**CASE NOTE**

# *R (BEGUM) v SPECIAL IMMIGRATION APPEALS COMMISSION; R (BEGUM) v SECRETARY OF STATE FOR THE HOME DEPARTMENT; BEGUM v SECRETARY OF STATE FOR THE HOME DEPARTMENT* [2021] UKSC 7, [2021] AC 765

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## I INTRODUCTION

Shamima Begum ('Ms Begum') was born on 25 August 1999 in the United Kingdom. Her parents were Bangladeshi nationals.[1] By s 1(1)(b) of the *British Nationality Act 1981* ('*BNA 1981*'), read with s 33(2A) of the *Immigration Act 1971*, Ms Begum was a British citizen at birth, because she was born in the United Kingdom and at least one parent, her father, was 'settled' in the United Kingdom.[2]

In 2015, aged 15, Ms Begum travelled to Syria to align herself with the so-called Islamic State in Iraq and the Levant ('ISIL') terrorist group. She entered an Islamic marriage with a Dutch ISIL fighter, by whom she had three children. The first two died whilst she was in ISIL held territory. Ms Begum fled when ISIL was displaced from lands it had seized and, on 13 February 2019, encountered journalists in a camp in Syria controlled by the Syrian Democratic Forces militia. She was aged 19 and was nine months pregnant with her third child. She gave birth soon thereafter, but her child died on 7 March 2019.[3] On 19 February 2019, the Secretary of State for the Home Department ('SSHD') took a decision under the *BNA 1981* s 40(2), by which the SSHD 'may by order deprive a person of a citizenship status if … satisfied that deprivation is conducive to the public good' to remove Ms Begum's British citizenship.[4] The SSHD maintained that the *BNA*

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1 *Begum v Secretary of State for the Home Department* [2019] UKSIAC 163 [10]–[11] ('*SIAC Determination*').

2 *British Nationality Act 1981* (UK) s 1(1)(b) ('*BNA 1981*') read with the *Immigration Act 1971* (UK) s 33(2A), which defines 'settled' as 'ordinarily resident' in the United Kingdom and possessing indefinite leave to enter/remain; *SIAC Determination* (n 1) [12].

3 *SIAC Determination* (n 1) [13]–[15].

4 *BNA 1981* (n 2) s 40(2); *SIAC Determination* (n 1) [1].

*1981* s 40(4), by which no order may be made under the *BNA 1981* s 40(2) 'if [the SSHD] is satisfied that the order would make a person stateless', did not apply because Ms Begum was a citizen of Bangladesh by descent.[5] The SSHD also concluded that the decision did not breach the 'extra-territorial human rights policy' by which deprivation of British nationality would not be entered into if a foreseeable risk of harm (which would breach arts 2 or 3 of the *European Convention on Human Rights and Fundamental Freedoms* ('*ECHR*'), if within the jurisdiction) would arise as a direct consequence.[6]

Ms Begum's lawyers filed a notice of appeal to the Special Immigration Appeals Commission ('SIAC').[7] Ms Begum also sought leave to enter the United Kingdom to take part in her appeal. In June 2019, the SSHD refused this. Ms Begum filed a second notice of appeal to the SIAC in relation to this new decision based upon *ECHR* art 8. In light of the uncertainty as to whether the jurisdiction of the SIAC enabled all matters which might be raised in a public law claim, she also filed an application for judicial review. The appeal and judicial review matters were heard together in linked SIAC and Administrative Court proceedings.

The SIAC, in a detailed set of preliminary findings, held that (i) Ms Begum would not be made stateless by deprivation of nationality, because she was, despite statements to the contrary made by the authorities of Bangladesh, a national of that country;[8] (ii) the SSHD was reasonably entitled to conclude that no risk of engaging the extraterritorial human rights policy arose;[9] (iii) while Ms Begum could not have a fair and effective appeal whilst in custody in Syria, this finding did not dictate that her appeal must be allowed.[10] It dismissed her appeal from refusal of leave to enter. In the judicial review proceedings, the Administrative Court adopted relevant parts of the SIAC decision.[11]

Ms Begum's lawyers sought and obtained permission to appeal to the Court of Appeal from dismissal of the entry clearance appeal and the judicial review application. As to the SIAC's preliminary conclusions, no statutory appeal existed. Ms Begum did not challenge the SIAC's preliminary conclusion as to nationality and whether she would be made stateless by the order. However, Ms Begum's lawyers sought and obtained permission to apply for judicial review of those findings, and this was heard by the Court of Appeal sitting as a Divisional Court.[12]

The Court of Appeal allowed Ms Begum's appeal in part, holding (i) that the SIAC had erred in assessing the *ECHR* art 3 risk, treating itself as conducting a review on rationality grounds, not an independent risk assessment; (ii) that fairness required that Ms Begum be permitted entry into the UK to participate in her appeal; and (iii) that the Court was able to consider the national security risk

5 *BNA 1981* (n 2) ss 40(2), (4); *SIAC Determination* (n 1) [27].

