



Deprivation of British Nationality: the post-Begum landscape

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Overview of the *Begum* judgment

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Notice of decision to deprive

“As the Secretary of State, I hereby give notice in accordance with section 40(5) of the British Nationality Act 1981 that I **intend to have an order made to deprive you, Shamima Begum of your British citizenship** under section 40(2) of the Act. This is because it would be **conducive to the public good to do so.**

The reason for the decision is that you are a British/Bangladeshi dual national who it is assessed has previously travelled to Syria and aligned with ISIL. It is assessed that your return to the UK would **present a risk to the national security** of the United Kingdom. In accord with section 40(4) of the British Nationality Act 1981, **I am satisfied that such an order will not make you stateless.**” (para 1)



Multiple sets of proceedings

- Entry Clearance: “Ms Begum’s application was made on the understanding that, following the judgment of the Court of Appeal in *R (W2) v Secretary of State for the Home Department* [2017] EWCA Civ 2146; [2018] 1 WLR 2380 (“W2”), where a person claims that she cannot have a fair and effective appeal from a decision depriving her of citizenship from outside the United Kingdom, she should request leave to enter and, if it is refused, challenge that decision.” (para 3)
- Appeal against decision by the Home Secretary to deprive her of her citizenship.
- General challenge at the Administrative Court by way of judicial review challenging the decision on leave to enter (“LTE”).



Special Immigration Appeals Commission (“SIAC”)

These two appeals were eventually linked and the chairman of SIAC, Elisabeth Laing J outlined the issues to be determined:

- (1) Whether the deprivation decision rendered Ms Begum stateless.**
- (2) Whether the deprivation decision or the LTE decision was contrary to the Secretary of State’s extra-territorial human rights policy** because it exposed her to a risk of death or of inhuman or degrading treatment.
- (3) Whether she could have a fair and effective appeal against the deprivation decision from outside the United Kingdom and in Syria, and, if not, whether her appeal should be allowed on that ground alone.**



The Court of Appeal and Divisional Court

The Court of Appeal and Divisional Court handed down a judgment given by Flaux LJ, with which King and Singh LJJ agreed

- The Court of Appeal allowed Ms Begum's appeal against SIAC's decision in the LTE appeal, and her appeal against Elisabeth Laing J's decision to dismiss the application for judicial review of the LTE decision.
- It ordered the Secretary of State to grant Ms Begum leave to enter the United Kingdom and to provide her with the necessary travel documents.
- The Divisional Court allowed Ms Begum's application for judicial review of SIAC's decision on the second issue in the deprivation appeal, concerning the Secretary of State's policy, and remitted that issue to SIAC for re-determination.
- It dismissed Ms Begum's application for judicial review of SIAC's decision on the third issue in the deprivation appeal, namely whether her appeal should automatically be allowed if leave to enter the United Kingdom was refused.



The Supreme Court

“This court therefore has before it appeals in three separate sets of proceedings:

- (1) First, the Secretary of State has appealed against the Divisional Court’s decision to allow Ms Begum’s application for judicial review of SIAC’s decision concerning the Secretary of State’s policy. The issue arising in that appeal is whether the Divisional Court was wrong to conclude that SIAC had erred in determining that issue by applying principles of administrative law. There is also a cross-appeal in those proceedings by Ms Begum. The issue arising in the cross-appeal is whether the Divisional Court was wrong to reject her argument that the deprivation appeal should automatically be allowed if it could not be fairly and effectively pursued as a consequence of the refusal of her application for leave to enter the United Kingdom.
- (2) Secondly, the Secretary of State has appealed against the Court of Appeal’s decision to allow Ms Begum’s appeal against SIAC’s decision dismissing the LTE appeal, and to order that leave to enter must be granted. The issue arising in that appeal is whether the Court of Appeal was wrong to conclude that leave to enter must be granted to Ms Begum because she could not otherwise have a fair and effective hearing of her appeal against the deprivation decision.
- (3) Thirdly, the Secretary of State has appealed against the Court of Appeal’s decision allowing Ms Begum’s appeal against Elisabeth Laing J’s decision to dismiss the application for judicial review of the LTE decision, and ordering the Secretary of State to grant Ms Begum leave to enter the United Kingdom. The issue arising in that appeal is, again, whether the Court of Appeal was wrong to conclude that leave to enter must be granted to Ms Begum because she could not otherwise have a fair and effective hearing of her appeal against the deprivation decision.” (para 13)



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- Background to deprivation decision
 - Background to LTE decision
 - Jurisdiction and powers of SIAC
 - The Court of Appeal and Divisional Court's approach to SIAC



The Secretary of State's appeals allowed in each of the proceedings before the court, dismissing Ms Begum's cross-appeal:

- Ms Begum's LTE appeal is dismissed
- Her application for judicial review of the LTE decision is dismissed
- Her application for judicial review of SIAC's preliminary decision in the deprivation appeal is dismissed.



No end in sight



*Begum: Potential implications for
citizenship deprivation appeals in the
First tier Tribunal (IAC)*

David Sellwood, Garden Court Chambers

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Introduction

- *Begum* [2021] concerned with three interrelated decisions in context of **deprivation on conducive to the public good grounds (national security)**
- Judgment contains detailed analysis of **the statutory provisions & role of SIAC**
- **But** also addresses statutory provisions applicable in citizenship deprivation outside of conducive to the public good, and role of the First tier and Upper Tribunals on statutory appeals
- What issues are likely to arise from this?



Starting point – statutory scheme

British Nationality Act 1981

“S 40 Deprivation of citizenship

...

(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.]

