Appeal No: SN/41/2015
Hearing Date: 25 October 2016
Date of Judgment: 1st December 2016

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE FLAUX
UPPER TRIBUNAL JUDGE PITT
MR S PARKER

MSB

APPLICANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Applicant:	Mr S Saeed
Instructed by:	Aman Solicitors
Special Advocate:	Mr Stephen Cragg QC and Mr T Forster
Instructed by:	Special Advocates Support Office
For the Respondent:	Mr Steven Gray
Instructed by:	Government Legal Department

OPEN JUDGMENT

JUDGMENT

The Honourable Mr Justice Flaux:

Introduction and factual background

1. The applicant, to whom we will refer as "MSB" is a national of Somalia who entered the United Kingdom in 2000. He claimed asylum which was refused on 21 June 2001 but he remained in the country. He made further representations in August 2008 and was granted indefinite leave to enter on 23 February 2010. He is married with four children. His wife and children are all British citizens. On 1 September 2011, he applied for naturalisation pursuant to section 6(1) of the British Nationality Act 1981 which provides:

> "(1) If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen."

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

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

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

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

5. At the end of those questions was an italicised passage which specifically referred the applicant to the Booklet AN: *"For the purposes of answering questions 3.9 to 3.12 please refer to the Booklet AN which provides guidance*

on actions which may constitute war crimes, crimes against humanity, genocide or terrorist activities."

6. The Booklet AN (which described itself on the first page as "Naturalisation Booklet-The Requirements") was accompanied by the Guide AN (each of which stated on the first page that it was to be read in conjunction with the other). The versions which were extant at the time of the application and which the applicant would have been able to access had been revised in September 2010. The Booklet 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 headed in bold: **"What if you haven't been convicted but your character may be in doubt?"** the Booklet gave clear guidance in these terms:

> *"You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago this was… If you are in any doubt as to whether you have done something or it has been alleged that you have done something which might lead us to think that you are not of good character you should say so.*
>
> *You must also say here whether you have had any involvement in terrorism. If you do not regard something as an act of terrorism but you know that others do or might, you should mention it…If you are in any doubt as to whether something should be mentioned, you should mention it."*

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

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

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

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

10. The identical clear guidance as set out at [7] above was provided in the Guide at "Section 3 Good Character", the first paragraph quoted in a passage in the Guide dealing specifically with question 3.12 in the application form and the second paragraph quoted in a passage in the Guide dealing specifically with questions 3.9 to 3.11 in the application form.

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

> *"I…declare that, to the best of my knowledge and belief, the information given in this application is correct. I know of no reason why I should not be granted British citizenship. I promise to inform the Home Secretary in writing of any change in circumstances which may affect the accuracy of the information given whilst this application is being considered by the Home Office. I understand that information given by me will be treated in confidence but may be submitted for checking against records held by other Government Departments, the Security Service and other agencies, local authorities and the police, where it is necessary for immigration or nationality purposes, or to enable these bodies to carry out their functions."*

12. His 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, for example, there is information to suggest:*

a. They have not respected and / or is not prepared to abide by the law…or

b. they have been involved in or associated with war crimes, crimes against humanity or genocide or other actions that are considered not to be conducive to the public good;

c. their financial affairs were not in appropriate order…or

d. their activities were notorious and cast serious doubt on their standing in the local community…or

e. they had practiced deceit in their dealings with the UK government…or

f. they have assisted in the evasion of immigration control or

g. they have previously been deprived and are seeking to re-acquire citizenship within a prescribed period."

