Neutral Citation Number: [2014] EWHC 254 (Admin)

Case No: CO/10413/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 18th February 2014

Before :

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between :

POLOKO HIRI	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Raza Halim (instructed by **Duncan Lewis**) for the **Claimant**
Mr Colin Thomann (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 7th February 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE LANG DBE

Mrs Justice Lang:

1. The Claimant applies for judicial review of the Defendant's decision to refuse his application for naturalisation as a British citizen, which was contained in a letter dated 11th May 2012 and subsequently confirmed on review, in letters dated 29th June and 26th September 2012.

2. The reason for refusal was that the Defendant was not satisfied that he met the 'good character' requirement for naturalisation because of his conviction for a speeding offence which would not be 'spent' under the Rehabilitation of Offenders Act 1974 until 17th November 2016.

3. Charles George QC, Deputy High Court Judge, granted permission on 21st December 2012.

Facts

4. The Claimant is a national of Botswana, aged 33 (DOB 28th April 1980). He was born and brought up in Botswana, and enrolled in higher education, without completing his degree. Since boyhood he had an interest in joining the army, but his family persuaded him to pursue higher education instead.

5. He arrived in the United Kingdom (UK) on 1st November 2006, with a working holiday visa valid from 31st October 2006 until 30th October 2008.

6. During this period, some senior figures from the Army of Botswana attended the Royal Military Academy at Sandhurst to take part in training courses. The Claimant's uncle, an army Colonel, was among them. The Claimant met his uncle and his colleagues, and this inspired him to apply to join the British Army.

7. As a citizen of the Commonwealth, the Claimant was eligible to serve in the British Army. He applied in December 2007, and on 25th August 2008 he enlisted for a 12 year term as a Private in the Corps of Royal Engineers. It was a term of his engagement that, after completion of 4 years service, he could apply (on 12 months notice) to be transferred to the Reserve, either for 6 years, or for the balance of his term of engagement, if less.

8. The Claimant trained and served in the Army as a military draughtsman and combat engineer. In August 2011, he gave 12 months notice of his intention to leave the Army, in order to take a BSc degree in Architectural Technology.

9. The Claimant was convicted on 17th November 2011 of the offence of exceeding a temporary 50 mph speed limit on the M1 motorway on 9th April 2011. The circumstances were that he finished duty at Ripon Barracks at 22.00 on the evening of 8th April 2011, and drove south down the M1 to commence a period of Easter leave. At 01.21, near Swinford, he was captured on a traffic camera travelling at 81 mph in an area where there was a temporary speed limit of 50 mph because of construction works. The Claimant's account was that he was unaware of the temporary speed limit and he was not aware that he had exceeded the 70 mph speed limit.

10. The Claimant was co-operative in completing the notice of intending prosecution and admitting his guilt. The police indicated that the case would not be dealt with by way of fixed penalty, and he was summonsed to appear at court. He pleaded guilty by post and was given a fine of £100 and 5 points on his driving licence. He had obtained a

full UK driving licence on 21st April 2009 and had no other endorsements on it. The Claimant notified his superior officer of the conviction.

11. In December 2011, Major N. Worsley of the Directorate of Manning (Army) HQ Land Forces advised commanding officers to brief citizens of Botswana serving in the British Army that they would be at risk of prosecution and confiscation of their passports if they returned to Botswana. The Government of Botswana was now "rigorously enforcing" the Foreign Enlistment Act 1980, which made it a criminal offence to act in the military service of another country, without the permission of the President. A Motswana serving in the British Army had recently been threatened with prosecution upon returning to Botswana to visit relatives. Although the British Army would not disclose details of Batswana personnel, their identities were known to the Government of Botswana, possibly through monitoring of social networks.

12. On learning of these developments, the Claimant feared that he was at risk of prosecution and lengthy imprisonment if he returned to Botswana. The Botswana Penal Code, in paragraph 39, provides that a person who is in possession of the uniform of the armed forces of any foreign country shall be deemed to threaten the security of Botswana. Such an offence is punishable with 15 to 25 years imprisonment. As a member of the British Army Reserve, the Claimant retains an Army uniform. The campaign mounted on his behalf by the charity Veterans Aid has been widely reported in the Botswana press. The Minister of Foreign Affairs, Phandu Skelemani, has been reported as saying that the Claimant will be prosecuted if he returns.

