THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.12820

Increasing the Powers of the Secretary of State for the Home Department to Strip Individuals of their British Citizenship: *R (on the application of Begum)* v *SSHD*

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In *R (on the application of Begum)* v *Secretary of State for the Home Department*, Ms Shamima Begum was deprived of her British citizenship by the Secretary of State for the Home Department, as she had chosen to flee to Syria, and aligned herself with Islamic State of Iraq and Levant. To safeguard the UK's national security, the Supreme Court held that Ms Begum could not return to the UK to challenge the legality of the decision to deprive her of her citizenship. Accordingly, this matter was recently heard in the Special Immigration Appeals Commission whilst Ms Begum remained outside the UK. This piece argues that, as a result of this decision, the equilibrium of power has further shifted in favour of the executive/Secretary of State for the Home Department. This has the effect of attenuating the powers of the appellate bodies to hear cases regarding deprivation of citizenship matters.

INTRODUCTION

In *R (on the application of Begum)* v *Secretary of State for the Home Department*[1] (*Begum*), the Supreme Court decided that Shamima Begum (the respondent), who had travelled to Syria and aligned herself with Islamic State of Iraq and Levant (ISIL), could not return to the UK to challenge the decision to deprive her of British citizenship for national security reasons. This case concerned three appeals in which the Supreme Court reversed the earlier decision(s) of the Court of Appeal.

The Supreme Court held that the Secretary of State for the Home Department (SSHD) was entitled to refuse Ms Begum entry into the UK to pursue her appeal against the deprivation of her citizenship. Ms Begum's appeal hearing concerning the deprivation of her British citizenship took place at the Special Immigration Appeals Commission (SIAC) in November 2022, a year and a half after the Supreme Court decision was promulgated. It seems doubtful that she was able to partake in the proceedings according to principles of due process, as she was, and remains, residing within a refugee camp in Syria. This judgment

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1 [2021] UKSC 7.

thus carries grave implications for legal practitioners who must try to represent clients who remain in treacherous conditions overseas.

The judgment goes beyond Ms Begum's circumstances and applies to others who may be in a similar predicament to Ms Begum. It signifies the importance of the constitutional principle of the separation of powers, as it establishes that the judiciary is not the primary decision-maker in assessing risks to national security; that job is reserved exclusively for the executive. The Supreme Court held that the most serious error in the Court of Appeal's judgment was that it made its own assessment on the requirements of national security, concluding that the national security concerns about Ms Begum could be addressed by imposing a Terrorism Prevention and Investigation Measure (TPIM) without considering the relevant evidence. According to the Supreme Court, the Court of Appeal should have prioritised the SSHD's assessment.

The Supreme Court further held that the Court of Appeal had misunderstood the role of SIAC in relation to Ms Begum's refusal of entry into the UK, her citizenship matter and the SSHD's extraterritorial human rights policy. It was further held that Ms Begum could only challenge the decision to remove her citizenship on administrative law principles. Human rights principles remain unaffected by the judgment and may provide a basis for review of the SSHD's decision. Ms Begum's counsel did not advance an argument on this basis.

I argue that the *Begum* decision is significant because it sets a disturbing precedent for cases concerning deprivation of citizenship. In particular, it has restricted the powers of appellate courts that hear deprivation appeals, thereby shifting the equilibrium of power in favour of the executive and endangering the appellant's right to a fair trial. Even though the SSHD is democratically accountable for taking decisions in national security cases, I argue that it is difficult for an electorate to hold the SSHD to account for national security decisions given the secrecy surrounding such decisions. Finally, I address the implications of the Nationality and Borders Act 2022 (NBA 2022), which enables the SSHD to strip British citizens of their nationality without giving them notice; showing the ever-increasing power the SSHD possesses in citizenship deprivation cases.

FACTS

Shamima Begum, who was born and brought up in the UK, travelled to Syria at the age of 15, around February 2015, and aligned herself with ISIL, which is categorised as a terrorist organisation. She married an ISIL fighter soon after she arrived and had three children with him, each of whom passed away. At the time of the Supreme Court's decision in February 2021, Ms Begum was detained in the Al-Roj Internally Displaced Persons Camp in Syria which remains her place of residence. It was noted that Ms Begum may have been a victim of being radicalised as a minor. This issue came to light properly in November 2022 during her citizenship deprivation hearing, heard in

SIAC.[2] According to the British security services, those who travelled to Syria and aligned themselves with ISIL – as minors or otherwise – posed a sufficiently serious threat to the national security of the UK.

