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The Begum Judgment on the Couch

The Supreme Court's judgment in the Begum case[i] has attracted already, even in the few days since its release, multiple readings and commentary. This comment will attempt a different kind of reading, and of listening, given the judgment was not only published but also broadcast live as delivered by Lord Reed. It will employ Freud's method of listening to his patients with evenly suspended attention.[ii] This hovering attention is designed to bypass what Lacan later called 'empty speech,' the parts of the patient's discourse that bear no relation to, and indeed are designed to conceal her desire, in order to uncover her 'full speech,' the parts of her discourse that unwittingly or not, betray a glimpse into the patient's truth.

While this method can be recommended in all cases, it is particularly apt in this case which, like Freud's famous retelling of his own dream of Irma's injection, tries to reach into the navel of the dream, but never quite reaches it. The navel around which this case circulates and never quite touches, let alone addresses, is the decision that sparked the spade of appeals and cross appeals in the first place, the then Home Secretary's Sajid Javid's deprivation of Samina Begum's British citizenship. That decision is at the core of the case yet none of the courts before whom the parties have been to date, the Special Immigration Appeals Commission (SIAC), the Court of Appeal, the Divisional Court, nor, now, the Supreme Court, have yet examined.

The Home Secretary's decision in February 2019 to strip Shamina Begum of citizenship is therefore the absent centre of these lengthy proceedings. Last month's 47 page judgment did not address that decision and, as the Supreme Court admitted, that decision is not likely to be addressed in the foreseeable future. Instead the judgment addressed successive appeals and cross-appeals to that decision and to the Home Secretary's refusal of Ms Begum's application for leave to enter to appeal the decision. The appeals, invoking statutory rights of appeal, applications for judicial review and human rights claims, were first heard by SIAC

which turned them down, then by the Court of Appeal and Divisional Court which allowed them in part, remitted other parts to SIAC for redetermination, and ordered the Home Secretary to grant Ms Begum leave to enter, before arriving at the Supreme Court. To compound the complexity, in relation to judicial review claims, SIAC sat as an Administrative Court, while in relation to the deprivation and refusal of leave to enter decisions, it sat as an immigration tribunal. The same pattern continued on appeal: a panel of three judges sat as a Divisional Court in relation to judicial review, while in relation to leave to enter, it sat as a Court of Appeal; even though the issues were heard concurrently and with the same judges sitting under different hats.

It is important to give a flavour of the procedural structures framing, and dominating, these proceedings and which served to avoid addressing the substantive issues that were never ultimately heard and, as things stand at moment, will not be heard any time soon. The grounds for appeal were varied: the appeal against deprivation of citizenship rested on sections of the 1981 British Nationality Act, sections of the 1997 Special Immigration Appeals Commission Act, articles of the European Convention of Human Rights (ECHR), sections of the Nationality, Immigration and Asylum Act 2002 and sections of the 1998 Human Rights Act. These provisions had been updated by subsequent legislation with the result that the scope for appeals had already been heavily restricted by Parliament. As the Supreme Court summarised commenting on the 2002 Act, 'Each of those provisions was either repealed or substantially amended by the 2014 Immigration Act, with the effect of restricting the scope of appeals and narrowing the powers of the Tribunal and SIAC.'[iii]

So far so complicated but that is not even half the story. Ms Begum's parallel application for leave to enter rested on a set of different provisions altogether: first on sections of the 1971 Immigration Act, while her appeal against refusal of leave to enter rested on applications for judicial review to SIAC sitting as an Administrative Court and then to the

Court of Appeal sitting as a Divisional Court; the latter necessitated a cross-reference to the Home Office's Memorandum to the 1997 and 2014 Acts laying out Home Office practice in such cases; that practice was of not depriving subjects of their citizenship if there was a risk of their rights under ECHR being violated.[iv]

As if these provisions and their multiple amendments weren't labyrinthine enough, the Supreme Court emphasised that the principles different appellate bodies had to employ varied depending on the body hearing the appeals, the body making the decisions, as well as the type of decision being made: 'Different principles may even apply to the same decision,' SC warned, 'where it has a number of aspects giving rise to different considerations, or where different statutory provisions are applicable.'[v]

Far from attempting to consolidate, clarify or simplify the plethora of intersecting grounds, the Supreme Court did what every patient wanting to avoid confronting their own role in the process would do; first they looked for guidance from caselaw, then, on finding that caselaw answered sometimes Yes and other times No to the question, it decided instead to add to the proliferating mix their own elucidations and novel distinctions.

