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To cite this article: Chris Monaghan (2021): 'The Court of Appeal ... Appears to Have Overlooked the Limitations to its Competence, Both Institutional and Constitutional, to Decide Questions of National Security': Shamima Begum, the Supreme Court and the Relationship Between the Judiciary and the Executive, *Judicial Review*, DOI: [10.1080/10854681.2021.1964870](https://doi.org/10.1080/10854681.2021.1964870)

To link to this article: <https://doi.org/10.1080/10854681.2021.1964870>



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Published online: 09 Sep 2021.



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## 'The Court of Appeal ... Appears to Have Overlooked the Limitations to its Competence, Both Institutional and Constitutional, to Decide Questions of National Security': Shamima Begum, the Supreme Court and the Relationship Between the Judiciary and the Executive

Chris Monaghan

Principal Lecturer in Law, University of Worcester

1. This article considers the recent decision of the Supreme Court in *R (Begum) v Special Immigration Appeals Commission*.<sup>1</sup>
2. Judicial decisions are prone to being controversial. Sometimes the most ground-breaking decisions attract vocal criticism from either the left, or right, of the political and social spectrum. On matters of constitutional importance, the Supreme Court has certainly been proactive in its reinforcement of existing legal constitutional principles in *R (Miller) v Secretary of State for Exiting the European Union (Miller No 1)*<sup>2</sup> and in giving legal protection to a principle of the political constitution in *R (Miller) v Prime Minister (Miller No 2)*.<sup>3</sup> Needless to say, both decisions were condemned or severely criticised by some sections of the press, political establishment and the academy.<sup>4</sup> When a decision concerns political subjects as divisive as Brexit it is not unsurprising that the courts and individual members of the judiciary risk becoming the target for criticism. The late Professor JAG Griffith warned of the dangers of the judiciary;<sup>5</sup> this mantle has been picked up by Policy Exchange's Judicial Power Project, which unsurprisingly warns against the dangers of judicial power.<sup>6</sup>

<sup>1</sup>[2021] UKSC 7 [2021] AC 765.

<sup>2</sup>[2017] UKSC 5 [2018] AC 61.

<sup>3</sup>[2019] UKSC 41 [2020] AC 373.

<sup>4</sup>See for example the *Daily Mail's* criticism of the High Court's decision in its 'Enemies of the People' headline of 3 November 2016 <<https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>> accessed 15 August 2021. For a useful commentary and informed discussion see J Rozenberg, *Enemies of the People? How Judges Shape Society* (Bristol University Press 2020). See also D Nicol, 'Supreme Court Against the People', UK Const L Blog (25 September 2019) <<https://ukconstitutionallaw.org/>> accessed 15 August 2021. Nicol is particularly scathing of the Supreme Court's decision in *Miller (No 2)*: 'the Court acted in a partisan fashion as if it were the legal wing of Remain, and that as a result the judiciary now needs to have its wings clipped ... In its efforts to frustrate the will of the electorate the Supreme Court has taken the constitution away from the people: the people now need to find representatives who will legislate to take the constitution away from the Court.'

<sup>5</sup>JAG Griffith, *The Politics of the Judiciary* (5th edn, Fontana Press 2010).

<sup>6</sup>See: <<https://judicialpowerproject.org.uk>> accessed 15 August 2021.

3. Whether one subscribes to the philosophy of the Judicial Power Project is no doubt reflected in how one views the role of the judiciary within the UK's constitutional system. Exercises such as the Judicial Power Project's 50 Problematic Cases, whilst no doubt successfully catching the attention of academia and the profession, underpin a range of concerns that have subsequently been given credence by the government's agenda to review the operation of the Human Rights Act 1998 and judicial review.<sup>7</sup> It is arguable that such concerns are for the most part exaggerated and betray the tensions between legal and political constitutionalism.
4. Then there are those judicial decisions which, despite concerning important constitutional considerations and matters of institutional competence, will involve criticism based on the perceived fairness of the outcome and draw upon how society wishes to see itself. Given the particular circumstances of the case, it is unsurprising that the Supreme Court's decision in *R (Begum) v Special Immigration Appeals Commission* has proved to be controversial. It is arguable that anyone reading this article will perhaps have formed their own opinion about the decision and the issues that it raises. The decision has generated criticism from both the left and right of the political spectrum. Indeed, the deprivation of citizenship in circumstances as unique as Shamima Begum's will generate a diverse spectrum of opinion.
5. Writing in the *Daily Mail* Amanda Platell is one such critic of the decision.<sup>8</sup> Platell, the former press secretary to William Hague, the then leader of the Conservative Party, is clear that Begum ought to be allowed to return to the UK:

