SHAMINA BEGUM - A THREAT TO NATIONAL SECURITY

PART 1 - THE STORY SO FAR

Introduction

The case of Shamima Begum who left her home in London to live in the Islamic State of Iraq and the Levante (ISIL) has generated enormous public interest at every stage of the proceedings. In 2019 the UK Home Secretary (Sajid Javid) made a formal order depriving Ms Begum of her UK citizenship. Her legal challenges to that decision reached the Supreme Court in 2020. So far they have been unsuccessful. She has been held against her will in detention camps in Northern Syria for nearly four years. This month (November 2022) a renewed appeal against the Home Secretary's decision is due to come before a court called the Special Immigration Appeals Commission (SIAC).

The UK Government has accepted from the outset that Ms Begum may have been a child victim of radicalisation. It has been established in the proceedings that Ms Begum has been held in degrading and inhuman conditions throughout her time in the detention camps.

Shamima Begum

In February 2015 Ms Begum, then a school girl aged 15, travelled from her home in Bethnal Green to Turkey and then on to Raqqa in Syria which at that time was under the control of ISIL. Ms Begum was born in the UK and lived here until her journey to Syria. Ten days after her arrival in Raqqa she married an ISIL combatant who was a Dutch national. She lived through the war against ISIL giving birth to two children both of whom died in infancy. One of the two school friends who travelled to Syria with her was killed during this period.

Ms Begum remained in the dwindling ISIL Caliphate until, heavily pregnant with her third child, she fled from there with her husband in January 2019. They arrived in territory occupied by the forces fighting ISIL where she and her husband were separated. She was detained in the Al-Hawl camp in Northern Syria controlled by the Syrian Democratic Forces (SDF) a western backed force comprising for the most part Kurdish fighters. In 2019 Ms Begum was discovered in the camp by a Times journalist. On 13 February that newspaper published an article revealing her presence there and providing details of her life in Syria. This was based on an interview given by her to the journalist. In late February Ms Begum was transferred to another SDF camp in Northern Syria called Al-Roj where the conditions were said to be squalid and wretched. Her new born son died there on 7 March 2019.

The Home Secretary's Decision - A Threat to National Security

On 19 February 2019, less than seven days after the Times article, the Home Secretary Sajid Javid made an order depriving Shamima Begum of her British citizenship and nationality on the ground that she would present a risk to the national security of the United Kingdom if she was allowed to return here.

The Supreme Court judgement reveals that the Home Secretary's decision was informed by an assessment by the Security Service (MI5) -

"…..that any individual assessed to have travelled to Syria and to have aligned with ISIL posed a threat to national security."

The decision was a momentous, life changing one from Ms Begum's point of view. It has a number of stark features. The first is its timing so soon after the enormous publicity generated by the Times article. On 14 February 2019, the day after it first reported their discovery of Ms Begum (and several days before the Home Secretary made the deprivation decision), the Times published another article about her which included the following -

"Shamima Begum will not be rescued by British officials, the security minister said today as he warned that "actions have consequences." Ben Wallace said the government is not willing to risk the lives of British officials by sending them to a refugee camp in Syria to "rescue terrorists in a failed state"..... Mr Wallace said it was "worrying" that she did not regret going to Syria and that "people know what they're getting into."

It is clear from this that, from the moment of Ms Begum's reported discovery in the detention camp, the UK Government was not well disposed towards her. She was quite simply a terrorist who had joined ISIL of her own free will.

Next, there is the generality of the Government's approach. Anyone who joined ISIL in Syria is a threat to national security. The Security Service did not accuse Ms Begum of any direct involvement in terrorist activity. They did not say that she had promoted or encouraged any terrorist activity in the UK or elsewhere or that she had displayed any intention to do any of these things in future.