On 19 February 2019, the then SSHD, the Rt Hon Sajid Javid MP, made an order to deprive Ms Begum of her British citizenship (the deprivation decision).[3] He stated that such a decision would be 'conducive to the public good' as Ms Begum was believed to pose a threat to the national security of the UK.[4] He further stipulated that Ms Begum would not be left stateless, as she held Bangladeshi nationality through her parents.[5] A stateless person is someone who is not considered to be a national of any State under the operation of its law.[6] Ms Begum's right of appeal lay with SIAC.

On 3 May 2019, Ms Begum lodged an application for leave to enter the UK on human rights grounds.[7] On 13 June 2019 that application was rejected, for two reasons: first, the European Convention on Human Rights (ECHR/Convention) did not apply to her; second, even if it did apply, the SSHD stated that there was no evidence to suggest that refusal of leave to enter would result in the breach of her Convention rights (the leave to enter (LTE) decision)).[8] Due to a lack of a general right of appeal to SIAC on human rights grounds, she challenged the LTE decision before the Administrative Court by lodging an application for judicial review on the grounds that she could not have an effective appeal against the deprivation decision unless she was granted leave to enter the UK.[9]

On 7 February 2020, SIAC ruled that the deprivation decision did not render Ms Begum stateless as the SSHD did not depart from his policy when he issued the deprivation decision. SIAC further held that Ms Begum's appeal should not succeed simply because she did not have an effective appeal against the deprivation decision as she was detained by the Syrian Democratic Forces in a camp.[10] On the same day, the Administrative Court granted Ms Begum permission to apply for judicial review of the LTE decision but held that that application should be dismissed.[11]

Ms Begum then appealed to the Court of Appeal against SIAC's decision to dismiss the LTE decision.[12] Further, as there was no final determination of her deprivation appeal, she challenged SIAC's decision in the Administrative Court by lodging an application for judicial review.[13] This application was heard simultaneously with the hearing before the Court of Appeal, by a Divisional Court

2 Jess Glass, 'Latest Hearing in Shamima Begum's Citizenship Appeal to get Underway' *The Independent* 21 November 2022 at https://www.independent.co.uk/news/uk/crime/shamima-begum-london-british-islamic-state-syria-b2229369.html [https://perma.cc/DK7L-FECZ].
3 n 1 above at [1].
4 *ibid*.
5 *ibid*.
6 'Immigration Rules' (Home Office, 25 February 2016) at https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-14-stateless-persons (last accessed 2 June 2023).
7 n 1 above at [3].
8 *ibid* at [5].
9 *ibid* at [7].
10 *Begum* v *Secretary of State for the Home Department* (Appeal No SC/163/2019) [2020] HRLR 7.
11 n 1 above at [9]; *R (Begum)* v *Secretary of State for the Home Department* [2020] EWHC 74 Admin.
12 n 1 above at [10].
13 *ibid*.

comprising the same judges as the Court of Appeal.[14] The Court of Appeal and the Divisional Court's decision was delivered by Flaux LJ and other judges agreed with his reasoning and decision.[15] The Court of Appeal ordered the SSHD to grant Ms Begum leave to enter the UK.[16] The Divisional Court allowed Ms Begum's application for judicial review of SIAC's decision in relation to the SSHD's policy and transferred the issue to SIAC for redetermination.[17]

The Supreme Court thus had to determine three separate sets of proceedings. First, the then SSHD (Rt Hon Priti Patel MP) appealed against the Divisional Court's decision to allow Ms Begum's application for judicial review of SIAC's decision concerning her policy. The issue at stake was whether the Divisional Court was incorrect to conlude that SIAC had mistakenly determined that issue by applying the principles of administrative law erroneously.[18] Ms Begum cross-appealed against the decision of the Divisional Court in which it rejected her argument that the deprivation appeal should automatically be granted if it could not be fairly and effectively pursued as a result of the refusal of her application for leave to enter the UK.[19]

The second appeal dealt with leave to enter on human rights grounds. Ms Begum had a statutory right of appeal against that decision insofar as she claimed that that decision was unlawful under the Human Rights Act 1998 (HRA 1998). SIAC rejected this appeal, however it was granted by the Court of Appeal.[20] The last set of proceedings concerned the dismissal of Ms Begum's application for judicial review of the LTE decision. The SSHD appealed against the second and third set of proceedings arguing that the Court of Appeal had erred by concluding 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.[21]