13. 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 …"*

14. Paragraph 2.3 provides:

> *"If the application does not clearly fall into one of the categories outlined in paragraph 2.1 but there are doubts about the applicant's character, then caseworkers may request an interview in order to confirm their final assessment of the applicant's character."*

15. The caseworker concluded that the Secretary of State could not find that the applicant met the requirement to be of "good character" so the decision was taken to refuse the application. That decision was communicated to the applicant in a letter dated 4 April 2012 ("the refusal letter") which stated, inter alia:

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

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

16. The applicant asked his MP, Nick Raynsford to intervene on his behalf and on 18 April 2012, Mr Raynsford wrote to the Secretary of State making representations on his behalf. A response was received from the then Minister of Immigration, Mr Damien Green MP (which was sent to the applicant on 23 May 2012) and which stated, inter alia:

> *"It would not be in the public interest to disclose any further information regarding the decision. However the [UKBA] is prepared to review this decision should Mr Abdi wish this."*

17. On 24 May 2012, the applicant invited the Secretary of State to review the decision rejecting his application for naturalisation and asked for disclosure regarding the decision. On 20 June 2012, the Secretary of State wrote refusing to reverse the decision and also refusing to disclose anything further.

18. On 10 October 2012, the applicant's solicitors made an application, paying a fee of £80, asking for reconsideration of the decision and enclosing supportive statements from members of the community and reference letters. An offer was made for the applicant to attend an interview. The Home Office responded on 26 November 2012, maintaining its refusal in these terms:

> *"The Secretary of State possesses information which causes her to not be satisfied that your client meets the requirement to be of good character and remains of the view that it would not be in the public interest to provide your client with further reasons either as to the information held that relates to your client's character, or as to why it would not be in the public interest to release more information to your client concerning the decision that has been taken in his case."*

The letter also confirmed that the offer to attend an interview had been considered, but the Home Office did not believe that this would be helpful.

19. At the time of the refusal letter and this subsequent confirmation of the refusal of naturalisation, a refusal was only susceptible of challenge by way of

judicial review. The applicant initiated judicial review proceedings on 26 February 2013, but in common with other such cases, those were adjourned generally pending determination of the lead cases of *AHK and others*. It was determined in those lead cases that, 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].

20. In those circumstances, Parliament enacted section 15 of the Justice and Security Act 2013, inserting, so far as relevant, section 2D (review of certain naturalisation and citizenship decisions) into the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"), giving the Commission jurisdiction to review a decision which the Secretary of State has certified was made wholly or partly in reliance on information which, in her opinion, should not be made public (i) in the interests of National Security, (ii) in the interests of the relationship between the United Kingdom and another country, or (iii) otherwise in the public interest.

21. 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 14 September 2015, the applicant made the present application to set aside the decision to refuse his application for naturalisation.

22. 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 a ruling was made by the Commission, pursuant to which on 28 July 2016, the Secretary of State wrote a letter to the applicant's solicitors in the following terms:

> *"Pursuant to Rule 38 of the Special Immigration Appeals Commission (Procedure) Rules 2003, we are now able to provide the following information in respect of the above matter.*
>
> *MSB's naturalisation application was refused due to his close links to Al-Shabaab and because he was heavily involved in Al-Shabaab linked activities, including fundraising and associating with members of this group. This group is considered to include Sheikh Abdulkadir Mumin. Al-Shabaab is a jihadist terrorist based in East Africa. In 2012 Al-Shabaab pledged allegiance to Al-Qaeda. MSB is also considered to have expressed extreme opinions in the community. These matters were of interest to the Security Service."*

23. In Amended Grounds for Review dated 30 August 2016 and in his Skeleton Argument before us, Mr Saeed, the Solicitor Advocate for the applicant, put

forward five grounds for contending that the decision to refuse the application for naturalisation should be set aside:

(1) That the decision to refuse naturalisation was *Wednesbury* unreasonable, perverse or irrational because the applicant has never had close links to Al-Shabaab and has never been involved in any activities linked to Al-Shabaab.

(2) That there was procedural unfairness in the decision-making process, because the Secretary of State had failed to identify areas of concern in advance of making the decision and failed to give MSB a reasonable opportunity to address or rebut any such concerns before she made her decision;

(3) That, notwithstanding the disclosure on 28 July 2016, the Secretary of State had still failed to give adequate reasons for her decision as the language used in the letter was still too vague. The lack of reasoning was unlawful.

