UKSC 2020/0156, 0157, 0158

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION) AND THE DIVISIONAL COURT [2020] EWCA Civ 918 (KING, FLAUX AND SINGH LJJ)

BETWEEN:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Applicant/Cross-Appeal Respondent

- and -

SHAMIMA BEGUM

Respondent/Cross-Appeal Appellant

INTERVENER SUBMISSIONS BY JUSTICE

Introduction

1. Over the last 150 years, the ancient common law principle of allegiance has but infrequently received judicial consideration in nationality and citizenship cases heard in the United Kingdom.[1] This is regrettable, given that the statutory regimes applicable in respect of British subjects (and, more recently, British citizens) — whilst progressively divergent from common law principles associated with the subject-State relationship — have not displaced the ancient common law doctrine of allegiance. The divergence between statute and common law became particularly profound in 2002, with the introduction, under s.40 of the British Nationality Act 1981 ("1981 Act"), of a statutory power of unilateral citizenship deprivation, by the Executive branch of government, against a natural born citizen.

2. In this matter, the parties have been concerned with the operation and scope of a British citizen's appeal rights under s.40A of the 1981 Act. It is principally through this statutory lens that the parties have made submissions as to the extent that Leave to Enter should be afforded where, as here, there is a judicial finding that a citizen's statutory appeal rights cannot be exercised in a fair and effective manner unless he or she is permitted to re-enter British territory.

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[1] By way of comparison, see the High Court of Australia's consideration of allegiance and 'belonging' in *Love v The Commonwealth* [2020] HCA 3 and the cases set out in f.n's.32 and 34, below.

3. The nexus between State and subject is not so narrowly confined as to be a mere creature of statute; including such legislation as, at any given time, may govern citizenship and its deprivation. Statutory citizenship is but one form of legal relationship between State and subject. It does not displace ancient common law bonds between the Crown and its subjects: bonds that entitle the subject to rights of due process that are discreet from, and additional to, any rights concomitant with, or incidental to, statutory citizenship. Put another way, beneath the United Kingdom's inherently mutable statutory veneer of modern citizenship and nationality law lies an ancient substratum of allegiance bonds that are constitutional in character and, as yet, not displaced by the legislature, such as would deprive the judicial branch of its ancient role, as protector of the laws of the Kingdom and, indeed, the Rule of Law.

4. Providing a focus upon the ongoing operation of the common law principles associated with allegiance, these submissions address the following topics:

   i. the historical context and development of the concept of allegiance at common law, including the reciprocal duty of protection owed by the State to its natural born subjects (now, British citizens).
   ii. the extent to which the Executive branch of government may frustrate common law and legislative rights of a subject to re-enter the United Kingdom;
   iii. whether a subject abroad, suspected of conduct punishable under English criminal law, is entitled to access the substantive and procedural protection of that law, before any punitive action is taken against them by the Executive.

The principle of allegiance at common law

5. The principle of allegiance to the Crown, as a feature of nationality, traces its heritage to the dawn of the common law. Emerging from the feudal doctrine of fealty — a reciprocal relationship whereby the vassal owed an obligation of fidelity and obedience to the lord and the lord owed the vassal a duty of protection and guardianship — allegiance was owed to the sovereign, as the supreme feudal lord, by his subjects.[2] During the thirteenth and fourteenth centuries, the common law recognised as subjects (to whom the principle of allegiance applied), all persons born within the sovereign's territories (characterized as "natural born subjects").[3] Consequentially, during the

[2] Holdsworth, *A History of English Law*, 3rd ed (1944) vol 9, 72-3; Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 10, 354-355.

[3] Holdsworth vol 9, 75-6; Pollock & Maitland, *The History of English Law Before the Time of Edward I* (1895) vol 1, p 446; *Rotuli Parliamentorum*, vol 1, p 44; Statutes 25 Edw II stat 1 and 42 Edw III c 10.

fifteenth and sixteenth centuries, jurists defined subjecthood by reference to allegiance.[4]

6. The role of allegiance as the gravamen of subjecthood, at common law, was restated and explained in 1608 in *Calvin's Case*.[5] Sir Edward Coke affirmed that, for natural born subjects, allegiance was indelible and comprised reciprocal duties: the subject owing to the King (personally rather than in the capacity of the body politic) "his true and faithful ligeance and obedience", while the King was required "to govern and protect his subjects".[6] As allegiance for natural born subjects was indelible, such persons were not aliens and the reciprocal duties of allegiance endured, regardless of whether the natural born subject remained in the sovereign's territories.[7]