THE JUDGMENT

Lord Reed delivered the sole judgment of the Supreme Court, and the other judges agreed with him. The Supreme Court unanimously allowed the SSHD's appeals and dismissed Ms Begum's cross appeal. Lord Reed identified four errors in the Court of Appeal's reasoning. First, he concluded that the Court of Appeal had misunderstood the role of SIAC and its own powers in relation to the SSHD's decision to refuse a person leave to enter the UK.[22] Ms Begum's case involved a human rights claim because when she made an entry clearance

14 *ibid*.
15 *R (Begum)* v *Special Immigration Appeals Commission (UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism Intervening)* [2020] EWCA Civ 918.
16 *ibid* at [121].
17 *ibid* at [129].
18 n 1 above at [13(1)].
19 *ibid*.
20 *ibid* at [7(2)].
21 *ibid* at [13(2)]-[13(3)].
22 *ibid* at [133].

application on 3 May 2019, that refusal should have complied with section 6 of the HRA 1998.[23] No such ground was adduced in the Court of Appeal as her counsel relied on common law principles.[24] As Ms Begum did not advance any human rights arguments before the Court of Appeal, her appeal against the leave to enter the UK decision was dismissed.[25]

Secondly, the Supreme Court held that the Court of Appeal was incorrect to grant permission to Ms Begum's application for judicial review of the SSHD's refusal of leave to enter the UK.[26] According to the Supreme Court, the Court of Appeal made its own assessments on national security without considering any evidence and preferred it to that of the SSHD's assessment.[27] The SSHD on the other hand, made the decision to deprive Ms Begum of her British citizenship on the basis of the assessment conducted by the security services.[28] The security services included detailed assessments that focused on those that had deliberately aligned themselves with ISIL in Syria and were as such aware of ISIL's ideology to commit atrocities and engage in terrorist-related activity, thereby posing a threat to the national security of the UK.[29] The assessments stipulated that the main role for women was to act as wives of fighters and to raise the next generation of fighters/citizens of ISIL, whilst noting that ISIL encouraged women to also carry out attacks.[30]

To support its judgment, the Supreme Court relied heavily on the leading case in this area; *Secretary of State for the Home Department* v *Rehman*[31] (*Rehman*), in which SIAC issued a deportation order against an individual on the grounds of national security. In *Rehman*, Lord Hoffmann explained that the SSHD is responsible for making assessments on national security, given that the SSHD is democratically responsible to Parliament for executing this duty.[32] Lord Reed refuted the Court of Appeal's findings that the national security concerns about Ms Begum could be addressed and managed by arresting her upon her arrival into the UK or by subjecting her to a TPIM, given that there was no evidence to substantiate these findings.[33] The Supreme Court ruled that it was not a question of law (for the judges) to determine whether a matter was in the interests of national security, but rather it was a matter of judgment and policy; something which is entrusted to the executive under the UK's constitutional arrangements.[34] Accordingly, the SSHD's assessment vis-a-vis the national security risks posed by an individual ought to be respected for two reasons: first, the SSHD has institutional competence as she is briefed on national security

23 *ibid* at [3].
24 *ibid* at [107].
25 *ibid* at [107], [111].
26 *ibid* at [134].
27 *ibid* at [134].
28 *ibid* at [16].
29 *ibid* at [17].
30 *ibid* at [17], [19].
31 [2001] UKHL 47.
32 *ibid* at [61]. These points have been reiterated in later cases, including *A* v *Secretary of State for the Home Department* [2004] UKHL 56; *A* v *SSHD* [2005] 2 AC 68 (*A*) and *R (Lord Carlile of Berriew)* v *Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945.
33 n 1 above at [109].
34 *ibid* at [56].

matters by the security services;[35] and second, the SSHD is democratically accountable for making such decisions as the person charged by Parliament with undertaking such assessments, and is answerable to Parliament for the discharge of this duty.[36] However, the SSHD's decisions can be scrutinised in limited respects. In relation to appeals against deprivation of citizenship hearings, SIAC can consider the following matters: first, whether an order would make the person stateless; second, whether the SSHD has erred in law; third, whether the SSHD has acted in a way that no reasonable SSHD would have acted or has taken into account an irrelevant matter/disregarded something which should have been given weight, or is guilty of procedural impropriety given the serious consequences that flow from a deprivation of citizenship hearing; and fourth, whether the SSHD has abided by her obligations under the HRA 1998.[37]

