marks Solicitors
Special Advocate:	Mr Charles Cory-Wright QC
Instructed by:	Special Advocates Support Office
For the Respondent:	Mr Steven Gray
Instructed by:	Government Legal Department

OPEN JUDGMENT

The Honourable Mr Justice Flaux:

Introduction and factual background

1. The applicant, to whom we will refer as "MNY" is a national of Somalia who entered the United Kingdom on 12 March 2003. She claimed asylum and was granted indefinite leave to enter on 13 October 2003. On 23 June 2008, she 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 January 2008. 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 and 3.11 in the application form, the Guide gave clear guidance in these terms:

"3.8 – 3.11 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.

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. The applicant was therefore afforded every opportunity to bring to the attention of the Secretary of State any matters which were relevant to the question whether she 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."*

9. Her application was considered by a caseworker in the UK Border Agency ("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 there is information to suggest that he or she has not respected and / or is not prepared to abide by the law, he or she has been involved in or associated with war crimes, terrorism activities or other actions that are considered not to be conducive to the public good, their financial affairs were not in appropriate order, their activities were notorious and cast serious doubt on their standing in the local community, they had practiced deceit in their dealings with the UK government, they have assisted in the evasion of immigration control or they have previously been deprived and are seeking to re-acquire citizenship within a prescribed period."

10. 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 …"

11. 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 4 November 2009 ("the refusal letter") which stated:

> *"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."*

12. Some fourteen months later, on 5 January 2011, the applicant's solicitors wrote to the Home Office, requesting that her application be reconsidered on the basis of evidence from the ACPO Criminal Records Office and a letter from the Metropolitan Police Public Access Office. The Home Office did reconsider the application, but maintained the refusal, confirming in a letter dated 24 January 2011 that they took into consideration: "*the activities both past and present of a prospective citizen when assessing whether [the good character] requirement has been satisfied.*"

13. At the time of the refusal letter and this subsequent confirmation of the refusal of naturalisation, a refusal was only susceptible to 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].

14. In those circumstances and to remedy that perceived injustice, 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. Since the Commission has available to it the CLOSED material procedure, it is now possible for there to be a review of the decision of the Secretary of State by consideration of the CLOSED material at a CLOSED hearing, such as occurred in the present case.

15. 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 9 September 2015, the applicant made the present application to set aside the decision to refuse her application for naturalisation.

16. 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 10 June 2016, the Secretary of State wrote two letters to the applicant's solicitors. In the first, it was said, inter alia that: *"MNY is known to have associated with Islamic extremists".* The second letter enclosed a statement the applicant had given to the police on 11 August 2005 in which she gave her account of the nature and extent of her contact with various individuals, including Hussain Osman, who was convicted of conspiracy to murder in connection with the failed bombings at Shepherd's Bush station on 21 July 2005, and his brother Sherif, also convicted of terrorist offences. After receiving those letters, the applicant has served a witness statement dated 27 June 2016 which also seeks to explain the nature and extent of her relationship with Osman and Sherif.

17. Although in her Grounds and Additional Grounds, the applicant put forward a number of bases for contending that the decision to refuse her application for naturalisation should be set aside, at the hearing before us, Ms Haji on her behalf pursued only two grounds of challenge:

(1) That there was procedural unfairness in the decision-making process, because the Secretary of State should have provided the gist set out in the letter of 10 June 2016 at the time that the application was being considered in 2009, thus enabling the applicant to make representations as to why she had not associated in any meaningful sense with Islamic extremists;

(2) That the decision to refuse her application infringed her rights under article 8 of the European Convention of human rights ("ECHR").

18. 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

19. The burden of proof is on the applicant to satisfy the Secretary of State 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 763 per Lord Woolf MR at 776A and the decision of the Commission in *FM v SSHD* [2015] UKSIAC SN/2/2014 at [7].

20. 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."

