

SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SN/94/2020
Hearing Date: 7th October 2021
Date of Judgment: 19th November 2021

Before

**THE HONOURABLE MR JUSTICE JAY
UPPER TRIBUNAL JUDGE CANAVAN
MR NEIL JACOBSEN**

Between

MEHMET BASBAYDAR

Appellant

and

**THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT**

Respondent

OPEN JUDGMENT

Mr J. Walsh (instructed by **Morgan Has Solicitors**) appeared on behalf of the Appellant

Mr W. Hays (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Mr D. Lewis (instructed by **Special Advocates' Support Office**) appeared as Special Advocate

1. Mr Mehmet Basbaydar ("the Appellant") was born in Uskudar, Turkey on 1st January 1988. He is of Kurdish ethnicity. According to his witness statement dated 28th May 2021, his family was politically aware and attracted the unwelcome interest of the Turkish authorities in relation to their support of what may loosely be described as the rights and interests of the Kurdish people. However, they regarded the PKK as a terrorist organisation. Needless to say, membership of the PKK is a criminal offence in Turkey and this entity has also been a proscribed organisation in the UK since 2001.
2. In 2006 the Appellant commenced studies in Media Journalism at Marmara University in order to enhance his ability to speak out on legitimate Kurdish causes. He became involved in politics, supported the Kurdish Political Party ("DTP"), and wrote articles which were intended to hone his journalistic skills.
3. The Appellant was arrested for his political and cultural activities in March 2008, and was incarcerated pending his trial for exactly one year. He was released on 11th March 2009. He was detained again in November 2009 after issuing with others a press release directed, he says, to the harassment faced by the Kurdish people. On 31st August 2010 he was able to leave Turkey and to come to the UK. He claimed asylum not on arrival but on 6th October 2010.
4. When the Appellant was interviewed for the purposes of his asylum claim, he stated that he had come here purely for a family visit. He was on the point of returning to Turkey when he learned that he had been convicted in his absence and had been sentenced to 7½ years' imprisonment. He told the interviewing officer that he had been involved in Kurdish media meetings and attended DTP rallies. He denied any involvement in terrorist activities. In due course the Appellant was granted asylum, the Respondent taking the view that he had given a consistent account. Article 1F of the Refugee Convention was not applied to him.
5. First of all, the Appellant lived in London where he met his wife, Sema, in 2012. In the June of that year they moved to Portsmouth and started working in various cafes in the area. Thereafter, his involvement in protests and similar political activities (see further below) reduced greatly. In 2017 the couple bought their own café, Farm Kitchen. Mr John Walsh told the Commission that the Appellant was aware that various groups approached business operators in order to extort funds, from which we deduce that he was aware that it was the practice of the PKK to do precisely that to Kurds operating cafes and similar businesses. However, there were no such approaches to the Appellant.
6. The Appellant states that he has been involved in legal protest whilst in the UK, the most recent being in 2014/5. The focus of the protest was the continued actions of the Turkish state against the Kurds. He denies any connection with the PKK and also denies that anyone at the various meetings he attended advocated violence or claimed to speak on behalf of that organisation.
7. The Appellant applied to be naturalised on 5th July 2017. In his application form he denied being involved in, supporting or encouraging any terrorist activities. On 2nd September 2020 the Respondent refused that application on the ground that he did not meet the good character requirement under s. 6 of the British Nationality Act 1981. More specifically, "this was because of [his] connection to the PKK, a proscribed organisation".