The third error identified by the Supreme Court concerned the conclusion that, where an individual's right to a fair hearing of an appeal conflicted with the requirements of national security, then the former prevailed.[38] Lord Reed considered SIAC's reasoning wherein it stated, 'we accept that, in her current circumstances, [Ms Begum] cannot play any meaningful part in her appeal, and that, to that extent, the appeal will not be fair and effective'.[39] Ms Begum's counsel argued that she was unable to instruct lawyers or partake in the appeal as she was deprived of her nationality on national security grounds when she was outside the UK. Thus, her counsel argued that her appeal should succeed for this reason alone, whatever the merits of her case or the balance of countervailing national security reasons.[40] SIAC cited a few statutes to support its view that Parliament did not intend for deprivation appeals to be exercisable from the UK.[41] Lord Reed acknowledged that when a person is unable to pursue an effective appeal against a deprivation decision, Parliament has conferred upon that person a right of appeal. However, Parliament has not provided tribunals/courts with directions pertaining to situations where a person's circumstances are such that they cannot exercise that right effectively.[42] To address this problem, it is important to consider the appellate court's responsibility in upholding the 'administration of justice', the nature and consequences of the decision in question and any relevant provisions within the legislation.[43]

According to Lord Reed, 'the proposition that given the only way in which she can have a fair and effective appeal is to be permitted to come into the United Kingdom to pursue her appeal, fairness and justice must … outweigh the national security concerns appears to have been based on the view that the right to an effective appeal is a trump card. That view is mistaken'.[44] He further stated that if the Court of Appeal was making an evaluative judgment

35 *ibid* at [62], [23].
36 *ibid* at [134].
37 *ibid* at [120].
38 *ibid* at [110], [135].
39 n 10 above at [143].
40 *ibid* at [144].
41 n 1 above at [86].
42 *ibid* at [89].
43 *ibid* at [89].
44 *ibid* at [110].

on the facts, balancing the public interest in minimising the risk of terrorism, and determining whether on balance her application for leave to enter should be granted; that was not its function in an appeal hearing in which the SSHD's decision was not challenged.[45] Even if national security had been considered, the Court would have been restricted to reviewing the reasonableness of the SSHD's assessment, paying particular attention to the limitations imposed on it as a result of *Rehman*.[46] He concluded by stating that, as the safety of the public is of paramount importance, 'the 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'.[47]

Fourthly, the Supreme Court held that the Court of Appeal had mistakenly treated the SSHD's extraterritorial human rights policy as though it was a rule of law that had to be obeyed.[48] This policy should instead have been used to guide the exercise of statutory discretion.[49] The Supreme Court decided that SIAC could not exercise the SSHD's discretion unless the SSHD had breached the HRA 1998.[50] Lord Reed stated that even though there was a right of appeal against the SSHD's decision, it did not mean that the SSHD had to satisfy SIAC that the deprivation of Ms Begum's British citizenship was conducive to the public good.[51] As explained at various intervals in the judgment, the appellate courts/tribunals cannot decide how the primary decision-maker ought to exercise a statutory discretion conferred on the latter or exercise that discretion themselves without express statutory authority (with the exception of public law/HRA principles).[52]

In the present case, the SSHD considered the detailed assessments prepared by the security services and opined that depriving Ms Begum of her British citizenship would not expose her to a real risk of mistreatment whilst she was in Syria.[53] In principle, this determination could be challenged by SIAC on the grounds of unreasonableness. However, SIAC was in agreement with the SSHD and did not find the SSHD's assessment to be unreasonable.[54] The Supreme Court agreed with SIAC and held that Ms Begum's application for judicial review of SIAC's preliminary decision in the deprivation appeal should be dismissed.[55]

45 *ibid* at [110].
46 *ibid* at [110].
47 *ibid* at [135].
48 *ibid* at [136].
49 *ibid* at [122].
50 *ibid* at [69].
51 *ibid* at [67].
52 *ibid* at [68].
53 *ibid* at [130].
54 *ibid*.
55 *ibid* at [131].

THE EVER-INCREASING POWERS OF THE SSHD

I will first examine the effect this decision has on citizenship deprivation cases that arise outside the national security sphere. I will then consider whether undue deference was correctly afforded to the executive on national security grounds. Finally, I will consider the consequences of the recently enacted law in the NBA 2022 that enables the SSHD to deprive individuals of their British citizenship without giving them notice.