(3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—

- (a) fraud,*
- (b) false representation, or*
- (c) concealment of a material fact”*

...



Starting point – statutory scheme

British Nationality Act 1981

“S 40A Deprivation of citizenship: appeal

- (1) A person who is given notice under section 40(5) of a decision to make an order in respect of him under section 40 may appeal against the decision to the First-tier Tribunal.*
- (2) Subsection (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public –
 - (a) in the interests of national security,*
 - (b) in the interests of the relationship between the United Kingdom and another country, or*
 - (c) otherwise in the public interest**

...



The scope of an appeal before the FtT and UT pre-*Begum*

- Settled law – an appeal was a **full merits appeal** where the Tribunal exercised discretion for itself. See *Deliallisi* [2013] UKUT 439 (IAC), reiterated in *BA* [2018] UKUT 85 (IAC)
- Position recently outlined by the Court of Appeal, in *KV (Sri Lanka)* [2018] EWCA Civ 2483
 - (1) full consideration of deprivation decision
 - (2) find the relevant facts
 - (3) establish the relevant conditions precedent until s 40(2) or (3)
 - (4) if the relevant condition precedent is established, consider whether discretion should be exercised
 - (5) Determine whether Article 8 ECHR engaged, disproportionately interfered with, and
 - (6) *Normally* give considerable weight to SSHD's view on whether discretion should be exercised



Begum

- Judgment provides detailed analysis of the statutory framework and procedure
- Starts with a review of *Deliallisi*, from §42 onwards
- Queries approach to previous authorities and legal arguments in support of a full merits appeal, including approach in *Arusha & Demushi* [2012] UKUT 80 (IAC) and *Hesham Ali v SSHD* [2016] UKSC 60
- Underlines the scope of appellate jurisdiction is a spectrum, depending on a number of factors
- Considers and relies heavily on *SSHD v Rehman* [2001] UKHL 47. But query: do those apply outside of the national security sphere?



What issues now need to be determined?

- Number of issues arising post-*Begum* in deprivation appeals under s 40(3) of the 1981 Act.
Likely to include:
 - (1) The exercise of discretion: is that something the First tier and Upper Tribunals will still need to determine for themselves?
 - (2) Approach to determining whether the fraud / false information / concealment of a material fact has arisen
 - (3) Human Rights?
 - (4) Approach to policy guidance



Begum and beyond: Deprivation appeals in the FTT

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What does *Begum* say about FTT appeals?

- Recall: right of appeal under s40A of the 1981 Act is to the FTT
- Appeals against decisions taken either under s40(2) (“conducive good”) or s40(3) (“by means of deception”) of the 1981 Act end up in the FTT, where there are no national security issues
- BOTH provisions concern the SSHD’s discretion: s40(3): “*the Secretary of State may deprive....if the SSHD is satisfied that....was obtained by means of fraud/false representation/concealment of a material fact...*”



What does *Begum* say about FTT appeals?

- Lord Reid at paras. 66-67: appears to apply equally to FTT- appeals in s40(3) cases...
- Favours approach of Ockleton J in *Pirzada* [2017] UKUT 196 (IAC) over Lane J in *Deliallisi* [2013] UKUT 439 (see Lord Reid at paras. 41-44)
- BUT: SC did not consider *KV (Sri Lanka) v SSHD* [2018] EWCA Civ 2483...



Begum: what difference does it make?

- Arguably not much in many cases, even on the restrictive interpretation.....
- See Lord Reid at para. 71 on what SIAC (and hence FTT) *can* consider, including whether SSHD has:
 - acted in a manner which is *Wednesbury* unreasonable
 - taken into account irrelevant matters/failed to consider irrelevant matters
 - erred in law
 - breached obligations under HRA 1998



Begum: what difference does it make?

COMMON ISSUE 1: CONDITION PRECEDENT

Could be one of two sub-issues:

1. whether citizenship obtained *by means of* admitted deception, OR
2. whether there has been deception – a matter of precedent fact



S40(3): the condition precedent

- First issue concerns causality/materiality: whether citizenship obtained *by means of* fraud
- See *Sleiman* (deprivation of citizenship; conduct) [2017] UKUT 00367 (IAC) for a common scenario where ILR is obtained via the “legacy” scheme and breaks the chain of causation between the deception and the grant of citizenship
- In reality, this issue concerns whether the SSHD has erred in law/misapplied the law and arguably remains within FTT’s jurisdiction post-*Begum*



S40(3): the condition precedent

- Second issue: whether there has been a deception at all
- Requires findings of fact
- For example: spouse of an Albanian national coerced into falsely claiming her husband is Kosovan in applications for LTR/citizenship
- Query: post-*Begum*, does the FTT have a fact finding jurisdiction? Or is it limited to reviewing the decision-maker's view of the facts before her?



Begum: what difference does it make?

COMMON ISSUE 2: POLICY CHALLENGES

Has the SSHD misapplied or failed to apply her policy?

- E.g. appellant was a child when ILR granted yet deprivation pursued; SSHD has applied the wrong good character policy
- Arguably remains within jurisdiction
- See Lord Reid at para. 124: did the SSHD reach an unreasonable view of how the policy applied to the facts?



Begum: what difference does it make?

- COMMON ISSUE 3: ARTICLE 8 ECHR
- Will concern the “limbo” period following deprivation where the Appellant has no leave to remain
- Not affected by *Begum*: see Lord Reid at para. 69
- But difficult to win!



What next?

- Potential test case considering *KV (Sri Lanka)* and *Begum*?
- Remedies: will the FTT remit decisions to the SSHD as the result of a successful appeal?
- What position will the SSHD take on *Begum* in the FTT?



Thank you

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