The Home Secretary's decision was also informed by another Risk Assessment from the Security Service dated April 2017 on the threat to national security from UK-linked individuals who had travelled to ISIL-controlled territory to align with ISIL. Again, none of the content is specific to Ms Begum, her conduct at any stage or her known or suspected beliefs and intentions. Some of the content of the statement is questionable insofar as it fixes everyone involved with ISIL (including children who have been radicalised) with the same guilty knowledge and intentions. For example, the Security Service's assessment was -

"that anyone who had travelled voluntarily to ISIL-controlled territory to align with ISIL since the declaration of the caliphate was aware of the ideology and aims of ISIL and the attacks and atrocities that it had carried out. As such, they were assessed to have made a

deliberate decision to align themselves with the group and its ideology in support of its terrorism-related activity."

According to this approach there is nothing about Ms Begum's circumstances or conduct which could set her apart from every other ISIL combatant or camp follower. The assessment makes no allowance for human frailties like naivety. It does not recognise the possibility that gullible young people can be duped into making bad choices without being aware of the consequences.

The Court of Appeal judgement contains some further information from an Annex to the risk assessments made available to the Home Secretary -

"The Annex then refers to some of what she said in her interview with The Times….. It refers to what she said in the Times interview about seeing a severed head in a bin for the first time: "it didn't faze me at all. It was from a captured fighter seized on the battlefield, an enemy of Islam".

That is perhaps the high-point of any suggestion that she is or was a potential threat to national security. There is no attempt to look at what Ms Begum said to the journalist in the round or whether she said anything else to counter the impression given by this remark. In fact the full text of the interview is available on-line and it discloses that Ms Begum also made some pointed criticisms of corrupt and cruel behaviour on the part of the ISIL leadership. Readers can judge for themselves whether there is anything said by Ms Begum in the interview itself to indicate that she was minded to engage in or support terrorism if she was granted her wish to return to the UK.

Quite understandably the advice from the Security Service included an assessment of the risk that someone returning to the UK from the Caliphate might engage in or

promote terrorist activity here. This is summarised in the Supreme Court judgement in the following terms -

"The Security Service advised that the threat from individuals who returned to the United Kingdom from ISIL-controlled territory could manifest itself in a number of ways: (1) involvement in ISIL-directed attack planning, (2) involvement in ISIL-enabled attacks, (3) radicalising and recruiting UK-based associates, (4) providing support to ISIL operatives, and (5) posing a latent threat to the United Kingdom.,,,,Known examples were cited as evidence of each of these risks."

This was all perfectly sensible but none of it was specific to Ms Begum.

Is Shamima Begum a Victim?

Ms Begum may be a victim of radicalisation. The Security Service assessment -

"noted that individuals, such as Ms Begum, who were radicalised as minors might be considered victims. That did not, however, change the threat which the Security Service assessed Ms Begum as posing to the United Kingdom. It did not justify putting the United Kingdom's national security at risk by not depriving her of her citizenship."

This is a deeply troubling feature of the case. There is a real possibility that an impressionable young person was indoctrinated, perhaps duped, into supporting ISIL without any real understanding of what they were up to. It may well be that she travelled to Syria with little or no insight into what would become of her there.

A glimpse of the Government's attitude to this is seen in the following excerpt from the Court of Appeal decision:-

"*In his submissions, Sir James Eadie QC placed considerable emphasis on Ms Begum having left the UK of her own free will to go to Syria, aligned herself with ISIL and remained in Syria for four years until her detention by the SDF, so that the difficulties she faces in terms of presenting her appeal are to a large extent self-inflicted."*

Faux LJ's response to this hard hearted submission was -

"....I would be uneasy taking a course which, in effect, involved deciding that Ms Begum had left the UK as a 15 year old schoolgirl of her own free will in circumstances where one of the principal reasons why she cannot have a fair and effective appeal is her inability to give proper instructions or provide evidence."

The Government refused to acknowledge that branding Ms Begum as the author of her own misfortune does not wash if she is a child victim of juvenile radicalisation.

In another very real sense Ms Begum is a victim as a result of her detention in the Al-Hawl and Al-Roj camps. The SIAC who dealt with Ms Begum's case at first instance observed that Ms Begum had been and continued to be subjected to degrading and inhuman treatment in the SDF camps. This would have constituted a breach of her rights under Article 3 of the European Convention on Human Rights if those rights had been engaged. Of course, it is not the UK Government who are detaining Ms Begum in these dreadful conditions but her detention does aggravate the injury of the deprivation decision.

