A Paean to Judicial (Self) Restraint

The UK Supreme Court Shamima Begum Decision

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The Supreme Court has refused permission for Shamima Begum, who left the UK as a 15-year-old British schoolgirl for Syria in 2015, to come back to the UK so that she can effectively challenge the removal of her citizenship (decision dated 26th February 2021; [2021] UKSC 7). Begum was found in a camp in Syria two years back. The Home Secretary removed her British citizenship soon thereafter, arguing that she has eligibility for Bangladeshi citizenship, and would not be left stateless without British citizenship.

Now the unanimous decision of five judges of the Supreme Court is widely reported to be a win for former home secretary Sajid Javid who had stripped Begum of her citizenship. Yet, is it really a vindication of this action? It is important to recognise that the decision of the Supreme Court is not based on a factual assessment of Begum's case but only on whether she has to be given permission to return to the UK to participate in an effective and fair manner in the immigration appeal. A limited decision, and by no means a final adjudication on Begum's deprivation of citizenship case, is what is now available for analysis.

Fair Trial?

Those who are concerned about fair trial and other human rights are deeply disappointed at the manner in which the decision declares that fair trial is subject to public safety while staying Begum's appeal in the Special Immigration Appeals Commission (SIAC). In para. 135 the Supreme Court, distinguishing itself from the Court of Appeal, observes that "…. if a vital public interest – in this case, the safety of the public – makes it impossible for a case to be fairly heard, then the courts cannot ordinarily hear it". Applying this to Begum's situation, the Court suggests that, "[t]he appropriate response to the problem in the present case is for the appeal to be stayed until Ms Begum is in a position to play an effective part in it without the safety of the public being compromised. That is not a perfect solution, as it is not known how long it may be before that is possible. But there is no perfect solution to a dilemma of the present kind".

Indeed, this is a far cry from a perfect solution. In the coversheet to the judgment, we find a note on which point 3 is: "The steps taken on behalf of the Secretary of State and Her Majesty's Government to facilitate Ms Begum's involvement in the deprivation appeal, as described in the Witness Statements of Lauren Cooper dated 12 October 2020 and 5 November 2020, shall be confidential and no party or other person shall publish or disclose the same." Given that confidentiality, in the interests of national security, permeates each aspect which could potentially relate to the issue of fair trial, we are only given this tantalising glimpse into future possibilities but are unable to gauge what is truly likely to change in Begum's situation to allay fair trial concerns.

Review Standards

Overall, fair trial, which was the mainstay of the Court of Appeal's decision, is perhaps surprisingly, not the focus of the legal analysis of this decision. The pronouncements on fair trial appear superfluous as the bulk of the case is not about fair trial at all. The complex legal issues in this case are about appropriate applicable standards of review in various courts. Several paragraphs unpack the separate issues which come to the highest court of the land via appeals but through different pathways. Two of the proceedings are brought in the Supreme Court by the Home Secretary but one is brought by Begum in a cross appeal. Some of the proceedings originate in judicial reviews

and some in appeals. Some of the proceedings relate to the decision of the Minister to cancel Begum's citizenship (on a limited aspect) while others are about the refusal of leave to enter (LTE) which is an immigration decision. Begum would require LTE for returning to the UK to challenge her deprivation order so both deprivation and LTE refusal are linked but distinct legal issues. In Begum's cross appeal the judges were also clear that just because there may be lack of fairness if she is not present in the UK, Begum cannot automatically win her SIAC appeal solely on that basis. This was the weakest element in Begum's case and perhaps it dragged down the other issues.

Judicial (Self) Restraint

Despite the permutations and combinations of the pathways, subject matter, and person raising the issues in question, the Supreme Court arrives at a strangely uniform view on judicial oversight over decisions in the area of deprivation matters in all instances. In every consideration it appears the court is of the view that it, or any other court (SIAC, Divisional Court or the Court of Appeal), cannot fully review the Home Secretary's decision making. What this decision is then, in effect, is not any major pronouncement on right to nationality (or restrictions on it), statelessness (or its cross-links with citizenship), human rights issues (as connected to citizenship) or even on how counter-terrorism matters should be reviewed when there are issues of human rights at stake. Instead, it is a paean to judicial (self) restraint which renders the Supreme Court, and all the other courts with any involvement in this matter of Begum, impotent on the issue of review of ministerial discretion and action through its highly restrictive approach.

In order to justify why an appeal, which ordinarily has a more expansive remit than a judicial review proceeding, cannot adopt a close scrutiny of the deprivation decision, Lord Reed relies on an understanding that a proceeding which is called an appeal is not necessarily one in which an appellate review (full merits review) will always take place (para. 69). Here the subject matter is of critical importance according to Lord Reed. The Supreme Court opines that appeals, such as of the nature in which the SIAC is engaged in, can be restricted by inherent limitations to review powers such as those placed on courts by separation of powers. Courts have to respect executive authority in matters of national security and thereby rely on the discretion of the Home Secretary. Further, the Supreme Court drew on unreasonableness as a standard of review for exercise of ministerial discretion. Unreasonableness is much maligned for its restrictive nature in administrative review, sets a very high bar for any challenge. To use this standard, especially in the context of rights which are of an absolute (or not limited) nature such as Art 2 and Art 3 of the ECHR is a death knell for human rights in the context of national security.

SIAC and Review

In the past, SIAC has rarely engaged with full factual analysis, at least in rulings which it makes public. My own research has shown how several human rights issues, such as the right to life, right to be free from torture and right to family life have not been fully evaluated on their merits by SIAC. However, now such issues are even less likely to be agitated in the SIAC as the Supreme Court judges disagreed with the Court of Appeal on the role of the SIAC in national security matters. The Court of Appeal had reminded SIAC that it is an appeals court which should conduct a full review by assessing all the facts in a case itself, rather than relying on the decisions of other courts or bodies. But the Supreme Court decides that the SIAC could not do so in the current instance. Not surprisingly, in this situation, the Home Secretary becomes the sole custodian of the details of decision-making and evidence based on which action has been taken.

No Precedent Value

Many more legal twists and turns are still likely in Begum's case but now is an opportune moment to raise a question which is surely relevant: how would any person challenging a ministerial decision in the context of counter-terrorism, where they are excluded from the factual scenario because of national security reasons, gain enough information about the reason-

ableness or unreasonableness of a ministerial decision or action? The exceptional framing of the case where no particular facts of Begum's situation are revealed means its applicability to future cases is limited.

It is for this reason that this decision, despite coming from a unanimous bench at the highest court of this land, is unlikely to have much precedent value as it seems very much related to the new circumstances the government is likely to have presented to the court for potentially satisfying fair trial requirements in the future. Such circumstances, not on record for open justice, can hardly be generalisable to other cases where again similar issues may arise. And given the manner in which it leaves fair trial rights hanging, that is the best possible legacy of this case. It is far worse if this case is now cited for its pronouncements on fair trial in future cases.

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