Neutral Citation Number: [2023] EWHC 640 (Admin)

Case No: CO/1813/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 March 2023

Before :

The Honourable Mr Justice Mostyn

- -

Between :

The King on the application of Kanja Sandy	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Arfan Khan (instructed by **Graceland Solicitors**) for the **Claimant**
Katherine Apps (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 15 March 2023

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Approved Judgment

Mr Justice Mostyn:

1. The claimant was born in February 1972 in Sierra Leone. In 1990 a civil war erupted in that country. It continued for eleven years, ending in 2001. It is said that as many as 200,000 people perished during the fighting.

2. The claimant aligned himself with Johnny Paul Koroma who seized power in a coup in 1997. He acted as his aide-de-camp. He was then aged 25. He participated in combat operations, describing himself in his initial asylum application as "main commando qualified military personnel" and as a "freedom fighter" in his statement of facts and grounds in this (and in his earlier) judicial review claim. He was one of the top military trainers in the country and hundreds of personnel were trained under his tutelage. The conduct of the Koroma regime was abysmal and, as is well-known, its personnel committed numerous atrocities amounting to war crimes. The claimant was at the heart of the regime at a time when these abominations were perpetrated. Koroma himself was indicted by the Special Court for Sierra Leone, but died before he could face justice.

3. With the ever-changing, shifting alliances, the Koroma government fell, and the claimant was treated with hostility and suspicion by the incoming regime. He was imprisoned and tortured. He received death threats and there was an actual assassination attempt, a grenade exploding at his feet which miraculously did not kill him.

4. In 2001 the claimant left Sierra Leone and made his way to this country via Liberia, Guinea and France. He travelled to this country on Eurostar using a fake French passport and on arrival at Folkestone claimed asylum. In his statement in support, and in his interview with Home Office officials he emphasised his martial history, in order to develop a case that as a soldier for the defeated side he was at special risk of reprisal at the hands of the new regime. There is a laconic comment in his statement (which he did not repeat in his interview) that he was taken from Kailahun (where he had been locked up by the infamous Sam Bockarie (widely known as "Mosquito") for failing to loot the banks there) to Liberia with a "do or die" option to train rebels in Vahun. That aside, he did not suggest in his statement or in his interview that his martial conduct was the product of duress, let alone that he was acting in self-defence. He did not say that in his combat experiences he was an unwilling participant acting under the orders of a superior. On the contrary, his voluntary embrace of martial service to the former regime was relied on by him in order to demonstrate that there was a reasonable likelihood that he would face persecution if he were to be made to return to Sierra Leone. That argument succeeded and he was granted asylum on that very basis on 13 November 2001.

5. In due course the grant of asylum was superseded by the grant of indefinite leave to remain ("ILR") in 2011. Under that grant the claimant is entitled to reside in this country, and to work, receive benefits, and to contribute to a state pension. Moreover, he can travel using his ILR card and over the years has travelled extensively to Europe, Australia and the USA. So far as I can tell the only disadvantage compared to being a citizen is that in relation to foreign travel he needs a visa for almost every country, whereas with a British passport the holder can travel to many places without a visa.

6. There is no doubt that since his arrival here 23 years ago the claimant has conducted himself irreproachably.

7. He is married with children. He works as a nurse in an NHS hospital.

8. The claimant first applied for naturalisation in 2011. He was interviewed on 7 December 2010 and this initial application for naturalisation was rejected on 27 January 2011 on the ground that the Secretary of State could not be satisfied that he met the requirement of good character. He was however granted ILR.

9. The claimant made a second application for naturalisation in 2019. He adduced good character references relating to his work as a nurse in the NHS. The reference from the interim director of nursing dated 14 January 2019 stated:

> "I have always found Mr Sandy to be honest, hardworking and a diligent worker. He cares greatly about the staff and patients in this organisation and I have frequently seen him going the extra mile to provide care and attention to both. He takes his work very seriously and his attendance and reliability are excellent. He has always demonstrated thoughtful kindness and compassion towards patients and families in his care."