13. In February 2012, the Claimant applied for naturalisation. The application was refused by letter dated 11th May 2012. The reason for refusal was that the Defendant was not satisfied that he met the 'good character' requirement for naturalisation because of his speeding conviction which would not be 'spent' under the Rehabilitation of Offenders Act 1974 until 17th November 2016. He was advised that a further application prior to 17th November 2016 was unlikely to be successful. He applied for the decision to be re-considered and submitted a very favourable reference from his commanding officer, Major Plimmer, in support. However, the refusal was confirmed in a further letter dated 29th June 2012. In response to a pre-action letter, the Defendant reviewed the earlier decisions and upheld them, in a letter dated 26th September 2012.

14. On 23rd February 2012, the Claimant's daughter Peo Balule was born in London to his then partner Lilian Balule. The Claimant was not able to attend the registry office to register the birth because of his Army commitments, but he completed a statutory declaration of acknowledgment of parentage. The Claimant had known Lilian since 2009, and he was in a relationship with her from May 2011. They are now separated, but the Claimant continues to see his daughter regularly. Lilian is also from Botswana, but she has indefinite leave to remain in the UK.

15. In 2012, the Claimant applied for asylum, on the basis that prosecution and a lengthy prison sentence in Botswana for his service in the British Army would be a disproportionate and discriminatory punishment, in breach of his fundamental human rights. He also relied upon Art. 8. His asylum claim has not yet been determined.

16. On 31st August 2012, the Claimant's full time engagement with the Army terminated. He remains an Army Reserve for 6 years thereafter. His duties as a Reserve are to attend training and to respond to a call out order made under the Reserve Forces Act 1996, in the event of major emergency or war.

17. Whilst a full time serving officer, he was not subject to any condition or limitation on the period of permitted stay in the UK. Ordinarily his leave to remain in the UK would have expired 28 days after his discharge from the Army. The Defendant offered him a grant of limited leave to remain in the UK, on condition that he withdrew the claim for judicial review. He refused the offer. Nonetheless, the Defendant went ahead and granted him limited leave to remain for 30 months, pursuant to paragraph 276 QA Immigration Rules, from 5th February 2013 to 4th August 2015.

Legislation

18. By section 6(1) British Nationality Act 1981, British citizenship may be acquired by naturalisation. Subsection (1) provides:

> "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."

19. Under paragraph 1(1) of Schedule 1 to the Act, an applicant must fulfil the mandatory requirement that "he is of good character", together with other requirements. If he does so, the Secretary of State then has discretion to grant naturalisation, "if he thinks fit". There is no statutory definition of "good character".

Nationality Instructions

20. The Defendant has issued instructions and guidance to her officers on how to assess and determine naturalisation applications ("the Instructions"). Chapter 18 is headed "Naturalisation at Discretion: Section 6 British Nationality Act 1981". Paragraph 18.1.3 states:

> "Naturalisation is at the discretion of the Home Secretary. Under s. 6 of the British Nationality Act 1981, he may grant a certificate of naturalisation to a person of full age and capacity if he is satisfied that person meets the requirements set out in Schedule 1 to the Act. He can refuse to grant a certificate to a person who meets these requirements, but he cannot grant a certificate to a person who does not meet them."

21. The 'good character' requirement is considered in Annex D to Chapter 18. The material passages are as follows:

> "**2. Aspects of the requirement**

2.1 Caseworkers should not normally consider applicants to be of good character if, for example, there is information to suggest:

a. They have not respected, and/ or are not prepared to abide by the law (e.g. they have been convicted of a crime or there are reasonable grounds to suspect (i.e. it is more likely than not) they have been involved in a crime) (see sections 3 and 4);

……."

