

16 July 2020

MEDIA SUMMARY

Shamina Begum (Appellant) v Special Immigrations Appeals Commission (Defendant) (1) The UN Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism and (2) The National Council for Civil Liberties (Intervenors)

The Queen (on the application of Begum) v Secretary of State for the Home Department (Respondent) (1) The UN Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism and (2) The National Council for Civil Liberties (Intervenors)

[2020] EWCA Civ 918

On appeal from:

The Special Immigration Appeals Commission (T2/2020/ 0644) (sitting also as a Divisional Court in CO/798/2020) (T3/2020/0708) and the Administrative Court (T3/2020/0645)

JUDGES: Lady Justice King, Lord Justice Flaux and Lord Justice Singh

The issue

1. This case concerns the decisions of the Secretary of State (i) on 19 February 2019 to deprive Shamima Begum of her British citizenship (“the deprivation decision”); and (ii) on 13 June 2019 to refuse her application for leave to enter (“LTE”) the UK to pursue her appeal against the deprivation of citizenship before the Special Immigration Appeals Commission (“SIAC”). (“the LTE decision”)
2. The deprivation decision was challenged by way of an appeal to SIAC pursuant to section 40A of the British Nationality Act 1981 and section 2B of the Special Immigration Appeals Commission Act 1997.
3. At a hearing in October 2019 SIAC considered three preliminary issues. The findings made by SIAC in respect of these preliminary issues will form the backdrop to the hearing of the deprivation appeal itself which will take place at a later date. The preliminary issues were:

- (1) Whether the effect of the Secretary of State's decision of 19 February 2019 rendered Ms Begum stateless.
 - (2) Whether the deprivation decision dated 19 February 2019 was unlawful because of its direct and foreseeable consequence of exposing Ms Begum to a real risk of mistreatment which would constitute a breach of Article 2 or 3 of the European Convention on Human Rights ("ECHR") and/or would be contrary to the Secretary of State's practice as set out in a Supplementary Memorandum published in January 2014, which relates to extra-territorial situations where Articles 2 and 3 do not strictly speaking apply.
 - (3) Whether the Appellant could have a fair and effective appeal against the deprivation of citizenship from outside the UK and in Syria.
4. The LTE decision was challenged in two ways:
- (a) by an appeal to SIAC; and
 - (b) by judicial review proceedings in the Administrative Court.
5. Those matters were considered by SIAC at a joint hearing with the hearing of the application for judicial review in the Administrative Court.
6. On 7 February 2020 the following judgments were given:
- (1) An OPEN judgment by SIAC determining all three preliminary issues against Ms Begum.

(2) A judgment of the Administrative Court granting permission to apply for judicial review but dismissing the substantive claim for judicial review of the LTE decision.

(3) A CLOSED judgment of SIAC in the deprivation appeal.

It is only (1) and (2) with which the present case is concerned. The Court was not concerned with that CLOSED judgment, which it has not read.

7. For procedural reasons, the Court had to sit both as the Court of Appeal when considering the appeal from the Administrative Court and also as a Divisional Court of the High Court when considering an application for judicial review against the decision of SIAC on the preliminary issues. This Court has not been concerned with the first of those preliminary issues, whether the Secretary of State's decision rendered Ms Begum stateless.
8. The hearing before the Court of Appeal/Divisional Court centred on two issues:
 - i) SIAC found that Ms Begum cannot have a fair and effective hearing of her appeal against the deprivation decision, (Preliminary issue 3, which finding is not subject to an appeal by the Secretary of State) The issue therefore is how should that injustice be remedied? Three options were considered:
 - a) By allowing the appeal against the deprivation decision itself, as submitted on behalf of Ms Begum?

- b) By staying the appeal until such time as Ms Begum's situation improves to the extent that she can have a fair and effective appeal, as submitted by the Secretary of State? or
 - c) By granting LTE in order for Ms Begum to come to this country albeit under strict controls in order for her to pursue her appeal?
- ii) The second issue was whether in relation to Preliminary issue 2, SIAC was in error in applying the principles of judicial review to the Article 2 and Article 3 issue and should rather have conducted a full merits assessment and made its own independent assessment of the risk to Ms Begum resulting from the deprivation decision.

The decision of the Court of Appeal/Divisional Court

9. The Court (in a judgment given by Flaux LJ, with which King LJ and Singh LJ agreed) has today (16 July 2020) granted the application for judicial review of the SIAC decision in part, and allowed the appeal against the decision of the Administrative Court in relation to LTE. It follows therefore that the Court concluded that:

- i) Ms Begum should be allowed to come to the United Kingdom to pursue her appeal albeit subject to such controls as the Secretary of State deems appropriate.
- ii) The issue as to the Article 2/3 risk to which Ms Begum is exposed consequent upon the deprivation decision is remitted to SIAC in order for it to decide the issue of risk afresh on the totality of the evidence before it.

The Factual Background

10. The factual background is set out at paras. 7-11 of the judgment. Ms Begum was born in 1999 in the UK and held British citizenship from birth. SIAC found in its decision on the first preliminary issue that she also holds Bangladeshi citizenship by descent. On 17 February 2015, when she was 15, Ms Begum left the UK with two school friends and travelled to Syria. She married an ISIL fighter and has had three children, all of whom have died. She is currently in a detention camp run by the Syrian Democratic Forces in conditions which SIAC accepted at para.11 meet the threshold of inhuman or degrading treatment for the purposes of Article 3 of ECHR.

Reasons for the decision of the Court of Appeal/Divisional Court

11. In giving its decision, at para. 143, SIAC had said:

“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.”

On that basis it was submitted on her behalf that the consequence must be that her deprivation appeal should have been allowed by SIAC. This Court has disagreed with that: see para. 95 of the judgment.

12. The Court then considers, at para. 111, the critical question as to what steps can be taken to alleviate the unfairness and lack of effectiveness. The Court acknowledges that there are national security concerns about Ms Begum but the Court reaches the conclusion, at para. 121, that, notwithstanding those concerns, the only way in which she can have a fair and effective appeal before SIAC is for Ms Begum to be permitted to come into the UK to pursue that appeal. At

para. 122, therefore, the Court concludes that Ms Begum's appeal to the Court of Appeal should be allowed, so that she can have leave to enter the UK in order for there to be a fair and effective appeal before SIAC.

13. From para. 123 of the judgment the Court considers the second issue which arose from the decision by SIAC. This concerns the approach which SIAC should take to the application of the Secretary of State's extra-territorial policy whereby, notwithstanding that the ECHR does not have extra-territorial effect, it is the practice of the Secretary of State to consider any Article 2 (right to life) or Article 3 (prohibition of torture) risks associated with the deprivation of nationality. The Court concludes that SIAC fell into error in confining itself to the principles of judicial review, since its function is to conduct a full merits appeal: see paras. 124-128 of the judgment. Accordingly, the Court has decided to remit the matter to SIAC so that it can reconsider its decision in accordance with the judgment of the Court and after making all relevant.

NOTE

This summary is provided to assist in understanding the Court of Appeal's/Divisional Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. The full judgment of the Court and a copy of this media summary are available at www.judiciary.uk