Precarious Citizenship

A Review of Michelle Foster and Helene Lambert, *International Refugee Law and the Protection of Stateless Persons*, Oxford University Press, 2019. 254 pp. £70.00 (HB). ISBN: 978-0-19-879601-5

patriciatuitt.com

In February 2019, the UK Home Secretary revoked the citizenship of nineteen year old Shamima Begum, after she sought to return from Syria (where she had been living since February 2015), to the UK, which is the place of her birth. Hers is just one in a series of cases which have drawn attention to the fact that the UK (in common with other European states), has enacted legislation "... allowing for deprivation of nationality in the context of so-called 'home-grown' terrorists…" (Foster and Lambert, 2019: p. 76). As anticipated, litigation has been launched to test the legality of the Home Secretary's decision in relation to Begum, who was last known to be residing in a refugee camp in northern Syria. There is at least an even chance that the UK courts will conclude that given Begun's undeniable ties to the UK, coupled with the uncertainty surrounding her entitlement to claim the nationality of her Bangladeshi parents, revocation of British citizenship (when weighed against the full circumstances surrounding her alleged conduct - not least of which is that she was just fifteen when she journeyed to Syria), constitutes an unwarrantable intrusion into her right to a private and family life, which is secured under Article 8 of the European Convention on Human Rights (ECHR).

Begum is a young Asian/Muslim woman who many see as a victim of sexual exploitation. Just months before her situation came to the attention of the public, it was revealed that several descendants of the first group of Caribbean migrants to arrive in the UK on the ship *Empire*

Windrush, for the purpose of supplementing the UK's much depleted labour force, were unlawfully deported. Both instances serve to underscore "...the very strong connection between minority status and statelessness..." (Foster and Lambert, 2019: p. 220. See also p. 72/3). Further, both instances expose serious flaws in the international legal framework designed to protect stateless persons or persons at risk of statelessness. Against this background, the publication of *International Refugee Law and the Protection of Stateless Persons* is most timely. Noting the weaknesses of the current regime, the authors set out to "...examine the potential of stateless persons who are outside their country of former habitual residence to obtain protection as refugees in international law" (Foster and Lambert, 2019: p. 4).

With the possible exception of the stateless refugee who, like Begun, is alleged to have engaged in conduct which seriously threatens the security interests of the state of former habitual residence (see for discussion, Foster and Lambert, 2019: p. 210-14 & p. 190-1), the 1951 Convention Relating to the Status of Refugees (*Refugee Convention*) offers stronger protective mechanisms than are to to be found in other human rights instruments, including the 1954 Convention Relating to the Status of Stateless Persons (*Statelessness Convention*). This is because "[A]lthough identical in many respects, there are key substantive distinctions between the two regimes, a lack of clear supervisory authority, at least historically in relation to the 1954 Convention, and vital differences in state ratification and implementation...have together resulted in a significantly inferior system of protection for a person who is not considered as a national by any State as compared to refugees" (Foster and Lambert, 2019: p. 16. See also p. 46-49 for discussion of the role of UNHCR in respect to stateless persons & p. 43-45 for examples of "substantive distinctions"). As things currently stand, and without recourse to the 1951 *Refugee Convention*, stateless persons risk being held permanently "in limbo" (Foster and Lambert, 2019: p. 219).

According to the authors, the relative lack of academic analysis on the applicability of the refugee law framework to stateless persons is due to a failure on the part of researchers to capitalise on the fact that international human rights norms have "...intruded into state discretion..." (Foster

and Lambert, 2019: p. 50. See also p. 11-12) over the questions of nationality which have the potential to bring about a situation of statelessness. They argue that "...vital and significant inroads into state discretion in the regulation of nationality" (Foster and Lambert, 2019: p. 58) have altered the legal terrain considerably. With respect to their position, I would, nonetheless, question whether human rights principles have succeeded in fundamentally eroding the *force* of the sovereign assertion, which decisions over nationality exemplify. I would suggest, instead, that human rights principles have simply *altered the manner in which the will of the sovereign is imposed.* To put the position another way, whilst the authors may be correct in their observation that human rights principles have imposed restrictions on states in matters relating to nationality, they have observed but half - arguably the much less complex half - of an evolving story. The human rights trajectory of which the authors speak has also seen the individual who carries the nationality of a state being placed under a sometimes intolerable burden to preserve its integrity. The "...renunciation by conduct provisions...designed to respond to home grown terrorists and foreign fighters.." (Foster and Lambert, 2019: p. 131) are key examples. More pertinent are the various measures which compel individuals to constantly prove their entitlement to the benefits associated with citizenship of a state. It was precisely because the Immigration Act 2014 (UK) premised access to basic socio-economic rights (such as employment, housing and health care), on proof of immigration status (and that by way of a limited range of official documents) that several of the Windrush descendants - those who were not actually deported - were rendered homeless or were placed in extremely precarious situations. Whatever limits have attended states in their power to confer or withdraw citizenship, those states have been amply compensated by the increasingly complex and onerous measures individuals have to negotiate in order to retain a citizenship which, in spite of its human rights encasing, remains a highly negotiable commodity - especially when acquired by/conferred upon racial and other minorities for whom "...citizenship is not always a reliable indicator of the enjoyment of rights..." (Foster and Lambert, 2019: p. 209).