"**3**. **Criminal activity**

3.1 The Rehabilitation of Offenders Act 1974

3.1.1 In assessing the impact of previous convictions on the assessment of good character, caseworkers must have regard to the provisions of the Rehabilitation of Offenders Act 1974 ('the 1974 Act'). Under the 1974 **Act** a conviction becomes "spent" after a specified rehabilitation period, which will vary depending on the sentence imposed. Spent convictions should not be taken into account in assessing the character requirement…

3.1.2 Caseworkers should normally refuse an individual who has an unspent conviction, however there is discretion to overlook some minor one-off offences. Please see criteria in paragraphs 3.2.2 – 3.2.4 for further details.

3.1.3 Caseworkers should further note that where an individual has a conviction that can never become spent they will not normally be granted British citizenship; unless there are exceptional circumstances. Sentences that cannot become rehabilitated include:

(a) Imprisonment .. for life; or

(b) Imprisonment … for a term exceeding 30 months; or

(c) Preventive detention; or

(d) Detention during her Majesty's pleasure; or

(e) Imprisonment or detention for public protection … or an extended sentence under ... the Criminal Justice Act 2003."

"**3.2 Convictions – general**

3.2.1 All convictions should normally be spent under the 1974 Act before an application ... is approved…

3.2.2 Where the applicant is of good character in all other respects caseworkers should normally be prepared to overlook a single minor unspent conviction resulting in:

a. A bind-over order

b. An absolute or conditional discharge

c. Admonition

d. A relatively small fine or compensation order

e. A fixed penalty notice and Scottish fiscal fines – these fines are not classed as convictions and as such do not attract a spent period (see paragraph 3.2.3).

3.2.3 Caseworkers should note that if a fixed penalty notice or fiscal fine has been referred to a court due to the non-payment of the fine or if the notice has been challenged by the applicant and subsequently upheld by the court then this is treated as a conviction for the purposes of the 1974 Act … and will attract a "spent" period…

3.2.4 In determining whether an applicant meets the "good character" requirement, caseworkers should not normally take into account fixed penalty notices, *unless* the applicant has received more than one fixed penalty notice in the last 12 months, and this would suggest a pattern of offending. If an application is refused on this basis, the applicant should be advised that he or she can reapply at a time when he or she does not have more than one fixed penalty notice in the twelve month period before making an application.

3.2.5 Caseworkers should **not** normally disregard any unspent conviction that falls into the following categories irrespective of the severity of the sentence imposed:

a. Offences involving dishonesty (e.g. theft, fraud)

b. Offences involving violence

c. Offence involving unlawful sexual activity

d. Offences involving drugs

e. Offences which would constitute "recklessness" – e.g. drink-driving, excessive speeding, driving without tax/ insurance or whilst using a mobile phone. (NB Caseworkers should remember that fixed penalty notices do not constitute offences – see 3.2.2.e above).

f. Offences involving a serious deliberate criminal act that do not fit into points a) to d) above e.g. arson.

3.2.6 Where, exceptionally, it is proposed to grant citizenship to a person whose conviction resulted in a custodial sentence of 30 months or more (and which, therefore, can never become spent under the 1974 **Act**) prior approval should be sought from the Chief Executive or from a Board member acting in her absence."

Submissions

22. The Claimant's submissions were, in summary:

i) The Defendant's conclusion that she was not satisfied that the Claimant met the requirement of 'good character' was irrational.

ii) The Defendant failed to have proper regard to all the factors which were material to an assessment of his character. She had unlawfully fettered her discretion by applying her policy of refusing applications from applicants with unspent convictions for "excessive speeding" inflexibly, without properly exercising her statutory duty to assess his character as a whole. In particular, she failed to weigh in the balance, against the conviction, the powerful countervailing evidence of his excellent character. In assessing his character, she also erred in refusing to take into account either the circumstances of his offence or the severity of the penalty imposed by the court.

iii) Although the Instructions referred to the discretion to "overlook" or "disregard" unspent convictions, the proper approach was to take all matters into account, both favourable and unfavourable, to assess whether he met the "good character" requirement.

iv) The decision letters indicated that a test of exceptionality was applied, yet under the terms of the Defendant's Instructions, a test of exceptionality was only applicable to serious offences which could never become spent under the Rehabilitation of Offenders Act 1974 and registered sex offenders.