We can pick up one of these threads to examine in detail for illustration: a pivotal element in the Court of Appeal's decision to allow Ms Begum's appeal was its interpretation of the scope of SIAC's appeal powers; the Court of Appeal reasoned that SIAC had misinterpreted its remit by limiting itself to *reviewing* the Secretary of State's decision on administrative law grounds; instead, the Court of Appeal held, SIAC's task was to put itself in the Secretary of State's shoes and make the decision anew. For that reason it remitted the case to SIAC for redetermination.

When the Home Secretary appealed, the Supreme Court acknowledged there was no explicit statutory provision on the scope of SIAC's appeal remit.[vi] When statute is silent courts look to precedent for assistance but in this case the Supreme Court admitted precedent was also

divided.[vii] Since both statute and precedent are not conclusive, perhaps the literal meaning of words might help? The Special Immigration Appeals Commission, after all, is called an *appeals*, not a *review* Commission. The Supreme Court also acknowledged that 'Section 2B of the 1997 Act confers a right of appeal, in distinction to sections 2C to 2E, which provide for "review."'[viii] It acknowledged too that as regards the human rights claim, SIAC is not only called to review but can decide for itself.[ix] How did this line of reasoning then lead to the opposite conclusion? The Supreme Court introduced a fresh distinction between reviewing statutory *duties* as opposed to reviewing administrative *policies* and decided that while courts can review statutory *duties*, their role in the exercise of administrative *policies* was restricted to examining whether the Secretary of State had reasonable grounds to reach the decision. Deprivation of citizenship decisions were in pursuit of administrative *policies* and therefore couldn't be impugned.[x]

Prompting the reader to ask, when is an appeal *not* an appeal, and when is a decision *not* a decision; as the Court also indicated, following the 2004 Immigration Act, 'deprivation decisions' are no longer 'immigration decisions.'[xi] The mental acrobatics required to avoid giving SIAC appellate powers didn't go unnoticed by the Court itself which at one stage felt compelled to negate its own reasoning: 'That is not to say that SIAC's jurisdiction is supervisory rather than appellate. Its jurisdiction is appellate, and references to a supervisory jurisdiction in this context are capable of being a source of confusion.'[xii] It seems, nevertheless, that not all appeals are equal, some appeals are more equal than others and rather than dissipating the confusion, the Supreme Court's own distinctions compounded it.

Psychoanalysis is very familiar with the patient who spends her expensive sessions circling around an issue, chatting to the analyst about this and that avoiding, and indeed *in order* to avoid, getting to the crux of the matter. Why would a patient waste her time and money to avoid saying what really matters. It is tempting to think the patient may be protecting herself,

she has something to hide, something she is ashamed of, or feels guilty about. Often, however, it's not herself, or not only herself, the patient is protecting but the Big Other she wants to hide behind: let's keep talking, keep looking busy, keep occupying ourselves with peripheral issues so that our own, and the Big Other's lack, don't show through. Paradoxically the Other the Supreme Court is protecting behind a wall of procedural niceties and subtleties is also the Other the Supreme Court conferred ultimate discretion to make decisions on national security and whose decisions, it concluded, can rarely be impugned.

