Neutral Citation Number: [2022] EWCA Civ 304

Case No: CA-2021-000421 (T2/2021/0228)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
Garnham J, UTJ Rintoul and Mr Golland

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 March 2022

Before :

LORD JUSTICE BEAN
LORD JUSTICE SINGH
and
LORD JUSTICE GREEN

- -

Between :

GA	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Edward Grieves (instructed by **Fountain Solicitors**) for the **Appellant**
Natasha Barnes (instructed by the **Treasury Solicitor**) for the **Respondent**
Stephen Cragg QC (instructed by the **Special Advocates Support Office**) as Special Advocate

Hearing date: 18 January 2022

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Approved Open Judgment

Remote hand-down: This judgment was handed down remotely at 10 a.m. on Tuesday, 15 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives

Lord Justice Singh:

Introduction

1. This appeal from the Special Immigration Appeals Commission ("SIAC" or "the Commission") arises from the Respondent Secretary of State's refusal of the Appellant's application for naturalisation. The true basis for that refusal, alleged association with extremists, was only made known to the Appellant at a very late stage (after he had applied to SIAC for a review of the Respondent's decision, and then only following disclosure after a Rule 38 hearing). In an OPEN judgment handed down on 3 November 2020, the Commission (Garnham J, UTJ Rintoul and Mr Golland) held that there had been procedural unfairness in the way in which the Respondent had dealt with the application for naturalisation but refused to grant any relief. This was because, for reasons given in a CLOSED judgment, it considered that the decision would inevitably have been the same even if the procedural unfairness had not occurred.

2. Permission to appeal to this Court was granted by Elisabeth Laing LJ on 12 May 2021. She also granted permission to appeal on two CLOSED grounds. At the same time she continued the anonymity order which is in place in respect of the Appellant.

3. The Appellant invites this Court to allow his appeal and seeks an order that the Respondent must reconsider his application for naturalisation after giving him the opportunity to submit further evidence and make representations.

Factual background

4. The Appellant was born in Algeria in 1969. On 9 May 2000 he first entered the United Kingdom ("UK") and claimed asylum but this application was refused on 27 February 2001. He later married a European Union ("EU") national, whom he had met while in the UK. On 23 May 2002 the Appellant was convicted of possessing a false instrument and sentenced to 16 months' imprisonment. On 29 November 2005 he was granted both a Permanent Residence Card and Indefinite Leave to Remain.

5. On 4 October 2012 the Appellant made his first application for naturalisation. He did not declare his conviction of May 2002 in this application. He was under the impression, based on the guidance available to applicants at that time, that it was spent for the purposes of such an application. On 21 December 2015 the Respondent refused the application for naturalisation and in her letter stated that she was not satisfied that the good character requirement was met, given the Appellant's previous conviction, which he had failed to declare. In that letter, the Respondent incorrectly stated that the relevant conviction was on 24 July 2002 but, by the time of the SIAC hearing, this error had been acknowledged and corrected.

6. On 4 March 2016 the Appellant applied for re-consideration of the Respondent's decision on the ground that the relevant policy was ordinarily to disregard such a conviction. On 7 April 2016 the Respondent appeared to refuse this application for reconsideration. This was on the basis that the conviction could not be disregarded under the prevailing policy. The Appellant's deception was also considered to be a "main area of focus", according to the Respondent's letter.

7. On 4 August 2016 solicitors for the Appellant wrote to the Respondent, contending that there had been a failure by the Home Office to apply its policies correctly and that, based on the policy and written guidance available to applicants, it had not been necessary to disclose the Appellant's conviction. On 21 October 2016 his solicitors sent a further reminder letter to the Respondent.

8. On 22 December 2016 the Respondent wrote to the Appellant, confirming that she considered that there were grounds to re-open the case and that the application would be considered again. On 12 January 2017 the Respondent wrote to the Appellant, maintaining the decision and stating that the conviction could not be disregarded.

9. On 14 February 2017 the Appellant's solicitors replied, explaining again why the policy had been wrongly applied and to request a response granting the application within 14 days. On 29 March 2017 the solicitors sent a further letter requesting a response. None was received.

10. On 24 April 2017 the Appellant's solicitors sent a Pre-action Protocol letter to the Respondent, requesting either a response or a decision. On 15 May 2017 the Respondent replied and stated that she would now proceed to reconsider the Appellant's application in light of the further representations made.

11. On 20 June 2017 the Appellant's solicitors sent a letter requesting an update and a time estimate for the decision on the application. After receiving no response again, on 15 August 2017 they sent a further Pre-action Protocol letter stating that the delay in reconsideration was not justified.

12. On 31 August 2017 the Appellant's solicitors received a letter from the Home Office addressed (in error) to a Mr Qader, dated 29 August 2017, which stated that the application was refused on the grounds that the Appellant did not meet the good character requirement and that it would be contrary to the public interest to give reasons. No reference was made to the previous complaints.

