Shamima Begum’s Banishment is a Threat to Us All

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Two weeks ago, the British Special Immigration Appeals Commission (SIAC) rejected Shamima Begum’s appeal against the Home Secretary’s decision to deprive her of citizenship, dealing the latest blow in her on-going battle to regain her status. SIAC’s choice to uphold the Home Secretary’s deprivation decision is not just blatantly unjust, unfairly punishing a victim of child trafficking, but also indicates a dangerous decline in the UK’s commitment to the rule of law.

An Appeal That Shouldn’t Have Been Hers To Lose

Begum’s lawyers provided no less than 9(!) grounds of appeal, with several of them invoking her alleged status as a victim of child trafficking to contest the lawfulness of her deprivation decision. Importantly, the Commission found credible suspicion that Begum was, in fact, trafficked to what was then ISIS controlled territory within Syria for the purpose of sexual exploitation. However, this alone was not weighty enough to allow her to regain her citizenship. For one, her meeting the credible suspicion standard was insufficient to establish a breach of the UK’s investigative or protective duties towards her under Article 4 (prohibition of slavery) of the European Convention of Human Rights. The latter is binding upon public authorities in the UK pursuant to section 6 of the 1998 Human Rights Act (which the Conservative government also seeks to rid itself from). The Commission reasoned that to succeed with her section 6 claim, Begum had to prove that it was the exercise of the deprivation power that breached her rights under Article 4, as a “credible suspicion that she was trafficked does not, in and off itself, amount to a violation of Article 4 [para 227].” However, the Commission declined to find a “direct, obvious and essential nexus between the exercise of an admittedly wide discretionary power and the postulated breach” of Article 4 [paras 228, 238]. It is important to emphasize that Begum’s lawyers had provided the Commission with plenty of arguments to supply this link; yet it chose not to endorse these.

Nor did failure to consider (let alone attribute any weight to) her status as victim of child trafficking or the impact of her *de facto* statelessness render the Home Secretary’s deprivation decision an abuse of discretion. SIAC emphasized that the Home Secretary’s discretion in deprivation cases is *extremely* broad, with Parliament choosing not “to specify any of the factors that the Secretary must take into account in the public interest” when making a deprivation decision [para 253]. As such, it was for the Secretary alone to decide what is in the public interest and how much weight to give to certain factors [para 260]. He was thus not “required to make a formal judgment about trafficking with all the consequences that would flow from that, or, indeed, to take into account a credible suspicion that the individual may have been trafficked [para 255].” Nor did he have to attribute weight to the impact of

her statelessness following the deprivation decision, even though the Commission concluded that he had taken account thereof [para 305].

SIAC also rejected Begum's contention that the deprivation decision was procedurally unfair because she was not afforded the opportunity to make representations prior to the decision being made, pursuant to the statutory framework that governed her case. Importantly, SIAC accepted that common law fairness required such opportunities in general. Yet, even though Begum therefore won on the point of principle, the Commission found this alone insufficient to allow her appeal. Rather, she also had to show that the failure to provide her with an opportunity to advance prior representations would have made a practical difference to the outcome in her particular set of circumstances [para 344]; something the Commission was not satisfied was the case [para 349].

Finally, the Commission gave short shrift to arguments that challenged her deprivation for violating a public sector equality duty under the 2010 Equality Act and for being disproportionate under Article 8 of the ECHR. As regards the former, it held that the relevant provision did not apply to Begum's deprivation decision due to a general, statutory exemption for public authorities acting proportionally and for the purpose of safeguarding national security [para 389]. Concerning the Article 8 claim, SIAC noted that following the Supreme Court's assessment of ECtHR jurisprudence, only arbitrary citizenship deprivation could give rise to an Article 8 claim, and that Begum's deprivation was not arbitrary. "The rule of law," it posited, "had been applied to Ms Begum's case" [para 405].

Discretionary Citizenship Deprivation as a Threat to the Rule of Law

This should strike us as a rather troubling conception of what the rule of law amounts to. Indeed, contrary to SIAC's confident declaration, arguably one of the most concerning features of the case is the clear abrogation thereof. To be sure, the Begum saga can be criticized for a whole litany of reasons. For one, the Courts not only waived through but actively helped the government succeed in its attempt to wash its hands of its own failure to protect an underage, vulnerable girl from being trafficked into sexual exploitation. This was possible, in part, because Begum's rights, whether as a victim of trafficking, as a citizen, or simply as a human, were consistently reasoned away, downplayed, and ultimately dismissed on the basis of overly formalistic legal reasoning and an outsized degree of deference to the national security apparatus. Thus, what ultimately drove SIAC's rejection of Begum's appeal was the fact that the exercise of the deprivation power, and the national security assessment underpinning it, ought to be subject to only very light touch review according to public law, as opposed to human rights law principles.