23. In response, the Defendant submitted that:

i) Her conclusion was rational and reasonable, and one which she was entitled to reach in the exercise of the broad statutory discretion conferred upon her. The authorities cited confirmed that she was entitled to adopt a high standard

provided that it was reasonable in the circumstances. Moreover, the Claimant was free to re-apply once his conviction was spent, five years after the date of conviction. New Instructions had now been issued, with effect from 13th December 2012, which would operate more favourably in the Claimant's case, as applications would normally be refused only if a conviction resulting in a non-custodial sentence occurred in the last three years, not five years as previously.

ii) The Defendant was entitled to apply a policy (the Instructions), in the interests of consistency and fairness. The policy had been correctly applied on the facts of this case.

iii) The Defendant did not fetter her discretion unlawfully nor apply the policy inflexibly. In particular, she took into account the evidence of the Claimant's good character. It was reasonable for her not to consider the circumstances of individual offences, and it was reasonable for her to rely solely upon the conviction and sentence imposed by the court.

iv) The Instructions to officers that they could "overlook" or "disregard" unspent convictions in certain circumstances did not mean that they would be left out of account.

v) Use of the word "normally" in the Instructions denoted that officers could depart from the Instructions in appropriate cases. It was permissible to describe any such departure as an exception to the general rule (see *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, per the Master of the Rolls at [43])). The Claimant overstated the significance of the references to exceptionality in the Instructions; these did not purport to lay down a different rule in those categories of convictions.

Conclusions

24. In *R v Secretary of State for the Home Department ex p Al Fayed* (No 2) [2001] Imm AR 134, Nourse LJ described the requirement of "good character" in these terms:

> "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."

25. The Secretary of State is required to make an evaluation of the applicant's character on the basis of the material before her, having proper regard to the guidance in the Nationality Instructions. The onus is on the Claimant to satisfy the Secretary of State that he is of good character. Although the Secretary of State must exercise her powers reasonably, essentially the test for disqualification is subjective. See *Secretary of State for the Home Department v. SK (Sri Lanka)* [2012] EWCA Civ 16, per Stanley Burnton LJ at [31].

26. The Secretary of State's decision is only reviewable by the courts on traditional public law grounds. As Nourse LJ said in *ex p. Al Fayed (No. 2)*:

> "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."

27. In *Amirifard v Secretary of State for the Home Department* [2013] EWHC 279 (Admin), I said, at [59]:

> "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)*)."

28. In this case, the Claimant has failed to persuade me that the Defendant's decisions were irrational, applying the test that I set out in *Amirifard* (above). Parliament has entrusted the assessment of character to the Defendant, and although it is apparent from the evidence that her conclusion was controversial among members of the press, public and veterans, I do not consider that her decision was so unreasonable as to be unlawful.

29. However, I have concluded that the decision-making process was legally flawed in other respects.

30. In *SK (Sri Lanka)*, Stanley Burnton LJ described the Nationality Instructions, at [36], as "in the main practical instructions to decision makers as to how they are to go about deciding whether to be satisfied that an Applicant for naturalisation has shown that he is of good character"; not "guidance as to policy in the sense of a statement as to the Secretary of State's exercise of a discretion or power". Whilst this is obviously correct, the Instructions on the treatment of criminal convictions do appear to reflect a policy adopted by the Defendant, and it is apparent from the different versions of the Instructions which I have seen that the policy has changed from time to time.

31. The Defendant was entitled to adopt a policy, provided that she exercised her statutory function lawfully. The applicable principles were set out by Lord Browne-Wilkinson in *R v Home Secretary ex parte Venables* [1998] AC 407, at 496H:

> "When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power nunc pro tunc. By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise.
>
> These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases: see *Rex v. Port of London Authority, Ex parte Kynoch Ltd* [1919] 1 KB 176; *British Oxygen Co. Ltd. v Board of Trade* [1971] AC 610. But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful: see generally *de Smith, Woolf and Jowell, Judicial Review of Administrative Action,* 5th ed. (1995), pp 506 et seq., paras 11-004 et seq."

