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CASE AND COMMENT

DEFERENCE, “FAIRNESS” AND ACCOUNTABILITY IN THE  
NATIONAL SECURITY CONTEXT

IT was inevitable that the Supreme Court’s judgment in *R. (On the Application of Begum) v Special Immigration Appeals Commission* [2021] UKSC 7 would attract considerable attention both within the legal sphere and more broadly. While the case raises complex issues regarding how the state ought to respond to individuals who have travelled overseas to align with organisations proscribed under section 3 of the Terrorism Act 2000, such issues were not – at least directly – before the Supreme Court. Rather, the Supreme Court was called upon to resolve relatively straightforward questions regarding statutory interpretation and the application of administrative law principles. That relative simplicity, however, belies several especially noteworthy aspects of the court’s judgment, particularly its emphasis on the deference owed to Executive decision-making in the context of national security.

Ms. Begum travelled to Syria in 2015 when she was 15 years old. Once there, she married an ISIL (Islamic State of Iraq and the Levant) fighter and had three children, all of whom died. At the time of the proceedings before the Special Immigration Appeals Commission (SIAC) she was being held by Syrian Democratic Forces (SDF) in an internally displaced persons camp in Syria. The conditions in the camp were accepted by SIAC as being so appalling that they would, if the European Convention on Human Rights (ECHR) applied, meet the threshold of inhuman or degrading treatment under Article 3 (*Begum v Secretary of State for the Home Department*, SIAC, Appeal No SC/163/2019, 7 February 2020, at [130]).

In 2019, Ms. Begum was deprived of her British citizenship under section 40(2) of the British Nationality Act 1981 (BNA) on the basis that it was conducive to the public good to do so and she would not be rendered

stateless given she was, according to the Home Secretary, a dual British/Bangladeshi citizen. Ms. Begum appealed that decision and subsequently applied for leave to enter so as to be able to effectively participate in that appeal. Her application for leave to enter was rejected. Ms. Begum appealed that decision and also sought judicial review on the basis of common law principles.

SIAC and the Administrative Court rejected Ms. Begum's appeals and dismissed her judicial review challenge. Ms. Begum appealed those decisions to the Court of Appeal and Divisional Court respectively, which concluded that the Home Secretary had erroneously departed from an extraterritorial human rights policy when the deprivation decision was made and that Ms. Begum had to be granted leave to enter in order to effectively participate in her appeal against the deprivation order, notwithstanding the countervailing national security issues. The Supreme Court unanimously upheld the Home Secretary's appeals against each of those decisions.

A central aspect of the Supreme Court's judgment was its consideration of the nature of appeals to SIAC under section 2B of the Special Immigration Appeals Commission Act 1997 (SIACA). That section governs appeals from decisions under section 40(2) of the BNA. Section 2B applies when the Home Secretary has certified that the decision was based on information the disclosure of which is not in the public interest and/or in the interests of national security. The Home Secretary had issued such a certificate in respect of the deprivation decision concerning Ms. Begum. Having regard to the legislative history of section 2B and SIACA more generally, the Supreme Court confirmed that in appeals under section 2B against decisions depriving people of their citizenship "the principles to be applied by SIAC ... are largely the same as those applicable in administrative law" (at [69]). The Court of Appeal had, thus, erred in concluding that SIAC was required to conduct a full merits review when hearing a section 2B appeal. In reaching that conclusion, the Supreme Court also emphasised the importance of showing deference to the Home Secretary's decision. The Supreme Court observed that some aspects of the Home Secretary's exercise of discretion under section 40(2) may not be justiciable given that it "must depend heavily upon a consideration of relevant aspects of public interest, which may include considerations of national security and public safety" as occurred in the instant case (at [70]). As such assessments are "incapable of objectively verifiable assessment", SIAC (and other appellate courts) are required to show "appropriate respect [to such decisions], for reasons both of institutional capacity and democratic accountability" (at [70]).