Although the application form requires an applicant to disclose details of any involvement in war crimes, genocide, crimes against humanity or terrorism, the claimant was completely silent about his conduct in the civil war in Sierra Leone.

10. The claimant's second application was refused on 14 April 2021 on the basis that sufficient evidence had not been provided to satisfy the requirement of good character. The Guidance on good character states that it must be:

> "clear that if after a full consideration of a person's ability to meet the good character requirement taking into account both adverse and positive factors, if serious doubts remain, a certification of naturalisation should not be issued."

I deal with this Guidance in some detail below.

11. The claimant brought judicial review proceedings on 1 July 2021 to challenge the decision of 14 April 2021. Permission was granted by HHJ Lickley QC on 13 December 2021 on the basis that there was a failure to provide the claimant with an opportunity to address those matters which caused the defendant to conclude that he was not of good character. The proceedings were shortly thereafter withdrawn by consent and a consent order was approved on 10 January 2022 which directed the claimant to submit further evidence of good character and for the defendant to reconsider her decision and to make a new decision.

12. On 8 April 2022, the defendant again refused the claimant's application for naturalisation. This is the impugned decision. It states as follows:

> "Your client is considered to have been a long-term member of the Sierra Leone Army and later the AFRC. His actions will have contributed to the overall purposes of the organisations. In determining this, I have considered factors such as his role in the

AFRC, his profile within the group and the length of his membership and association with Koroma.

[…]

On the basis of this and the information he has provided during the course of the interaction with the Home Office, it is concluded that your client aided the commission of war crimes. Further, he is considered responsible for aiding the war crime of intentionally directing attacks against personnel involved in a peacekeeping mission as per Article 8 of the Rome Statute of the International Criminal Court.

Guinea was increasingly embroiled in the wars in Liberia and Sierra Leone. Guinea's refugee camps and border villages were attacked, and the population submitted to murders, rapes, looting and destruction of property by the Revolutionary United Front (RUF). Such attacks were war crimes, and it is therefore believed your client indirectly aided these war crimes by his involvement in training troops who committed international war crimes.

[…]

In establishing whether there are grounds to refuse an application, we consider evidence directly linking the applicant to such activities, such as the likelihood of their membership of and activities for groups responsible for committing such crimes. The individual role of the applicant, length of their membership and level of seniority are also relevant.

[…]

I have looked at the positive aspects of your life since arriving in the UK as well as the information he himself provided during his asylum process about his life and circumstances in Sierra Leone.

There are no doubts your client's actions in Sierra Leone benefited the AFRC directly or indirectly. It is an organisation known to have committed abuses and international crimes whilst he was with them. His profile was significant, as the Aide De Camp to the then President.

I have been unable to establish compelling evidence to show strong countervailing factors in your client's personal circumstances and conduct since entering the United Kingdom that could outweigh the assistance and support, he gave to the AFRC and J P Koroma. It is noted that Koroma, was indicted by the Special Court for Sierra Leone on March 7 2002, he was wanted for war crimes and crimes against humanity and other serious violations of international humanitarian law prior to his death.

> I have reviewed the consideration given to your client's application and the decision made on it. I am satisfied that there are no grounds to overturn the previous decision to refuse on the basis your client was unable to meet the statutory requirement to be of good character. The decision to refuse the application is therefore maintained."

13. This judicial review claim was issued on 23 May 2022. Permission was refused on the papers by David Pittaway QC on 16 August 2022. A renewal hearing then took place on 20 October 2022 before Mr Simon Tinkler. The court granted permission on renewed ground 1 and refused permission on renewed ground 2. Renewed ground 1 states:

> "The decision maker erred in law in that the decision maker did not consider the following in the exercise of her discretion and referred to in the published policy:
>
> (a) Mitigation, duress, and other defences, including the superior orders defence.
>
> (b) The degree to which the applicant had distanced himself from his past memberships or associations in Sierra Leone.
>
> (c) The degree to which the Claimant was personally and directly involved in the relevant activities in Sierra Leone."