8. The Appellant now applies to this Commission to set aside that decision pursuant to s. 2D of the Special Immigration Appeals Act 1997.
9. The principles governing this application for review are well-established, with the leading authorities being *R (oao Thamby) v SSHD* [2011] EWHC 1763 (Admin) and *AHK v SSHD* [2014] (SN/2/2014). In short:
 - (1) The Respondent is entitled to set a high bar for satisfying the good character requirement, and this Commission may intervene only if the standard adopted by her and/or its application to the facts of a particular case is unreasonable.
 - (2) The burden is on an applicant to satisfy the Respondent that the good character requirement is met.
 - (3) The Commission must apply judicial review principles to the Respondent's decision-making process, including the decision itself.
 - (4) The Commission's task is to review the facts with careful or anxious scrutiny and to decide whether the Respondent's factual findings are reasonable. Here, the Commission shows no deference to the Respondent.
 - (5) If the factual findings are reasonable, the Commission must then decide whether the Respondent's decision – entailing as it does an evaluative assessment – is reasonable in the *Wednesbury* sense. In this context a degree of deference must be shown to the Respondent.
10. Item (4) above merits further elaboration. In *R (oao SSHD) v SIAC* [2015] 1 WLR 4799, the Divisional Court explained that the Respondent was under a duty to disclose to the special advocates in CLOSED not merely the report and any other documents relied on by the decision-maker but also “such material as had been used by the author of any report relied upon by the decision-maker to found or justify the facts and conclusions expressed therein”. This obligation served to attenuate at least to some extent the unfairness inherent in the statutory scheme, namely that an applicant for naturalisation would remain unaware of the decisive material in his case for reasons of national security.
11. Mr Walsh, hampered as he is by being unsighted as to the CLOSED material, submits that the Respondent has made an irrational decision which failed to have regard to the fact that his client has led a blameless life here since 2010 without being involved in or with the PKK. It is said that the Respondent has wrongly conflated the issue of lawful support for Kurdish causes by participation in protests or otherwise with any unlawful nexus to or involvement with the PKK. Mr Walsh further submits that the Respondent must have ignored relevant Home Office Guidance, and that the witness statement of Christine Hughes on its behalf “gives no clue that [the requisite] sophisticated approach was brought to the Appellant's case”. The inference must be that the Respondent has relied on intelligence that is either unreliable or hostile towards him, and that it has failed to take relevant considerations and circumstances into account. Finally, it is said that the Respondent has acted unfairly by failing to give any forewarning to the Appellant and in failing to set out any of the foundations for the decision under appeal.
12. In his brief but effective oral submissions Mr Walsh added that there could well have been a misunderstanding of perfectly innocent events, or that the Appellant's business may have been confused with another's.

13. Subject to three matters, we are simply unable to deal with any of these submissions in OPEN. To the extent that these submissions are relevant (and our inability to refer to CLOSED material means that we cannot state to what extent, if any, they are), they stand or fall on an analysis of the CLOSED material that is undertaken elsewhere. It is unnecessary to go further than this in OPEN.
14. The first matter we are able to address is the Appellant's signed statement on his application form that he has not supported terrorist activity. That statement would be true if the Respondent were not entitled to conclude that he had supported such activity, and it would be untrue if the Respondent had been entitled to reach the conclusion that the Appellant had. As such, the application form does not separately advance the Respondent's case.
15. The second matter we may address is the Appellant's contention that the Respondent has acted unfairly. Although it is of course true that the Appellant has not seen the evidence vouching the conclusion that he has a connection with the PKK, and was given no opportunity to put his case to the Secretary of State before the naturalisation application was refused, this state of affairs is an inexorable consequence of the statutory scheme. The public interest in maintaining the secrecy of material whose disclosure might damage national security or the relationship between the UK and another country, or otherwise cannot be disclosed in the public interest, overrides what would otherwise be the Appellant's common law right to be told the essence of the case against him. There are numerous authorities to that effect, the most recent being *AMA v SSHD* [2021] (SN/75/2018). This inherent unfairness is attenuated, but not removed, by the appointment of a special advocate, the rule 38 procedure, the careful or anxious scrutiny that the Commission must apply to the CLOSED material, and the principle that the Respondent must give wider disclosure than would ordinarily apply in judicial review proceedings.
16. The third matter we may address throws some light on our reasoning and conclusion in CLOSED.
17. In our judgment, although Mr Lewis has been able to persuade us the information before the Respondent was flawed, we cannot accept that the error that has been identified could make any difference to the outcome of his case.
18. We have reached our overall conclusion in this case with some reluctance, but any sympathy we might have for the Appellant and his wife must be placed to one side. Our statutory functions are, of course, closely circumscribed. It would be open to the Respondent to take another look at this case in the light of this judgment but there could no obligation to do so.
19. We remain grateful for Mr Walsh's able arguments, but our reasons for refusing this application under s. 2D of the 1997 Act are – subject to the foregoing - wholly set out in the CLOSED judgment that we are handing down at the same time.
20. This application is refused.