32. The Claimant relied upon *R v Eastleigh Borough Council ex parte Betts* [1983] 2 AC 613, in which the House of Lords held that it was permissible to adopt general policy guidelines for determining whether applicants for housing had a "local connection" with the area (within the meaning of the statutory definition), provided that the authority reached its conclusion by reference to the facts of each individual case (per Lord Brightman at 627H -628B).

33. The Claimant also referred to a passage in the judgment of Sedley LJ in *Pankina v Secretary of State for the Home Department* [2010] 3 WLR 1526, at [28]:

> "A policy is precisely not a rule: it is required by law to be applied without rigidity, and to be used and adapted in the interests of fairness and good sense. To take the present case, the policy guidance standing alone would not only permit but require a decision-maker to consider whether, say, a week's dip below the £800 balance during the three-month period mattered. This would in turn require attention to be given to the object of the policy, which is to gauge, by what is accepted on all sides to be a very imprecise rule of thumb, whether the applicant will be able to support him or herself without recourse to public funds. If that object was sensibly met, the law might well require the policy to be applied with sufficient flexibility to admit the applicant, or would at least require consideration to be given to doing so. But if the requirement is

> a rule … then there is no discretion and no judgment to be exercised."

34. *De Smith's Judicial Review* 6th ed. (2007) helpfully explains the rationale behind these principles at paragraph 9-005:

> "The underlying rationale of the principle against fettering discretion is to ensure that two perfectly legitimate values of public law, those of legal certainty and consistency (qualities at the heart of the principle of the rule of law) may be balanced by another equally legitimate public law value, namely, that of responsiveness. While allowing rules and policies to promote the former values, it insists that the full rigour of certainty and consistency be tempered by the willingness to make exceptions, to respond flexibly to unusual situations, and to apply justice in the individual case."

35. How do these principles apply in the circumstances of this case? In my judgment, in deciding whether an applicant for naturalisation meets the requirement that "he is of good character", for the purposes of the British Nationality Act 1981, the Defendant must consider all aspects of the applicant's character. The statutory test is not whether applicants have previous criminal convictions – it is much wider in scope than that. In principle, an applicant may be assessed as a person "of good character", for the purposes of the 1981 Act, even if he has a criminal conviction. Equally, he may not be assessed as a person "of good character" even if he does not have a criminal conviction. Plainly, criminal convictions are relevant to the assessment of character, but they are likely to vary greatly in significance, depending upon the nature of the offence and the length of time which has elapsed since its commission, as well as any pattern of repeat offending. So, in order to conduct a proper assessment, the Defendant ought to have regard to the outline facts of any offence and any mitigating factors. She ought also to have regard to the severity of the sentence, within the sentencing range, as this may be a valuable indicator of the gravity of the offending behaviour in the eyes of the sentencing court. Although I asked for details of the number of applications she has to process, none was provided. Her letter of 26th September 2012 stated that the majority of applicants do not have any unspent convictions. I was not provided with any evidence to support a view that it was too onerous for her to consider individual convictions.

36. The Defendant is entitled to adopt a policy on the way in which criminal convictions will normally be considered by her caseworkers, but it should not be applied mechanistically and inflexibly. There has to be a comprehensive assessment of each applicant's character, as an individual, which involves an exercise of judgment, not just ticking boxes on a form.

37. The Defendant's decision dated 11th May 2012 was made by an official in the UKBA, at grade "ECT1". In a one page letter, he referred to the conviction and the fact that it would not be spent until 17th November 2016. He concluded:

> "In certain circumstances we would disregard an unspent conviction. Our policy in this regard is published on our website …. It is highly unlikely that we would disregard an unspent conviction outside this policy.

> You were convicted on 17 November 2011 for a motoring offence for which you received a £100 fine. This will not be spent under the Rehabilitation of Offenders Act 1974 until 17 November 2016 As your conviction is not one that we would normally disregard, nor can we find grounds to disregard it exceptionally outside our published policy, we cannot be satisfied that the good character requirement is met. The application had therefore been refused.
>
> It is open to you to re-apply for citizenship at any time but an application made while you have an unspent conviction is unlikely to succeed."