The Legal Proceedings

Ms Begum appealed against that decision to deprive her of her citizenship and she applied for leave to enter the United Kingdom to enable her to present that appeal. The case has been heard at three tiers of the judicial hierarchy, the SIAC, the Court of Appeal and the Supreme Court.

The SIAC made a finding that Ms Begum could not effectively present her appeal to them because of the restrictive circumstances of her confinement in a detention camp. They rejected an argument that her inability to obtain a fair and effective hearing required them to grant the appeal. This left the merits of the appeal unresolved and meant that there were three possible future options open to Ms

Begum - to proceed with the appeal as best she could, to stay the appeal until her circumstances improved (if ever) or to risk it being struck out in future.

Ms Begum enjoyed substantial success in the Court of Appeal. They held that the Home Secretary's deprivation decision was unlawful because it was taken in contravention of his own policy and that she was entitled to a re-hearing in the SIAC. They ordered that Ms Begum be given leave to enter the UK to present her appeal. The Supreme Court, in a judgement written by the Court's President Lord Reed, reversed the Court of Appeal decisions and restored the SIAC judgement with the result that Ms Begum was left in limbo unable to pursue her appeal against the decision to deprive her of her citizenship. There was no point in giving her leave to enter the UK as she was not free to leave the detention camp.

National Security and the Law

The case is of considerable legal interest in light of the judgement handed down by Lord Reed in 2021. The United Kingdom Government frequently invokes national security in a variety of ways which conflict with the public interest in open government, with the rights and duties of citizens and with the operation of the rule of law. In cases in which these conflicts have arisen the Courts have traditionally shown great deference to the Government applying the constitutional principle of the separation of powers. In Ms Begum's case this deferential approach has been applied with renewed vigour.

Lord Sumption (who retired from the Supreme Court in December 2018) has said that this case is one of a series of recent cases which show that -

"the UK Supreme Court has lately adopted a more restrained approach to cases challenging the exercise of executive power" - Johnathan Sumption letter to the London Review of Books (LRB) 10.2.22.

According to Lord Sumption, who we may reasonably credit with some inside knowledge of this change, -

"this marks an important change of judicial mood……the essential feature of the Supreme Court's recent decisions on public law has been a renewed emphasis on the centrality of Parliament in our constitution, not just as the supreme legislative organ of the state but as the ultimate source of the political legitimacy of governments."

In *Begum* Lord Reed addressed the nature of the test to be applied in cases (like this one) which are appeals against decisions taken by the Secretary of State in the exercise of a statutory discretion. The Court must confine itself to considering whether the decision maker -

"has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight.."

In national security cases there are additional constraints dictated by the subject matter. Lord Reed said [70] that courts must bear in mind that -

"in relation to matters of this kind, that the Secretary of State's assessment should be accorded appropriate respect, for reasons both of institutional capacity …..and democratic accountability,"

The first question which springs to mind in any specific case is what is meant by *"appropriate respect."* In many cases this comes down to acceptance of the Government's position. The underlying principles of institutional capacity (expertise) and democratic accountability overlap. They are well entrenched in the case law and they merit closer examination. Before I turn to those in part 3 of this piece, it is necessary to look at what the Supreme Court said about the correct approach to the factual components of Ministerial decisions.

PART 2 - RESTRICTIONS ON JUDICIAL SCRUTINY OF THE FACTS

Factual Issues

The main practical impact of Lord Reed's judgement in *Begum* is his emphasis on the restricted extent to which the courts can review the factual components of Ministerial decisions on national security issues. This involves the resolution, in a restrictive direction, of what Lord Reed perceived to be a difference in approach between senior judges in an earlier case called *Secretary of State for the Home Department v Rehman [2003] 1 AC 153.* The difference turned on a distinction between two different types of fact. First, primary facts - who did or said what and when. These are things which have happened in the past. Second, predictive or evaluative factual judgements - whether there is a risk that someone will engage in terrorist activity in future for example. These are matters of judgement which often involve an element of expert evaluation. These are the factual judgements which inform national security decisions - whether it is appropriate to exclude an individual from the UK or to subject them to control measures.