13. On 13 September 2017 the Appellant applied to SIAC for a review of that decision. A Rule 38 hearing was held on 3 May 2018, at which it was possible for a Special Advocate to make submissions in CLOSED session with a view to securing further disclosure of facts and documents into OPEN. Following that hearing, the Respondent explained that the Appellant's citizenship application had been refused on the ground that the Appellant did not meet the good character requirement and that this was because the Appellant had associated with Islamist extremists in the past. In her explanation, the Respondent referred to a section of previously unpublished guidance to caseworkers concerning association with extremism and terrorism. That guidance was also disclosed.

The proceedings before SIAC

14. Before SIAC the Appellant initially advanced four Grounds of Review but these were revised after the disclosures that followed the Rule 38 hearing. The two Replacement Grounds of Review, filed on 10 February 2020, were that:

(1) the Respondent had failed to provide him with a fair opportunity to address matters which had been held against him; and

(2) the Respondent relied upon an unlawful, unpublished policy.

15. The SIAC hearing was held on 6 July 2020 before Garnham J, UTJ Rintoul and Mr Golland. All the parties were represented by counsel and a Special Advocate also appeared to represent the Appellant's interests in CLOSED session. On 3 November 2020 the Commission handed down OPEN and CLOSED judgments, dismissing the review, with detailed reasons being given in the CLOSED judgment. I will refer here only to the OPEN judgment.

16. At para. 30, the Commission observed that the Appellant had good grounds for his initial procedural complaint. At para. 31, it concluded that it was "manifestly unfair" that applicants were being misled by the guidance given to them about previous convictions and that a failure to disclose information not required by that guidance was being held against the Appellant. At para. 33, the Commission said that the Respondent was plainly in error to maintain her position that the conviction ought to have been disclosed even after the Appellant's solicitors had pointed out that spent convictions were to be disregarded.

17. At para. 34, the Commission also observed that the essential basis for refusing the naturalisation application had shifted significantly and it was misleading to maintain for a number of years, as the Respondent did, that the decision on the Appellant's good character was based on his failure to disclose the 2002 conviction.

18. At para. 36, the Commission said that, at least from April 2016, when the Commission handed down its OPEN judgment in *ARM v Secretary of State for the Home Department* (SN/22/2015), which referred to CLOSED Home Office guidance for caseworkers entitled "terrorism", there was no good reason why the Respondent should not have explained the true concerns about the Appellant's character by using the form of words eventually deployed in this case. If that had been done, the Appellant would have been able to address those concerns in his application for re-consideration.

19. However, the Commission held, at para. 37, that all of these matters were of historical interest only, as the Respondent had re-considered the application and reached a fresh decision. The Commission felt that it was in a position to consider both the Respondent's concerns about the Appellant's good character based on his alleged association with Islamist extremists in the past and the Appellant's answers to those concerns.

20. The Commission held, at para. 39, that the substance of the Appellant's case and the strength of the Respondent's objection to naturalisation could only be resolved in CLOSED. The Commission directed itself that, where it has found procedural unfairness in a failure to disclose information so that an applicant does not know the case he has to meet, it should be very slow to conclude that it would be inevitable that the outcome of a decision on reconsideration would be the same, relying on the Commission's observations at para. 114 of *LA, MB, RA, SAA v Secretary of State for the Home Department* (SN/63, 64, 65 and 67/2015, judgment of 24 October 2018).

21. Having had the benefit of argument in CLOSED session, the Commission held that the outcome in this case was inevitable and therefore the review had to be dismissed for the detailed reasons provided in the CLOSED judgment.

Grounds of Appeal

22. The Appellant was granted permission to advance two OPEN grounds of appeal:

    (1) the Commission did not have all of the relevant material before it to exercise its discretion to refuse the review ("ground 1"); and

    (2) the Commission erred in substituting its own decision for that of the Secretary of State ("ground 2").

23. On behalf of the Appellant Mr Edward Grieves takes grounds 1 and 2 together and submits that, once the Commission had concluded that a particular procedural error had occurred, this case was not an appropriate one for it to substitute its own view on whether the Appellant met the statutory criteria and in effect to exercise the Secretary of State's discretion for her. Mr Grieves submits that there are four principal reasons for why the Commission's decision to apply the inevitability test itself was in error:

    (1) The statutory scheme for the grant of naturalisation under section 6(1) of the British Nationality Act 1981 ("the 1981 Act") gives the discretion to the Secretary of State herself and that discretion is not only to be exercised by reference to the statutory criteria.

    (2) SIAC's powers are limited when reconsidering a decision afresh in contrast to the Secretary of State's, particularly in relation to its ability to investigate new factual matters.

    (3) The Commission in this case is highly unlikely to have had all of the relevant material before it to determine whether a decision would inevitably have been the same. This is because:

        (a) the SIAC procedure rules regulate appeals and reviews to it differently;

        (b) the assistance of Special Advocates on CLOSED material is limited during any reconsideration, as they are not able to take further direct instructions after going into CLOSED; and

        (c) two important features of natural justice are magnified when CLOSED material is present: the uncertainty of what may be perceived to be "obvious"; and the feeling of resentment created by shutting an individual out of a decision-making process: see *John v Rees* [1970] Ch 345, at 402 (Megarry J).