7. Whilst the Union with Scotland Act 1706[8] introduced a change in nomenclature — introducing "British subject" as an alternative to "natural born subject" — allegiance continued to be the defining feature of common law subjecthood in the eighteenth century. The permanency of allegiance for natural born subjects was upheld, with the court of the King's Bench in *Aeneas Macdonald's Case*[9] applying the logic earlier articulated by Sir Matthew Hale: "the natural-born subject of any prince cannot by swearing allegiance to another prince put off or discharge him from that natural allegiance; for this natural allegiance was intrinsic and primitive, and antecedent to the other".[10] By oblique reference to feudal principles in respect of the ties of homage,[11] Hale posited that divestiture of allegiance must be reciprocal: it "cannot be divested [by the subject] without the concurrent act of the prince to whom it was first due".[12]

8. Between the late eighteenth century and the late nineteenth century, exceptions began to emerge with respect to the permanency of allegiance for the subject born in the sovereign's territories. Blackstone noted that the bond of allegiance was indelible, except by legislation.[13] The loss of British colonies in the United States led to a judicial

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4 K Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (2000), 141–2, 151–70.
5 (1608) 7 Co Rep 1a [77 ER 377].
6 *Calvin's Case* (1608) 7 Co Rep 1a at 4b, 6b–7a [77 ER 377 at 382, 384–5].
7 *Calvin's Case* (1608) 7 Co Rep 1a at 5b, 7b–8a [77 ER 377 at 383, 385–6]. See also *Storie's Case* (1571) 3 Dyer 300b [73 ER 675].
8 Statute 6 Anne c 11.
9 (1747) 18 State Tr 857 at 859.
10 Hale, *The History of the Pleas of the Crown* (1736) vol 1, 68.
11 Bracton f78b.
12 Hale, *The History of the Pleas of the Crown* (1736) vol 1, 68.
13 Blackstone, *Commentaries on the Law of England* (5th ed 1773) 365

finding that indelibility did not apply where there was, by treaty, secession of a colony.[14] In response to a Royal Commission[15] finding that the common law rule of the indelibility of the subject was "neither reasonable nor convenient",[16] the Naturalisation Act 1870[17] introduced limited legislative means whereby subjects could renounce their nationality and allegiance; in particular, s.4 provided that natural born British subjects who were subjects of a foreign state (by the law of that state) could make a declaration of alienage. Finally, in *Re Stepney Election Petition; Isaacson v Durant,*[18] the Court of Appeal overturned two principles associated with indelibility in *Calvin's Case*: first, the Court found that a natural born subject becomes an alien when the sovereign ceases to have dominion over the territory in which that person resides and, secondly, the Court found that allegiance is owed to the King in his body politic, rather than personal, capacity.[19]

9. The twentieth century saw further statutory evolution in respect of nationality and citizenship. Section 1 of the British Nationality and Status of Aliens Act 1914 preserved the rubric of allegiance within the definition of the natural-born British subject (as a condition of such subjecthood) but did not define the term. With the British Nationality Act 1948 ("1948 Act"), allegiance ceased to be an express pre-condition for a natural born subject to attain the status of 'Citizen of the United Kingdom and Colonies'. Similarly, the 1981 Act does not expressly require allegiance for a natural born subject to attain the status of "British Citizen", although, under s.42, an oath of allegiance remains a condition precedent for registration or naturalisation.

10. Away from the realm of statutory nationality and citizenship law, the twentieth century saw the preservation of common law principles of allegiance. Prior to the 1948 Act, the reciprocal nature of allegiance duties between State and subject was affirmed,[20] as was the continuity of those duties despite any actions by State or subject: the State's failure to afford protection does not relieve the subject of his duty of obedience,[21] just

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14 *Doe v Thomas v Acklam* (1824) 2 B & C 779 [107 ER 572]

15 Royal Commission on the Laws of Naturalisation and Allegiance.

16 Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalisation and Allegiance* (1869) [4109], v, viii.

17 Statute 33 Vict c 14.

18 (1886) LR 17 QBD 54.

19 *Re Stepney Election Petition; Isaacson v Durant* (1886) LR 17 QBD 54 at 64-66.

20 *China Navigation Company v Attorney-General* [1932] 2 KB 197; *Attorney-General v Nissan* [1969] 1 All ER 629; *Oppenheimer v Cattermole* [1972] 3 All ER 1106.