14. I have to say that this Ground is not very well expressed. I discussed this with counsel. In my opinion, to express what was clearly intended it would be better couched thus:

> "The decision maker erred in law in that in the exercise of her discretion she did not consider the following matters referred to in the published policy:
>
> (a) the defences available to the claimant, including duress and superior orders, and the mitigation available to him referable to the facts giving rise to those defences;
>
> (b) the degree to which the claimant had distanced himself from his past memberships or associations in Sierra Leone; and
>
> (c) the degree to which the claimant was personally and directly involved in the relevant activities in Sierra Leone."

I shall refer to these claims as Grounds A, B and C.

The legal principles

15. For the purposes of this case, the relevant statutory provisions are laid out in section 6(1) of, and Schedule 1 para 1(1)(b) to, the British Nationality Act 1981 ("the 1981 Act").

16. Section 6(1) provides:

> "**Acquisition by naturalisation**.
>
> (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."

17. Schedule 1(1)(b) provides:

> "…the requirements for naturalisation as a British citizen under section 6(1) are, in the case of any person who applies for it:
>
> …
>
> (b) that he is of good character; …"

18. If the Secretary of State is satisfied that the applicant is of good character then she has a discretion whether to grant the applicant a certificate of naturalisation as a citizen. In contrast, there is no discretion where the Secretary of State is not so satisfied. In that event, the plain meaning of the provisions is that the Secretary of State must refuse the application. This interpretation is confirmed by the authority of *R(Amin) v SSHD* [2022] EWCA Civ 439 at [25].

19. This case does not concern the discretion whether to grant the applicant a certificate of naturalisation where the Secretary of State is satisfied that the applicant is of good character. It concerns the lawfulness of a finding that the applicant is not of good character, and that, therefore, his application must be refused.

20. Whether someone is of bad character is not a concrete fact in the same way that someone has, for example, red hair, or weighs more than 12 stone. Concrete facts of that nature are proved by evidence in the normal way, but finding them does not require the forming of any kind of value judgment by the fact-finder. In contrast, bad character is an abstract fact which cannot be directly observed or measured, and its ascertainment requires a certain amount of subjectivity by the fact-finder. That subjectivity is the making of a moral assessment of the subject at the relevant time. It is of a piece with other abstract facts such as "dishonesty" or "sexually motivated" although they require an assessment of the subject's state of mind at the relevant time.

21. Plainly, the ascertainment of abstract facts such as these requires the formation of a value judgment, or an evaluation. An evaluation has discretionary characteristics, but it is definitely not the same thing as an exercise of discretion: see *Abela & Ors v. Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043 at [23] per Lord Clarke. A discretionary exercise is where the court picks a result from a range of choices, none of which can be said to be wrong. The power vested in the Secretary of State to grant or not grant a certificate of naturalisation where she is satisfied that the applicant is of good character is a true discretion as neither choice can be said to be wrong.

22. The answers to binary yes/no questions which do not relate to concrete facts are always evaluations. Questions of this type which I have had to answer in other cases in recent times have included: "Was he dishonest?", "Did he act with a sexual motivation?", and "Did he make a special contribution?"

23. The question the Secretary of State had to answer was uncomplicated: "Is he of good character?" The formal burden of proof lay on the applicant but, as always, it will be a rare case where that burden does not yield to the evidence: see *Quinn v Quinn* [1969] 1 WLR 1394 at 1409 per Winn LJ and my own decision of *Cathcart v Owens* [2021] EWFC 86 at [43] – [45]. The standard of proof is the civil balance of probability (i.e. more likely than not). There are no restrictions on the admissibility of evidence.

24. The answer to the question is given by a classic evaluation. This is confirmed by authority. In *R (on the application of Al-Enein) v SSHD* [2019] EWCA Civ 2024 Singh LJ stated at [31]:

> "…the Secretary of State must be satisfied that the applicant is a person of good character. This is not strictly speaking an exercise in discretion. Rather it is an exercise in assessment or evaluation."

25. Where such an evaluation of the evidence is made by a court, it is very difficult for it to be challenged on an appellate review: see the speeches of Lord Hoffmann in *Biogen Inc. v Medeva Ltd.* [1997] RPC 1 and *Piglowska v Piglowski* [1999] UKHL 27, [1999] 1 WLR 1360. In the latter case, which was concerned with a post-divorce financial award he stated:

> "It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.
>
> …the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts."