Signing up to a barbaric death cult was more than a mistake: it was a crime. Begum crossed all barriers of decency ... And yet forgiveness must remain the core of our Christian culture – especially for children. She is British whether or not she has a passport ... The judges are wrong. Shamima must come home to face stiff British justice. How else can we be a nation that believes in redemption?<sup>9</sup>

6. The language used is potentially divisive and underpinned by a reference to a Christian culture, but nevertheless Platell believes that the Supreme Court's decision was incorrect. *The Guardian's* editorial was that '[Begum] ought to have her day in court'. Critical of the Supreme Court and the then Home Secretary's decision, *The Guardian* argues that:

[w]hile the government's overriding objective appears to have been avoiding Ms Begum's return, her unjust treatment is the greater threat. For decades, community cohesion was a goal of public policy. To be united as a community, with a working social contract, people need to feel a sense of togetherness in spite of their differences.<sup>10</sup>

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<sup>7</sup>See: <<http://judicialpowerproject.org.uk/50-problematic-cases/>> accessed 15 August 2021.

<sup>8</sup>A Platell, 'ISIS bride Shamima Begum's crimes were sickening – but she's British all the same' *Daily Mail* (27 February 2021) <<https://www.dailymail.co.uk/news/article-9305891/PLATELLS-PEOPLE-ISIS-bride-Shamima-Begums-crimes-sickening-shes-British-same.html>> accessed 15 August 2021.

<sup>9</sup>Ibid.

<sup>10</sup>'The Guardian view on Shamima Begum: she ought to have her day in court' *The Guardian* (26 February 2021) <<https://www.theguardian.com/commentisfree/2021/feb/26/the-guardian-view-on-shamima-begum-she-ought-to-have-her-day-in-court>> accessed 15 August 2021.

7. Before considering the Supreme Court's decision it is first necessary to consider the factual background. Ms Begum held UK and Bangladeshi citizenship, by virtue of being born in the UK and having family connections to Bangladesh. Along with two other female school children, Ms Begum travelled to Syria aged 15 and joined the Islamic State of Iraq and the Levant ('ISIS'). Ms Begum married an ISIS fighter, with whom she then had three children. Subsequently Ms Begum fell under the control of the Syrian Democratic Forces and was held in an internally displaced persons camp in Syria. The Security Service regarded anyone who travelled to Syria to join ISIS, even if not in a fighting capacity, as a risk to national security. This was because they had supported ISIS ideology and understood the nature of the actions carried out by the organisation. The Security Service held that anyone returning from Syria in these circumstances was a risk to national security for five reasons, including being involved in, or enabling, ISIS attacks and radicalising UK nationals.<sup>11</sup> In March 2018 the Security Services had advised the Home Secretary that depriving Ms Begum of her citizenship would not result in 'a real risk of mistreatment' that would breach either art 2 or art 3 of the European Convention on Human Rights.<sup>12</sup>
8. Sajid Javid MP, the then Home Secretary, had written to Ms Begum on 19 February 2019 informing her that he would make an order pursuant to his power under s 40 (5) of the British Nationality Act 1981 to deprive Ms Begum of her British Citizenship. The Home Secretary informed Ms Begum that the reason was that:

you are a British/Bangladeshi dual national who it is assessed has previously travelled to Syria and aligned with ISIL. It is assessed that your return to the UK would present a risk to the national security of the United Kingdom. In accord with section 40(4) of the British Nationality Act 1981, I am satisfied that such an order will not make you stateless.<sup>13</sup>

The order was then made on 19 February 2019 to deprive Ms Begum of her UK citizenship.