21 *De Jager v Attorney-General of Natal* [1907] AC 326; *China Navigation Company v Attorney-General* [1932] 2 KB 197, 211-213.

as the subject's failure to act in the spirit of his duty of obedience does not relieve the State of its obligation to afford protection.[22] Further, in *Joyce v DPP*,[23] the House of Lords affirmed that, at common law: (i) the natural born subject cannot at any time cast off allegiance;[24] (ii) the State's duty of protection includes, but is not limited to, the protection of the State's legal system,[25] and (iii) even an alien may owe allegiance duties where the State has afforded some form of protection (eg. a passport that was issued by the State, even when no longer in the person's possession).[26] This final point in *Joyce* was applied, by analogy, in *P(GE) (an infant)*[27] to reach the conclusion that binding duties under common law principles of allegiance, distinct from statutory nationality and citizenship law, may be created by: being ordinarily resident in the territory of the State, departing the State on a travel document permitting return to the State, and leaving family and effects in England.[28]

11. In the premises, whilst the rise of statutory nationality and citizenship has been accompanied by a shift away from the rubric of allegiance, the doctrine of allegiance persists in the common law. As such, the principle continues to inform the connection between natural born subject and State, even when the State has, under statute, deprived that subject of citizenship. Allegiance, it may be said, remains the fundamental common law nexus between State and natural born subject. Indeed, it may be apt to express this reciprocal relationship of duties as a species of 'constitutional nationality', as opposed to the mutable species of nationality and citizenship that have arisen as mere creatures of statute in recent centuries.

Frustration of the right to re-enter the United Kingdom

12. Where, as in Ms Begum's case, the State relies upon a legislative instrument to deprive its natural born subject of her citizenship, what recourse does the alienated subject have to re-enter the United Kingdom? Under the 1981 Act, s.40A provides a statutory appeal right, whereby a natural born subject is given, as a final protection against executive deprivation action, access to the English justice system. However, this statutory scheme does not provide that the alienated natural born subject must be provided with

22 *Johnstone v Pedlar* [1921] 2 AC 262
23 [1946] AC 347.
24 *Joyce v DPP* [1946] AC 347 at 366.
25 *Joyce v DPP* [1946] AC 347 at 370.
26 *Joyce v DPP* [1946] AC 347 at 369–71.
27 [1964] Ch 568; [1965] 3 All ER 977.
28 *P(GE) (an infant)* [1964] Ch 568 at 585C–E, 590G–591A, 595B.

access to the territory of the United Kingdom, in order to prosecute their appeal. Accordingly, viewed through the statutory lens, the right of an alienated subject seeking to re-enter the United Kingdom for the purpose of challenging a deprivation of citizenship decision is to be determined by reference to the ability of that alienated subject to receive a fair and effective appeal in whichever foreign territory he or she may presently be located. On such basis, the Court of Appeal found (correctly, it is submitted) that, if Ms Begum could not participate in a fair and effective appeal from her locale, the executive must facilitate her re-entry, by allowing Leave to Enter and providing travel documents.

13. The right of re-entry for the alienated natural born subject, however, is not conditional upon the existence of a statutory appeal right, the scope of which is determined by statutory interpretation. For the natural born subject deprived of his or her right of re-entry and abode, the common law doctrine of allegiance provides a discreet pathway to the protection of the laws of the United Kingdom and, in particular, access to the nation's courts and tribunals. It is submitted that this common law substratum provides the basis for the principle that the Court of Appeal described as "well-recognised in English public law": that the subject has the right to fair, meaningful and effective participation in appeals against decisions by the executive branch of government.

14. Such submission finds its basis in the duty of "protection" that the State owes to its subjects under the doctrine of allegiance. Although the full scope of this duty of protection is yet to be determined, its fundamental elements are exceedingly clear and were summarised two hundred years ago by Chitty, as follows:

> The duties arising from the relation of sovereign and subject are reciprocal. Protection, that is, the security and governance of his dominions according to law, is the duty of the sovereign; and allegiance and subjection, with reference to the same criterion, the constitution and laws of the country, form, in return, the duty of the governed…We have already partially mentioned this duty of the sovereign, and have observed that the prerogatives are vested in him for the benefit of his subjects, and that His Majesty is under, and not above, the laws. This doctrine is laid down by several writers; and is expressly ratified by the coronation oath, wherein the King swears to govern according to law…[29]

Accordingly, by s.3 of the *Coronation Oath Act 1688*,[30] the sovereign must answer the

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29 Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820), 71.