Thus, the deference given on an appellate review to a decision based (a) on findings of fact and (b) evaluations of those findings of fact is very wide. And this is where there is a statutory right of appeal against the primary decision.

26. Where the Secretary of State makes an evaluation of the facts pursuant to Section 6(1) and Schedule 1, para 1(1)(b) of the 1981, what degree of deference should a court afford her decision when it is subjected to judicial review? Obviously, it will not be less than

that given by an appeal court to a first instance decision which is an evaluation of the facts.

27. There are a number of factors which suggest that the decision of the Secretary of State should be immune from review unless it is shown that it was *Wednesbury* perverse, irrational or unreasonable (these adjectival descriptions all being synonymous for this purpose) in the traditional sense.

28. These factors are, first, that the decision has been specifically entrusted to the Secretary of State by Parliament in a long-standing democratic expression of the will of the people. It is not a prerogative power left in the hands of the Secretary of State by historical accident. The 1981 Act was the successor to the British Nationality Act 1948, where in s.10 and para 1(c) of the Second Schedule the Secretary of State was given by Parliament the same power to grant a certificate of naturalisation provided that he was satisfied that the applicant alien was of good character. That in turn replaced the British Nationality and Status of Aliens Act 1914 which in s.2 provided, in striking similar language to the provisions with which I am concerned:

> "**Certificate of naturalization**
>
> (1) The Secretary of State may grant a certificate of naturalization[1] (*sic*) to an alien who makes an application for the purpose, and satisfies the Secretary of State:
>
> …
>
> (b) that he is of good character …"

That Act repealed a number of earlier statutes stretching back to two passed in the reign of Edward III (25 Edw. 3. stat. 1 and 42 Edw. 3. c. 10) and included the Foreign Protestants (Naturalization) Act 1708 (7 Anne, c. 5), and the British Nationality Act 1730 (4 Geo. 2. c. 21). I have not been able to look at those ancient statutes but I shall assume that those passed after the Act of Settlement 1701 also vested the same power in the executive.

29. So, the power with which I am concerned has been given by Parliament to the Secretary of State exclusively, in repeated expressions of the democratic will stretching back over 300 years.

30. The second key factor I have already touched on is that the specific matter assigned to the Secretary of State is not objectively verifiable. The abstract fact of "good character" does not represent a single standard to which all rational people would subscribe. One person's personal standards of what would amount to being of good character may be very different to another's. This means that the decision will inevitably have a high subjective content.

31. The third key factor is that the entrustment of this power exclusively to the Secretary of State does not carry with it any right of appeal by a person aggrieved by her decision.

[1] At some point between 1914 and 1948 the Parliamentary draftsman abandoned the Oxford spelling of the verb suffix *-ize* in favour of *-ise.*

32. Looking at the matter from first principles, and without the benefit of judicial pronouncements on the issue, it seems to me that these three factors must combine to make the decision immune from judicial review unless it can be shown that it is demonstrably unreasonable in the *Wednesbury* sense. By "demonstrably unreasonable" I mean that the decision is obviously unlawful for one of the reason given by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 at 229:

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation* gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

33. These rules are simple and clear. In my judgment, if the Secretary of State follows them, her decision will be immune from judicial review. Those rules are that the Secretary of State must:

i) act in good faith;

ii) call her attention to the matters which she is bound to consider; and

iii) exclude from her consideration matters which are irrelevant to what she has to consider.

34. In the interests of transparency, and in order to engage the people with the processes of governance, it has long been the policy of government to publish Guidance as to how this executive power will normally be exercised. The matters that the Secretary of State must take into account will, obviously, include any matters which she or her predecessors have stated in such Guidance that they will take into account.

35. The published Guidance is named: **Nationality: Good Character Requirement.** The version in force at the relevant time was 2.0. In it, on its eighth page (the pages are unnumbered) it states: "You must refuse an application if the person's activities cast 'serious doubts' on their character." This acid test of "serious doubts" has been referred to in a number of cases, all of which have been decided on the basis that the test was

lawful: for example see *SK v SSHD* [2012] EWCA Civ 16 at [19], [21]. The acid test is just another way of saying that the applicant has the burden of proving that it is more likely than not that he is of good character. If the decision-maker has "serious doubts" about the applicant's character then it follows as night follows day that the civil standard of proof will not have been met.

