

# The Begum Case: Why Ministerial Discretion Precludes Human Rights Issues

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Devyani Prabhat

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In recent years, cancellation of British citizenship has become a high-profile issue. This is not least because of the case of Shamima Begum, and the unusual media frenzy surrounding it. Begum, who left the UK as a 15-year-old British schoolgirl for Syria in 2015, was found in a camp in Syria four years ago. The Home Secretary removed her British citizenship soon thereafter, arguing that she has eligibility for Bangladeshi citizenship, and would not be left stateless without British citizenship. After protracted litigation surrounding a number of preliminary issues, three weeks ago, Begum lost her appeal in front of the Special Immigration Appeals Commission's (SIAC). Despite media interviews with Begum who is now an adult, the legal issues of her appeal actually concerned the nature of her conduct as a 15-year-old child. In particular, it turned on whether her travel to Syria should be treated as a case of child trafficking, and the impact this classification would have on issues of conduct that underpinned the Home Secretary's decision to deprive her of citizenship.

The SIAC's refusal to allow her appeal is remarkable for the nearly unlimited degree of discretion it appears to grant the Home Secretary in cancellation cases, even where human rights are at stake.

## The UK's Framework for Cancellation of Citizenship

Cancellation of citizenship is quite easily done in the UK as it is carried out by a simple executive order (Home Secretary's order). There is no judicial oversight at the point of cancellation, nor do affected individuals receive an opportunity to make representations prior to the decision being made. Indeed, at times, the person affected does not even have to be notified of the order. Moreover, challenging a deprivation order is difficult. Appeals are only possible after the order comes into effect at which point cancellation will have already taken effect. Most people are outside the country when their citizenship is cancelled and are therefore unable to attend any legal challenges to the cancellation. Even when a person does appeal, their appeal is heard in a special court, (the aforementioned SIAC). The SIAC holds closed proceedings when required in national security interests and gives closed judgments where national security related material is involved. Special advocates provide legal support to appellants, but they only share the gist of the case with their clients and cannot take instructions once they have had access to any sensitive material.

It is within this rather opaque setting that Begum's case, like most cancellation appeals, has been heard. She had been stripped of her citizenship while outside the country and thus first sought permission to enter to be present at her appeal. This permission was denied by the Home Secretary, and she litigated the impact of this decision on her ability to instruct her lawyers and participate in her trial, arguing that it violated her fair trial rights. She lost that round of litigation in 2022 when it went up all the way to the Supreme Court. Earlier than that, she had also lost a challenge to the cancellation on the ground that it would leave her stateless because the court found she held Bangladeshi nationality (through eligibility provided by Bangladeshi legislation), despite Bangladesh's assertion to [the contrary](#).

In the earlier litigations, courts (with the notable exception of the court of appeal on the fair trial issue) held that rights considerations for Begum would not mean the courts would step in to reconsider the original decision made by the Home Secretary. The latest case turned both on her status as a victim of trafficking and the fact that she was a child at the time she left for Syria. This time too, the SIAC did not think that the issues of trafficking gave grounds to challenge the exercise of discretion by the Home Secretary.

## **When National Security Trumps Human Rights**

A common thread that runs through these decisions is a view that Section 40 of the British Nationality Act authorises the Home Secretary to make an order stripping someone of citizenship with wide latitude as to what is conducive to the public good. In these kinds of cases the Home Secretary assesses what is a threat to national security and then decides whether to cancel citizenship or not. In the UK ministers are given decision making authority based on their collective responsibility to Parliament. There is considerable weight placed on their superior knowledge and expertise on the issues they oversee. In reality, despite the legal fiction of ministerial responsibility to Parliament, the Home Secretary is assisted by an entire administrative machinery such as staff and bureaucrats who support the Home Office and is unlikely to have individual oversight over all facts and personnel.

In most national security matters the Home Secretary is given wide discretion, with the judiciary applying only a very light touch standard of review. However, section 6 of the Human Rights Act 1998 requires courts and tribunals to act compatibly with the rights found in the European Convention on Human Rights. As a result, when rights are impacted courts usually apply the more searching proportionality analysis when reviewing ministerial discretion, examining both whether rights were considered and attributed appropriated weight by the decision maker. An example of how this operates is seen in immigration law where a person may challenge their deportation from the UK on the basis of their right to a private and family life (Article 8 of the ECHR, for example: House of Lords in *Huang* [2007] UKHL 11 on Article 8 and proportionality). Courts try to determine through proportionality analysis whether individual rights are sufficiently protected.

While proportionality analysis is about the balance of factors, in the context of Begum's appeal, it was possible to engage in a deeper analysis of the Home

Secretary's decision making. Appellate courts (such as the SIAC) are not confined by the relatively narrow standards of review of decision making that ordinarily apply in judicial review proceedings. Instead, they can undertake what is called a "full merits review" of a case. While this does not empower them to simply substitute their own views for those of the decision maker, they should actually examine how the rights components as well as other relevant information formed a part of the original decision. In light of this, the SIAC's reluctance to narrow down the Home Secretary's ministerial discretion in Begum's case despite serious concerns about statelessness, issues of fair trial or, (as in the latest round), trafficking issues, is greatly surprising.

## **Implications for Trafficking Victims and Equal Citizenship**

In cancellation of citizenship cases, the Home Secretary's assessment turns on an individual's conduct. However, it is unclear what circumstances, including potential mitigating factors, the Home Secretary should consider when exercising their discretion. Trafficking as an issue was unprecedented in a national security case in the SIAC until the Begum case. The court found there was trafficking, noting that "...there is a credible suspicion that Ms Begum was recruited, transferred and then harboured for the purpose of sexual exploitation [para 219]." It seems to logically follow that trafficking of a minor is a very significant issue, especially while evaluating conduct supposedly justifying the deprivation decision. In Begum's case, the SIAC also found that trafficking was not actually considered relevant by the Home Secretary who decided to strip Begum of her citizenship. But it appears that in the eyes of the SIAC trafficking is simply not relevant once there is a national security threat to be assessed. The Begum case may leave other victims of trafficking now with no recourse to justice. However, Begum's lawyers have already indicated that the case will go through another set of appeals, and the trafficking issue means the case may even go before the European Court of Human Rights in Strasbourg. The European Court of Human Rights is likely to give much deeper consideration to the issues of trafficking which are important for understanding recruitment of participants including children in conflict areas.

Another implication of Begum's case is that anyone with any other national connection is now at greater risk of losing their British citizenship and becoming effectively stateless. The situation raises concerns amongst naturalized citizens and other second-generation migrants born as British in terms of their legal status in the country. The SIAC noted in its decision that "...many right-thinking people in this country's Muslim communities (and beyond) feel that they are being treated as second-class citizens, and/or that their welcome is somehow contingent. The Commission has received a considerable body of evidence on that topic, and it raises important issues. It is not an answer to that concern to say that the Secretary of State has paid regard at a general level to inter-community relations or was given advice that the deprivation of Ms Begum was strongly supported by a majority of public opinion [para 397]." It then says that it has seen closed evidence that such an issue has been duly considered by the Home Secretary [para 398]. In the end, it is this sleight of hand between closed and open evidence which appears to leave

Lady Justice a mere stage prop in the theatre of justice. There is no way for ordinary citizens reading this decision to decide for themselves whether inter-community relations have been considered and minority rights protected.

Citizenship deprivation remains a power to abandon citizens at will. It is a dangerous power and one which undermines equal citizenship because of the manner in which it almost exclusively affects minority ethnicity nationals. Left unscrutinised, it is a serious threat to democracy.