Lord Reed is now saying in clear terms in *Begum* [71] that the court's power to review the facts informing Ministerial decisions is confined to consideration of

" whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or based upon a view of the evidence which could not reasonably be held."

Note the clear reference to findings of fact generally which must include primary facts. Note also the reference to evidence (as opposed to proven fact) as a sufficient basis for the Minister's decision. Lord Reed all but excluded the possibility of the court taking a fresh look at the evidence reaching its own conclusions on which primary facts were proved. He curtailed the scope for a court to review the predictive or evaluative inferences based on the primary facts. These are very

significant limitations. They mean that the decision-maker (the Government Minister) has to be taken at their word to a very large extent. If the Minister can point to evidence which is capable of supporting a factual proposition, there can be little scope for challenging the quality or reliability of that evidence or of rejecting that finding on the ground that there is cogent competing evidence.

The question of whether there was no evidential basis for an opinion ostensibly held by a Minister is a low bar in comparison with an examination of whether the primary facts which underpin that opinion are true.

Lord Reed acknowledged that SIAC, when reviewing a decision of this kind, -

"has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision."

It is difficult to attach much practical significance to this when the tribunal has such a narrow remit in reviewing findings of fact. One might think that this consideration would require the Home Secretary to provide a more cogent or convincing justification for his decision but that is not the position.

Observations on the Begum Case

1. Lord Reed made it clear that the case before the Supreme Court did not turn on the facts. That is, of course, quite correct but it might also be said that the case turned on the absence of facts which were beyond the ken of Ms Begum and her legal team. This is because the Home Secretary was in control of the facts as known to the Security Service and any other agency within his jurisdiction which was involved in the case. The Home Secretary could choose which facts to reveal and how to present them. Most importantly he could defend his decision in court by tabling a fairly scant factual explanation of his

reasons. Nothing more was required of him because of the constraints placed on the courts' powers of review.

2. Ms Begum was being detained by the SDF when the Home Secretary took his decision. The submission given to the Home Secretary included the following observation -

"...there is no realistic possibility of her being able to travel to the UK even if [leave to enter] were to be granted and…any grant of leave to enter would not result in her release from detention by the SDF."

Presumably the same could be said even if there was no question of revoking her UK citizenship. One might question why it was necessary to take that step while she remained in a camp from which she could not effectively exercise her right of appeal against that decision. There was no suggestion that she was likely to be released in the foreseeable future or that she had a means of escape. She certainly did not pose an imminent threat to the national security of the UK at that time.

3. The day after the Times reported Ms Begum's presence in the SDF camp and several days before the deprivation decision, the Security Minister Ben Wallace was quoted as saying that -

" if foreign fighters who are UK citizens present themselves at British consular offices in Iraq and Turkey, officials would deal with them "as we are obliged to."

This strongly implies that the Government had a plan to deal with persons in the same predicament as Ms Begum. It is not unreasonable to suppose that there was a plan to deal with any of these people who were known to the authorities and who made their own way back to the UK. Ms Begum could be deprived of her UK citizenship because, according to the SIAC, she also held Bangladeshi citizenship and would not be rendered stateless by the Home

Secretary's decision. In all likelihood there are other ISIL combatants or supporters who only hold UK citizenship and who have been or will be dealt with by other means if they return to the UK.

4. In Ms Begum's case the Court of Appeal held that she could be allowed leave of entry to pursue her appeal against the deprivation decision. They held that any national security concerns about Ms Begum on her return to the UK could be addressed and managed by her being arrested and charged upon her arrival in the United Kingdom, or by her being made the subject of a Terrorist Prevention and Investigation Measure (TPIM). The Supreme Court held that the lower court had erred on this point saying [109] -

   "*As to the first of those alternatives, there was no evidence before the court from the police, the Crown Prosecution Service or the Director of Public Prosecutions as to whether it was either possible or appropriate to ensure that Ms Begum was arrested on her return and charged with an offence. Those were not, of course, matters for decision by the Secretary of State. Nor was it known whether, if she were arrested and charged, she would be remanded in custody: that would be a matter for the courts. As to the second alternative, there was no evidence, nor any submissions, before the Court of Appeal as to whether or not a TPIM could or would be imposed on Ms Begum, or as to the effectiveness of any such measure in addressing the risk which she might pose, having regard, for example, to the resources available to monitor compliance with TPIMs and the demands on those resources.*"