First, it is worth stating that an individual can be stripped of his/her British citizenship on two grounds as specified in the British Nationality Act 1981(BNA 1981): firstly, the SSHD can deprive a person of his/her British citizenship if she is satisfied that deprivation is conducive to the public good/national security grounds;[56] secondly, the SSHD may deprive a person of his/her citizenship which results from naturalisation/registration if she is satisfied that it was obtained by fraud, false representation or through concealing a material fact.[57] Most individuals who have been deprived of their British citizenship enjoy a right of appeal to the First-tier Tribunal (FTT),[58] but this right is limited in cases where the SSHD certifies that the deprivation decision was taken in reliance on information which should not be made available to the public because it is in the interests of national security,[59] in the interests of the relationship between the United Kingdom and another country,[60] or otherwise in the public interest.[61] In such instances, decisions can only be appealed against on grounds of Wednesbury unreasonableness,[62] as described in the seminal case of *Rehman*.[63]

As stipulated above, the FTT has exercised the SSHD's discretion in cases where individuals were losing their British citizenship on the basis of committing fraud, making false representations or through concealing material facts.[64] Amongst others, this discretion has been exercised in the case of *Deliallisi* v *SSHD*[65] (*Deliallisi*), and reiterated more recently in the case of *BA (Deprivation of Citizenship: Appeals)*[66] (*BA*), which Lord Reed discussed, and by the Court

56 BNA 1981, s 40(2).
57 BNA 1981, s 40(3)(a)(b)(c).
58 BNA 1981, s 40A(1).
59 BNA 1981, s 40A(2)(a).
60 BNA 1981, s 40A(2)(b).
61 BNA 1981, s 40(A)(2)(c).
62 This is the standard of unreasonableness that is used in assessing an application for judicial review of a public authority's decision.
63 n 1 above at [110].
64 BNA 1981, s 40(3).
65 *Deliallisi (British citizen: deprivation appeal: Scope) Albania* [2013] UKUT 439 (IAC) and applied to *BA (Deprivation of Citizenship Appeals)* [2018] UKUT 85 IAC. In *Deliallisi* at [31], on appeal, Judge Lane of the Upper Tribunal reinforced the principle that if the legislature had provided a right of appeal against a decision under BNA 1981, s 40(A), then in the absence of express wording limiting the nature of that appeal, it ought to be treated as requiring the appellate body to exercise a fresh judgment.
66 [2018] UKUT 85 IAC. In this case, on appeal, the Tribunal had to ask itself whether the evidence established that citizenship had been obtained by fraud, and if so whether the circumstances of the case pointed to deprival of citizenship. As it was an appeal and not a review, the Tribunal was concerned with facts as it found them, not with the SSHD's view of them. In most cases

of Appeal in the case of *KV* v *Sri Lanka*[67] (*KV*), which he did not discuss.[68] In each of these cases, the judges held that, if the legislature had provided a right of appeal against a citizenship deprivation decision, then the appellate body could exercise a fresh judgment.[69]

Therefore, until the present judgment was handed down, it was also very clear from the cases of *KV*, *Dellialisi* and *BA* that the FTT could exercise the discretion that the SSHD possessed in cases concerning fraud, false representation and where individuals concealed material facts.[70] This begs the question of whether the tribunals/courts would still be able to exercise the SSHD's discretion in cases of this nature, when national security was not an issue.[71] Lord Reed hinted that the *Begum* decision 'may' apply to such cases.[72]

To resolve this ambiguity and to assess the ramifications of the *Begum* judgment, we need to examine the case of *Ciceri (Deprivation of Citizenship Appeals: Principles)*[73] (*Ciceri*). *Ciceri* was decided a few months after *Begum*, addressing citizenship deprivation on grounds of fraud,[74] and the guidance from *Begum*[75] was applied. Accordingly, the FTT's role is now confined to reviewing whether the SSHD's discretion to deprive an individual of his/her British citizenship for fraud, false representation or concealment of material facts is limited to the grounds of Wednesbury unreasonableness, unless there are human right issues.[76] Like the *Begum* case, the FTT confined itself to a very limited role as it adopted the same approach to fraud cases as it does with national security.

By adopting a narrow interpretation of the *Begum* decision, it will be difficult for individuals to pursue their appeals successfully, affecting the number of people who may be made stateless. This is particularly worrying given the increasing number of people who are being stripped of their British citizenship. According to the Home Office's statistics, 289 people have been deprived of their British citizenship for fraud and an additional 175 on national security

the weight would be such that the FTT would have no proper basis for exercising its discretion differently. However, that did not absolve the FTT from its duty to decide the issue.

