



Immigration Team

Edward Raw

Isaac Makka

Phil Bonavero

Kate Jones

Ben Haseldine

Nilay Shastry

Jyoti Wood

Jenny Lanigan

Adele Pullarp

Karen Staunton

Alex Maunders

Ciara Moran

Josh Stamp-Simon

Tabitha Everett

Bartholomew Scholefield
(pupil)

Daniella Adeluwoye (pupil)

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000

E: clerks@4kbw.co.uk

W: www.4kbw.co.uk

Immigration Newsletter: March 2024 Update

SHAMIMA BEGUM v THE SECRETARY OF STATE FOR THE HOME DEPARTMENT [2024] EWCA Civ 152: Case Analysis

On 23 February 2024, the Court of Appeal handed down its judgment in the appeal of Shamima Begum against the deprivation of her British citizenship. The issue before the Court was whether the Special Immigration Appeals Commission (hereafter “the SIAC”) was correct to conclude that the deprivation decision of the Secretary of State for the Home Department was lawful. Indeed, the Court unanimously dismissed Ms Begum’s appeal, thereby upholding the decision of the SIAC. This article shall set out the issues before the Court of Appeal and analyse the approach deployed by the Court in its legal reasoning.

Brief Background

On 19 February 2019, the then Home Secretary, Mr Sajid Javid, without prior notice to Ms Begum, exercised his power to deprive Ms Begum of her British citizenship, pursuant to Section 40(2) of the British Nationality Act 1981 (hereafter “the BNA 1981”). The Home Secretary decided to make a deprivation order on the basis that he was satisfied that it would be conducive to the public good for reasons of national security. Ms Begum was deemed a threat to national security because in 2015, aged 15, she travelled from East London to Syria to join the Islamic State.

Ms Begum subsequently exercised her appeal rights against the deprivation order to the SIAC under Section 2B of the Special Immigration Appeals Commission Act 1997. On 22 February 2023, the SIAC dismissed her appeal (the Supreme Court having held in 2021 that the Secretary of State had acted lawfully in refusing leave for Ms Begum to enter the UK in order to take part in her appeal to the SIAC). It was the decision made by the SIAC to dismiss Ms Begum’s appeal against the deprivation order that was the subject of Ms



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Begum's appeal to the Court of Appeal.

Ms Begum's appeal was advanced on five grounds, each of which shall be taken in turn below. References in square brackets are to paragraphs within the judgment.

Ground 1: Breach of Article 4 European Convention of Human Rights (hereafter "the ECHR")

The first ground concerned a breach of Article 4 ECHR. Under Article 4 ECHR, the Home Secretary was required to take into account (a) whether Ms Begum was a potential victim of trafficking, (b) whether the State had failed to protect her from such exploitation, and (c) what legal obligations were conferred upon Ms Begum as a victim or a potential victim of trafficking for the purposes of sexual exploitation [52]. Bearing in mind these considerations, the Home Secretary then had to determine whether a deprivation order was justified in light of these matters [52]. It was submitted on Ms Begum's behalf, that the Home Secretary's failure to consider these issues amounted to a breach of her rights under Article 4 ECHR.

The Court held that Article 4 did not engender any material consideration for the Home Secretary [92].

Under the Article 4 framework, Ms Begum invoked the following legal obligations: (a) the operative (consisting of both the protective and recovery duty), (b) the investigative, and (c) the restitutionary.

Turning first to the protective duty, the Court held that there were two obstacles that were fatal to Ms Begum's argument. Firstly, the SIAC had made it clear in its decision that there was an arguable breach of the protective duty owed by the United Kingdom and not an actual breach [78]. Secondly, the court determined there was an absence of a causal link between the arguable breach in 2015 and Ms Begum's deprivation decision in 2019 [78].

Next, the Court held that the recovery duty did not assist Ms Begum's appeal because there was no Strasbourg or domestic case law to substantiate the argument that the United Kingdom was obligated to repatriate a former victim

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of trafficking if that trafficking had occurred abroad [79]. Neither did Article 16 of the European Convention Against Trafficking assist Ms Begum further on this point [80-81].

Under the investigative duty, Ms Begum had argued that any investigation could only be effective if she were present in the United Kingdom [85]. This argument was rejected by the Court for the following three reasons. Firstly, it appeared to the Court to be tantamount to an obligation imposed upon the State to repatriate Ms Begum [85]. Taking note of the fact that such an obligation did not exist under an operational duty, the Court determined that it would be inconsistent if that obligation were secured under a different duty. Secondly, it conflicted with the 2020 decision of *Begum v Home Secretary* [2021] UKSC 7, whereby the Supreme Court opined that the Home Secretary was not required to provide Ms Begum with leave to enter the United Kingdom to present her appeal [85]. As such, it logically followed that it would be “surprising” if the State’s investigative duty provided Ms Begum entry to the United Kingdom so she could participate in her appeal to SIAC [85]. Lastly, the Home Secretary was required to take reasonable steps to investigate; this did not extend to repatriating an individual who had been assessed as a threat to the State’s national security [85].