(4) That the Secretary of State is under a duty to disclose the underlying evidential basis for her decision so as to enable the applicant to evaluate it and if there is merit in doing so, to challenge the evidence relied on against him. In failing to give that disclosure, the Secretary of State had acted unlawfully.

(5) That in failing to interview the applicant, the Secretary of State had acted unreasonably and had unlawfully fettered the discretion afforded to her in her policy.

24. At the hearing Mr Saeed only developed submissions on the second ground of unfair process and, to a limited extent, the fifth ground, fettering of the policy. Whilst he indicated that he was not formally abandoning the other grounds, he did not develop any oral submissions in relation to them. Before considering the 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

25. The burden of proof is on the appellant to satisfy the SSHD that the requirements of Schedule 1 to the British Nationality Act including that of good character are met on the balance of probabilities. If this test is not satisfied the Secretary of State must refuse the application. An appellant for naturalisation seeks the grant of a privilege not a right and the 1981 Act vests the Secretary of State with considerable discretion to refuse an application: see *R v. Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 736 per Lord Woolf MR at 776A and the decisions of the Commission in *FM v SSHD* [2015] UKSIAC SN/2/2014 at [7] and *MNY v SSHD* [2016] UKSIAC SN/53/2015 at [19].

26. 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."

27. 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."

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

(1) The Commission is required to apply a conventional judicial review approach to naturalisation challenges. The Commission's task is to review the facts and consider whether the findings of fact by the decision-maker are reasonable. In that part of the review there is no place for deference to the Secretary of State: see [14] and [32].

(2) The Commission does not need to determine for itself whether the facts said to justify a naturalisation decision are in fact true. As a matter of common law and ordinary public law, the existence of facts said to justify the denial of nationality does not constitute a condition precedent, and fact-finding is not necessary to determine whether the procedure is fair or rational: see [23]-[24].

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

(4) In the absence of an arbitrary or discriminatory decision, or at the very least some other specific basis in fact, refusal of naturalisation will not engage ECHR rights. The challenge to the decision is open only on grounds of rationality; and even if ECHR rights are engaged, the exercise is still one of proportionality rather than a full merits review by the Commission: [22] and [24]. It would be very rare in this context for there to be a breach of Article 8 rights, in other words that interference with private or family life will be disproportionate, given the level of public interest in enforcing a legitimate immigration policy: [33].

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

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

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

> "I agree with SIAC that it is not sufficient for CLOSED disclosure to be limited to the summary prepared for the Home

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

The applicant's witness statements

31. In support of his application for review, the applicant has produced two witness statements. The first is dated 21 June 2016, in fact before the letter of 28 July 2016 and the second soon after it was sent, dated 30 August 2016. In the first statement, the applicant gives evidence about how he knew Abdulkadir Mumin from Woolwich Mosque and about his dealings with him. Mumin had left the UK and they had spoken on the phone only once since then, when Mumin was in Nairobi. The applicant had found out after Mumin left that he had joined Al-Shabaab and thinks he has now joined Islamic State. The applicant says he does not want anything to do with those organisations because he does not agree with their views at all.

32. He repeats the same point in his second, short, statement, denying that he has any links with Al-Shabaab or has raised funds for them. He also denies that he has expressed extremist views in the community. He has obtained statements from others in the community confirming this. He believes there is no evidence to the contrary but if there is, it is false. He says that he has heard that there are people in the community who give information to the security services but none of the information regarding him is correct.

33. Mr Gray submitted on behalf of the Secretary of State that the statutory review in cases under sections 2C and 2D of the 1997 Act was to be decided applying the principles of judicial review. One of those principles was that fresh evidence, such as these witness statements, is not ordinarily admissible. It is for the Commission to determine whether the procedure was fair, which is to be judged at the time of the making of the decision in question by reference to the material which was before the decision maker. Mr Gray relied upon [23] to [26] of the judgment of the Commission in *AA v SSHD* [2015] UKSIAC SN/10/2014 where Sir Stephen Silber held that the subsequent witness statement of the applicant was inadmissible.