67 [2018] EWCA Civ 2483 at [6]. The court discussed the extensive powers it possessed not just in relation to BNA 1981, s 40(3) but also s 40(2) of the. In *KV*, it was held that the courts could give full consideration to the deprivation decision when deciphering whether to deprive a person of their citizenship, find the relevant facts, establish whether the relevant condition precedent specified in sections 40(2) and (3) existed for the exercise of that discretion to deprive a person of their British citizenship; if the relevant condition precedent was established then the courts could consider whether the discretion should be exercised by the FTT and determine whether Article 8 (right to private and family life) was disproportionately interfered with and the Tribunal was advised to 'normally' give weight to the SSHD's decision.

68 See also other cases some of which were discussed, *Re Arusha (Deprivation of Citizenship: Delay Kosovo)* [2012] UKUT 80 IAC; also see *R (on the Application of Lord Carlisle of Berriew QC)* v *SSHD* n 32 above; *Ali* v *SSHD* [2016] UKSC 60; *Al-Jedda* v *SSHD* [2013] UKSC 62; *Aziz* v *SSHD* [2018] EWCA Civ 884; *Hysaj (Deprivation of Citizenship: Delay)* [2020] UKUT 128 (IAC); *Laci* v *SSHD* [2021] EWCA Civ 769.

69 *Dellialisi* n 65 above at [31]; *BA* n 66 above.

70 n 41 above at [41].

71 BNA 1981, s 40(3).

72 n 1 above at [42], [48], [44].

73 [2021] UKUT 238 IAC.

74 BNA 1981, s 40(3).

75 n 73 above at [29].

76 *ibid* at [19].

grounds since 2006.[77] This restrictive approach is inconsistent with Convention rights as well as the international law on human rights. Historically, the UK has been a champion of global efforts to decrease statelessness, not least by signing up to the 1961 UN Convention on the Reduction of Statelessness[78] (Statelessness Convention). The interpretation of *Begum* signals a marked departure from that stance.

According to the 1961 Statelessness Convention, a person who is in the process of being deprived of his/her citizenship should be entitled to a fair hearing by a court or another independent body;[79] something that the UK seems to be deviating away from. Ultimately, the SSHD will be in charge of a policy that will lack oversight, scrutiny and supervision of the courts, giving rise to the argument that there may be a lack of separation of powers between the judicial and the executive branch of the State, which brings me to my next point.

Judicial deference or judicial abdication?

Lord Reed held that the Court of Appeal had erroneously substituted its own view for that of the SSHD, without giving due respect to the SSHD's assessment on the balance between national security and the applicant's rights.[80] A high level of deference was afforded to the executive in relation to this issue. Lord Reed placed heavy reliance on the judgment of Lord Hoffman in the case of *Rehman* (a case which was not cited by the Court of Appeal) in which he referred to the democratic legitimacy of Ministers, enabling them to take national security decisions (as above).[81] Lord Hoffmann warned the judiciary to respect the constitutional boundaries between itself, the legislature and the executive, as it was not a question of law to decide whether a matter was in the interests of national security, but something that was specifically entrusted to the executive.[82] This was specifically true for decisions involving deprivation of citizenship, because such questions involved 'evaluations and judgment',[83] pertaining to the 'extent of the risk' the individual in question posed.[84] According to Lord Hoffmann's reasoning in *Rehman*, decisions that have an impact on the community (such as those concerning national security) should be taken by those that can be removed from office by the community (as discussed above).[85]

77 C. J. McKinney, 'How Many People have been Stripped of their Citizenship' (Free Movement, 10 January 2022) at https://freemovement.org.uk/how-many-people-have-been-stripped-of-their-british-citizenship-home-office-deprivation/ (last accessed 28 May 2022).
78 Convention on the Reduction of Statelessness 1961 at https://www.unhcr.org/uk/protection/statelessness/3bbb286d8/convention-reduction-statelessness.html [https://perma.cc/8VYK-NY46].
79 *ibid*, Art 8(4).
80 n 1 above at [50], [70].
81 *Rehman* n 31 above at [50].
82 *ibid*.
83 *ibid* at [56] per Lord Hoffmann and in *Begum* [2021] AC 765 at [58].
84 *Begum ibid* at [58].
85 *Rehman* n 31 above at [62].