9. In response, Ms Begum made an application to the Home Secretary on 3 May 2019 for leave to enter the UK, partly on the basis of her human rights.<sup>14</sup> Ms Begum wished to use the leave to enter application to allow her to appeal from the deprivation decision from within the UK. The Home Secretary rejected the application, for reasons including that Ms Begum's human rights claim did not fall within the application of the European Convention on Human Rights, and that allowing her to return was not in the interests of national security or the public interest.<sup>15</sup> Ms Begum then appealed to the Special Immigration Appeals Commission and made an application for judicial review.<sup>16</sup>

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<sup>11</sup>*R (Begum) v Special Immigration Appeals Commission* (n 1) [16]–[20].

<sup>12</sup>*ibid* [20]–[22].

<sup>13</sup>*ibid* [1].

<sup>14</sup>*ibid* [3].

<sup>15</sup>*ibid* [4]–[5].

<sup>16</sup>*ibid* [6].

10. The Special Immigration Appeals Commission decided to hear both the original deprivation of citizenship appeal and the leave to enter appeal together. The Special Immigration Appeals Commission dismissed the deprivation appeal, *inter alia* finding that due to her Bangladeshi nationality, she was not stateless, and also dismissed her leave to enter appeal despite holding that her appeal against the Home Secretary's decision would not be effective from Syria.<sup>17</sup> The judicial review application was also dismissed by the Administrative Court.<sup>18</sup>
11. Subsequently Ms Begum appealed to the Divisional Court and to the Court of Appeal against the Special Immigration Appeals Commission and Administrative Court's decisions in relation to her application for leave to enter the UK.<sup>19</sup> Both the Divisional Court and the Court of Appeal were comprised of Flaux LJ, King LJ and Singh LJ. The Court of Appeal allowed the appeal against the decisions of the Special Immigration Appeals Commission and Administrative Court regarding the leave to enter decision. The Court of Appeal ordered that Ms Begum should have leave to enter the UK. The Divisional Court held that in part the Special Immigration Appeals Commission's decision relating to the deprivation decision could be judicially reviewed.
12. The decisions of the Divisional Court and Court of Appeal were appealed by Priti Patel MP, the current Home Secretary.
13. The first appeal related to the decision of the Divisional Court to allow the Special Immigration Appeals Commission's decision in relation to the deprivation decision and the Home Secretary's policy. Ms Begum cross-appealed. The second appeal related to the Court of Appeal's decision to allow Ms Begum to appeal the Special Immigration Appeals Commission's decision that had dismissed her leave to enter appeal. It also related to the order that Ms Begum should now have leave to enter the UK and argued that the Court of Appeal had erred by holding that this was required in order for her to 'have a fair and effective hearing' when she appealed the deprivation decision. The third appeal related to the Court of Appeal's decision that Ms Begum should be able to appeal the Administrative Court's decision.<sup>20</sup>
14. In the Supreme Court the judgment was delivered by Lord Reed, President of the Supreme Court, on behalf of Lord Hodge, Lady Black, Lord Lloyd-Jones and Lord Sales. The Supreme Court first considered the jurisdiction and powers of the Special Immigration Appeals Commission. The Special Immigration Appeals Commission had approached the task before it on the basis that it had to decide whether the Home Secretary's decision under s 2 of the Special Immigration Appeals Commission Act 1997 to refuse the leave to enter application breached the Home Secretary's

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<sup>17</sup>*Begum v Secretary of State for the Home Department* (Appeal No SC/163/2019), [2020] HRLR 7.

<sup>18</sup>*R (Begum) v Secretary of State for the Home Department* [2020] EWHC 74 (Admin).

<sup>19</sup>*R (Begum) v Special Immigration Appeals Commission* [2020] EWCA Civ 918, [2020] 1 WLR 4267.

