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Like David Hicks, the next 'Shamima Begum' should issue a Writ for Habeas Corpus.

By Felicity Gerry QC and Eamonn Kelly[1]

Last month we appeared for JUSTICE, intervening in the UK Supreme Court decision upon the cross appeals for Shamima Begum, against deprivation of her citizenship and leave to enter the UK to challenge same.

The Supreme Court held that the Ms Begum cannot presently return to the UK to pursue her appeal. It considered that national security concerns raised by the Secretary of State outweighed Ms Begum's right to a fair and effective hearing. It further held that there was no evidence as to whether these national security concerns could be managed upon Ms Begum's arrival in the UK. As such, 'significant weight' was afforded to the Secretary of State's assessment of the national security concerns. Further, when an individual's right to a fair hearing comes into conflict with the requirements of national security, their Lordships held that the right to a fair hearing will not necessarily prevail – it does not 'trump' all other considerations. The result is that Ms Begum's appeal against the deprivation of her citizenship will be stayed until she can play an effective part in it, without the safety of the public being compromised. This was acknowledged by the President of the Supreme Court as "not a perfect solution".

What does this mean for other citizens currently held in Syrian camps who do not have Ms Begum profile, particularly women and children? It is important to note that their Lordships specifically gave 'careful consideration' to the constitutional issues raised by the intervention by JUSTICE, in which we raised questions around the scope of the exercise of prerogative powers to protect nationals. These issues, which are constitutional in nature, remain open for future cases.

In the UK, these issues were last substantively tested in the case of Lord Haw Haw, a Nazi propagandist who was returned to the Old Bailey to be tried for treason. The only issue in his case was whether he was a British national. It was held that he had sufficient "allegiance" to be tried because he had possession of an out of date passport, even though he was born and brought up elsewhere. It was a very thin basis for "belonging", far less than that of some British women and children currently held in Syrian camps.

In Australia, the law in this area is far more developed, with the most recent relevant decision being in *Love v Commonwealth* [2020] HCA 3 which provides some precedent for those who are assessed as "belonging" to exercise a right to return, not through policy arguments but

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pursuant to the ancient common law of allegiance. This, in our view, leaves open the potential for a different cause of action by excluded citizens, particularly trafficked women and children.

We have long argued that, rather than running policy arguments, the remedy is in a Writ for Habeas Corpus. In Australia such approach was, at least partly, tested by David Hicks who was indeed repatriated from Guantanamo Bay. In the Begum hearing, the questions of Lord Reed, Lord Sale and Lord Hodge, focussed on the nature and scope of the Court's jurisdiction on Ms Begum's appeal. Although the Court chose not to decide on the constitutional grounds argued by the JUSTICE intervention — perhaps because those arguments were not run by the parties —these issues remain live in the UK. If citizens 'belong' they have a right to return, even if they are to be prosecuted for foreign fighter offences. This could well "trump" the national security policy issues raised by the state in Begum.

What is really in issue is Prerogative power, with respect to the right of a national who retains allegiance, to seek protection from their nation state; not through procedural rights but by due process of law. This goes to the essence of the Rule of Law and the Separation of Powers: the courts protecting subjects from excesses of state power. That is not merely the application of procedural fairness principles, but the recognition of common law rights that have not, as yet, been displaced in the UK or other common law jurisdictions. A decision by the Executive to refuse or frustrate the right of a subject to enter is, we suggest, amenable to judicial review, whereupon "national security risks" would not be relevant considerations or matters affecting reasonableness or rationality. This is because the prerogative power preserves a constitutional right under the common law: the protection of the rule of law, to a *subject* that the state seeks to deprive of the right of subjecthood (and with that, the right of abode). Essentially, the court would not be giving 'leave to enter' but, rather, exercising a prerogative power to prevent the Executive from refusing re-entry, in circumstances in which there was no judicial finding that allegiance had been reciprocally divested. The removal of *statutory* citizenship makes re-entry difficult but does not remove the common law right, for all subjects, of re-entry (if only to access the Courts to challenge such refusal of entry).

In our view, a subject of the UK retains this constitutional right to re-entry. It makes sense, because the UK Supreme Court ordered a stay rather than making a final decision. Were Ms Begum to issue a writ, her subjecthood would need to be determined, first. She (and others in her position) would be entitled to the reciprocal rights and duties that arise as a consequence of allegiance, including the protection of law. If subjecthood is lost or removed, this must be in a non-arbitrary way: namely, through a fair hearing. A central issue for a fact finder in such situation is, therefore, not an assessment of risk to national security but rather whether there has been a divestiture of allegiance, including by virtue of any 'alignment' with another state or entity. No such determination has been made in Ms Begum's case.

Such due process allows for the protection of *all* subjects, protects the nation from external threats, and identifies those persons for whom there is no duty. It also informs a decision as to whether a removal of statutory citizenship has been lawful. In addition, the UK, has strong policy in the context of trafficked persons and exploited children. These are live issues for the women and children in Syrian camps. It is our view that there would be few, if any, circumstances in which a Court would find that a divestiture of allegiance had occurred where the subject is a trafficked person or exploited child. Such a finding would require compelling probative evidence that, despite the involuntary nature of such person's circumstances they, nonetheless, may be found to have exercised the high level of agency required to establish a renunciation of allegiance. In practical terms, it is difficult to imagine a circumstance in which

such argument could be made out.

In the Begum case there was a fundamental error in challenging national security *at all*. What should have occurred, first, was a hearing on whether Ms Begum retained *allegiance*. This is because, even after the she was deprived of statutory citizenship, she retained her common law right of re-entry. A refusal to allow any national (or person who 'belongs') amounts to a frustration of constitutional rights to re-entry which should be considered before the removal of any statutory citizenship. The real remedy is through the prerogative writ of *habeas corpus*. As long as a subject's allegiance remains untested by the Courts, the subject retains the right of access to the Courts and repatriation requires "facilitation" by the Executive.

The duty of protection owed by State to subject is fundamental to the nation state. Deprivation of citizenship and, consequentially, refusal of leave to enter are not limited to consideration of the statutory powers of the state, on the one hand, and statutory rights of the citizen, on the other. Instead, such decisions about deprivation of the right of abode and entry are grounded in ancient common law principles that reciprocally bind subject and state and may only — under separation of powers principles — be severed by way of judicial, rather than executive or legislative, action. Whilst the Court in Begum did not determine the case on the basis of the ancient common law principles of allegiance between state and subject, raised in JUSTICE's submissions, it also did not reject the existence of such principles. In light of the Court's ruling, those submissions now provide a clear and potent further legal option for Ms Begum and the many other UK women and children who remain stranded in Syrian refugee camps.

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