34. Mr Saeed accepted that the statements would only be relevant if he was right in his submission that, as a matter of procedural fairness, the information given in the letter of 28 July 2016 could and should have been given before

the decision refusing the application for naturalisation. If he was wrong in that submission, the statements were irrelevant. In our judgment that concession was correctly made and, in the light of the conclusions we have reached, the statements are inadmissible.

No procedural unfairness

35. As we have said although there were five grounds for review, at the outset of his oral submissions, Mr Saeed made it clear that he was only going to develop oral submissions in relation to unfair process and fettering of the policy, the second and fifth grounds. The second ground involves the submission that the Secretary of State acted unfairly by failing to identify her areas of concern in advance of making the decision and in failing to give the applicant a reasonable opportunity to address or rebut such concerns.

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

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

37. Mr Saeed submitted that questions 3.10 and 3.11 in the application form focused on involvement by the applicant in terrorism or extremism, so he

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

38. Mr Saeed placed particular reliance on the decision of the Commission in *AQH v SSHD* [2016] UKSIAC SN/46/2015 and in particular [21] where having quoted the part of question 3.10 of the application form which asks whether the applicant has ever been "involved in supporting acts of terrorism" and question 3.12 which asks the applicant whether he has "engaged in any other activities which might be relevant to the question of whether [he was] a person of good character", Sir Brian Keith says:

> "Anyone reading this section would have realised that the Home Secretary wanted to know whether the applicant for naturalisation harboured extreme views which amounted to support for the use of violence to achieve one's political or religious goals. 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. The same is true of the Guide…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 [i.e. the information contained in a letter of 14 June 2016 following the Rule 38 process in that case] 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 other reasons for not disclosing those things to him."

39. Mr Saeed submitted that the present case was closer to that of *AQH* than to the other recent decision of the Commission in *MNY v SSHD* [2016] UKSIAC SN/53/2015, where a similar argument was rejected and the Commission held at [39]-[40] of its open judgment (distinguishing *ZG and SA* [2016] UKSIAC 1; SN/23/2015 and SN/24/2015, upon which Mr Saeed also relies in the present case) that the application form and Guide had provided that applicant with detailed assistance as to the sort of matters which would be of concern to the Secretary of State, so that there was no requirement to have provided at the time of the application for naturalisation the disclosure subsequently given in

June 2016 following the Rule 38 process. Mr Saeed submitted that if the Secretary of State had provided the information set out in the letter of 28 July 2016 at the time of the decision or the subsequent reconsideration, the applicant could have dealt with those matters, as he had done now.

40. Mr Saeed submitted that the matters disclosed in the letter of 28 July 2016 were not foreshadowed by questions in the application form. He submitted that "close links" is a vague phrase: you can have close links with someone for a completely innocent reason. He gave the example of knowing someone who is a member of a political party but not sharing their political views. If it is subsequently declared a terrorist organisation, it does not mean you share those views or are a terrorist. Mr Saeed also alighted on the phrase: "MSB is also considered to have expressed extreme opinions" and submitted that the use of the word "considered" meant that it was not being said that he had expressed such extremist opinions.

41. In relation to his fifth ground of review, he submitted that the case did not fall clearly within one of the categories of paragraph 2.1 of Annex D to Chapter 18 of the Staff Instructions, so that paragraph 2.3 applied and the caseworker could have requested an interview which would have been helpful. By not doing so, the Secretary of state had unlawfully fettered her discretion.

42. Mr Gray submitted on behalf of the Secretary of State that the Commission should reach the same conclusion as it had reached in *MNY* at [40], that the application form, Guide (and in this case Booklet) do provide detailed guidance on the requirements for good character. The suggestion by Mr Saeed, that there was a disconnect between the disclosure provided on 28 July 2016 and what was set out in the application form, Guide and Booklet was unsustainable. Plainly the contents of the disclosure fell within questions 3.10 and 3.11 and looking at the disclosure in the round, the catch-all question in 3.12 was clearly engaged.