30 Statute 1 Will & Mary c 6.

question: "Will You solemnely Promise and Sweare to Governe the People of this Kingdome of England and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same?".[31]

15. It follows that, at common law, the State owes to the natural born subject, even after deprivation of statutory 'citizenship' rights, the protection of the law of the State.[32] As the common law doctrine of allegiance is not conditional upon any statute, it is remains open to the natural born subject who has been alienated, by executive action under legislative instrument, to have recourse to protection of the laws of the United Kingdom, access to the nation's courts and tribunals, and the assurance of natural justice principles, including *audi alteram partem*.[33] Further, although the right of abode is a creature of the law and may be removed by legislation, at common law any subject of the Crown has the right to enter and remain in the United Kingdom whenever he or she pleases.[34]

16. This common law entitlement is relevant to Ms Begum's case. The scope of the appeal right under s.40A of the 1981 Act may be limited by means of statutory interpretation, such that the requirement for an in-country appeal is to be implied (or not) on the basis of fair and effective appeal rights. By contrast, in circumstances in which there has been, at law, no divestiture of allegiance, Ms Begum's common law right to the protection of the State's laws and legal fora is unaltered. If the natural born subject seeking to pursue a legal right under the State's laws — for example, the right of abode — is, by virtue of being located outside the territory of the United Kingdom, unable to fairly, meaningfully and effectively access the laws of the United Kingdom and its courts and tribunals, the Executive branch of government may not, by frustrating such subject's re-entry, nullify the Crown's duty of protection.

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31 At her coronation on 2 June 1953, to the question "Will you solemnly promise and swear to govern the People of the United Kingdom of Great Britain and Northern Ireland…according to their respective laws and customs?", her Majesty Queen Elizabeth II answered "I solemnly promise so to do" and, thereafter, signed such oath.

32 The notion that "rights of due process" may, as a minimum, arise in respect of the natural born subject without statutory rights of citizenship or nationality was observed by Justice Kirby of the High Court of Australia in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCA 36; (2005) 218 ALR 483, 516 [117]–[118].

33 See *Al-Rawi v Security Service* [2012] 1 AC 531, including at 572 [12] and 575 [22].

34 See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (no 2)* [2009] AC 453 at 485 [44]-[45]. See also, regarding statutory citizenship, the High Court of Australia's acknowledgment that the "duty to protection" under the doctrine of allegiance appears to encompass "[t]he right of the Australian citizen to enter the country [which] is not qualified by an law imposing a need to obtain a licence or 'clearance' from the Executive": *Singh v The Commonwealth* (2004) 222 CLR 322 at 387–8 [166]; *Air Caledonie International v The Commonwealth* (1983) 165 CLR 462 at 469.

17. Indeed, where, as in Ms Begum's case, the Crown's duty of protection under the doctrine of allegiance is not displaced, the Courts of the United Kingdom retain sufficient jurisdiction over the alienated natural born subject to compel their appearance, by issuing the prerogative writ of *habeas corpus*: one of the cornerstones of the common law tradition.[35] As noted by Lord Scarman in *R v Home Secretary ex p Khawaja*,[36] "[h]e who is subject to English law is entitled to its protection".[37] Accordingly, the principle of *habeas corpus* applies to every person — whether or not a statutory 'citizen' or 'national' of the United Kingdom — within the jurisdiction of the Courts of the United Kingdom.[38] In this respect, the following passage from *Calvin's Case* is significant:

> But the other kind of writs that are mandatory and not remedial, are not tied to any place, but do follow subjection and ligeance in what country or nation soever the subject is, as the King's writ to command any of his subjects residing in any foreign country to return into any of the King's own dominions…[39]

18. As such, where the State has sufficient control of its subject (including by written or oral agreement with the foreign State or authority holding its subject) as to bring about its subject's release from detention, the writ of *habeas corpus* may issue, notwithstanding that the subject is in not in United Kingdom territory.[40] [redacted].[41]

Protection of the criminal justice system

19. The writ of *habeas corpus* is of particular relevance where, as here, the criminal laws

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35 See *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [59]–[60].

36 [1984] 1 AC 74.

37 *R v Home Secretary ex p Khawaja* [1984] 1 AC 74 at 110.

38 *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [60]; *R (Bancoult) v Foreign Secretary* [2001] QB 1067, .

39 *Calvin's Case* (1608) 7 Co Rep 1a at 20a, 6b–7a [77 ER 377 at 401].

40 See, eg, *R v Secretary of State for Home Affairs; Ex parte O'Brien* [1923] 2 KB 361; *Hicks v Ruddock* (2007) 156 FCR 574.

