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Shamima Begum's case and the assault on the right to a fair trial
By Ameer Ismail

The saga on whether Shamima Begum should be allowed to return to the UK has polarised public opinion. From the Home Secretary Sajid Javid's decision to remove her British citizenship in February 2019 to the Supreme Court's decision last week, Ms Begum's case has raised a number of important debates on battling extremist ideology, protecting victims of terror-related sex-trafficking, and the morality of removing citizenship.

In the midst of these well-versed issues, Lord Reed's sole and leading speech in the Supreme Court's judgment in *Begum* [2021] UKSC 7 unfortunately turns on a weakened construction of the right to a fair trial and, secondly, on an unprincipled interpretation as to when a full merits appeal by the Special Immigration Appeals Commission (SIAC) is warranted.

Background

Shamima Begum's story has been well-documented. She was born in the United Kingdom and had held British citizenship. In February 2015, at the age of 15, she travelled to Syria with two other schoolgirls from Benthal Green in order to support ISIL. It was only in February 2019 that she was discovered by journalists in a refugee camp in Syria. Following a series of interviews that became widely publicised in the media, the Secretary of State decided to deprive her of her British citizenship. The Secretary of State subsequently also refused Ms Begum's application for leave to enter the UK (LTE).

In SIAC's judgment, it was held that (1) loss of her British nationality did not render her stateless; (2) that the Secretary of State's decisions were reasonable and rational; and (3) although Ms Begum could not play any meaningful part in her appeal such that the proceedings would not be fair and effective, her appeal should not automatically succeed and instead, the appeal should either proceed in her absence or she should ask for a stay of the appeal.

In the Court of Appeal, the decision on statelessness was not challenged but Ms Begum did succeed in part in relation to the remaining two issues. Flaux LJ provided the leading speech in which he recognised that although Ms Begum's appeal should not automatically succeed, fairness and justice, in the context of her right to a fair trial, outweighed the national security concerns of permitting her re-entry. As such, she should be permitted to enter the UK to prosecute her appeal. Furthermore, the Court of Appeal held that SIAC had approached the issue from the wrong starting point. Flaux LJ described the appeals in question as "full merits appeals" which required SIAC to stand in the shoes of the Secretary of State as opposed to conducting a less intrusive rationality review.

The Secretary of State appealed to the Supreme Court on these two issues and Ms Begum cross-appealed on the finding that she was not entitled to automatically succeed in her challenge.

The Right to a Fair Trial

The Supreme Court decided that Ms Begum should not be granted LTE in order to prosecute her appeal because her fair trial rights should not prevail over the requirements of national security. Lord Reed rejected Flaux LJ's argument that LTE was necessary because otherwise she could not have a fair and effective hearing in her appeal. Instead, he held that the most appropriate course of action was to stay her appeal (indefinitely) until Ms Begum is able to play an effective part without the safety of the public being compromised.

Lord Reed based this argument on precedent, in particular *Carnduff v Rock* [2001] EWCA Civ 680, which, on his view, illustrated the principle that where it is impossible for a case to be fairly tried, the interests of justice may require a stay of proceedings.

However, the reliance on *Candruff*, and its subsequent citations in *Al Rawi* and *Tariq*, is reflective of a more worrying trend. *Candruff* involved the application of the doctrine of public interest immunity (PII) which is a rule of evidence that entitles a party to object to the disclosure of documents on the ground that it would be contrary to the public interest.

It is immediately apparent that PII is not applicable to Ms Begum's case. The unfairness found in Ms Begum's appeal does not concern the disclosure of evidence but lies instead in her inability to play any meaningful part in her appeal.

In the view of Lord Reed and the Supreme Court therefore, the right to a fair trial is subject to a general public interest qualification, even outside the typical cases on disclosure of sensitive material. The consequence is that there is no such thing as a "minimum irreducible core" in the right to a fair trial as even the most basic features of due process rights can, and most likely will, concede to the public interest.

The decision in *Begum* reflects the trend of fair trial rights being eroded under the justification of public interest and national security. Ironically, the absence of any core minimum features in the right to a fair trial has serious and overlooked consequences for the much more significant public interest in a fair and just legal system.

Full merits appeal or not?

The second main issue was whether SIAC had correctly approached the issues in the Begum appeal. As noted above, the Court of Appeal held that SIAC erred in asking the question of whether the Secretary of State's position was reasonable or rational. Flaux LJ noted that the appeals under sections 2 and 2B of the 1997 Act were full merits appeals.

The Supreme Court unanimously disagreed with the Court of Appeal. Lord Reed held that an appeal under section 2 of the 1997 Act is governed by section 84(2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") which provides that an appeal must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act

1998 (HRA). Similarly, albeit for different reasons, he held that a full merits appeal under section 2B of the 1997 Act is also limited to whether the decision was compatible under the HRA. As section 6 of the HRA was not in issue in the present case, Flaux LJ erred in his finding that SIAC should have undertaken a de novo assessment of risk.

In terms of principle, the distinction relied on by Lord Reed is artificial. It is incoherent and unprincipled that only a light-touch rationality review is warranted in Ms Begum's case when it is substantively similar to an action under section 6 of the HRA. It is reminded that section 6 of the HRA provides that a public authority must not act in a way which is incompatible with a Convention right. Here, Ms Begum's appeal concerned a public authority's decision to deprive her of her British citizenship which ultimately infringed on a number of her human rights. Although the appeal did not formally trigger section 6 of the HRA, it is substantively identical and therefore, the Supreme Court's interpretation of the scope of a full merits appeal is unprincipled in its narrowness.

The consequence of Lord Reed's interpretation of sections 2 and 2B of the 1997 Act entitled the Supreme Court to accept the highly deferential rationality review conducted by SIAC and "find no defect in its reasoning". As a result, the Secretary of State's appeal on all the disputed issues was allowed.

Conclusion

The final chapter in the Begum saga is a disappointing one. On the Supreme Court's interpretation, the right to a fair trial is firmly subservient to issues of national security even outside the context of disclosure and closed material proceedings. It is the final nail in the coffin for those that advocate for a core irreducible minimum standard of fairness in due process rights and obligations.

The Supreme Court's decision also raised a number of other important issues on the role of the courts and the extent of judicial institutional competence in determining questions of national security. These issues unfortunately fall outside the scope of this article.