43. He submitted that the reliance by Mr Saeed on *AQH* was misconceived. Even if it was possible to reconcile the first sentence of [21] of that judgment with the remainder of the paragraph, which was difficult, that was a situation where the applicant harboured extremist views and in that silent sense, supported the extremist organisation and the point that the Commission was making was that the application form did not deal with silent support. However, that did not assist the applicant here, given the disclosure on 28 July 2016 which went way beyond silent support for Al-Shabaab. These submissions were supplemented by Mr Gray in CLOSED.

44. Mr Gray made submissions in relation to the applicant's grounds 2 to 4 compendiously since they all concerned alleged procedural unfairness, that is alleged unfairness in failing to provide the disclosure made on 28 July 2016 at the time of the application for naturalisation and failing to identify issues of concern to the Secretary of State, alleged failure to provide adequate reasons and alleged failure to disclose the evidential basis for the decision to refuse the application.

45. Mr Gray relied upon the legal framework which we have set out above, in particular that naturalisation was a privilege not a right and the Secretary of State had a wide discretion. He submitted that there was no statutory requirement for the Secretary of State to invite representations prior to making a determination. What fairness requires in any particular case depends on the legal and factual context, as *ex parte Doody* makes clear. In this case, the application form provided the applicant with the opportunity to make out his case as to his good character. Furthermore, the refusal letter did indicate that the issue was character, which enabled his solicitors to make further representations and for there to be a reconsideration of the position by the Secretary of State in May and October 2012.

46. Mr Gray submitted that *R v SSHD ex parte Fayed* [1998] 1 WLR 763 is not authority for the proposition that, as a general rule, a "minded to refuse" procedure should be adopted in applications for naturalisation. It establishes no more than that in some circumstances, fairness can require disclosure of issues of concern before a determination. In that case, given the complexity of the affairs and backgrounds of the Fayed brothers, without an indication as to what were the areas of concern, it would have been impossible to know what information the Secretary of State wanted from them in relation to character.

47. 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."

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

49. Furthermore, he submitted that the letter of 4 April 2012 had made it clear that the application was being refused on the grounds that the Secretary of State was not satisfied as to the applicant's good character. The elements of good character were clear from the application form, Guide and Booklet and, following the refusal, the applicant was given the opportunity to make representations and seek a reconsideration of the decision. Mr Gray pointed out that in his first witness statement dated 21 June 2016, the applicant had given detailed evidence about a number of matters, including his dealings with Mumin, over a month before the disclosure provided by the Secretary of State on 28 July 2016. There was nothing in that statement which could not have been provided by the applicant at the time of his application or his subsequent requests for reconsideration or review, all in 2011 or 2012. Likewise the matters in his second statement could have been provided earlier. Mr Gray submitted that all the matters in those witness statements were plainly in the applicant's mind at the time in 2011 and 2012. Again those submissions were developed by Mr Gray in CLOSED.

50. In relation to the applicant's suggestion (not developed by Mr Saeed in oral submissions) that there was an on-going failure by the Secretary of State to provide reasons for her decision even after the disclosure made on 28 July 2016, Mr Gray submitted that this was misconceived for two reasons. First, he relied upon the decision of Ouseley J in *R (on the application of AHK and others) v SSHD* [2013] EWHC 1426 (Admin) at [29] in support of his submission that 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. The same point was made by Lord Woolf MR in *ex parte Fayed* at 776H-777A:

> "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."

51. 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.

52. The second reason why the applicant's complaint about alleged continuing failure to provide adequate reasons for the decision was misconceived was that that form of words had been arrived at as a consequence of the ruling of the Commission pursuant to the Rule 38 process. There was no basis for any complaint about a failure to provide yet further reasons beyond that disclosure.