36. It must be noted, for the purposes of this case, that the Guidance does not stipulate that bad character requires demonstration of direct involvement in the war crimes and comparable behaviour. Rather, demonstration of direct involvement as a member of the governing party or clique which perpetrated that conduct is sufficient.

37. As for matters that should be left out of account, it is obvious that an applicant's status as a refugee is irrelevant. Although the Refugee Convention grants a person who is awarded refugee status an expedited route to a naturalisation application, that right is purely procedural and says nothing about entitlement or otherwise to citizenship. The tests for the grant of refugee status and for the grant of citizenship are entirely different. There is no warrant for suggesting that the person with an award of refugee status is exempted from the requirement of demonstrating that he or she is of good character.

38. If the Secretary of State does not follow these rules then her decision will be unreasonable (or perverse or irrational – these are synonyms – see *above*) and may be set aside on a judicial review. If the Secretary of State complies with the rules then the decision will be immune from judicial review, even if the judicial reviewer would have reached a different conclusion on the merits following a factual evaluation. This is because the merits *per se* are forbidden territory for a judicial reviewer. Such a reviewer can only look at the merits to see if the rules have been followed.

39. My analysis is supported by Court of Appeal authority which is binding on me. Ms Apps has drawn my attention to *R v SSHD ex parte Fayed (No. 2)* [2000] EWCA Civ 523 where Nourse LJ at [38] asked the question:

> "Was the Home Secretary's decision [to reject Mr Al-Fayed's application for naturalisation] disproportionate or irrational?"

And answered it at [40] – [41]:

> "40. It is important to emphasise that the decision to be taken, though, like many such decisions, one which could seriously affect the rights of the applicant, was an administrative decision, reviewable by the courts only if the decision-maker in some way misdirected himself or, having correctly directed himself, gave a decision which no reasonable decision-maker could have given in the circumstances. It being clear that the Home Secretary correctly directed himself, the present case falls into the second category. In simple language, what is said is that the decision was so out of proportion, or, in simpler language still, so much of an over-reaction, to the unimportance of the facts relied on that no sensible person could have made it. The case having been put in that way, the substance of it, as Mr Beloff has accepted, can be seen to be conventional irrationality. It is therefore unnecessary to enter into the question whether our law

> recognises disproportionality as a separate ground on which administrative decisions can be reviewed by the court."
>
> 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."

40. It is interesting that back in 2000 the concepts of irrationality and disproportionality were the same.

41. In *R (DA (Iran)) v SSHD* [2014] EWCA Civ 654 Pitchford LJ stated at [4]:

> "The parties are in agreement that the Secretary of State enjoys a significant measure of appreciation in assessing for herself the requisite standard of good character in the factual context of the application under consideration. In *R v Secretary of State for the Home Department, ex parte Al Fayed* [2000] EWCA Civ 523, at paragraph 41 Nourse LJ (with whom in this respect Kennedy and Rix LJJ agreed) observed that the concept of good character was incapable of being defined against a single standard to which all could subscribe. A decision by the Secretary of State could be based upon a higher standard of good character than that which might be adopted by another decision-maker also acting reasonably. Parliament had assigned to a minister of the Crown the task of making the judgement whether a person was of good character and it was for the minister to adopt the requisite standard of good character subject only to a requirement of reasonableness."

42. In *R (Amirifard) v Secretary of State for the Home Department* [2013] EWHC 279 (Admin) at [59], Lang J put it this way:

> "The test for irrationality is set high, namely, that no rational decision-maker could have reached this conclusion. This test is especially difficult to satisfy in an area where Parliament has conferred a broad discretion on the Secretary of State and the Court of Appeal has declared that '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' (per Nourse LJ in *ex p. AL Fayed (No. 2)*)."