   The Home Secretary is the Minister responsible for imposing TPIMs. She is under a duty to consult on the prospects of prosecuting an individual before TPIMs may be imposed. The Government could obtain and present information from the Police, the CPS or from any other relevant agency about which legal steps might be taken against Ms Begum to protect the public if she returned to the UK. If there is no prospect of a prosecution the Home

Secretary has the TPIM option. She could use all the relevant information when deciding whether to deprive someone like Ms Begum of their citizenship. She could provide the relevant information to the SIAC in an appeal against a deprivation decision. The absence of evidence about legal measures which could address any national security risks posed by Ms Begum is a state of affairs which is largely within the Government's control. In the appeal on the leave to enter issue it operated to their advantage and against Ms Begum who was in no position to offer evidence about how the authorities would deal with her if she returned to the UK. She may face the same difficulty in the renewed appeal.

5. The Home Secretary took his decision in the knowledge that Ms Begum may have been a child victim of insidious manipulation which caused her to make what turned out to be a disastrous journey to the part of Syria controlled by ISIL. Furthermore, he set the Government's face against any attempt to enquire into the circumstances of her radicalisation or to assess whether this might have a bearing on the risk that she would really pose if she returned to the UK. He closed the door on any attempt to rehabilitate her or reverse the negative effects of her indoctrination. He did not give Ms Begum the opportunity to reach a place of safety within or outside the UK where her future threat to national security could be fully considered.
6. It may be that Ms Begum's legal team are better informed than they were when they first mounted an appeal. They may have facts of their own to present on important issues like radicalisation. The Metropolitan Police are said to have investigated the circumstances surrounding Ms Begum's departure from England. It would be very surprising if that did not involve a close look at whether and if so how she had been radicalised. Nothing of that has been disclosed in any of the court proceedings so far. According to

another report in the Times the Government's written submissions to the SIAC say that Ms Begum has never claimed that she was the victim of radicalisation.

7. Ultimately, the UK Government may simply fall back on the general assessments tabled in 2019 - Ms Begum is a threat to national security because she joined ISIL regardless of her age and level of maturity at the time and regardless of whether she was a child victim of radicalisation. When, as they must, the SIAC apply the approach to the facts set out by Lord Reed then the Government may well succeed in defending the deprivation decision on that approach alone.

PART 3 -THE SEPARATION OF POWERS

In this final part I look in more detail at the two strands of the justification for a deferential approach to Government decisions taken on national security grounds as affirmed by Lord Reed in *Begum.*

Institutional Capacity

This strand is referred to in cases which precede *Begum* as institutional competence. It is actually a combination of two related concepts. These were explained by Lord Hoffman in *Rehman*. That case concerned the deportation from the UK of a Pakistani national who was considered to be a threat to the national security of his home country and, indirectly, to that of the United Kingdom - Lord Hoffman's analysis was endorsed by Lord Reed in *Begum* at [60] and [61].

The first component (institutional competence properly so called) is that -

"*Not only is the decision entrusted to the Home Secretary but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the*

Commission, despite its specialist membership, cannot match" - Lord Hoffman in *Rehman* at [57].

As we have seen in the Begum case when it comes to national security issues the Home Secretary will rely on advice from the Security Service which, in common with many other law enforcement and security agencies, has access to information which is unavailable to the public. They will also have great expertise in assessing risks and identifying future threats to the safety of the public.

This makes sense but it does not entirely justify excluding judicial scrutiny. It does not explain why the Home Secretary is entitled to such a wide margin on all questions of primary fact. Also, courts are well used to adjudicating in highly complex disputes which turn on technical or scientific expertise.