<sup>20</sup>*R (Begum) v Special Immigration Appeals Commission* (n 1) [13].

duties under s 6 of the Human Rights Act 1998, and by deciding the question of the initial deprivation decision under s 2B of the Special Immigration Appeals Commission Act 1997 not on its merits but ‘by applying the principles of judicial review’.<sup>21</sup> This approach had been criticised by the Court of Appeal, with Flaux LJ holding that both decisions needed to be decided on their merits:

as such it is for [the Special Immigration Appeals Commission] to decide for itself whether the decision of the Secretary of State was justified on the basis of all the evidence before it, not simply determine whether the decision ... was a reasonable and rationale one on the material before him as in a claim for judicial review.<sup>22</sup>

Lord Reed noted that ‘[t]he jurisdiction and powers of [the Special Immigration Appeals Commission] in appeals under sections 2 and 2B are a matter of some complexity’.<sup>23</sup>

15. Lord Reed considered the case law relating to appeals to the Special Immigration Appeals Commission under s 2B of the Special Immigration Appeals Commission Act 1997. His Lordship noted that ‘[t]here 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’.<sup>24</sup> Lord Reed then considered the arguments of counsel for Ms Begum and Liberty that related to the jurisdiction of the Special Immigration Appeals Commission under s 2B. Counsel had made reference to the decision of the Upper Tribunal in *Delisallisi v Secretary of State for the Home Department*,<sup>25</sup> which had been clear that where a right of appeal existed under statute, the tribunal, unless statute provides otherwise, is required ‘to exercise afresh any judgement or discretion employed in reaching the decision against which the appeal is brought’.<sup>26</sup> Lord Reed noted that a different decision as to the tribunal’s discretion had been reached by Mr Ockelton when chairing the Upper Tribunal in *Prizada (Deprivation of Citizenship: General Principles)*,<sup>27</sup> however, this was subsequently criticised and *Delisallisi* was preferred in *BA (Deprivation of Citizenship: Appeals)*.<sup>28</sup>
16. Lord Reed was clear that from the authorities concerning ‘the scope of appellate jurisdiction’ the principles and powers ‘are by no means uniform’.<sup>29</sup> His Lordship considered the decisions relied upon in *Delisallisi* as a basis for reaching its decision as to the discretion available.
17. Lord Reed then referred to the House of Lords decision in *Secretary of State for the Home Department v Rehman*.<sup>30</sup> This decision related to an appeal under s 2 of the

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<sup>21</sup>ibid [29]; *Begum v Secretary of State for the Home Department* (n 17) [138] (Elisabeth Laing J).

<sup>22</sup>*R (Begum) v Special Immigration Appeals Commission* (n 18) [123] (Flaux LJ).

<sup>23</sup>*R (Begum) v Special Immigration Appeals Commission* (n 1) [30].

<sup>24</sup>ibid [40].

<sup>25</sup>[2013] UKUT 439 (IAC).

<sup>26</sup>ibid [31] (Lane J).

<sup>27</sup>[2017] UKUT 196 (IAC), [2017] Imm AR 1257.

<sup>28</sup>[2018] UKUT 85 (IAC), [2018] Imm AR 807.

<sup>29</sup>*R (Begum) v Special Immigration Appeals Commission* (n 1) [46].

<sup>30</sup>[2001] UKHL 47, [2003] 1 AC 153.

Special Immigration Appeals Commission Act 1997 to the Special Immigration Appeals Commission. At the time, appeals under s 2 had not been restricted to human rights grounds. In *Rehman* the Home Secretary had relied upon national security when taking the decision to deport Mr Rehman. The Special Immigration Appeals Commission had decided that:

it was entitled to form its own view as to what was capable of being regarded as a threat to national security, and its own view of whether the allegations against Mr Rehman had been proved differing in both respects from the view of the Secretary of State.<sup>31</sup>