The Supreme Court categorically, and in contrast to the Court of Appeal, declared that 'The role of the court is supervisory, not primary decision-maker.'[xiii] The Court of Appeal had acknowledged the national security implications of allowing leave to enter but determined that fairness and natural justice outweighed that risk.[xiv] The Supreme Court had curt rebukes at this point:

> The Court of Appeal's approach did not give the Secretary of State's assessment the respect which it should have received, given that it is the Secretary of State who has been charged by Parliament with responsibility for making such assessments, and who is democratically accountable to Parliament for the discharge of that responsibility.[xv]

The Supreme Court's self-restraint is not new as it was at pains to point out, citing Lord Hoffman on the separation of powers between executive and judiciary.[xvi] The irony is that it took just a handful of paragraphs to dismiss the Court of Appeal's reasoning when the bulk of the judgment, round 100 out of 137 paragraphs (that's nearly 40 minutes out of a 50 minute session) are spent examining and distinguishing varying grounds of appeal and previous caselaw before pronouncing, finally, its own view on the matter. As it turned out, that view was rather limited and can be summed up under the broad conclusion, 'This is a difficult situation, there is no right answer, so I'm afraid there's nothing we can do.' In the Supreme Court's own words, 'The constituent elements of what is a fair process are not absolute or fixed

but do not provide an answer what to do if a fair procedure is impossible.'[xvii] Given the same separation of powers celebrated by invoking Lord Hoffman allocates the administration of justice to the *judiciary,* it seems an abdication of the Supreme Court's role to commend the separation of powers and then, *as judiciary*, resolve to do, nothing. Nothing is indeed what the outcome is for the foreseeable future, as the appeals against the deprivation decision and refusal of leave to enter, remain in indefinite limbo.

It's worth recalling that this state of limbo is exactly what the Court of Appeal deemed unacceptable: 'simply to stay her appeal indefinitely' Lord Justice Flaux said, 'is wrong in principle. It would in effect render her appeal against an executive decision to deprive her of her British nationality meaningless for an unlimited period of time.'[xviii] The Supreme Court recognised the impasse and tried to wish it away: 'The fact that the appeal process is a safeguard against unfairness does not mean that a decision which cannot be the subject of an effective appeal is unfair.'[xix] Unfortunately tautologous reasoning achieves precisely what it sets out to avoid: it underlines, rather than conceals, what it tried to evade. In this case it reminds the reader of SIAC's unequivocal finding that an appeal in which the appellant could not participate would not be a fair hearing.[xx]

Freud's recommendation to analysts to maintain an 'evenly suspended attention' to everything they hear was designed to avoid an important danger: that of focusing on parts of the patient's discourse and run the risk of making one's own selection from the material: if the analyst makes her own selection from the plethora of the patient's associations, the analyst 'is in danger of never finding anything but what he already knows.'[xxi] If we pay even attention to all 137 paragraphs of SC's judgment, what sticks out, perhaps like a bone in the throat, in this sea of microscopic examination and dissection of procedures, statutes and caselaw? Is there a sudden change of tone that indicates something significant, if unacknowledged, is intervening? The reader here bears as much responsibility as the writer in identifying aberrant asides, and I

will mention just three that stuck out for me. First, the rather gratuitous ticking off of a first instance judge on whose judgment the Court of Appeal had relied and with whom the Supreme Court disagreed; there's an aside almost suggesting, we know his type, he has form, he's the type who doesn't listen to the House of Lords.[xxii] Another factor, Ms Begum's leaving Britain of her own accord didn't fail not to get mentioned in earlier appeals, despite counsel's protest that her voluntary departure bore no relevance to whether her appeal would be fair or not. As the Court of Appeal commented,

> 'the key justification for going ahead with the deprivation decision was that she had been out of the UK for some years of her own choice. He noted that this was part of the reasoning of SIAC and the Secretary of State mentioned the point in one form or another in seven places in her skeleton argument.'[xxiii]

Finally, a stark line from a previous case manages to appear several times in the judgment, despite its tone of alarming finality in what is supposed to be an investigation into whether an appellant should appear in person: 'no amount of conditions, or careful watching of a person who is in the United Kingdom, can achieve the assurance of knowing that they are outside the United Kingdom permanently.'[xxiv]