The second concept is said to be a limitation of the appellate process arising from the role of the Home Secretary as the primary decision maker, -

"*the need, in matters of judgement and evaluation of evidence, to show proper deference to the primary decision-maker"* Lord Hoffman in *Rehman* at [49]. At [57] Lord Hoffman continued -

"*Secondly, as I have just been saying, the question at issue in this case does not involve a yes or no answer as to whether it is more likely than not that someone has done something but an evaluation of risk. In such questions an appellate body traditionally allows a considerable margin to the primary decision-maker. Even if the appellate body prefers a different view, it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could reasonably be entertained."*

This is not specific to national security cases. It is concerned with predictive/ evaluative facts rather than primary ones.

One further difficulty with this whole concept is that the Minister taking a discretionary decision of this kind, unlike an independent tribunal such as the SIAC, is not an impartial adjudicator. She decides which facts are relevant. They are not tested by cross-examination before the decision is taken. There is no independent evaluation of the evidence or of the judgement calls based on it at that stage. Also, it would be naive to suppose that when taking decisions of this kind the Home Secretary does not have one eye on the political implications of the decision. This might well influence the selection of the relevant facts, colour the way in which they are presented and sway the judgement calls which are based upon them.

The breadth and depth of the margin afforded to the Government raises a general question of whether challenges in national security cases can ever be successful when the Government holds all the factual cards (the information, intelligence and expertise), has a very wide margin in making predictive/evaluative judgements and the court is required to take them at their word on all this unless the decision is wholly unsupported by, or completely at odds with, the evidence.

Democratic Legitimacy

As we have seen, the Supreme Court identified this as the second principle which underlies the correct approach to judicial review of decisions taken by the Government on national security grounds. In *Begum* The Supreme Court unanimously held that the Government's assessment of the requirements of national security must be respected because it is the Home Secretary 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 – paragraph [134]. This is part of the constitutional doctrine known as the separation of powers.

The Court in *Begum* commended a more detailed exposition of this principle set out by Lord Hoffman in *Rehman.* In that case the SIAC allowed his appeal against the order primarily on evidential grounds. The Court of Appeal reversed that decision and they were upheld in the House of Lords.

Lord Hoffman made the following observations about national security assessments -

"[50] the question of whether something is in the interests of national security is not a question of law. It is a matter of judgement 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."

These comments are about predictive/evaluative judgements based on primary facts. They are not about the extent to which primary facts have to be established by evidence or the extent to which the court can exercise its own judgement on whether those facts are proved. Lord Hoffman then said -

"[62].....Such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. 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."

There is no disputing that the Government bears the awesome responsibility of protecting the public from terrorism and that it may be exposed to trenchant criticism if it fails in this duty. Nonetheless, the idea that this doctrine of democratic accountability should exclude judicial scrutiny of national security decisions is problematic.

First, the separation of powers is not a recognised rule of law in any strict sense. It is a flexible constitutional doctrine which does not provide a clear yardstick to measure the point where courts can legitimately intervene in decisions or actions of the Executive. Many decisions taken by the Government are clearly political in character and beyond judicial scrutiny but the distinction is much less clear cut at the point at which individual decisions are made which directly affect the rights of individual citizens.

Second, the doctrine of separation of powers serves more than one purpose. Here the objective is to ensure that each branch of the State respects the designated territory of the others. The courts must not tread on the Executive's turf. But another facet, arguably the main historical justification for the doctrine, is to prevent abuses of power by subjecting the Executive to the rule of law. This is all the more important when the Executive purports to make decisions which directly affect the rights of citizens. Who else can protect individuals from abuses of power except the courts? For example up until 2002 the Home Secretary set the period which prisoners sentenced to life imprisonment would have to serve before release on licence. In *R (Anderson v the Home Secretary) [2003] 1 AC 837* the House of Lords held that this was incompatible with Article 6 of ECHR because the sentence is part of the trial and the Home Secretary is not independent of the Executive. Lord Steyn said that -

"the separation of powers between the judiciary and the legislative and executive branches of government is a strong principle of our system of government.....it is reinforced by constitutional principles of judicial independence, access to justice and the rule of law."

Third, the principle as described by Lord Hoffman is that the Government is answerable to Parliament and not the courts. Lord Sumption's letter was a response to an article entitled *"In the Shallow End"* (LRB 27 January 2022) in which Conor Gearty criticised this change in approach in the Supreme Court. He said -

"Many judges over the years have realised that parliamentary sovereignty is an empty shell, that Parliament is a creature of the executive...."