18. Upon appeal the Court of Appeal reversed the decision of the Special Immigration Appeals Commission. The Court of Appeal's decision was upheld by the House of Lords. In *Rehman* Lord Slynn had been clear that when reaching his decision, the Home Secretary 'is not merely finding facts but forming an executive judgment or assessment',<sup>32</sup> that 'due weight' needed to be given to his 'assessment and conclusions ... [as the Home Secretary was] undoubtedly in the best position to judge what national security requires'.<sup>33</sup>
19. In *Rehman* Lord Hoffmann was of the opinion that whilst the Special Immigration Appeals Commission had jurisdiction, it had not considered that the powers of the judicial branch were limited.<sup>34</sup> The rationale for this limitation was the separation of powers and a recognition of relative institutional competence. The question of whether Mr Rehman was a threat to national security was an executive decision, not one for the courts to decide. This was the position under the constitution. Inherent in this was 'in matters of judgment and evaluation of evidence, to show proper deference to the primary decision-maker'.<sup>35</sup> This was justified by democratic accountability of the executive and the expertise of the executive and its advisors when reaching such a decision.<sup>36</sup> However, Lord Hoffmann was clear that the Special Immigration Appeals Commission could find that there was not an evidential basis to justify the decision reached (but that this did not require a standard of proof) that the decision could be held to be unreasonable, or it could be held to be contrary to art 3 of the ECHR.<sup>37</sup>
20. Therefore, in the present appeal Lord Reed observed that the Supreme Court needed to consider the 'functions and powers' of the Special Immigration Appeals Commission and 'to examine the nature of the decision' to deprive Ms Begum of her citizenship.<sup>38</sup> His Lordship was clear that s 2B related to an appeal and not just a review of the decision that would have been limited by principles of judicial review.<sup>39</sup> Lord

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<sup>31</sup>*R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7 [52].

<sup>32</sup>*Rehman* (n 30) [22] (Lord Slynn).

<sup>33</sup>*ibid* [26] (Lord Slynn).

<sup>34</sup>*ibid* [49] Lord Hoffmann.

<sup>35</sup>*ibid*.

<sup>36</sup>*ibid* [62] (Lord Hoffmann).

<sup>37</sup>*ibid* [54] (Lord Hoffmann).

<sup>38</sup>*R (Begum) v Special Immigration Appeals Commission* (n 1) [63].

<sup>39</sup>*ibid* [65].

Reed considered the decision to deprive Ms Begum of her citizenship under s 40(2) of the British Nationality Act 1981 and noted that only the Home Secretary had been provided with discretion to make such a decision and not the Special Immigration Appeals Commission.<sup>40</sup> However, the Special Immigration Appeals Commission could review the Home Secretary's use of his discretion. Importantly, statute required that the discretion that was exercised was conducive to the public good, which Lord Reed was very clear, did not mean that the Special Immigration Appeals Commission needed to be satisfied that it was conducive for the public good. Therefore, the Home Secretary's decision could be challenged, but his discretion and decision-making ability could not be undertaken by the Special Immigration Appeals Commission. The ability to review the decision was limited to judicial review, such as questions of reasonableness or irrelevant considerations.<sup>41</sup> The Special Immigration Appeals Commission could make its own assessment as to whether there had been a breach of s 6 of the Human Rights Act 1998.<sup>42</sup>

21. Lord Reed was clear that the Special Immigration Appeals Commission, when determining whether the Home Secretary's decision was reasonable, or whether the Home Secretary had taken into account an irrelevant consideration must take into account the fact that the Home Secretary's underlying discretion needed to comply with the statutory requirement that any decision made must be 'conducive to the public good', but that not all considerations will be justiciable. Making reference to *Rehman*, Lord Reed was again clear that the Home Secretary's 'assessment should be accorded appropriate respect, for reasons both of institutional capacity ... and democratic accountability'.<sup>43</sup> The Supreme Court's starting position as to the jurisdiction and powers of the Special Immigration Appeals Commission differed to that reached by both the Divisional Court and Court of Appeal. Lord Reed indicated that this was due to reference not being made to *Rehman*.
22. Lord Reed was critical of several authorities relied upon by the Court of Appeal. In *Al-Jedda v Secretary of State for the Home Department*<sup>44</sup> Mitting J held that the Special Immigration Appeals Commission's powers to consider the decision were not narrower under s 2B than they were under s 2. Lord Reed disagreed with this approach, being unable to accept that the merits of the decision could be reviewed.<sup>45</sup> In *Al-Jedda* Mitting J had declined to accept the limitations set out by Lord Hoffmann in *Rehman* and believed that the Special Immigration Appeals Commission was better placed than the Home Secretary to decide whether the individual posed a risk.<sup>46</sup> The reliance on Lord Wilson's judgment in *Al-Jedda v Secretary of State for the*

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<sup>40</sup>ibid [67].

