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

SUPPLEMENTARY INTERVENER SUBMISSIONS BY JUSTICE

JUSTICE was permitted leave only with respect to written submissions of no more than ten pages. However, having attended the hearing via the live stream and noted the questions of Lord Reed, Lord Sale and Lord Hodge, with respect to the nature and scope of the Court's jurisdiction upon this appeal, we provide the following, short, additional written submissions:

1. Lord Reed correctly identified the bases upon which leave to enter may be granted as, either, under s 3 of the Immigration Act 1971 or by exercise of prerogative power. His Lordship enquired as to whether the exercise of the prerogative power in such circumstances was amenable to "conventional" judicial review. The Secretary of State asserted that it was and, further, that consideration of the "balance" between private appeal rights and public interest (eg. national security) fell within standard administrative law grounds applicable upon a judicial review, such as relevance and rationality.

2. By reference to our previously filed submissions, we submit that, the Court of Appeal's decision to order leave to enter was not merely the exercise of procedural fairness principles but the recognition of a right to enter which exists by prerogative power. The decision by the Executive to refuse or frustrate the right of a subject to enter is, we submit, amenable to judicial review, however, "national security risks" are not relevant considerations or matters affecting reasonableness or rationality. This is because the

prerogative power preserves a constitutional right under the common law: the protection of the rule of law, to a *subject* that the state seeks to deprive of the right of subjecthood (and with that, the right of abode). Essentially, the Court was not giving 'leave to enter' but, rather, exercising a prerogative power to prevent the Executive from refusing re-entry, in circumstances in which there was no judicial finding that allegiance had been reciprocally divested. The removal of statutory citizenship makes re-entry difficult but does not remove the common law right, for all subjects, of re-entry (if only to access the courts to challenge such refusal of entry).

3. Our submission remains that a subject of the Crown retains a Constitutional right to re-entry. Here Ms Begum seeks re-entry in order to access the powers of the courts to retain her statutory citizenship. This, in turn, raises whether she has continuing subjecthood. For this, she is entitled to the reciprocal rights and duties found in allegiance, including the protection of law. If subjecthood is lost or removed, this must be in a non-arbitrary way: namely, through a fair hearing.

4. A central issue for a fact finder in such situation is, therefore, not an assessment of risk to national security but rather whether there has been a divestiture of allegiance, including by virtue of any 'alignment' with another state or entity. No such determination has been made in Ms Begum's case.

5. Both Lord Reed and Lord Sale asked questions as to the powers of the UK Supreme Court in the present circumstances. We submit that this Court, in its inherent and supervisory jurisdictions, is vested with the power to protect a subject's right to re-enter for a fair hearing as to divestiture of allegiance. Such due process allows for the protection of *all* subjects, protects the nation from external threats, and identifies those persons for whom there is no duty. It also informs the decision on whether a removal of statutory citizenship was lawful.

6. In the context of trafficked persons and exploited children, there would be few, if any, circumstances in which a court would find that a divestiture of allegiance had occurred. Such a finding would require compelling probative evidence that, despite the involuntary nature of such person's circumstances, they nonetheless may be found to have exercised the high level of agency required to establish a renunciation of allegiance. In practical terms, it is difficult to imagine a circumstance in which such argument could be made out.

7. By referring to *SSHD v Rehman*, Lord Reed alluded to the point made by the Secretary of State: that SIAC and the Court of Appeal cannot conduct their "own" national security assessment but must rely on probative evidence from the Executive.

8. In our submissions, we agree that the Court of Appeal erred by taking national security into account in its LTE decision, perhaps by not recognizing the prerogative nature of the power it was exercising. However, its error lay in considering national security *at all.* What should have occurred was a hearing on whether Ms Begum retained *allegiance*. This is because, even after the SSHD deprived Ms Begum of statutory citizenship, she retained her common law right of re-entry. This stands in addition to the point made by Ms Begum, that national security is not relevant until such time as appeal rights are able to be exercised (the "horse before the cart" argument). Without a fair hearing on allegiance, the horse is Trojan, when it ought to be transparent.

9. The SSHD has, in alleging that the Court of Appeal erred by overturning the SSHD's decision to refuse leave to enter, submitted that the SSHD considers that, absent such leave, Ms Begum may not re-enter the United Kingdom. This amounts to a frustration of Ms Begum's Constitutional right to re-entry so as to challenge the removal of her statutory citizenship. In such circumstances, this Court is entitled to order that the Executive facilitate, and not refuse or frustrate, Ms Begum's re-entry, in the exercise of the prerogative as to entry, at common law, which is not displaced by s 3 of the Immigration Act 1971. Indeed, we submit such exercise may be considered through the prerogative as if a writ of *habeas corpus* had been issued.

10. Lord Hodge asked whether the SSHD, in making a deprivation decision, is under any obligation to facilitate an appeal in respect of such decision. We submit that, in addition to any obligation that may arise in respect of a statutory appeal right, the SSHD is separately required, at common law, to facilitate an appeal, as the subject remains entitled to access domestic law, by virtue of allegiance. As long as that allegiance remains untested by the courts, the subject retains the right of access to the courts. Accordingly, where a subject cannot effectively access or participate in proceedings before domestic courts, the Executive is precluded from frustrating such subject's return. Whilst the extent of repatriation "facilitation" required by the Executive, in exercising the deprivation power, is not precisely defined, it must surely extend to the outer limits of *habeas corpus* — namely, whether it is within the State's power to

facilitate repatriation.[1] We submit that where, as here, there is evidence that a request of the entity or State detaining the subject would likely suffice to enable repatriation, then such "facilitation" falls within the duty of protection owed by State to subject.

11. It is for the above reasons that we again submit that the Court of Appeal was right to grant leave to enter. Further, this Court has power to not only remit the matter to SIAC for a full merits review but also to acknowledge a subject's right to re-enter in order to participate fairly in a judicial hearing on allegiance, such as to enable a non-arbitrary determination of the lawfulness of the removal of his or her statutory citizenship.

FELICITY GERRY QC

EAMONN KELLY

27 NOVEMBER 2020, LIBERTAS CHAMBERS, LONDON.

[1] Perhaps the horse analogy is Act 5, Scene 4 of Shakespeare's Richard III.