This is true to a greater or lesser extent depending on the issue in hand. When it comes to questions of national security MPs of the party in power usually rally behind the Government and opposition MPs often fall into line. MPs of all parties shy away from unpopular causes regardless of their merits.

The full form of the doctrine of democratic legitimacy places the final say with the electorate to whom the Government and Members of Parliament who support or oppose the Government are answerable. But is the right to vote down a Government every five years or so an adequate alternative to judicial scrutiny of individual decisions which affect the rights of citizens? Sometimes arbitrary or disingenuous decisions made by the executive are very popular with large swathes of the electorate. Voters could be disquieted by some decisions but unwilling to vote the Government out for that reason alone. Also, without judicial scrutiny the public might never get to know how unsatisfactory an individual decision really was. It took the Chilcot Inquiry years of careful scrutiny to uncover the full extent of the serious shortcomings in the Government's presentation of the national security considerations prayed in aid by them in support of the invasion of Iraq.

It is worth looking in more detail at Lord Sumption's explanation in his letter to the LRB for the recent shift in approach by the Supreme Court towards recognition that Parliament -

"is the ultimate source of the political legitimacy of governments."

He said that -

"*The function of the courts is not to review the social or economic merits of government policy.*"

In another passage he wrote -

"We are only a democracy because ministers are responsible to the elected Chamber of Parliament for the formation and execution of policy."

This is all perfectly understandable when it applies only to matters which are truly policy issues. No one would argue that the Government is not entitled to have a policy that terrorists who pose a genuine threat to the safety of UK citizens should be excluded from the country or, providing the other legal criteria for this are met, deprived of their UK citizenship. But where does this deference end? Why should a court not entertain a challenge to the factual allegation that someone is a terrorist and does pose a threat of that kind? Those allegations turn on the truthfulness or otherwise of primary facts and on the quality of expert risk assessments. They are not items of government policy. The courts have the means and the expertise to adjudicate on factual issues. They have the powers to remedy injustices centred on false or misleading factual grounds. In what meaningful sense is the Home Secretary answerable to Parliament for the factual merits of a particular decision when he controls which facts are disclosed and when he forms part of a Government which commands majority support there?

Good Faith

One of the cases cited (with approval) by Lord Hoffman in *Rehman* was *Chandler v DPP [1964] AC 763.* In 1964 a group of anti-nuclear protesters were convicted of

offences under the Official Secrets Act 1911 for breaking into RAF Wethersfield to disrupt the operations of a squadron of nuclear bombers based there. An Air Commodore had testified at the trial that the airfield was of importance for national security and that disruption to its operations would be prejudicial to the national interest. In an appeal to the House of Lords the majority of judges followed the deferential approach and said that the jury should have been directed to accept the Air Commodore's evidence without question. However, a significant departure from this unquestioning line was set out in a dictum from Lord Devlin who said (albeit he was not dissenting in his opinion) that it was open to the court to consider an allegation that the exercise of Ministerial discretion in a case such as this is tainted by bad faith or abuse -

"Men can exaggerate the extent of their interests and so can the Crown. The servants of the crown, like other men animated by the highest motives, are capable of formulating a policy ad hoc so as to prevent the citizen from doing something that the Crown does not want him to do. It is the duty of the court to be alert now as they have always been to prevent abuse of that prerogative."

In the important case *A v Secretary of State for the Home Department [2005] 2 AC 68* the House of Lords ruled (8 to 1) that the indefinite detention of international terrorists without trial was unlawful. Several of the judges mentioned the danger of the Government acting in bad faith in relying on national security claims. At [177] Lord Rodger said -

"national security can be used as a pretext for repressive measures that are really taken for other reasons."

Lord Walker (the dissenter on this occasion) said at [193] that -

"a portentous but non-specific appeal to the interests of national security can be used as a cloak for arbitrary and oppressive action on the part of government".....national security can be the last refuge of the tyrant."

The deferential approach, in particular the limits imposed on the review of findings in fact, restricts the ability of the courts to guard against abuses of this kind.