

Begum v Special Immigration Appeals Commission (SIAC) [2020] EWCA Civ 918

The issues considered

On 16 July 2020, the Court of Appeal handed down its judgment in the latest installment of Shamima Begum's case. Ms Begum, who is now 20, fled to Syria to join ISIS (Daesh) age 15. The Home Secretary (then Sajid Javid) made the decision to strip her of her British citizenship under the British Nationality Act 1981¹. With the intention of challenging the deprivation order, Ms Begum requested leave to enter (LTE), on the basis that it would allow her to meaningfully participate in court proceedings. In June 2019, the Special Immigration Appeals Tribunal (SIAC) refused this request. A year later in February 2020, SIAC issued three preliminary findings in Ms Begum's appeal:

1. Due to her Bangladeshi citizenship, the decision of the Home Office to strip Ms Begum of her British nationality did not render her stateless;
2. The deprivation order did not constitute a breach of government policy on breaches of human rights (Articles 2 and 3 of the ECHR);
3. The fact that Ms Begum would be unable to have a fair or effective appeal in her current circumstances should not prevent the appeal from going ahead.

Whilst the first finding remains unchanged, the second and third were considered by the Court of Appeal (CA). As these findings were not final, they could only be challenged by way of judicial review², permission for which was granted. Ms Begum, who is currently held in Camp Roj, a refugee camp in northern Syria, was also permitted to appeal against the refusal of LTE.

The court decision

Lord Justice Flaux delivered the leading judgement, with which Lord Justice Singh and Lady Justice King agreed.

The court addressed itself to SIAC's finding that the government was not in breach of Articles 2 or 3 of the European Convention on Human Right (ECHR), on the basis that Ms Begum's potential exposure to treatment contrary to human rights provisions was not a direct consequence of any government action. In other words, Ms Begum would be in Camp Roj regardless of the decision to strip her of her nationality. In accepting this submission, the SIAC had erred in its approach, treating the case as a judicial review as opposed to undertaking a full review of the facts itself [123]. The CA reminded SIAC that it is required to undertake its own independent risk assessment, and not to evaluate whether or not the decision-maker was sufficiently justified in reaching his conclusion. Flaux LJ remitted the issue to the tribunal for a *de novo* merits assessment, directing SIAC to "stand in the shoes of the Secretary of State" [125].

The court proceeded to consider SIAC's assertion that "in her current circumstances, (Ms Begum) cannot play any meaningful part in her appeal, and that, to that extent, the appeal will not be fair and effective",

¹ British Nationality Act 1981, s40(2)

² Special Immigration Appeals Commission Act 1997, s7(1)

[26] next to its decision that the appeal should proceed regardless. Flaux LJ commented that it was “un-thinkable” [112] that Ms Begum’s appeal would be allowed to go ahead regardless of the fact that SIAC categorically acknowledged that such an appeal would be neither fair nor effective. SIAC’s suggestions that the appeal either be stayed or continue without Ms Begum’s participation were rejected on the basis that either option would only exacerbate the unfairness [113]. The CA overturned this element of SIAC’s findings whilst accepting that the Secretary of State’s national security case merits substantial consideration. His Lordship concluded the judgment stating that “fairness and justice must, on the facts of this case, outweigh the national security concerns, so that the LTE appeals should be allowed.” [121]

Significance

The decision in this case may be lauded as a triumph for human rights. Indeed, it undoubtedly demonstrates that the state cannot simply absolve itself of responsibility for an individual by purporting to deprive that individual of their nationality. However, caution should be heeded insofar as Ms Begum’s case is concerned. There is a real possibility that the decision may be reversed, with the government confirming that it will challenge the decision. Accordingly, Ms Begum’s lawyer has commented that there remains a “long road ahead”.³

The wider significance of this case remains to be seen, though this particular judgement may well be weaponised by the government as a tool to curtail the powers of the judiciary, specifically by restricting the practice of judicial review. In its bold finding that individual rights (on the facts of this case) must trump national security concerns, the three-judge panel showed a strong united front, albeit one which likely irked cabinet ministers. In the wake of the judgement, Prime Minister Boris Johnson stated that there may be ways in which judicial review goes “too far”.⁴ Considered in the context of Attorney General Suella Braverman’s assertion that “Parliament must retrieve power ceded to (...) the courts”⁵, there would appear to be clear indications from the current government that it will not hesitate in introducing legislative reforms to limit the use of judicial review. *Begum v Special Immigration Appeals Commission* may well reignite momentum for the ‘Constitution, Democracy & Rights Commission’, which the Attorney General stated will “ensure that the boundaries of judicial review are appropriately drawn”.⁶

By Zoe Darling

³ Dan Sabbagh and Nazia Parveen, ‘Shamima Begum: Home Office to fight court rule letting Isis recruit return to UK’ *The Guardian* (16 Jul 2020) <<https://www.theguardian.com/uk-news/2020/jul/16/shamima-begum-wins-right-to-return-to-uk>> accessed 26 Jul 2020.

⁴ Ashley Cowburn, ‘Boris Johnson told to keep ‘populist hands’ off judiciary after reports he wants overhaul of how government is challenged in court’, *The Independent* (25 Jul 2020) <<https://www.independent.co.uk/news/uk/politics/boris-johnson-judicial-reviews-supreme-court-uk-governemt-a9637601.html>> accessed 26 Jul 2020.

⁵ Suella Braverman, ‘People we elect must take back control from people we don’t. Who include the judges’, *Conservative Home* (27 Jan 2020) <<https://www.conservativehome.com/platform/2020/01/suella-braverman-people-we-elect-must-take-back-control-from-people-we-dont-who-include-the-judges.html>> accessed 26 Jul 2020.

⁶ *ibid*