21. Likewise, in *Secretary of State for the Home Department v. SK Sri Lanka* [2012] EWCA Civ 16, Stanley Burnton LJ observed [31]:

> "It is for the appellant 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 appellant is of good character, and has good reason not to be satisfied that an appellant is of good character, and has good reason not to be satisfied, she is bound to refuse naturalisation."

22. 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]. On well-established principles, it is for the Commission to determine whether the procedure adopted was fair, not simply to review on *Wednesbury* grounds the conclusion of the Secretary of State as to what fairness requires.

(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].

23. The Preliminary Issues Judgment was the subject of an application by the Secretary of State to the Divisional Court for judicial review, specifically in relation to 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."

24. 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."

No procedural unfairness

25. On behalf of the applicant, Ms Haji submitted that, in the light of the recent disclosure on 10 June 2016 of the gist: *"MNY is known to have associated with Islamic extremists"*, fairness required that this gist be provided to the applicant before the refusal of her application in November 2009, so that she could make representations, with a view to persuading the Secretary of State to allow her application. Had she been afforded the opportunity to refute this allegation that she had associated with Islamic extremists, she could and would have provided the same explanation which she had given to the police in August 2005, essentially reiterated in her witness statement dated 27 June 2016, that she knew Sherif socially and met Osman, whom she knew as Hamji through Sherif but had no idea that Hamji was involved in the failed bombing or that Sherif was assisting him and that she did not share their views.

26. In support of this submission, Ms Haji 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."

27. In the specific context of naturalisation cases, Ms Haji relied upon two authorities. First, she relied upon the decision of the Court of Appeal in *R v SSHD ex parte Fayed* [1998] 1 WLR 763, in which the majority of the Court of Appeal held that the Secretary of State was required to disclose to the Fayed

brothers various adverse matters before determining their applications for naturalisation. At 773G-H, Lord Woolf MR said:

> "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 this case, it will 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. It would be a situation in which the approach of this court in *R v Gaming Board for Great Britain ex parte Benaim and Khaida* [1970] 2 QB 417, 430–431 would apply. Lord Mustill's remarks in his speech in *R v SSHD ex parte Doody* [1994] 1 AC 531, 560D–H would also apply. It is not necessary to refer to the many other authorities to the same effect which could be relied on in support of this conclusion."

28. Later in his judgment at 776H-777A, Lord Woolf MR said that all that was required of the Secretary of State was to identify areas of concern and that there might be situations in which even that might involve disclosing matters

which it was not in the public interest to disclose, in which case the Secretary of State would not be obliged to disclose:

> "It does not require the Secretary of State to do more than to identify the subject of his concern in such terms as to enable the applicant to make such submissions as he can. 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."

29. Second, Ms Haji relied in particular on the recent decision of the Commission in *ZG and SA* [2016] UKSIAC 1; SN/23/2015 and SN/24/2015, where that principle, which she submitted is to be derived from *ex parte Fayed*, was applied. 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 in *ex parte Fayed,* that the Secretary of State was relieved from disclosure for national security reasons.

30. The Commission was not persuaded by that contention. In rejecting it, Sir John Royce cited at [33] of the judgment, the following passage from the judgment of Lord Sumption JSC in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700 at 31:

> "The second practical difficulty was raised by way of submission in the Court of Appeal and dealt with in the judgment of Maurice Kay LJ, who thought it had "some force". This was the supposed practical difficulty of permitting representations in a situation where there is closed material. I have to say that for my part I am not impressed with this difficulty. In justifying the direction in the course of these proceedings, the Treasury disclosed the gist of the closed material including the provision of banking facilities to Novin and Doostan and their alleged provision to Mr Taghizadeh and Mr Esbati. I cannot see why they should have had any greater difficulty in disclosing before the making of the direction the material that they were quite properly required to disclose afterwards."

31. The Commission concluded on this point:

> "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."