It was held that an arguable breach did not meet the requisite standard to impose a restitutionary duty upon the State [88].

Ground 2: Common Law

The second ground pertained to whether the Home Secretary should have taken into consideration the fact that Ms Begum was a potential victim of trafficking [93]. It should be noted that this assessment was purely a matter for the Home Secretary. It was submitted by Ms Begum’s legal team that the Home Secretary’s failure to consider this amounted to a breach of the Home Secretary’s duties at common law. The Court rejected ground two on the basis that the Home Secretary had considered the possibility that Ms Begum was a trafficking victim [94]. However, such consideration did not outweigh his concern that she posed a threat to the national security of the State [94].

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Ground 3: De facto statelessness

The third ground hinged upon Section 40(4) of the BNA 1981, which outlined that the Home Secretary could not make a deprivation order if he were satisfied that the order would make a person stateless [100]. It was submitted that whilst Ms Begum was not de jure stateless when the Home Secretary made the deprivation order, she was rendered de facto stateless by having her citizenship stripped [101]. This was because, in practical terms, it was not feasible for Ms Begum to enter Bangladesh [102]. The Court held that the Home Secretary had taken that matter into account. However, notwithstanding the practical implications of the effects of a deprivation order, he proceeded to make such an order [102]. Therefore, this ground also failed.

Ground 4: Procedural Fairness

The fourth ground of the appeal challenged the fact that the deprivation order was made without prior notice to Ms Begum. The Court drew particular attention to the legislative purpose and context. Indeed, the Court opined that given that “[a]t least a main purpose, [...] if not the main purpose”, of Section 40(2) BNA 1981 was to protect the public from national security threats, providing Ms Begum with prior notice would defeat the purpose of the deprivation order [106]. As such, this ground failed.

Ground 5: The public sector equality duty

The last ground raised related to whether deprivation orders (a) disproportionately impacted British Muslims and (ii) impacted detrimentally upon the relations between members of Muslim communities and others [124]. It was held that due to the exemption provision contained within the Equality Act 2010, the Court did not have to undertake a proportionality assessment [136].

Comment

The Shamima Begum case has sparked considerable debate across the political spectrum. Lady Chief Justice Baroness Carr, keen not to fan the flames,

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commented in the concluding remarks of the judgment that:

“It could be argued that the decision in Ms Begum’s case was harsh; it could also be argued that Ms Begum is the author of her own misfortune. But it is not for this court to agree or disagree with either point of view. Our only task is to rule on whether the decision made under s 40 was unlawful” [138].

The Court’s dismissal of the first ground sets a worrying precedent; it demonstrates the Court’s restrictive approach to Article 4 and issues of national security. Article 4 is an absolute right, meaning that exceptions and derogation are not permissible even “in the event of a public emergency threatening the life of the nation” as per *Rantsev v Cyprus* [2010] 51 EHRR 1 at [283]. Indeed, it was held by the European Court of Human Rights that where circumstances give rise to a credible suspicion that a person was at a real and immediate risk of trafficking or exploitation, an operational duty becomes incumbent upon the State, requiring them to take measures to ensure that person is removed from such risk, provided that it does not impose an impossible or disproportionate burden upon the State **(1)**. Therefore, the Court’s decision seems to be at odds with *Rantsev* given a credible suspicion was engaged.

Further, the Court’s decision on the third ground paints a troubling picture of the legal landscape governing the protections afforded to persons stripped of their British citizenship. Subsection 40(4) was built into the BNA 1981 to act as a brake pedal on the Home Secretary’s power where a British national would become stateless. However, it is apparent from the Court’s decision that the legislation confers little protection in material terms. Indeed, the technical loophole inherent in the statute has meant that whilst Ms Begum is not legally stateless, the practical reality is that she is effectively stateless, nonetheless.

This decision could have provided a welcome opportunity for the Court to reconcile the ever-growing tensions between domestic and international law on issues of national security. Unsurprisingly, Ms Begum’s solicitor, Daniel Furner, expressed that her legal team was “not going to stop fighting until she does get justice and until she is safely back home.” **(2)** It remains to be seen how long Ms Begum will be able to continue this fight: having recently been

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refused permission to appeal the judgment by the Court of Appeal, she will now need to persuade the Supreme Court to permit an appeal. It is hoped that clarity in respect of the issues will be afforded by the Supreme Court in due course, and potentially thereafter, the Strasbourg Court.

Daniella Adeluwoye

Pupil Barrister

The views expressed are those of the author alone, and do not reflect 4 King's Bench Walk Chambers, nor do they constitute legal advice.

References

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2. <https://www.theguardian.com/uk-news/2024/feb/23/shamima-begum-loses-appeal-against-removal-of-british-citizenship>

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