The Supreme Court declaring SIAC's appeal powers narrower than deemed by the Court of Appeal means executive decisions can only be challenged under administrative law grounds, that is, if the Home Secretary acted in a way no reasonable Home Secretary would have acted. The limited grounds on which Courts can review such decisions don't quite make Home Secretaries into Freud's father of the primal horde but in this case, the result is not far off: Home Secretaries are bound by (some) rules, but we won't know whether they followed them because there is no prospect of effectively appealing their decision. The Supreme Court abdicating its responsibility of finding a way out of the impasse means the decision remains unappealable even when Parliament, following rebuke from Strasbourg, specifically provided

for an appeal: SC reminds us SIAC was created precisely in response to criticism that there must be a mechanism for appeals from decisions of the Home Secretary.[xxv] That reminder however doesn't prompt a different conclusion: 'Parliament has conferred a right of appeal, Parliament hasn't stipulated what to do when the right of appeal cannot be effectively exercised.'[xxvi] This abdication of responsibility is particularly spectacular given the highest Court charged with the administration of justice asks itself what it should do and concludes that the thing to do is to do nothing; even when the Court admits that the likely consequence is not that the disadvantaged party wins, but that the disadvantaged party loses.[xxvii]

As disconcerting as the Supreme Court's evasion of the issues it did address, are the implications of issues it did *not* address; conspicuously unargued before the Supreme Court and the Court of Appeal, was SIAC's finding that the decision to deprive Ms Begum of British nationality did not render her stateless. This finding was not challenged by Ms Begum's team, despite the ripple effects it could have on subsequent decisions: in particular although it was claimed that British citizenship (or lack of) was not likely to make any difference to an individual's treatment in Syria, there was arguably a risk of treatment contrary to ECHR should they be moved to Bangladesh or Iraq. That risk was deemed to be remote and therefore deprivation of citizenship was not deemed contrary to Home Office practice. The unspoken implication, however, is that the nationality of British citizens whose parents were born abroad is somehow different from, or conditional, to that of other British nationals, confirming, that is, that the children of immigrants do indeed need to (continue to) be good immigrants.

A good analyst of course would never share these thoughts with their patient, at least not openly. A cough, a silence, a repetition of the patient's words might be used to encourage the patient to see, and to hear for themselves, the significance of what they just said. I mention a few lines an analyst might repeat to the Supreme Court in this case, perhaps raising her tone at some words, to enable it listen back to itself. First,

'*The fact that the appeal process is a safeguard against unfairness does not mean that a decision which cannot be the subject of an effective appeal is unfair.*'[xxviii]

Then,

consider how such a body should reasonably respond to a problem of that kind, *having regard to its responsibility for the administration of justice*.[xxix]

And lastly:

the risk of transfer to Iraq or Bangladesh, and possible mistreatment there, was in any event irrelevant[xxx]

Once the analyst has repeated these lines back, she would sit quietly, wait for the analysand to take in what they just said, and whether they may be prompted to do something about it. This technique, Freud suggests, is particularly essential 'with patients who practise the art of sheering off into intellectual discussion during their treatment, who speculate a great deal and often very wisely about their condition and in that way avoid doing anything to overcome it.'[xxxi]

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[i] *R (on the application of Begum) (Appellant) v Special Immigration Appeals* Commission (Respondent) *R (on the application of Begum) (Respondent) v Secretary of State for the Home Department* (Appellant) *Begum (Respondent) v Secretary of State for the Home Department* (Appellant) https://www.supremecourt.uk/cases/docs/uksc-2020-0156-judgment.pdf last accessed 10 March 2021.

[ii] 'Recommendations to Physicians Practising Psychoanalysis' *The Standard Edition of the Complete Works of Sigmund Freud* Vol. XII (1911-1913) ed. James Strachey (London: Vintage, 2001), 111.

[iii] *ibid* at [36].

[iv] *ibid* at [21], [122].

[v] *ibid* at [69].