    (4) The Commission conducted the reconsideration on the basis that the only document that would have been before the Secretary of State would be the witness statement of the Appellant but this was not necessarily the case, as that statement was simply a starting-point, which had been deployed at the OPEN

hearing to show that there were representations that the Appellant would wish to make if reconsideration were ordered.

Submissions for the Respondent

24. On behalf of the Respondent Ms Natasha Barnes makes three submissions on the applicable legal principles:

    (1) First, it is well established that an applicant for naturalisation seeks a privilege and not a right and that the 1981 Act vests the Secretary of State with considerable discretion. An applicant must persuade the Secretary of State that he is of good character and a high standard is set for this requirement.

    (2) Secondly, it is also well established that a court may refuse relief if satisfied that, if the error found had not been made, the outcome would inevitably have been the same. The onus falls on the public body to show that the decision would inevitably have been the same. She accepts that this is a stringent test and the discretion to refuse a remedy should be exercised sparingly.

    (3) Thirdly, the courts have consistently emphasised that an appellate court should be slow to interfere with the exercise of discretion by a lower court. It may only do so where the lower court has erred in principle or reached a conclusion which was not reasonably open to it. By way of example, Ms Barnes cites the approach taken by Saini J in *Sakandar Azam v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB); [2021] Med LR 150, at paras. 50-52.

25. Ms Barnes submits that SIAC was conscious that it should be very slow to conclude that the outcome of any reconsideration would inevitably be the same and cited *LA and Others* to the effect that this would be "very unusual". Aware of this need for caution, the Commission nevertheless came "firmly" to the conclusion that the outcome was inevitable for the reasons set out in its CLOSED judgment.

26. Ms Barnes advances three arguments for why SIAC was entitled to refuse relief to the Appellant:

    (1) There is no good reason why, in principle, SIAC cannot refuse a remedy if satisfied that the same outcome would have been inevitable and this approach is consistent with the principles of judicial review which SIAC must apply in this context.

    (2) SIAC has routinely applied the "inevitable outcome" test when determining relief.

    (3) The fact that an individual does not know the reason why the same outcome was inevitable does not necessarily mean that SIAC should grant relief. In this case, even if the Appellant had been notified that the refusal was based on his past association with extremists, he would still not have been given any more details and so any further submissions made by him would not have made a difference.

Material legislation

27. Section 6 of the 1981 Act 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 him a certificate of naturalisation as such a citizen."

28. Para. 1 of Sch. 1 makes it clear that, subject to para. 2, the requirements for naturalisation as a British citizen under section 6(1) include: (b) that a person is of "good character". This requirement cannot be waived by the Secretary of State.

29. Ordinarily a dissatisfied applicant for naturalisation can challenge the refusal decision by way of judicial review in the High Court. However, in the present context, section 2D(2) of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") provides that:

> "The applicant to whom the decision relates may apply to the Special Immigration Appeals Commission to set aside the decision."

This is because the decision has been certified by the Secretary of State as having been made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public in the interests of national security: see section 2D(1)(b)(i) of the 1997 Act, as amended.

30. Subsection (3) provides:

> "In determining whether the decision should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings."

31. Subsection (4) provides:

> "If the Commission decides that the decision should be set aside, it may make any such order, or give any such relief, as may be made or given in judicial review proceedings."

32. In *LA and Others* SIAC, chaired by Elisabeth Laing J, held that, in considering whether to grant relief, the provisions of section 31(2A) of the Senior Courts Act 1981 do not apply to SIAC: see paras. 108-112. SIAC went on to state that the applicable principles which govern the discretion of the Commission to grant or refuse relief remain those which preceded the amendment to section 31 in 2015: see para. 113. It said that "it

will be a very unusual case indeed in which the court could be satisfied that, had the decision maker acted fairly in taking the decision, the decision would inevitably, or necessarily, have been the same": see para. 114.

33. The approach taken in that case was followed in the present case too. It was common ground that the test in SIAC is still the old test, which applied to judicial review proceedings before the Senior Courts Act was amended by the Criminal Justice and Courts Act 2015: whether the outcome would have been inevitable even if the error had not occurred. Before this Court Ms Barnes did not contend otherwise but wished to reserve the Respondent's position as to whether *LA and Others* was correctly decided on this point in case it should arise in a future case.

Conclusions

34. There is no dispute before this Court as to the relevant test. It is common ground that the question for SIAC was whether the outcome of the decision would have been inevitable even if the procedural unfairness found by it had not occurred. It is also common ground that this Court cannot interfere with the exercise of SIAC's discretion unless it erred in principle or reached a conclusion that was not reasonably open to it.

35. For reasons that can only be set out in the CLOSED judgment, I have reached the conclusion that SIAC did, with respect, err in principle and did reach a conclusion which was not reasonably open to it in the circumstances of this case. Accordingly, I would allow this appeal and remit the matter for reconsideration by the Respondent in accordance with this and the CLOSED judgment. The decision is quashed and remitted to the Secretary of State to be taken again on the basis of all the evidence, including that submitted by the Appellant, as of the date of the fresh decision.

Lord Justice Green:

36. I agree.

Lord Justice Bean:

37. I also agree.