6 *SIAC Determination* (n 1) [129]–[134].

7 The statutory basis for appeal is *BNA 1981* (n 2) ss 40A(1)–(2) and *Special Immigration Appeals Commission Act 1997* (UK) s 2B. Appeal would ordinarily be to the First-tier Tribunal (Immigration and Asylum Chamber) but is to Special Immigration Appeals Commission if the Secretary of State for the Home Department certifies that the decision relies wholly or partly upon information which, in his opinion, should not be made public, for reasons of national security or international relations of the United Kingdom or otherwise in the public interest.

8 *SIAC Determination* (n 1) [27]–[128], [192].

9 ibid [129]–[139], [192].

10 ibid [140]–[192].

11 *Begum v Secretary of State for the Home Department* [2020] EWHC 74 (Admin), [3].

12 *Begum v SIAC and another; R (Begum) v SSHD* [2020] EWCA Civ 918; [2020] 1 WLR 4267, [5]–[6] ('*Begum v SSHD*').

attached to permitting Ms Begum into the United Kingdom, which it believed was manageable.[13] The SSHD appealed these conclusions to the United Kingdom Supreme Court, and Ms Begum cross-appealed the conclusion of the Court of Appeal that the appeal to the SIAC did not fall to be allowed if Ms Begum could not fairly and effectively pursue it. The United Kingdom Supreme Court upheld the SSHD's appeals and dismissed Ms Begum's cross-appeal.[14] The sole judgment was given by Lord Reed, President of the Supreme Court, with whom other members of the Court agreed.

## II THE JUDGMENT OF THE SUPREME COURT

The judgment of Lord Reed is likely to represent the definitive judicial statement concerning the SIAC's jurisdiction, with the Court's interpretation, in general, a restrictive one.[15] The SIAC has two statutory jurisdictions. The first, regarding statutory appeals from the refusal of human rights claims linked to immigration decisions, has been limited by successive legislative changes to appeal on the basis of breach of human rights protected by the *Human Rights Act 1998* ('*HRA 1998*') s 6.[16] The second jurisdiction accommodates appeal to the SIAC against deprivation of nationality under the *BNA 1981* ss 40A(1)–(2) and the *Special Immigration Appeals Commission Act 1997* s 2B.[17] In respect of such appeals, Lord Reed observed that '[t]here does not appear ever to have been any statutory provision relating to the grounds on which an appeal … may be brought, the matters to be considered, or how the appeal is to be determined'.[18]

Lord Reed held that, applied to the SIAC, the existence of a right of appeal 'enables [the SSHD's] conclusion that he was satisfied to be challenged' but 'does not, however, convert the statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied.'[19] This applied to the SSHD's extraterritorial human rights policy, as well as to the basic the *BNA 1981* s 40(2) 'conducive to the public good' question.[20] Only where a question arose as to whether the SSHD had acted compatibly with the appellant's *ECHR* rights contrary to the *HRA 1998* s 6, would the SIAC, because of the separate statutory structure related to *HRA 1998* rights, carry out its own primary assessment.[21]

In the conclusion of his judgment, Lord Reed enumerated four principal errors in the judgment of the Court of Appeal.[22] First, the Court of Appeal misunderstood the scope of an appeal against a decision of the SSHD to refuse a person leave to enter the UK.[23] Ms Begum's appeal against the refusal of leave to enter decision could only be brought on the ground that the decision was unlawful under the *HRA 1998* s 6 and, once that argument was not advanced before the Court of Appeal, her appeal against the refusal of leave to enter should have been dismissed. Second, the Court of Appeal erred in its treatment of the appeal from dismissal of

13 *Begum v SSHD* (n 12) [123]–[128], [120]–[121].
14 *R (Begum) v SIAC; R (Begum) v SSHD; Begum v SSHD* [2021] UKSC 7; [2021] AC 765.
15 ibid [28]–[81].
16 ibid [33]–[37].
17 ibid [38]–[71].
18 ibid [40].
19 ibid [67].
20 ibid [68]–[69].
21 ibid.
22 ibid [132]–[136].
23 ibid [132].