<sup>41</sup>ibid [68].

<sup>42</sup>ibid [69].

<sup>43</sup>ibid [70].

<sup>44</sup>(Appeal No SC/66/2008).

<sup>45</sup>*R (Begum) v Special Immigration Appeals Commission* (n 1) [73].

<sup>46</sup>*Al-Jedda v Secretary of State for the Home Department* (n 44) [8] (Mitting J).



*Home Department*<sup>47</sup> which had been used to suggest that the Special Immigration Appeals Commission could decide the merits rather than just having to be satisfied by the decision, was criticised.<sup>48</sup> Finally, reference had been made to the Supreme Court's decision in *Pham v Secretary of State for the Home Department*.<sup>49</sup> However, Lord Reed stated that the Supreme Court had wrongly reached a conclusion that s 4 of the Special Immigration Appeals Commission Act 1997 had governed appeals made under s 2B.<sup>50</sup> Furthermore, Lord Reed was clear that the part of Lord Sumption's judgment<sup>51</sup> relied upon by Ms Begum did not permit 'an approach which would place [the Special Immigration Appeals Commission] 'in the shoes' of the decision-maker and treat it as competent to re-consider the matter'.<sup>52</sup>

23. Lord Reed then proceeded to consider the appeals in the present case. These will be considered in turn.
24. The first appeal was Ms Begum's cross-appeal against the Divisional Court, which related to the deprivation appeal. Ms Begum was arguing that the Divisional Court had wrongly rejected the argument that the appeal should be automatically allowed 'if it could not be fairly and effectively pursued' because of the rejection of the application for leave to enter.<sup>53</sup> Lord Reed was clear that whilst Parliament has given Ms Begum the right to appeal the decision to deprive her of her citizenship, the courts have not been given guidance 'if the person's circumstances are such that she cannot effectively exercise that right'.<sup>54</sup> Lord Reed considered the case law and reached a conclusion that whilst there were difficulties in appealing the decision and that the consequences for the loss of citizenship were significant, the court had to be mindful of the public interest, as 'it would be irresponsible for the court to allow the appeal without any regard to the interests of national security'.<sup>55</sup> The fact that it was difficult for Ms Begum did not mean that she automatically won her case.<sup>56</sup> Therefore, Ms Begum's cross-appeal was dismissed.
25. The second appeal was the Home Secretary's appeal against the Court of Appeal's decision regarding the leave to enter appeal. The third appeal was the Home Secretary's appeal against the Court of Appeal's decision in the judicial review of the leave to enter decision. Lord Reed observed that:

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<sup>47</sup>[2013] UKSC 62, [2014] AC 253 [30] (Lord Wilson).

<sup>48</sup>*R (Begum) v Special Immigration Appeals Commission* (n 1) [78]–[79].

<sup>49</sup>[2015] UKSC 19, [2015] 1 WLR 1591.

<sup>50</sup>*R (Begum) v Special Immigration Appeals Commission* (n 1) [80].

<sup>51</sup>*Pham v Secretary of State for the Home Department* (n 49) [107] (Lord Sumption).

<sup>52</sup>*R (Begum) v Special Immigration Appeals Commission* (n 1) [81].

<sup>53</sup>*ibid* [84].

<sup>54</sup>*ibid* [89].

<sup>55</sup>*ibid* [94].

<sup>56</sup>*ibid* [90].

[b]oth appeals raise the same issue: whether the Court of Appeal was wrong to conclude that leave to enter must be granted to Ms Begum because she could not otherwise have a fair and effective hearing of her appeal against the deprivation decision.<sup>57</sup>