38. In my view, this letter indicates that the assessment of the Claimant's character was based entirely upon the fact that he had an unspent conviction; there is no reference to any other aspect of his character and background. This was not an adequate assessment of the Claimant's character, as required by law. No references were sought from his employer, or his personal referees, and there was no interview with the Claimant. I also consider that the official made an error of law in stating that any departure from the "normal" policy in relation to the Claimant's conviction would be "highly unlikely": this indicates an excessive adherence to the terms of the policy, without proper consideration of the case on its individual merits.

39. The Claimant invoked the review procedure and a second decision was made on 29th June 2012 by a UKBA official with the grade of "ECT1 Senior Caseworker". This was also a one page letter which stated, inter alia:

> "…We do not examine the circumstances surrounding the conviction(s) nor any mitigating circumstances put forward at the time of conviction as this will have been considered by the court prior to sentence.
>
> We would not normally naturalise a person with an unspent conviction unless it is a 'one-off' minor offence, e.g. contravention of a motoring regulation, and we would not normally overlook an unspent conviction in any circumstances if it falls into one of the following categories, none of which we consider to be minor:
>
> a. Offences involving dishonesty (e.g. theft, fraud)
>
> b. Offences involving violence
>
> c. Offence involving unlawful sexual activity
>
> d. Offences involving drugs
>
> e. Offences which would constitute "recklessness" – e.g. drink-driving, excessive speeding, driving without tax/ insurance or whilst using a mobile phone.

> f. Offences involving a serious deliberate criminal act that do not fit into points a) to d) above e.g. arson.
>
> You were convicted on 17 November 2011 for speeding and fined £100 and 5 penalty points. We do not consider this offence to be minor and could find no grounds to disregard it exceptionally outside our normal policy. As we could not be satisfied the good character requirement for naturalisation was met, his [sic] application was refused.
>
> …A fresh application made before 17 November 2016, i.e. the date on which your conviction becomes spent, is unlikely to be successful."

40. The Claimant's application for review was supported by unusually strong evidence of his good character from a senior army officer, whose reliability as a referee was not in question. Major Plimmer, of the 73 Armoured Engineer Squadron, said in his letter dated 12th June 2012:

> " I am writing to you on behalf of Sapper Poloko Hiri who is a serving soldier under my command in 73 Armoured Engineer Squadron, 21 Engineer Regiment. Sapper Hiri joined the Army in August 2008 and has served as a Military Draughtsman and Combat Engineer since completing his training. He has been employed within 73 Armoured Engineer Squadron since March 2011. He has decided to leave the Army in order to attend a university course …a decision I fully support.
>
> Sapper Hiri is an intelligent, motivated and hard working soldier. Sapper Hiri has an EXEMPLARY record of conduct since he has been employed within the Armed Forces. His character has been put to the test on various military training exercises where his peers have had to depend on him in austere and challenging environments. To see that Sapper Hiri has been denied British citizenship for what is deemed as 'bad character' directly contradicts his performance as a serving soldier. I have spoken to him about his speeding fine and he regrets his actions and has paid his fine. However, it appears that one moment's act of misjudgement has defined and tarnished his otherwise good character. The offence was a foolish mistake but it is not a reflection of his character from my experience as his Officer Commanding.
>
> Not only has Sapper Hiri served in the British Army for 4 years, there is also a genuine concern that Batswana soldiers serving in foreign armies are being prosecuted by their governments when returning home to Botswana. Please find attached a copy of an email from Directorate of Manning (Army) Land Forces Head Quarters with a further attached document entitled 'Enforcement of the Foreign Enlistment Act by the Government of Botwana', highlighting the Army's concerns on the matter. "

41. Wing Commander Dr Hugh Milroy, Chief Executive Officer of Veterans Aid, commented in his evidence to this court:

> "I cannot emphasise how unique it is for a Veteran to have left service without receiving a single charge. Soldiers frequently get into trouble and are disciplined; it is what they do. However, Poloko served without any blemish whatsoever. If Poloko were good enough to carry a weapon for this country, then surely he is good enough to be a citizen."

I consider that these points in the Claimant's favour would have been fairly obvious to any reader of Major Plimmer's letter.