Despite the book's thorough and creative analysis of a wide range of domestic and international treaties and cases, the reader may conclude that (as internally displaced persons, 'climate refugees' and others in need of international protection have discovered), the *Refugee Convention* is capable of

yielding only to a tiny portion of the estimated 1.5 million stateless refugees (Foster and Lambert, 2019: p. 4). The proposition that statelessness *per se* does not give rise to refugee status is now unarguable; for "...a well-founded fear of being persecuted is a prerequisite..." (Foster and Lambert, 2019: p. 12), and whilst "...a denial of human rights can amount to 'being persecuted'...(Foster and Lambert, 2019: p. 50), "[i]n numerous cases, denial of civil and political rights have been found *not* to amount to persecution" (Foster and Lambert, 2019: p. 175). As for cases where the state indirectly withholds healthcare and shelter from its citizens (the Windrush instance), "[t]here are relatively few cases where the denial of socio-economic rights has been found to amount to persecution, individually or cumulatively..." (Foster and Lambert, 2019: p. 182).

Returning to the Shamima Begum situation, any claim that she may advance to the effect that the death of her third baby was causally linked to the UK's decision to revoke her nationality, thereby rendering adequate child health care less accessible, is unlikely, without more, to amount to sufficient evidence of persecution; for "[t]he absence of physical injury, arrest, detention or questioning is a powerful factor against a finding of persecution, even if discrimination and harassment exist" (Foster and Lambert, 2019: p. 176). However, subject to the potential application of Article 1F(b), which would exclude her situation from the ambit of the *Refugee Convention* (see for discussion Foster and Lambert, 2019: p. 210-214), and in the absence of an alternative state of nationality, the UK's "...withdrawal of nationality may well constitute persecution in and of itself" (Foster and Lambert, 2919: p. 159. See also p. 160). That said, considerable barriers stand in the way of the applicant for refugee status adducing "...proof of a negative..."(Foster and Lambert, 2019: p. 109), which is essentially what is entailed in establishing statelessness. It is claimed that UK jurisprudence places a degree of responsibility on the applicant to prove that s/he is *not* a national of any state which is inconsistent with international law standards (at p. 114-15), and which potentially increases the danger of "...a subjective and...irrelevant list of factors invoked in assessing whether a person is stateless " (Foster and Lambert, 2019: p. 108). However, in my view, even the correct legal standard places an undue burden on the applicant. According to this standard "...the burden of proof is in principle shared,

in that both the applicant and the examiner must cooperate to obtain evidence and to establish the facts" (Foster and Lambert, 2019: p. 116).

After reading the work, I was left with the uncomfortable sense that Hannah Arendt was not far wrong in her assessment of the situation of the stateless person as being *so abject* that it is not in the interests of a state to exert on them such force as would amount to persecution (for a contemporary reading, see Mancheno, 2016). That sense leads me to interrogate the claim that the protection needs of both refugees and stateless persons are the same (e.g. Foster and Lambert, 2019: p. 11 & p. 17 & p. 21), and to offer instead the suggestion that the non-refugee stateless person's "rightlessness" means that her/his protection needs are much greater. Following this train of thought, I was a little disheartened to learn that the distinguished refugee scholar and practitioner, Guy Goodwin-Gill, has conceded defeat in his attempt to persuade the academy and the judiciary that statelessness *per se* is the authentic refugee condition (Foster and Lambert, 2019: p. 98, and for general discussion, p. 94-98. See also Tuitt, 2013). If we follow Arendt's philosophical position as regards statelessness, we ought to resurrect Goodwin-Gill's stance, and accept that "...a person's inability to return is illustrative of a dire enough lack of fundamental protection as to merit inclusion in the 1951 Convention, which may or may not include a well-founded fear of persecution" (Foster and Lambert, 2019: p. 93).

International Refugee Law and the Protection of Stateless Persons is likely to prove an almost instant point of reference for UK courts and tribunals.. However, despite the authors highly persuasive and authoritative arguments, I am not convinced that the appropriate response to the stateless person's protection needs is to lend even more weight to a *Refugee Convention* that has long ceased to be relevant to the majority of people around the globe in refugee-like situations. At the risk of sounding hopelessly utopian, I would suggest that what is urgently needed is for more scholars and practitioners to push against the requirement of proof of fault and causation which structures all of the international instruments covering displaced and stateless persons, and which relegates *human need* to secondary status.

References

Tania Mancheno, "Between Nomos and Natality: Hannah Arendt on the 'Stateless' Condition", *HannahArendt.net*, 2016, 110-130.

Patricia Tuitt, "Transitions: Refugees and Natives", vol 20(2), *International Journal on Minority and Group Rights,* 2013, 179-197.