Ms Begum's application for judicial review of the SSHD's refusal of leave to enter the UK by making its own assessment of the requirements of national security, without there being any relevant findings of fact by the Court below or evidence before the Court of Appeal.[24] The approach of the Court of Appeal 'did not give the [SSHD's] assessment the respect which it should have received, given that it is the [SSHD] who has been charged by Parliament with responsibility for making such assessments and who is democratically accountable to Parliament for the discharge of that responsibility'.[25] Third, the right to a fair hearing does not trump all other considerations, such as the safety of the public.[26] If a vital public interest makes it impossible for a case to be fairly heard, then the courts cannot ordinarily hear it and the appropriate response to the problem in the present case was for the deprivation appeal to be stayed until such time as Ms Begum was in a position to play an effective part in it without the safety of the public being compromised.[27] Fourth, the Court of Appeal mistakenly treated the SSHD's extraterritorial human rights policy as if it were a rule of law which he must obey as opposed to guidance in the exercise of his statutory discretion.[28] In light of the prior conclusions as to its role, the SIAC was not entitled to re-exercise the SSHD's discretion for itself and was generally restricted to the role of reviewing the decision.

In light of this, the SSHD's appeal from the decision of the Court of Appeal succeeded and Ms Begum's cross-appeal failed. In essence, the dismissal of her leave to enter appeal and her applications for judicial review were confirmed. As to the ongoing deprivation appeal (Ms Begum had judicially reviewed preliminary findings in the SIAC appeal, but the appeal itself remained in being), in practical terms, Ms Begum might (i) continue her appeal despite inability to make this fair and effective; (ii) seek a stay to the appeal; or (iii) allow the appeal to be terminated and, if conditions changed in future, seek to reinstate it.

## III EFFECT OF THE DECISION

The effect of the decision is broadly to re-emphasise the considerable power of the United Kingdom executive in relation to deprivation of nationality and the limited potential of the statutory appeal right. Not only is the *BNA 1981* s 40(2) a broad power to deprive a person of nationality status on the basis of its conduciveness to the public good in the view of the Secretary of State, the decision of the Supreme Court in the *Begum* case makes clear that there are substantial limitations on the power of the SIAC. Save in relation to *ECHR* grounds raised by reference to the *HRA 1998* s 6, the SIAC has a predominantly supervisory role, rather than affording a full appeal on the merits. As has been emphasised by the SIAC in addressing the renewed appeal before it after the decision of the Supreme Court, '[t]he effect of [the Supreme Court decision] is that the focus must be on the material that was placed before the [SSHD] when s/he made the relevant decisions. This is not an appeal *de novo* on the merits'.[29]

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24 ibid [134].
25 ibid.
26 ibid [135].
27 ibid.
28 ibid [136].
29 *Begum, C8, C10, and D4 v SSHD* (Special Immigration Appeals Commission, Jay J, 20 July 2021) [38]. This and further decisions dated 19 October and 29 October 2021 are available on the SIAC website: <http://siac.decisions.tribunals.gov.uk/>.

In addition, that appeal right may indeed be largely illusory in a case where a fair process cannot be provided with the affected individual abroad.[30]

In the United Kingdom, the absence of a more exacting legal standard for deprivation of nationality seems likely to remain an issue of concern to many into the future. The present scheme affords a very high degree of latitude to the SSHD to judge whether deprivation is 'conducive to the public good'. Further, and even beyond the limitations of the statutory appeal, there continues to be a relative paucity of broader standards against which deprivation decisions may be judged. Mere *de jure* nationality is not an effective proxy for security. If citizenship is still, in important senses, 'the right to have rights' as against the state in question, and particularly so when the individual is beyond the territorial reach of domestic laws (including those protecting human rights), then a case such as Ms Begum's illustrates the imperfections of a statutory protection focused on protection from statelessness as defined in the *Convention relating to the Status of Stateless Persons* art 1(1) ('not considered as a national by any State under the operation of its law'). The protective effect is limited given both that a state (here, Bangladesh) may be found to be a state of nationality even if it asserts that it is not, and that a state of nationality may be the locus for serious risks to that individual, including risks of actions incompatible with international human rights law. In the case at first instance, the SIAC had considered evidence of the Government of Bangladesh's 'strong stance … denying [Ms Begum's] alleged citizenship in light of her alleged activities'.[31] The Foreign Minister of Bangladesh had stated that Ms Begum had 'nothing to do' with Bangladesh and if found in that country would face execution under its terrorism laws, calling the decision of the SSHD to remove her nationality 'human fly tipping — taking [the UK's] problems and dumping them on other countries'.[32] One effect of the decision may be to increase focus on the application of *ECHR* rights through the *HRA 1998*, regarding deprivation of nationality. The *ECHR* lacks any strong, specifically directed right to hold or retain nationality of the type stated in *Universal Declaration of Human Rights 1948* art 15 and it has been very slow to develop substantial protections in this area by reference to more open-ended rights. However, its jurisprudence relating to the *ECHR* art 8 (right to respect for private and family life) has gradually come to bear more directly on questions of citizenship. In *Ramadan v Malta*, the Court held that although the right to citizenship is not as such guaranteed by the *ECHR* or its Protocols, it cannot be ruled out that an arbitrary revocation of citizenship might, in certain circumstances, raise an issue under