Another core facet of the Supreme Court's judgment concerned the consequences of Ms. Begum's inability to participate effectively in the appeal

against the deprivation order. SIAC accepted that in her current situation, Ms. Begum could not play “any meaningful part in her appeal, and . . . to that extent, the appeal will not be fair and effective” (at [85]). However, as SIAC, the Divisional Court and the Supreme Court all agreed, this did not mean that her appeal should automatically succeed. As the Divisional Court observed, it would be contrary to principles of fairness if the appeal were allowed without consideration of its merits: “[f]airness is not one-sided and requires proper consideration to be given not just to the position of Ms Begum but the position of the Secretary of State” (at [87]). This raised the associated question of what should happen when a person is unable to pursue an effective appeal against a deprivation decision. The Supreme Court distinguished between cases in which a person is placed at a “forensic disadvantage” (for instance because of the unavailability of evidence) and cases in which the disadvantage “is of such an extreme nature [that] it is impossible for the case to be fairly tried”. In cases of forensic disadvantage, “the court will usually proceed with the case” whereas in cases involving “extreme” forensic disadvantage, “the interests of justice may require a stay of proceedings” (at [90]–[91]). The Supreme Court firmly rejected the Court of Appeal’s conclusion that leave to enter had to be granted to enable Ms. Begum to have a fair and effective hearing of her appeal against the deprivation order. In concluding that Ms. Begum should be granted leave to enter the UK, the Court of Appeal assessed for itself the level of risk posed by Ms. Begum and proposed alternative means by which the Home Secretary could address any such risk including, for instance, the imposition of a Terrorism Prevention and Investigation Measure or arresting and charging her upon her arrival. The Supreme Court was highly critical of the Court of Appeal’s approach, concluding that the Court of Appeal had “overlooked the limitations to its competence, both institutional and constitutional, to decide questions of national security” (at [109]).

The last issue of note in the Supreme Court’s judgment concerned the approach to be taken when reviewing the Home Secretary’s application of an extraterritorial human rights policy. According to that policy, the Home Secretary will not deprive individuals of British citizenship when they are outside the jurisdiction of the UK for the purposes of the ECHR if doing so would expose those individuals to a real risk of treatment which would constitute a breach of Article 2 (right to life) or 3 (freedom from ill-treatment) if the ECHR did apply (at [21]). Applying a reasonableness standard of review, SIAC concluded that the Home Secretary was entitled to determine that a real risk of ill-treatment contrary to the ECHR was not a foreseeable and direct consequence of depriving Ms. Begum of her citizenship. The Court of Appeal disagreed, holding that SIAC ought to have conducted a full merits review and formed an independent assessment of the risk. According to the Supreme Court “it was

the Court of Appeal rather than SIAC which erred” (at [117]). The adoption of the extraterritorial human rights policy did “not alter the discretionary nature of the [Home Secretary’s] decision [under s. 40(2) of the BNA], or convert the practice into a rule of law” (at [123]). While a failure to follow a policy without good reasons could be open to challenge, “the question how the policy applies to the facts of a particular case is generally treated as a matter for the authority, subject to the *Wednesbury* requirement of reasonableness” (at [124]). The decision of the Home Secretary being reasonable, it was not open to challenge.

While the reasoning of the Supreme Court regarding the nature of appeals under section 2B of the SIACA and the approach to be taken to the extraterritorial human rights policy is relatively uncontroversial, the court’s repeated reference to constitutional catchphrases such as “institutional competence”, “democratic accountability” and “respect” is notable. This is particularly so given the judgment was delivered while the Independent Review of Administrative Law was being conducted and in light of accusations of judicial overreach by the courts. Certainly, no one could argue that the judgment evinces such overreach. But, should we be concerned by the conservative approach taken by the Supreme Court, particularly given the context? The implications of the Supreme Court’s decision are profound for individuals such as Ms. Begum who find themselves deprived of their British citizenship while outside UK territory (and, thus, beyond the protective scope of the ECHR). Is it acceptable that in such cases, where it is acknowledged that an appeal against the deprivation order cannot be fair or effective, that the lawfulness of the order goes unchecked, potentially indefinitely? It is difficult to see how, in light of the arsenal of counter-terrorism tools available including administrative orders such as Terrorism Prevention and Investigation Measures, such an outcome reflects a fairer compromise than permitting the individual leave to enter in order to participate in the appeal. And that is to say nothing about the procedural limitations which individuals such as Ms. Begum face when conducting appeals from deprivation decisions and refusals of leave to enter including, in particular, as a result of the use of the closed material procedure. So, while the Supreme Court’s judgment may be considered a success in terms of its recognition of the limits of judicial competence, it serves as a stark reminder of the extent of the powers exercisable by the Executive in the name of “national security” and the limited ability of the courts to hold the Executive accountable in such cases.

STEVIE MARTIN

Address for Correspondence: Fitzwilliam College, Cambridge, CB3 0DG, UK. Email: [ssm41@cam.ac.uk](mailto:ssm41@cam.ac.uk)