Proportionality

43. In his submissions Mr Khan argues that the lawfulness of the decision should be assessed by reference to the standard of proportionality. He argues that in spheres other than the grant of citizenship the Supreme Court has expressed a clear preference for the lawfulness of a decision to be assessed by reference to the concept of proportionality rather than by the "vagueness" of irrationality. He accepts that the concept has never before been applied in a naturalisation case, but points to the fact that it has been applied in a loss of citizenship case (*Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591) and in a case where the decision was not to hold an inquiry (*R (Keyu) v SSHD* [2015] UKSC 69). He submits that:

    i) a proportionality appraisal is a legitimate method to examine whether a power was exercised erroneously or in excess of the bounds of discretion even in those cases which fall outside the ECHR or EU law, citing *Kennedy v Charity Commissioner* [2015] 1 AC 455 at [54] per Lord Mance;

    ii) it is inappropriate to treat all judicial reviews under a general but vague principle of reasonableness (ibid at [55]); and

    iii) the advantage of the terminology of proportionality is that it introduces a structural analysis of factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantage (ibid at [54]).

44. As a backstop he argues that even if reasonableness remains the lodestar, there are dicta in *Pham* and *Kennedy* to the effect that a reasonableness review is indistinguishable from a proportionality appraisal where a fundamental right such as the right to nationality is concerned. Both techniques involve consideration of weight and balance, with there being a need for a searching review of the primary decision maker's evaluation of the evidence, citing *Pham* at [114] and *Kennedy* at [54]. In such a case the ostensible formal reasonableness standard is in reality, he argues, an indirect proportionality approach.

45. Ms Apps vigorously submits that there is no basis for applying a direct or indirect proportionality approach to this judicial review claim.

46. In *Keyu & Ors v Secretary of State for Foreign and Commonwealth Affairs & Anor* [2015] UKSC 69 Lord Neuberger PSC stated:

> "131 The appellants raise the argument that the time has come to reconsider the basis on which the courts review decisions of the executive, and in particular that the traditional *Wednesbury* rationality basis for challenging executive decisions should be replaced by a more structured and principled challenge based on proportionality. The possibility of such a change was judicially canvassed for the first time in this jurisdiction by Lord Diplock in *Council of Civil Service Unions*

> *v Minister for the Civil Service* [1985] AC 374, 410E, and it has been mentioned by various judges in a number of subsequent cases – often with some enthusiasm, for instance by Lord Slynn in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 51. In other words, the appellants contend that the four-stage test identified by Lord Sumption and Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, paras 20 and 74 should now be applied in place of rationality in all domestic judicial review cases."
>
> …
>
> 133. The move from rationality to proportionality, as urged by the appellants, would appear to have potentially profound and far-reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest – see *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, para 27, per Lord Steyn. However, it is important to emphasise that it is no part of the appellants' case that the court would thereby displace the relevant member of the executive as the primary decision-maker – as to which see per Lord Sumption and Lord Reed in *Bank Mellat (No 2)* at paras 21 and 71 respectively. Furthermore, as the passages cited by Lord Kerr from *Kennedy v Charity Commission (Secretary of State for Justice intervening)* [2014] UKSC 20, [2015] AC 455, paras 51 and 54, and *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] UKSC 19, [2015] 1 WLR 1591, paras 96, 113 and 115 show, the domestic law may already be moving away to some extent from the irrationality test in some cases."

47. There is no doubt that in the world of judicial review proportionality has advanced like a cuckoo, occupying the common law nest of traditional assessment, laying its continental eggs in it, and ejecting its home-incubated *Wednesbury* hatchlings. The four-stage test summarised by Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 is now routinely applied whenever actual discrimination is alleged or where a violation of some other Convention right is claimed. The concept of disproportionate, and therefore unlawful, treatment is easy to understand where the state is removing or limiting a right of the subject. It is harder to grasp where the allegation is that the state is not granting you something, although it is perfectly logical for the claimant here to argue that the measure of depriving him of a passport because of things he did nearly a quarter of a century ago is disproportionate.