As identified by Lord Reed in the *Begum* decision, national security is a politically sensitive area, which is poorly suited to judicial decision-making. There is no doubt that the decision in the present case is constitutionally and legally correct given the institutional sensitivities that judges need to adhere to, as depicted by an array of cases.[86] However, as argued by Lock, one needs to ascertain the extent to which individuals can hold Ministers to account for the national security decisions they take.[87] National security decisions are considered as being security-sensitive by the government, and are thus not made available to the public.[88] Even in the present case, the decision to deprive Ms Begum of her citizenship and to refuse to provide her with leave to remain was not made available to the public as it was contrary to public interest to disclose it, as noted by Lock.[89] Indeed, disclosing information about certain national security decisions such as the decision to intercept the communications of a suspected terrorist is deemed to be a criminal offence.[90] Further, there is no record to indicate the number of individuals that have been stripped of their citizenship for counter-terrorism purposes.[91]

Thus, as suggested by Lock, it is indeed highly questionable whether the public can effectively monitor individual national security decisions for the purposes of holding Ministers to account.[92] Accordingly, there is a good case for judicial intervention. The courts should be allowed to evaluate whether fundamental safeguards have been observed given that there are several other British women and children held in the Al Hoj and Al Roj detention camps.[93] Without this oversight, judicial deference becomes abdication of the judicial role itself.

86 There is a long list of cases that depict this point; see for example, *R (Lord Carlile of Berriew)* v *Secretary of State for the Home Department* n 32 above; *R (Corner House Research)* v *Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC 756; *Chandler* v *Director of Public Prosecutions* [1964] AC 763; *R* v *Secretary of State for Foreign and Commonwealth Affairs, Ex p Pirbhai* (1985) 107 ILR 462; *R* v *Secretary of State for Foreign and Commonwealth Affairs, Ex p Ferhut Butt* (1999) 116 ILR 607; *R (Abbasi)* v *Secretary of State for Foreign and Commonwealth Affairs and SSHD* [2003] UKHRR 76; *R (Campaign for Nuclear Disarmament)* v *Prime Minister* [2003] 3 LRC 335; *A* v *SSHD* n 32 above; *R* v *Jones* [2007] 1 AC 136; *R (Gentle)* v *Prime Minister* [2008] AC 1356.

87 Daniella Lock, 'The Shamima Begum Case: Difficulties with "democratic accountability" as a justification for judicial deference in the national security context' (UK Const L Blog, 9 March 2021) at https://ukconstitutionallaw.org/2021/03/09/daniella-lock-the-shamima-begum-case-difficulties-with-democratic-accountability-as-a-justification-for-judicial-deference-in-the-national-security-context/ [https://perma.cc/X9GG-ZZUA].

88 *ibid*.

89 n 1 above at [2], [4]; Lock, n 87 above ,

90 See for example, Investigatory Powers Act 2016, s 59; Lock, *ibid*.

91 'Transparency Data: HM Government Transparency Report: Disruptive Powers 2020' (Home Office, 3 March 2022) at https://www.gov.uk/government/publications/disruptive-powers-2020/hm-government-transparency-report-disruptive-powers-2020-accessible (last accessed 27 May 2022).

92 Lock, n 87 above.

93 Yasmin Ahmed, 'The UK Supreme Court has Failed Shamima Begum' (Human Rights Watch, 2 March 2021) https://www.hrw.org/news/2021/03/02/uk-supreme-court-has-failed-shamima-begum [https://perma.cc/W8VV-4R6D].

Losing British citizenship without being notified

Since *Begum* was decided, even more egregious powers have been awarded to the SSHD by virtue of the NBA 2022,[94] which confirms the recent trend in increasing the powers awarded to the SSHD in citizenship deprivation cases. One of the most controversial provisions within the Act is the ability of the SSHD to deprive a person of his/her citizenship without giving that person notice. This can be achieved if the SSHD deems it necessary, on the basis of certain circumstances that include: national security;[95] an investigation or for the purposes of the prosecution of organised crime;[96] the risk to the safety of any person;[97] or the relationship between the UK or another country.[98] Accordingly, the SSHD now has very wide-ranging and ill-defined powers to take away citizenship in secret that go far beyond what might be compelling or difficult situations. However, the SSHD must, as soon as it is reasonably practicable give the person notice specifying that she has made an order to deprive a person of their British citizenship,[99] give the reasons for that order,[100] and inform the person of his/her right of appeal to the tribunal/courts.[101]