32. In reliance on that passage and what Lord Sumption JSC had said, Ms Haji submitted that the gist disclosed in June 2016 could and should have been disclosed earlier in November 2009 and, if it were not in the interests of national security to disclose it, it would not have been disclosed in June 2016. Fairness required that the applicant be afforded the opportunity to refute what was merely speculative circumstantial evidence, no more than guilt by association. The applicant did not know about the views of Osman and Sherif or share them, she was simply having an engagement party in Sherif's girlfriend's garden the day after Osman was arrested. Since the applicant did not know at the time of her application that this was the area of concern of the Secretary of State, she did not know that there was an issue which went to her good character. She could not rebut something of which she was unaware.

33. 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 her case as to her good character. Furthermore, the refusal letter did

indicate that the issue was character, which enabled her solicitors to make further representations and for there to be a reconsideration of the position by the Secretary of State in January 2011.

34. 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. That case 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. 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."

35. 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 Guidance, 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 the application and the applicant had every opportunity to deal

with them. No more was required for the decision made to be procedurally fair.

36. 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.

37. Accordingly, Mr Gray submitted, the Secretary of State cannot be required pursuant to a requirement of procedural fairness 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.

38. Mr Gray submitted that this case was clearly distinguishable from *ZG and SA.* Those were cases where the relevant applications for naturalisation (copies of which in redacted form were provided to us) dated back to 2000 when the application forms which were 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.

39. 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."

40. Not only is that judgment not an authority which provides any basis for concluding that the process adopted in the present case was unfair, but it is clearly distinguishable, because the application forms there provided no guidance as to what information as regards good character the Secretary of State required. In contrast, both the application form and the Guidance 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 her the opportunity to set out, before the decision was taken, her case as to her character and to disclose any matters adverse to her application. In our

judgment, there was no requirement in the present case for the Secretary of State to provide to the applicant before considering her application in November 2009 the gist provided to her in June 2016.

41. 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.

Article 8 of the ECHR

42. On behalf of the applicant, Ms Haji accepted that for Article 8 to be engaged, the decision had to be a sufficiently serious decision that her rights were directly and substantially affected but submitted that that was the position here, because she had been granted refugee status. Ms Haji submitted that the effect of the refusal of naturalisation was to render the applicant stateless, as she could not be reasonably expected to return to Somalia, in relation to which she has recurrent nightmares about her treatment there. Ms Haji also contended that the decision had failed to take account of the best interests of her two children who were born in June 2006 and February 2009 and who both have British passports. Ms Haji submitted that the applicant, who has a travel document with which she has travelled abroad with her children, including to Ethiopia, had been treated differently from her children.

43. Mr Gray submitted that the applicant is a refugee who is a Somali national so that there is no question of the refusal of her application for naturalisation having rendered her stateless, which was a point which was made for the first time in oral submissions by Ms Haji to the Commission. Likewise, there was no evidence to support what was now asserted on her behalf by Ms Haji. The children were not even mentioned on her application form, so the decision

maker could not have been aware of them. She had been issued with a travel document, as she said in her statement, but there was no evidence that she was treated differently from her children or that she had ever complained about this.

44. We agree with Mr Gray's submissions that there is no evidence to support what is now asserted in relation to the article 8 claim. Furthermore, more fundamentally, as the Preliminary Issues Judgment in *AHK and others* confirms, in cases of naturalisation, unless the decision to refuse is arbitrary or discriminatory, Article 8 is not engaged. There is no suggestion that the decision here was arbitrary or discriminatory. In all the circumstances, the claim based on Article 8 fails.

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

45. 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 taken, even if the Secretary of State had made the disclosure for which the applicant contends in November 2009 and had acted lawfully. He relied 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.

46. It is submitted 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 9 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 unlawfully, and should refuse the application on that ground.

47. 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. We too do not need to resolve the conflict on this point, albeit for a different reason, that we have concluded that there was no procedural unfairness and that the decision of the Secretary of State was lawful. We consider it better to leave this point for determination in a case where it is critical to the decision.

Conclusion

48. 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 her application for naturalisation were reasonable and justified.

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