48. The problem with allowing the advance of the cuckoo is that (to mix metaphors) it opens the door to a review of the merits and, however much the contrary may be protested, the result is that the judicial reviewer steps into the shoes of the decision-

maker. It is for this reason that a line has been drawn, and that line is well-summarised by Jay J in *Begum v SSHD* [2023] Appeal No SC/163/2019 at [72]:

> "For completeness, the Commission agrees with the Secretary of State that proportionality does not form a separate head of public law challenge in a non-human rights context. Our reading of the decision of the Supreme Court in *Keyu v SSFCDA* [2015] UKSC 69; [2016] AC 1355, paras 131ff, is that the law has not moved that far. That was the point the Commission was seeking to make in B4 at para 81 ("no overarching proportionality assessment"), in response to a wide-ranging submission made by the appellant."

I agree with this. For my part, for the reasons set out above, I am satisfied that the correct legal principles do not encompass what might be described as a crypto-merits-based proportionality appraisal of the decision in question. Rather, a judicial reviewer of a refusal to grant naturalisation has to stick strictly to the tramlines of the traditional principles.

49. In his submissions Mr Khan referred on a number of occasions to the power of the Secretary of State being "unfettered", and for this reason the use of a proportionality review would be apt. Of course, there is no such thing as an unfettered power or discretion (although there are countless examples in the books of a discretionary power being thus described). In *R (McCourt) v Parole Board* [2020] EWHC 2320 (Admin) the Divisional Court memorably stated at [41]:

> "In any democracy subject to the rule of law, all public power is limited by law."

This echoes what Justice Benjamin Cardozo stated in 1924:

> "Complete freedom – unfettered and undirected – there never is. A thousand limitations – the product some of statute, some of precedent, some of vague tradition or of an immemorial technique – encompass and hedge us even when we think of ourselves as ranging freely and at large… Narrow at best is any freedom that is allotted to us" (The Growth of the Law: Yale University Press 1924)

50. In response to Mr Khan's argument I hold that the public power vested in the Secretary of State is forcefully fettered by the common law, which *au fond* requires her to act reasonably when reaching her decision.

Ground A

51. As reformulated by me, this states:

> "The decision maker erred in law in that in the exercise of her discretion she did not consider the following matters referred to in the published policy:

> (a) the defences available to the claimant, including duress and superior orders, and the mitigation available to him referable to the facts giving rise to those defences."

52. I have to say that this ground is totally without merit, and I am surprised that permission to pursue it was granted. The reason that the decision-maker did not take into account the defences (or mitigatory effect) of duress and superior orders was because the claimant never raised them. I have explained above that apart from a passing comment in his asylum statement that he was taken to Liberia to train rebels under a do or die option, neither in his asylum statement nor in his asylum interview was it his case that he was coerced either directly or via superior orders. On the contrary, his whole case was to the opposite effect, as I have explained above. Not a word was said about these matters in his naturalisation applications.

53. In his submissions, Mr Khan came close to arguing that notwithstanding that in his naturalisation application these defences were never pleaded the Secretary of State should nonetheless have treated the claimant as having advanced them. I completely reject this argument. In my judgment, where a naturalisation application is made the Secretary of State is under no obligation to go outside the four corners of that application. In this case the claimant had made his original application which was rejected; he then made his second application but, remarkably, advanced no further evidence to that which he had relied on first time round. In such circumstances there is in my judgment no duty at all imposed on the Secretary of State to acquire evidence or to advance arguments on behalf of the claimant.

54. The suggestion that the Secretary of State somehow forgot about her own Guidance is very far-fetched in circumstances where not only does the decision letter have a hyperlink to the Guidance within it, but where the language of the decision letter clearly echoes the contents of the Guidance.

Ground C

55. It is convenient to consider next Ground C as this, like Ground A, relates to the claimant's activities in Sierra Leone. It states:

> "The decision maker erred in law in that in the exercise of her discretion she did not consider the following matters referred to in the published policy:
>
> (c) the degree to which the claimant was personally and directly involved in the relevant activities in Sierra Leone.