Ms Begum was also deprived of her citizenship without notice whilst she was in Syria.[102] From the SSHD's perspective, there could be national security reasons for revoking the person's citizenship without notice. If someone poses a threat to the UK's national security, the SSHD presumably would not want that person to be present in this country before their British citizenship is revoked: if that person was present in the UK, then they could exercise their right of appeal and thus they may not be removed elsewhere whilst their appeal was pending. From the national security perspective, the whole point was to remove the perceived threat the person posed. But this new power raises questions about the potential for error, which had serious implications in the case of *E3* v *SSHD*.[103] In that case, an individual had his British citizenship revoked whilst he was in Bangladesh. Yet, there was no evidence to suggest that he had engaged in criminal/terrorist related activities.[104] As a consequence, he spent five years in Bangladesh trying to get his British citizenship reinstated.[105]

Prior to the NBA 2022, the SSHD was supposed to send a 'written notice' to the British citizen before depriving that person of his/her British

94 The NBA 2022 was signed into law on 28 April 2022.
95 NBA 2022, s 10(2)(5A)(b)(i).
96 NBA 2022, s 10(2)(5A)(b)(ii).
97 NBA 2022, s 10(2)(5A)(b)(iii).
98 NBA 2022, s 10(2)(5A)(b)(iv).
99 NBA 2022, s 10(2)(5D)(a).
100 NBA 2022, s 10(2)(5D)(b).
101 NBA 2022, s 10(2)(5D)(c).
102 Chiara Giordano, 'Shamima Begum Says Her World "Fell Apart" After Losing British Citizenship' *The Independent* 17 February 2020 at https://www.independent.co.uk/news/uk/home-news/shamima-begum-latest-isis-bride-uk-citizenship-camp-syria-a9340526.html [https://perma.cc/3VN9-A7HM].
103 *E3* v *SSHD* [2022] EWHC 1133 QB.
104 *ibid* at [67]-[68].
105 *ibid*.

citizenship.[106] This 'written notice' could be sent to the person's last known address if their whereabouts were unknown.[107] However, even before the NBA 2022, the SSHD revoked a person's citizenship without notifying that person as evidenced by the recent case of *R (D4)* v *SSHD*.[108] Here the Home Office interpreted the provision of sending a 'written notice' to revoke a person's British citizenship, as including the notice as part of their file (ie without sending it to the person concerned). The High Court and the Court of Appeal ruled that the deprivation order had no legal effect, and so the SSHD has appealed this case to the Supreme Court (where it is currently being heard).[109]

In addition, there could be potential breaches of international Conventions, such as the 1961 Statelessness Convention. This stipulates that a person who is being deprived of his/her citizenship should be given a right to a fair hearing by a court or another independent body (as discussed above).[110] Denying a notice before a deprivation decision is made could potentially breach this provision and one's right to a fair trial under Article 6 of the ECHR; it also threatens the British values of the rule of law.

This new power is not only extremely draconian; it is also potentially discriminatory, because it overwhelmingly affects individuals who hold dual nationalities, are likely to be from migrant communities and are much more likely to have another citizenship by virtue of their own birth or through their parents/grandparents. Therefore the UK may punish two people convicted of the same crime differently based upon their heritage, in effect making them second-class citizens.

CONCLUSION

The significance of this judgment goes well beyond Ms Begum's circumstances underlining the significance of separation of powers as well as limiting the scope of appellate tribunals in deprivation of citizenship hearings. There is no doubt that the Supreme Court has acted constitutionally, but it has bent over backwards to protect the executive's position. Although it is difficult for the judiciary to deliver judgments on national security matters due to the difficulties associated with scrutinising the evidence, coupled with the fact that judges lack of democratic accountability, nevertheless, the judiciary has deferred the matter to the executive to an extreme extent. This case has overturned previous case-law and set a disturbing precedent. Due to this ruling, Ms Begum may remain in the camp for an indefinite period where she may be exploited further.

Finally, the Supreme Court has delivered a message to others who are in the same predicament as Ms Begum. Morally it leaves (former) British citizens

106 BNA 1981, s 40(5).
107 The British Nationality (General) Regulations 2003, Reg 10.
108 [2021] EWHC 2179 (Admin).
109 'Case details *R (on the application of D4)* v *SSHD* Case ID 2022/0042' at https://www.supremecourt.uk/cases/uksc-2022-0042.html [https://perma.cc/2S93-T9VA].
110 Statelessness Convention 1961, n 78 above, Art 8(4).

who have misbehaved as children in conditions of inhumane and degrading treatment, with no State accepting responsibility to champion their interests. Thus, Ms Begum and other former British citizens that are in the same position, currently remain citizens' of nowhere.