Under the UK constitutional framework, these days only the latter necessitates the more searching and exacting proportionality test in reviewing governmental action. By contrast, review according to public law principles deploys a more deferential and more easily met standard of irrationality or unreasonableness. Moreover, the

Supreme Court has stipulated that cases involving national security assessments also require special deference to the decision-maker on grounds of both institutional and constitutional competence. As a result, the Home Secretary's assessment of what national security requires can outweigh even the most fundamental procedural and substantive values that usually serve to determine the permissible bounds of executive power. Thus, the "devastating impact" [para 302] and "draconian" [para 304] nature of Begum's *de facto* statelessness was not enough for the Supreme Court to warrant the limitation of discretion exercised in the name of national security. Nor did it take issue with the evident due process concerns that permeate the deprivation process as a whole. Quite to the contrary, the UK Supreme Court explicitly endorsed the idea that national security concerns can justify weaker procedural rights.

All of this indicates that the damage this saga has wrought goes beyond the injustice inflicted upon Begum herself (though this is significant and should not be ignored or forgotten). Despite repeated statements to the contrary, national security now constitutes a trump card, which if played in the judicial arena, appears to eradicate the possibility for meaningful scrutiny, let alone limitation, of the exercise of executive discretion. This is so even in cases where rights as fundamental as citizenship are at stake. The idea that governmental decision-making ought to be liberated from even the most basic requirements of the rule of law (e.g. basic due process) when national security is at stake has had sustained support since the War on Terror was first declared some 20 years ago. The Begum saga evinces not only how entrenched this belief has become within the UK judiciary, who has consistently chipped away at rights protections in national security cases citing the need for deference. It also demonstrates how dangerous it really is, not just to the protection of fundamental rights but also to the broader constitutional framework designed to safeguard liberal democratic values.

It bears repeating, in this regard, that contrary to what the Home Office believes, citizenship is not a privilege but a fundamental right. There are plenty of reasons this is the correct view, not least citizenship's material significance to its holder and the concept's deep connection to liberal democracy's commitment to equality, liberty and dignity. For better or for worse, it remains the case that we confer a bundle of rights on the basis of citizenship. These are necessary to ensure that individuals subject to a government's coercive power are treated on the basis of equality and respect. This is why Hannah Arendt called citizenship the right to have rights, and it is why the idea of treating citizenship as a privilege to be traded off whenever it might be "conducive to the public good" should strike us as noxious. As critical scholars have repeatedly made clear, it turns citizenship from a fundamental guarantee of equal status into a disciplinary device that serves to dangerously increase arbitrary government power vis-à-vis a particular, often already dominated, class of individuals.

There is a popular misconception that the reasons we have for treating citizenship as a fundamental right also means we should treat it as absolute or non-derogable. This need not be so. To consider citizenship a right does not mean its deprivation can never be justified. After all, we permit deprivation of rights for several reasons,

most importantly for the purpose of punishment. It is not immediately clear whether citizenship should be beyond the scope of permissible punishment, in the same way as, say, our right against inhuman and degrading treatment is. While this is the stance the US Supreme Court has taken on the issue, there are forceful arguments to the contrary, and its view remains an outlier as a matter of comparative law. For example, Israel and Australia's Supreme Court reached the opposite conclusion, just last summer. Yet, we need not insist on rendering citizenship an absolute right to understand why the UK's citizenship deprivation model, and the judicial endorsement thereof, is so pernicious and corrosive of its broader system of liberal democratic, constitutional governance.

Following the decisions in Begum's case, it is clear that citizenship can be deprived on the sole basis of the Home Secretary's entirely discretionary, personal and ultimately non-transparent decision that to do so might be "conducive to the public good." They are free to disregard considerations that, in reality, ought to be central to determining the permissible bounds of governmental discretion. Not just that, the Deprivee can also be denied both comprehensive and meaningful due process rights that would enable the contestation of such a decision, both before and after it is made. And even if the individual succeeds in bringing an appeal – and I should stress how difficult this is in practice – it appears now that, safe some extremely unusual circumstances, it is almost impossible for SIAC to declare the deprivation decision an unlawful or unreasonable exercise of governmental discretion under public law principles. This is so even where this leads to statelessness, a condition that ostensibly at least is still "deplored by the international community of democracies."

All of this should strike us as a radical conception of executive power and a dangerous devaluation of fundamental rights, both of which should be untenable in a state committed to the rule of law. This is the case even if we believe that governments should have some latitude when it comes to defending their national security interests. Latitude is not the same as granting the government a blank cheque to do as it pleases the minute it decides for itself that national security might be implicated. Yet this is precisely what the Courts have done in Begum's case, and following the failure of her appeal, those coming after her. SIAC introduced its decision by noting that what was at stake in this case were fundamental rights and the rule of law. Instead of vindicating them, it contributed to their abrogation.