30 The difficulties are well illustrated by the efforts of the SIAC and the parties, in this and other cases, to take stock of the issues (if any) that may be raised. Since the decision of the Court, these have led to a flurry of three successive case management/procedural decisions of the SIAC, dated 20 July, 19 October and 29 October 2021 respectively. At present, Ms Begum's resumed SIAC appeal is listed for hearing in November 2022, but there is a substantial incentive to agree to stay the proceedings rather than press forward, because dismissal of an appeal pursued with Ms Begum unable to play an effective part would potentially hinder the bringing of a new appeal in the event of effective participation becoming possible in the future.

31 See *SIAC Determination* (n 1) [70]–[72], [75].

32 'Shamima Begum: IS Bride "Would Face Death Penalty in Bangladesh"', *BBC News* (online, 3 May 2019) <https://www.bbc.co.uk/news/world-asia-48154781>; For an interesting parallel to the language of the Minister, see John Fischer Williams, 'Denationalization' (1927) 8 Brit YB Int'l L 45, 57: '[i]t is no longer possible simply to send undesirables abroad. Slops may be thrown out of the windows of a settler's hut on a prairie; in a town such a practice is inadmissible'.

*ECHR* art 8 because of the impact of such a decision upon the individual.[33] The jurisprudence of the Court has gradually come to apply in the context of justification for interference with protected rights with the concept of arbitrariness, by which deprivation 'must be in conformity with domestic law and comply with specific procedural and substantive standards, in particular the principle of proportionality'.[34] In *Usmanov v Russia*, the Court held that an annulment of citizenship breached *ECHR* art 8 because of the insufficient clarity of relevant law and/or lack of procedural safeguards.[35] The increased elucidation of applicable norms by the European Court of Human Rights, coupled with the domestic protection of *ECHR* norms by the *HRA 1998*, and the thinness of other recourse, may draw further attention to the *HRA 1998* in domestic litigation on deprivation.

Another point of note is that although Ms Begum left the United Kingdom whilst still a child and the SSHD by the *Borders Citizenship and Immigration Act 2009* s 55, incorporating art 3(1) of the *Convention on the Rights of the Child 1989* ('*CRC89*'), is bound in immigration, asylum or nationality decisions to treat the best interests of the child as a primary consideration, by the time Ms Begum was located she was no longer a child.[36] Had she reappeared earlier, whilst still a minor, her *CRC89* 'best interests' would have had considerable importance as a primary consideration in the case. On appeal and judicial review, her circumstances fell to be considered variously at the date of the decision challenged or at the date of adjudication.

Child law might also have been relevant in another context. Had any of Ms Begum's children, born whilst she remained a British citizen, survived, such a child would remain a British citizen by descent when Ms Begum lost her own British citizenship by deprivation under the *BNA 1981* s 40(2).[37] In that case, on the facts, the inherent jurisdiction of the High Court in England and Wales, regarding children of British nationality, would allow the Court to order removal of the child to the United Kingdom.[38] In parallel, the United Nations Committee on the Rights of the Child has, in recent months, reiterated, specifically in the admissibility decisions on applications under the *Optional Protocol to the Convention on the Rights of the Child* communications procedure concerning children of French ISIL fighters, that 'States should take extraterritorial responsibility for the protection of children who are their nationals outside their

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33 *Ramadan v Malta* (European Court of Human Rights, ECLI:CE:ECHR:2016:0621JUD007613612, 21 June 2016) [84].

34 United Nations Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality — Report of the Secretary-General*, UN Doc A/HRC/13/34 (14 December 2009) [25].

35 *Usmanov v Russia* (European Court of Human Rights, ECLI:CE:ECHR:2020:1222JUD004393618, 2020).

36 *ZH (Tanzania) v SSHD* [2011] UKSC 4; [2011] 2 AC 166.