26. Lord Reed disagreed with the reasoning of Flaux LJ in the Court of Appeal, where Flaux LJ had taken the approach that a solution must be found to counter the unfairness and lack of effectiveness of Ms Begum's appeal.<sup>58</sup> Lord Reed was critical of Flaux LJ's approach and the Court of Appeal's decision that the appeal be allowed and Ms Begum permitted to re-enter the UK. In the Court of Appeal Flaux LJ had taken the view that Ms Begum was not a sufficiently serious national security threat when contrasted to the individual in *U2 v Secretary of State for the Home Department*,<sup>59</sup> that the threat she posed could be managed upon her return to the UK, and that 'fairness and justice' outweighed any concerns relating to national security.<sup>60</sup>
27. Lord Reed was critical of Flaux LJ's judgment. First, he observed that the leave to enter decision could only be appealed under s 6 of the Human Rights Act 1998 ground, and this had not been considered.<sup>61</sup> Secondly, the weighing up of the risk that Ms Begum posed when compared to the individual in *U2* was 'misguided' and the Court of Appeal 'was in no position either factually or jurisdictionally to undertake such a comparison'.<sup>62</sup> Furthermore, His Lordship criticised the conclusion drawn that because the risk posed by the individual in *U2* could not be managed in the UK, it did not mean that individuals who the Court of Appeal considered to pose less of a risk could be safely managed.<sup>63</sup> Thirdly, Lord Reed was critical of the suggestion offered by the Court of Appeal to manage Ms Begum's risk to national security and held that '[t]he Court of Appeal also appears to have overlooked the limitations to its competence, both institutional and constitutional, to decide questions of national security'.<sup>64</sup> Fourthly, Lord Reed dismissed the conclusion drawn that 'fairness and justice must ... outweigh the national security concerns'. His Lordship was clear that such an evaluation was not within the Court of Appeal's competence and, if it had been argued, then its role was to review the reasonableness of the decision.<sup>65</sup> Therefore, the Supreme Court allowed the second and third appeals.
28. The fourth appeal related to the Divisional Court's decision to permit judicial review of the Special Immigration Appeals Commission's decision relating to the Home Secretary's policy. The Special Immigration Appeals Commission had accepted the Home Secretary's decision that the deprivation of citizenship did not breach his

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<sup>57</sup>ibid [98].

<sup>58</sup>ibid [101]–[102].

<sup>59</sup>(Appeal No SC/130/2016).

<sup>60</sup>*R (Begum) v Special Immigration Appeals Commission* (n 1) [106]; *R (Begum) v Special Immigration Appeals Commission* (n 19) [119]–[121] (Flaux LJ).

<sup>61</sup>*R (Begum) v Special Immigration Appeals Commission* (n 1) [107].

<sup>62</sup>ibid [108].

<sup>63</sup>ibid.

<sup>64</sup>ibid [109].

<sup>65</sup>ibid [110].

human rights policy. In the Court of Appeal Flaux LJ had held that both the s 2 and s 2B appeals were not to be decided on the basis of judicial review (i.e. had the Home Secretary acted reasonably), but rather were full merit appeals.<sup>66</sup> Therefore, the Court of Appeal stood upon appeal in the Home Secretary's shoes.<sup>67</sup> However, Lord Reed was of the view that the Court of Appeal was wrong. The appeal under s 2 of the Special Immigration Appeals Commission Act 1997 only related to the lawfulness of the decision under s 6 of the Human Rights Act 1998, which meant that '[a]ny question as to whether the policy was properly applied does not, therefore, impugn the lawfulness of the [leave to enter] decision' and would be heard as part of a s 2 appeal.<sup>68</sup> Furthermore, Lord Reed rejected the argument that for a s 2B appeal the court was in the shoes of the Home Secretary and could exercise the discretion that he enjoyed under s 40(2) of the British Nationality Act 1981.<sup>69</sup> The central issue with regards to the human rights issue was whether the Home Secretary followed his policy when exercising his discretion. This was preferred to the approach taken by the Court of Appeal, which had been whether, if applicable, arts 2 and 3 of the ECHR were at risk of being contravened. This policy was for the Home Secretary's guidance and he was not obliged to follow it as if it were a rule of law. The Supreme Court found in favour of the Home Secretary's appeal.<sup>70</sup>