42. In my view, it is apparent from the letter of 29th June 2012 that the official did not properly weigh in the balance the strong countervailing evidence of the Claimant's good character against the fact of his conviction. He applied the terms of the Instructions mechanistically and inflexibly, concluding that as he had a conviction for an offence which involved "excessive speeding" within paragraph 3.2.5(e), he was not "of good character".

43. The official deliberately excluded from his consideration the circumstances of the offence and the mitigating factors, on the grounds that these would have been taken into account by the court prior to sentence. The implication is that the severity of the sentence imposed by the court would be an indication of the seriousness of the offending behaviour. However, paragraph 3.2.5. of the Instructions states that it applies "irrespective of the sentence imposed", and no consideration was given to the fact that the Claimant's sentence was at the lower end of the sentencing range.

44. Paragraph 3.2.5 identifies types of offending behaviour such as dishonesty, violence, sexual offences, arson, and drug abuse which are viewed particularly seriously by the Defendant and she instructs that they should not normally be disregarded when assessing character. Also included in the list are driving offences which, in her view, "constitute recklessness", such as drink driving, driving without tax/insurance, using a mobile telephone, and "excessive speeding". Since under paragraph 3.2.5, it is the type of offending behaviour which triggers more stringent treatment, it was all the more important to assess the circumstances of the offence. The Claimant was driving on a motorway at 80 mph, believing that the limit was 70 mph. It was at night (1.21 am) and so the road would not have been busy with traffic. He failed to observe that a temporary speed limit of 50 mph had been imposed on a section of the motorway, because of construction works. The works would have been in operation during the day, and so easily visible, but less so at night. As Major Plimmer said, this was "one moment's act of misjudgement". It was "excessive speeding" because he exceeded the limit by 31 mph. But, in assessing his "recklessness" and the risk of harm, it was relevant that the excessive speeding occurred on a motorway at night, not in a busy or built-up area.

45. The sentence imposed was at the lower end of the range, reflecting the nature of the offence and his mitigation. He was not disqualified from driving, though disqualification was available as a sentencing option. He was fined £100 when the maximum fine was £1000. It seems unlikely that the fine was reduced to reflect

inability to pay since he had an Army salary. He was given 5 penalty points, instead of the maximum of 6. Prior to this offence, he had a clean licence.

46. The May and June decisions were reviewed by the Defendant on 26th September 2012, in her response to the Claimant's pre-action letter. This was a much more detailed letter, written by an official at CT3 grade in the UKBA. The material parts of the letter stated:

> "Your client was driving at 81 mph in a 50 mph zone – over 60% faster than the speed limit in force at that time and in excess of the maximum UK speed limit of 70 mph. Whilst no legal definition of "excessive speeding" may exist, the Secretary of State is of the opinion that exceeding the speed limit to this extent constitutes excessive speeding and as such, would not normally disregard an unspent conviction resulting from this offence having been committed."

…..

> "Furthermore, the fact that the applicant has served in the armed forces for four years does not alter the fact that he is required to meet the good character requirement for naturalisation in the same manner as those received from civilians.
>
> Since the established policy does not cover your client's particular circumstances, I have looked for a precedent where we have naturalised an applicant who has an unspent speeding conviction where the speed was considered excessive. As there are no existing precedents that match his circumstances, I have considered whether they are sufficiently different from other applicants who have unspent speeding convictions to justify your client's naturalisation. I can see no grounds which might support the view that the circumstances of your client's conviction are sufficiently different to those where applications are routinely refused to warrant applying discretion exceptionally in the face of established policy.
>
> Having fully reviewed the case, I disagree that the decision to refuse was irrational, disproportionate and unreasonable. As detailed above, the decision was taken fully in accordance with nationality law and published policy, and as such, there are no grounds to reopen the case and naturalise your client as a British citizen."