53. Mr Gray submitted that, in so far as Mr Saeed relied upon the decision of the Commission in *ZG and SA* [2016] UKSIAC 1; SN/23/2015 and SN/24/2015 in support of the applicant's case that the disclosure provided on 28 July 2016 could and should have been provided at the time of the application for naturalisation, that decision was distinguishable for the reasons the Commission had given in *MNY* at [39]-[40].

54. Mr Gray dealt briefly with the applicant's submissions in his fifth ground about the Secretary of State having unlawfully fettered her policy by refusing the applicant an interview. He submitted that although the policy was sufficiently flexible to cater for an interview in certain circumstances, this was not a case where an interview would be or was necessary. That submission was developed in CLOSED.

55. So far as concerns the applicant's first ground, that the decision of the Secretary of State to refuse the application for naturalisation was *Wednesbury* unreasonable or irrational or perverse (not developed by Mr Saeed at all in oral submissions), Mr Gray submitted this was wholly unsustainable. On the facts, this was an entirely reasonable decision for the Secretary of State to make. Again, that submission was developed in CLOSED.

56. We deal first with the submission that the Secretary of State could and should have disclosed the information provided on 28 July 2016 at the time of the decision or the subsequent reconsideration, we agree with Mr Gray that *ZG and SA* are clearly distinguishable from the present case and provide no guidance to the correct approach in cases such as the present. Those were cases where the relevant applications for naturalisation dated back to 2000 when the application forms which they completed simply asked about criminal convictions and did not otherwise refer to good character. So far as the guidance then in force is concerned, it gave no assistance as to good character in general, but only provided details of what constituted previous convictions to be disclosed or spent convictions.

57. In contrast, the application form and the Guide and Booklet in the present case provided the applicant with detailed assistance as to the sort of matters which would be of concern to the Secretary of State and afforded him the opportunity to set out, before the decision was taken, his case as to his character and to disclose any matters adverse to his application. In our judgment, there was no requirement in the present case for the Secretary of State to provide to the applicant before considering or reconsidering his application for naturalisation, the gist provided to him in July 2016.

58. Furthermore, given the persistent reliance by applicants in these naturalisation cases on *ZG and SA*, we wish to emphasise 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."

59. We also consider that the reliance placed by the applicant on the open judgment in *AQH* is equally misplaced. We agree with Mr Gray that [21] of that judgment seems to be internally inconsistent. The first sentence seems to recognise that questions 3.10 to 3.12 will catch anyone who has extreme views which amount to support of terrorism or extremism, whether those views are overt or covert. In our judgment that is plainly correct, in which case it is difficult to follow the reasoning in the rest of the paragraph that the application form and Guide should have dealt specifically with those who merely supported terrorism.

60. However, on the basis that the rationale for that decision is that it was dealing with the case of silent support for terrorism or extremism, it is clearly distinguishable from the present case where, on the basis of the disclosure in the letter of 28 July 2016, the applicant's activities went way beyond silent support for Al-Shabaab and extremism.

61. We were unimpressed by Mr Saeed's submissions that there was a disconnect between the disclosure given on 28 July 2016 and the questions asked in the application form. The phrase *"close links to Al-Shabaab"* was not vague, not least because the letter went on to identify two specific links: fundraising and association with members of the group. Fundraising for Al-Shabaab is fairly and squarely within having: *"been involved in, supported or encouraged terrorist activities"* in question 3.10 of the application. Furthermore, association with members of Al-Shabaab, when combined with fundraising for them, is not the kind of innocent association which Mr Saeed postulated, but associating with people the applicant not only knew to be members of Al-Shabaab but was actively supporting and encouraging by fundraising for them.

Association in that sense is equally caught by questions 3.10 or 3.11 or, failing that, by the catch-all question 3.12.

62. Contrary to Mr Saeed's submissions, the phrase in the letter: *"MSB is also considered to have expressed extreme opinions in the community"* is not saying that he had not in fact expressed them. It is simply saying that the information available to the Secretary of State was that he had expressed such opinions.