This ground seems to be based on a false premise. It implies that the Guidance requires an applicant to have been personally and directly implicated in war crimes and other atrocities before a finding of bad character can be made. The Guidance does not say that. On its tenth page it states:

> "Those who associate or have associated with persons involved in terrorism, extremism and/ or war crimes may also be liable to refusal of citizenship."

It then goes on to list a number of very obvious evidential questions that the decision-maker might ask including:

> "How long has this association lasted? The longer the association, the more likely it may be that the applicant is aware of or accepts the activities and views.
>
> How long ago did such association take place?"

56. The decision was certainly based on the claimant's admitted previous conduct and likely personal (at least indirect) involvement in the war crimes perpetrated during the Sierra Leone civil war. If that had been the only basis for the decision it would not, in my judgment, have been capable of being impugned under traditional judicial review grounds. Whether it could have been impugned on a proportionality review is not something I need to consider, in the light of my finding that such a review is not lawfully available in this type of case. So, even on the terms of Ground C, the claim fails.

57. However, direct involvement was not the only footing for the decision. It was also based on the claimant's associations with the organisations NPRC and AFRC (which organisations were found by the Special Court for Sierra Leone to have been responsible for war crimes and crimes against humanity) and with the leaders of those organisations including Bockarie and Koroma who were responsible for instigating and ordering such atrocities. The guilt of the claimant by association was indisputable and of the utmost seriousness. For that reason it was the subject of exhaustive analysis in the decision letter.

58. Mr Khan has not sought to suggest that association with these people and these organisations would not fall within the terms of the Guidance; nor has he sought to suggest that the Guidance was somehow unlawful in providing for bad character to be shown by reference to association with people and organisations guilty of war crimes.

59. In my judgment Ground C is as meritless as Ground A.

Ground B

60. This states:

> "The decision maker erred in law in that in the exercise of her discretion she did not consider the following matters referred to in the published policy:
>
> (b) the degree to which the claimant had distanced himself from his past memberships or associations in Sierra Leone."

The decision letter records:

> "I have taken note of his circumstances and his life in the United Kingdom over the past 20+ years. I note that he has raised a family and maintained a family life in the UK. He has a good employment record; he is a nurse and has a position of responsibility in the NHS. I acknowledge he has had no

> convictions and that there are no apparent adverse factors for me to consider, since his entry to the United Kingdom."

61. In reaching her decision the decision-maker did not dispute that following his entry into the United Kingdom the claimant had eschewed completely his past life in Sierra Leone and his association with the named people and organisations.

62. Ground B is also meritless. It is not correct for the claimant to suggest that the decision-maker did not take into account how he had imposed a complete severance between his new life in England and his old life in Sierra Leone. She did.

Conclusion

63. In my judgment the claimant has not come close to showing that this decision was flawed on the traditional grounds set out above. In determining whether the claimant was of good character the decision-maker weighed all the evidence and formed a value judgment with a strong moral content. In the weighing exercise the decision-maker did not leave out anything of account of any relevance; nor did she take into account any matter of irrelevance. On the contrary, her reasoning strikes me as being a completely conventional, indeed impeccable, way of assessing the relevant evidence. When it came to forming the value judgment of whether the claimant was of good character the decision-maker did so, again, in a conventional way even if its strong moral content meant that the deeds of the past, had not, even by now been outweighed by the claimant's irreproachable life over the last 20 odd years. That may seem to be a hard decision, but it was one that the decision-maker was entitled to make on her evaluation of the facts, and as such it is a decision that is immune from judicial review.

64. The claim is therefore dismissed.

Postscript

65. After seeing this judgment in draft, Mr Khan has submitted that it is not open to me to express the view that Grounds A and C were totally meritless and that it was surprising that permission to pursue them was granted. I disagree. The consideration of permission by necessity follows a limited, even cursory, scrutiny of the issues, and this is so whether the grant is awarded on the papers or following a short oral hearing. The true merit of a Ground is only capable of being properly appreciated following a full hearing. If the Court considers, following full argument, and with the wisdom of hindsight, that the Ground was in fact totally meritless (and that therefore it was doubtful that permission should have been granted) then, in my judgment, the Court is entitled to express that opinion. Such an opinion does not, of course, amount to a formal revocation of the permission that was granted.