47. Although the official had Major Plimmer's reference and the Claimant's solicitor's letter referring to evidence of his good character, she did not weigh the powerful countervailing evidence of good character in the balance, in order to make an overall assessment of his character, as is required. When deciding that she could find no grounds upon which to depart from the normal policy in respect of offences of excessive speeding, she made no mention of the factors pointing to his good

character. It appears that she misinterpreted the significance of the glowing reference from his commanding officer, his "exemplary" Army record and the fact that his character had been tested in challenging military environments, since she merely stated that his Army service did not excuse him from meeting the "good character" requirement in the same way as civilians. It was never suggested by the Claimant that the "good character" requirement did not apply to him.

48. By the time of the September 2012 decision, the Claimant's full time engagement had terminated. But there was no suggestion that there was any change, since the date of Major Plimmer's letter, in either his exemplary record or his suitability to serve in the armed forces. The evidence was that he would continue to serve in the Army Reserve for six more years.

49. As in the case of the June letter, no regard was given to the circumstances of the offence, the mitigating factors or the severity of the sentence imposed. For the reasons I have already given, this meant that the assessment was inadequate.

50. In my view, the September letter demonstrates how inflexibly the policy on criminal convictions was being applied in practice, since the official considered she had to find a precedent case to justify a finding that the Claimant was "of good character". The Claimant was entitled to have his application determined on its individual merits, even if his case was unique. As the extract from *De Smith* states, public law requires "the full rigour of certainty and consistency [to] be tempered by the willingness to make exceptions, to respond flexibly to unusual situations, and to apply justice in the individual case."

51. There is at least one example of a case comparable to the Claimant's, but it was decided under a different version of the Defendant's policy. Therefore I do not criticise the author of the September letter for not taking it into account. UKBA has published precedents which include a case in May 2003 where naturalisation was granted to a person who had been convicted of speeding, fined £300 and disqualified for three weeks. The conviction would not be spent for a further two years. He had no other convictions. The recorded decision was:

> " The current policy is to disregard a single conviction for a minor offence that results in a relatively small fine. Although it was difficult to assess whether this could be regarded as a "relatively small fine", consideration was given to the fact that courts are encouraged to relate fines to offender's means. The applicant's honesty in notifying us of his conviction was also taken into account."

52. The distinguishing feature between the Claimant's case and the case in 2003 was that it was decided under an earlier version of the Defendant's policy, in force until June 2006. The 2006 policy contained the same provision that an applicant who had an unspent conviction would not "normally" be successful and that a single conviction for a minor offence could be "ignored". The difference was that "excessive speeding" had not been added to the list of offences which were not to be considered "minor" for this purpose. In the revised Instructions which apply to decisions taken on or after 13th December 2012, paragraph 3.2.5 has been removed altogether. Thus, it is only in the period between 2006 and 2012 that the Defendant's policy has categorised "excessive

speeding" together with serious criminal offences which should not normally be overlooked, regardless of the circumstances.

53. The Claimant submitted that the references in the decision letters to overlooking or disregarding the Claimant's convictions demonstrated an erroneous approach in law.

54. These terms are in the Instructions, and so it is understandable that the officials used them. However, I agree with the Claimant that his conviction should not be overlooked or disregarded; it should be weighed in the balance against the countervailing evidence of good character, in order to assess his character as a whole.

55. The Claimant submitted that the decision makers erred in applying a test of exceptionality when considering whether to depart from the "normal" position of refusing to disregard an offence of "excessive speeding". Mr Thomann is correct in saying that a departure from policy is frequently described as an exception to the general rule (see e.g. *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, per the Master of the Rolls at [43])). However, I accept the Claimant's submission that, in this particular policy, the term "exceptional" is only used in respect of convictions which are never spent under the Rehabilitation of Offenders Act 1974, because of the gravity of the sentence (see paragraphs 3.1.3 and 3.2.6) and in respect of registered sex offenders (paragraph 4.1.6). By reserving the word "exceptional" for the most serious offences, the policy must be taken to mean that departure from the normal policy will be more rare in those cases than others involving less serious offences (as one might expect). I am not, however, convinced that the use of the word "exceptional" made any real difference to the decision making process in this case. The May and June letters used very similar wording, and I suspect that their authors were using a decision letter template or recommended forms of wording.

Conclusion

56. For the reasons I have set out above, I have concluded that the decision-making process was legally flawed, and that the Defendant should re-consider her decision, in accordance with the law.