37 *BNA 1981* (n 2) s 2(1)(a).

38 See *Re A (Jurisdiction: Return of Child)* [2013] UKSC 60, [2014] AC 1; *A v A (Return Order on the Basis of British Nationality)* [2013] EWHC 3298 (Fam), [2014] 2 FLR 244; *Re M (A Child)* [2020] EWCA Civ 922, [2021] Family 163; and, on related issues concerning the approach by relevant courts to minors in the context of radicalisation of parents and/or children, see James Munby, *Radicalisation Cases in the Family Courts* (Guidance, 8 October 2015); *Re M (Wardship: Jurisdiction and Powers)* [2015] EWHC 1433; *London Borough of Tower Hamlets v B (No 2)* [2016] EWHC 1707 (Fam), [2016] 2 FLR 887. This possibility was evidently considered by the family of Ms Begum during the short lifespan of her third child, see Esther Addley, and Daniel Boffey, 'Shamima Begum's Family Hope to Bring Her Baby to the UK', *The Guardian* (online, 21 February 2019) <https://www.theguardian.com/uk-news/2019/feb/21/shamima-begums-family-hope-to-bring-her-baby-to-uk>.

territory through child-sensitive, rights-based consular protection', and referred to the recommendation of the Independent International Commission of Inquiry on the Syrian Arab Republic that countries of origin of foreign fighters take immediate steps towards repatriating the children of fighters 'as soon as possible'.[39] Given the general priority accorded by the family courts of England and Wales to continued contact with a parent if in the best interests of the child, a legal basis for repatriation of a child might have affected Ms Begum's own position significantly.[40] This case, on its ultimate facts, did not raise an issue regarding the British citizen child of a person deprived of British nationality. But it highlights issues which may arise in a future case.

It is a striking fact, in this context, that Ms Begum's third child, a son, was a British citizen, as he was born two or three days before Ms Begum's own British citizenship was extinguished by the decision of the SSHD.[41] There is no evidence that the SSHD had delayed his decision so that the child could be born a British citizen. Had the order taken effect three or four days earlier, the child would not have been a British citizen capable of engaging the inherent jurisdiction of the High Court concerning children. The timing of his mother's denationalisation, and the difference between the child being born a British citizen and the contrary result, therefore had extremely serious potential consequences for the child.

## IV CONCLUSION

The decision of the Supreme Court represents yet another prompt to reflection as to the very wide provision for deprivation of British citizenship by the SSHD under the *BNA 1981* s 40(2). By making clear the paucity of domestic law restraints upon the SSHD, the decision may ultimately have the effect of moving attention to the question — which the Supreme Court did not address — of whether domestic law safeguards, if not reformed, might be found so insufficient as to fall short of the international law norm prohibiting arbitrary deprivation of nationality, which the European Court of Human Rights in recent cases has been willing to find applicable through the broader art 8 *ECHR* rights. That question looms over the future but will, for the moment, remain unresolved. It also raises important questions concerning the absence of protection from serious harms which may, given the technical nature of the statelessness definition, not be alleviated by

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39 *Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication*s, UN Docs CRC/C/85/D/79/2019 and CRC/C/85/D/109/2019 (2 November 2020) [9.6]–[9.7] citing Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc A/HRC/43/57 (28 January 2020). See also Marko Milanovic, 'Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights', *EJIL:Talk!* (Blog Post, 10 November 2020) <https://www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and-the-extraterritorial-application-of-human-rights/> criticising the reliance of the Committee on nationality, as the source of jurisdiction, as potentially arbitrary.

40 See, eg, *SSHD v AB (Jamaica)* [2019] EWCA Civ 661, [2019] 1 WLR 4541, [107] (King LJ), citing '[t]he considerable importance which the Family Court places on the right of a child to have a relationship with his parents' and referring to the decision of James Munby P in *Re Q (Implacable Contact Dispute)* [2015] EWCA Civ 991; [2016] 2 FLR 287.

41 The father of Ms Begum's children, to whom she had been married aged 15 by ISIL in an Islamic ceremony, was Dutch national and ISIL recruit Yago Riedijk. It appears that in the case of each child, that child would have been a Dutch national from birth only if (i) the under-age purported marriage between Ms Begum and Mr Riedijk was recognised by Dutch law as sufficient to ground Dutch citizenship in their child; or (ii) the child was legally acknowledged as his by Mr Riedijk.

protection from statelessness, and leaves to be resolved on the facts of future cases important issues of child law, including the international human rights protections of the *CRC89*.