41 [redacted]

of the United Kingdom amply provide for any case that the State may seek to bring against its subject, Ms Begum. Notwithstanding her present deprivation of citizenship, Ms Begum remains, by reason of her natural born subject status and the doctrine of allegiance, subject to the (still in force) protections of *Magna Carta 1297*, including:[42]

> No freeman shall be taken or imprisoned, or disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgments of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.[43]

20. Whilst the SSHD characterises this case as raising "questions as to the balance to be struck between degrees of protection of procedural rights and degrees of protection of the public from terrorism",[44] the balance of the SSHD's submissions do not articulate, in legal terms, the "terrorism" from which the public is said to be protected by reason of refusing Ms Begum Leave to Enter. Instead, the allegation is made by way of a "national security" assessment and assertion that Ms Begum "aligned with ISIL". Indeed, the SSHD submits that there was no basis for the Court of Appeal to speculate that a prosecution could be brought against Ms Begum, because such decision would be made by the Crown Prosecution Service, in which the SSHD plays no role.[45]

21. It is noteworthy that the SSHD utilises the language of allegiance as the basis for the decisions to deprive citizenship and refuse Leave to Enter. Equally, it is noted that English law provides for not only "terrorism" and "foreign fighter" offences but extraterritorial jurisdiction in respect of same,[46] reflecting the United Kingdom's international obligations: including treaties to which the United Kingdom has acceded, whereby the principle of *aut dedere aut judicare* applies,[47] and resolutions whereby States are required to repatriate and prosecute their "foreign fighter" citizens.[48]

22. The appeal rights under s.40A of the 1981 Act afford an opportunity to challenge a

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42 Statute 25 Edw 1 c 1. See *Bancoult* at f n.34 above.

43 Modern translation of Chapter 29, *Halsbury's Statutes of England and Wales* (4th ed, 1995) vol 10, 16.

44 Secretary of State's Written Case, [1]

45 Ibid, [55](b).

46 Under the Terrorism Act 2000 (eg, sections 11, 15–18, 54, 57 and 58) and the Terrorism Act 2006.

47 See, eg, *Convention for the Unification of Certain Rules for International Carriage by Air 1971*, *Convention on the Prevention and Punishment of Crimes Against* Internationally Protected Persons, *Including Diplomatic Agents 1973*, *International Convention against the Taking of Hostages 1979; International Convention for the Suppression of Terrorist Bombings 1997; International Convention for the Suppression of the Financing of Terrorism 2000*.

48 See, eg, United Nations Security Council Resolutions 2178 and 2396.

decision by the Secretary of State, that deprivation of citizenship is conducive to the public good. Where the reasons for such decision extend to allegations of conduct punishable under the criminal law of the United Kingdom, the citizen is entitled to the protection of the law from penalty, until such time as the State has investigated such allegations, determined to prosecute the matter, and has been successful in so doing. This necessarily involves the legal defences and discretionary protections for trafficked persons and exploited children, including, but not limited to, s.45 of the Modern Slavery Act 2015, where the legal burden falls on the State.[49]

23. Equally, the common law doctrine of allegiance, coupled with the protections articulated in Chapter 29 of Magna Carta, provides that a natural born subject, though deprived of statutory citizenship, may access the law and fora of the United Kingdom in order to challenge any Executive decision (including to refuse his or her re-entry), where such decision is made on the basis of allegations of conduct punishable under the criminal law of the United Kingdom. Where, as here, there is a judicial finding that such access is only possible following re-entry to the United Kingdom, then national security concerns, and the ability to address and manage same, cannot provide a basis for precluding re-entry. Accordingly, it is submitted that the Court of Appeal, in considering the application of *U2 v Secretary of State for the Home Department*:[50] (i) was correct to distinguish Ms Begum's case on the basis that the national security assessment made in *U2* was after a full appeal hearing, in which U2 participated fully, but (ii) wrong to distinguish her case on the basis that it appeared to be at a lower level of seriousness, as regards national security concerns and, accordingly, such concerns could be addressed and managed if she returns to the United Kingdom. National security, when premised upon an allegation of conduct punishable under the criminal law of the United Kingdom cannot preclude re-entry of the natural born subject: it may, however, inform the exercise of the Crown's prosecution of such subject.

FELICITY GERRY QC

EAMONN KELLY

26 OCTOBER 2020, LIBERTAS CHAMBERS, LONDON.

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49 If the MSA was in force, see *MK v R* [2018] QB 86. See also; *R v VSJ and Others* [2017] 1 Cr App R 33; *R v L and others* [2013] 2 Cr App R. 23; *R v N, R v L* [2017] EWCA Crim 2129; *R v N* [2019] EWCA Crim 984; *R v DS* [2020] EWCA Crim 285 and *R v JXP* [2019] EWCA Crim 1280;

50 [2019] SC/130/2016