29. Lord Reed was clear that the Court of Appeal had been wrong for four reasons. First, the leave to enter decision could only be appealed against where the decision is contrary to s 6 of the Human Rights Act 1998. Secondly, the Court of Appeal had wrongly preferred its own assessment of national security over that of the Home Secretary. Thirdly, the Court of Appeal had been wrong to give priority to Ms Begum's right to a fair hearing over national security considerations. Fourthly, in deciding that the Home Secretary had acted unlawfully the Court of Appeal had wrongly treated his policy as a rule of law, rather than guidance.<sup>71</sup>
30. Returning to the beginning of this article where the theme of controversial judicial decisions was briefly discussed, it is clear that the Supreme Court's decision, whilst being controversial due to the outcome, was in fact constitutionally and legally correct. The decision to deprive Ms Begum of citizenship and then to refuse her leave to enter the UK in order for her to appeal the deprivation decision was that of the Home Secretary. Yes, this is a controversial decision, and it may not be preferable for a number of reasons, such as humanitarian, fairness and justice, and conceptualising the irrevocable nature of citizenship for those born in the UK; however, it was the Home Secretary's decision. The approach taken by the Court of Appeal in terms of the nature of the s 2B appeal and exercising the Home Secretary's discretion

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<sup>66</sup>R (*Begum*) v *Special Immigration Appeals Commission* (n 19) [123] (Flaux LJ).

<sup>67</sup>ibid [125].

<sup>68</sup>R (*Begum*) v *Special Immigration Appeals Commission* (n 1) [117].

<sup>69</sup>ibid [118].

<sup>70</sup>ibid [129].

<sup>71</sup>ibid [132]–[136].

was arguably flawed due to a departure from the appropriate boundaries of institutional competence.

31. Judicial deference should not be presented as requiring judges to always defer to the executive on the basis that ministers are democratically accountable through the ballot box to the electorate or that the courts always lack the ability to review certain types of decisions. It is a more nuanced approach than this. Lord Hoffmann recognised the importance of institutional respect and an acceptance of relative institutional competence in *Rehman* and it was endorsed by the Supreme Court in the present case. A full merits review is not the only way to ensure that the courts discharge their constitutional duties, as although the s 2B appeal was restricted to a review on judicial review principles, these coupled with the review of the Home Secretary's duty under s 6 of the Human Rights Act 1998, offer a suitable role for judicial scrutiny of the executive. The issue may be that this does not go far enough, and that there may well be justification for the court to depart from the constraints of deference and stand in the shoes of the decision maker, yet it is difficult to see how in the particular case it could be justified.
32. Focusing on the issue of judicial deference to the executive, it must be emphasised however that judicial deference should never be the norm unless there is institutional and constitutional justification for this. This will depend on the circumstances and the correct approach will be decided accordingly by the court, with at first instance the safeguard of the initial decision being appealed should it be thought that the wrong balance had been struck. In *Begum*, based on the particular set of facts, the wording of the statute, the correct determination of the powers and jurisdiction of the Special Immigration Appeals Commission, and the national security context, there was such a justification for institutional deference when considering the leave to enter the UK decision. It is submitted that the approach of the Supreme Court was preferable to that of the Court of Appeal as a matter of legal and constitutional reasoning, which draws upon judicial reasoning in similar case such as *Rehman*.
33. It does not mean that one has to accept that it is *right* to deprive someone born in the UK of their citizenship. It is submitted that the deprivation decision is difficult to justify. However, this is a moral and ethical conclusion. Furthermore, although it risks falling into the territory of an abdication of responsibility, which is caused by presuming that the executive always makes the *correct* decision because the executive fully understands the national security dimension, caution needs to be taken when attempting to weigh up (outside of the full understanding of the national security considerations) how much a risk Ms Begum posed to the UK. The decisions were those of the Home Secretary, who had been given the discretion to make such decisions by Parliament. The discretion was not unlimited. The Home Secretary relied on expert advice and was entrusted to reach a decision that he in the circumstances believed to be correct. The Supreme Court was clear that the

appellate process did not confer the Special Immigration Appeals Commission with the ability to exercise the Home Secretary's discretion and come to its preferred decision.

34. The Supreme Court's decision makes interesting reading and could be viewed as traditional in its articulation of legal and constitutional principles. Whatever the flaws in the Court of Appeal's approach, nonetheless, it could be viewed as an attempt to do justice in a very difficult situation and develop the law to be less deferential to the executive in such extraordinary situations such as the present case. One thing is certain, the *Begum* litigation will generate considerable legal, political and public debate.