[vi] *ibid* at [40]: 'There does not appear ever to have been any statutory provision relating to the grounds on which an appeal under section 2B may be brought, the matters to be considered, or how the appeal is to be determined.'

[vii] *ibid* at [46]: 'It is apparent from them that the principles to be applied by an appellate body, and the powers available to it, are by no means uniform. At one extreme, some authorities, concerned with licensing appeals to courts of summary jurisdiction, have held that such appeals should proceed as re-hearings, reflecting the terms of the relevant legislation and the procedures followed by such courts. Other authorities, concerned with appeals to the Court of Appeal against discretionary decisions by lower courts, have held that the scope of the appellate jurisdiction was much more limited. Modern authorities concerned with the scope of the jurisdiction of tribunals hearing appeals against discretionary decisions by administrative decision-makers have adopted varying approaches, reflecting the nature of the decision appealed against and the relevant statutory provisions.'

[viii] *ibid* at [65].

[ix] *ibid* at [37]: 'It has been clear since the decision in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 that SIAC's task, in considering an appeal on that ground, is not a secondary, reviewing, function

dependent on establishing that the Secretary of State misdirected himself or acted irrationally, but that SIAC must decide for itself whether the impugned decision is lawful.'

[x] *ibid* at [120-121].

[xi] *ibid* at [38].

[xii] *ibid* at [69]: 'the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. As has been explained, they depend upon the nature of the decision under appeal and the relevant statutory provisions. Different principles may even apply to the same decision, where it has a number of aspects giving rise to different considerations, or where different statutory provisions are applicable.'

[xiii] *ibid* at [126].

[xiv] *Shamima Begum v Special Immigration Appeals Commission and Secretary of State for the Home Department* https://www.judiciary.uk/wp-content/uploads/2020/07/WP-Begum-Judgment-NCN.pdf last accessed 7 March 2021, para 121: 'Notwithstanding the national security concerns about Ms Begum, I have reached the firm conclusion that given that 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, on the facts of this case, outweigh the national security concerns, so that the LTE appeals should be allowed.'

[xv] Above n 1 at [134].

[xvi] *Secretary of State For The Home Department v Rehman,* [2001] UKHL 47, Lord Hoffman, para 50, 'It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.' quoted at para 56 and at para 62: 'If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.' Quoted above n 1 at [62].

[xvii] i*bid* [95].

[xviii] Above n 16 at [117].

[xix] Above n 1 at [88].

[xx] It was this finding that the Court of Appeal had relied on when it concluded that leave to enter had to be granted. Note the fact that no effective appeal could take place did not entitle Ms Begum to *win* her appeal, the deprivation decision continued to stand, but it did entitle her to the right to enter so that her appeal could be heard.

[xxi] Above n 2 at [112].

[xxii] *Ibid* at [76] 'Mitting J stated that "[w]e do not accept this limitation upon our decision-making power". Mitting J's reluctance to accept guidance from the House of Lords is also evident in another of his judgments which was cited by counsel for Ms Begum. In *Zatuliveter v Secretary of State for the Home Department* (Appeal No SC/103/2010) (unreported) given 29 November 2011, para 8, he declined to follow the guidance given in *Rehman* as to the weight to be attached to the Secretary of State's assessment, on the basis that "we believe that we are able to, and do, give more careful and detailed scrutiny to the risk posed by an individual appellant to national security than the Secretary of State".'

[xxiii] Above n 16 at [58].

[xxiv] *ibid* at [80]; above n 1 at [109].

[xxv] Above n 1 at [31]. In *Chahal v United Kingdom* (1996) 23 EHRR 413 the European Court of Human Rights found that Britain did not abide by its human rights obligations in not allowing appeals from decisions of the Home Secretary where those decisions were made on the grounds of national security.

[xxvi] Above n 1 at [89].

[xxvii] *ibid* at [90].

[xxviii] Above n 1 at [88].

[xxix] *Ibid* [89]

[xxx] *Ibid* [104]

[xxxi] Above n 2, 119.