63. As we have already said, the application form and the Guide and Booklet in the present case provided the applicant with detailed assistance as to the sort of matters which would be of concern to the Secretary of State and afforded him the opportunity to set out, before the decision was taken, his case as to his character and to disclose any matters adverse to his application. The burden was on the applicant to satisfy the Secretary of State of his good character. In those circumstances, the applicant could and should have disclosed any matter which would be of concern to the Secretary of State without any further prompting or any disclosure. In our judgment, there was no requirement on the Secretary of State to make the disclosure set out in the letter of 28 July 2016 at the time that the application for naturalisation was being considered or reconsidered in 2011 and 2012.

64. 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.

Other grounds of review unsustainable

65. As we have already noted, apart from a brief submission about the fifth ground, Mr Saeed did not develop any submissions orally in relation to his other grounds for review, so they can all be dealt with briefly.

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

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

68. In our judgment, there is no evidence that the Secretary of State did not apply her policy properly and there is nothing in the applicant's witness statements

which undermines her decision to refuse his application for naturalisation or which should have caused her to reconsider that decision. The Secretary of State did not unlawfully fetter her discretion.

69. The third ground, lack of reasons, we have already dealt with so far as position in 2011 and 2012 is concerned. To the extent that the applicant complains about the disclosure made on 28 July 2016 and submits that there should be further or clearer disclosure, that ground is unsustainable for the reasons Mr Gray gave. First, the Secretary of State cannot be required to take a decision to refuse naturalisation only on the basis of material which she is willing to disclose and is entitled in an appropriate case (of which this is one) to take the decision on the basis of material which it would not be in the public interest to disclose. Second, the disclosure made in the letter of 28 July 2016 had been made following consideration and a ruling by the Commission in the Rule 38 process. No further disclosure could be required.

70. Furthermore, since the present procedure is a species of judicial review, the Commission is concerned with the reasonableness of the decision taken at the time. Given that, as we have held, the Secretary of State was under no obligation to disclose the information in the letter of 28 July 2016 at the time of the decision in 2011 and 2012, even if the applicant had some legitimate basis for challenging the disclosure now made (which he does not, for the reasons we have just given), that could not possibly impugn the decision the Secretary of state took to refuse his application for naturalisation.

71. The applicant's fourth ground, failure to disclose the evidential basis for the decision is unsustainable for the reasons we have already given in concluding there was no procedural unfairness in the present case.

72. The fifth ground, that the Secretary of State unlawfully fettered her discretion by not granting the applicant an interview either at the time of the original decision or at the time of reconsideration, is also unsustainable. There is no obligation on the Secretary of State to grant an interview, it is entirely a matter of discretion. There is no question of the Secretary of State not having applied the policy: the present case does not fall into paragraph 2.3 of Annex D to Chapter 18 of the Staff Instructions because it does clearly fall within paragraph 2.1. It was not a case where an interview was necessary or would have made any difference.

73. Accordingly, for those reasons and the further reasons and analysis set out in our CLOSED judgment, the applicant's first and third to fifth grounds are not arguable.

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

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

75. Mr Gray 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.

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

77. This argument was also run on behalf of the Secretary of State in *ZG and SA:* see [38]-[40] of the judgment, where the rival argument on behalf of the applicants was set out. The Commission did not find it necessary to resolve the conflict because it was not satisfied that it was highly likely that the outcome would not have been substantially different. The argument was also raised in *MNY* where the Commission did not find it necessary to decide the point in view of its decision that the application for statutory review failed, and in *AQH*, where the Commission concluded that it too did not need to resolve the issue about the application of section 31(2A) of the Senior Courts Act 1981, because judicial review (and therefore statutory review under section 2D of the 1997 Act) is always discretionary and the Court would ordinarily refuse the relief sought if it concluded that, even though a decision or action of a public body was unlawful, the same decision or action would have been taken if the public body had acted lawfully. Since the Commission in that case considered that the application for naturalisation would always have been refused, even if the applicant had been afforded the opportunity to make representations about the matters of concern to the Secretary of State, it exercised its discretion to refuse any relief.

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

Conclusion

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

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