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Introduction

1. I have been asked for my opinion as to possible arguments that might be raised in relation to the application of the requirement that certain children applying to register as British citizens must satisfy the Secretary of State that they are of good character.

The good character requirement

2. When the British Nationality Act 1981 ('BNA') was enacted it included a 'good character' requirement for adults applying to naturalise as British citizens. However, no such condition was imposed in respect of children who were entitled by the BNA to register as British citizens if various requirements as to birth, residence and / or descent were satisfied or if the Secretary of State was prepared to grant citizenship as an exercise of discretion. However, the Immigration, Asylum and Nationality Act 2006, s. 58 introduced a 'good character' requirement for some of the categories under which children could register. That provision was replaced by BNA s. 41A as inserted by the Borders, Citizenship and Immigration Act 2009, s. 47(1) and subsequently amended by Immigration Act 2014, Sch 9(9), Para. 70(3).

3. British Nationality Act 1981, s. 41A(1) now provides:

> An application for registration of an adult or young person as a British citizen under s. 1(3), (3A) or (4), 3(1), (2) or (5), 4(2) or (5), 4A, 4C, 4D, 4F, 4G, 4H, 4I, 5, 10(1) or (2) or 13(1) or (3) must not be granted unless the Secretary of State is satisfied that the adult or young person is of good character.

4. Subsection (5) says:

> In this section, 'adult or young person' means a person who has attained the age of 10 years at the time when the application is made.

5. The effect of that provision is that an applicant for registration as a British citizen who is over the age of 10 must satisfy the Secretary of State that he or she is of good character to qualify for registration as a British citizen pursuant to an application under the following provisions:

s. 1(3)	Person born in the UK whose mother or father becomes a British citizen or settled in the UK whilst the person is a minor
s. 1(3A)	Person born in the UK whose father or mother becomes a member of the armed forces whilst the person is a minor
s. 1(4)	Person born in the UK who spent the first 10 years of his or her life in the UK and was not absent from the UK for more than 90 days in each of those years (s. 1(7) enabling the Secretary of State to disregard excess absences)
s. 3(1)	Discretionary registration of a person who applies whilst a minor if the Secretary of State 'thinks fit'

s. 3(2)	Person born outside the UK who applies whilst a minor and (a) whose mother or father was a British citizen by descent; (b) that parent was born to a mother or father who was a British citizen otherwise than by descent and (c) if the applicant is not stateless, the applicant's parent lived in the UK for a period of 3 years some time prior to the applicant's birth
s. 3(5)	Person born outside the UK who applies whilst a minor and (a) whose father or mother was British by descent at the time of the applicant's birth; (b) that both parents were in the UK for a period of 3 years, ending with the date of the application or, if the parents were widowed, divorced or legally separated, one of them lived in the UK for the 3 year period
s. 4(2)	A British overseas territories citizen, British national (overseas), British overseas citizen, British subject or British protected person who satisfies various requirements as to residence in the UK
s. 4(5)	A British overseas territories citizen, British national (overseas), British overseas citizen, British subject or British protected person who has at any time been in crown service under the government of a British overseas territory and the Secretary of State thinks fit in the special circumstances of the case to register the person
s. 4A	British overseas territories citizens, if the Secretary of State thinks fit
s. 4C	A person born before 1.1.1983 who would before then have become a citizen of the UK and Colonies had specified provisions of the British Nationality Act 1948 been different

s. 4D	A person born outside the UK and qualifying territories whose father or mother was, at the time of the person's birth, a member of the armed services and serving outside the UK and qualifying territories
s. 4F-I	A person born before 1.7.2006 who would have qualified for citizenship (by birth or registration) under various provisions but for the fact that the person's parents were not married
s. 5	A British overseas territories citizen treated as a national of the UK for EU law purposes
s. 10(1) and (2)	Persons with various citizenship statuses prior to 1.1.1983
s. 13	A person who renounced British citizenship

6. There is no good character requirement for registration under the following provisions:

s. 4B	A British overseas citizen, British subject, British protected person or British National Overseas who does not have any other citizenship or nationality and has not renounced or voluntarily lost or relinquished another citizenship or nationality;
Sch. 2	Various provisions for registration as a British citizen of a person who would otherwise be stateless

The meaning of 'good character'

7. There is no legislative definition of 'good character'. In *R v Secretary of State for the Home Department ex parte Al Fayed (No. 2)* [2001] Imm AR 134, Nourse LJ said the following of 'good character':

> In *R v Secretary of State for the Home Department, ex parte Fayed* [1998] 1 WLR 763, 773F-G, Lord Woolf MR referred in passing to the requirement of good character as being a rather nebulous one. By that he meant that good character is a concept that cannot be defined as a single standard to which all rational beings would subscribe. He did not mean that it was incapable of definition by a reasonable decision-maker in relation to circumstances of a particular case. Nor is it an objection that a decision may be based on a higher standard of good character than other reasonable decision-makers might have adopted. Certainly it is no part of the function of the courts to discourage ministers of the Crown from adopting a high standard in matters which have been assigned to their judgment by Parliament, provided on that it is one which can reasonably be adopted in the circumstances.

8. In *Amirifard v Secretary of State for the Home Department* [2013] EWHC 279 (Admin) Lang J said at para. 59, having cited that passage from *Al Fayed,*

> the test for irrationality is set high, namely that no rational decision maker could have reached this conclusion. This test is especially difficult to satisfy in an area where Parliament has conferred a broad discretion on the Secretary of State and the Court of Appeal has declared that 'it is not part of the function of the courts to discourage ministers of the Crown from adopting a high standard in matters which have been assigned to their judgment by Parliament, provided only that it is one which can reasonably be adopted in the circumstances'.

9. With that in mind, she rejected the contention in *Hiri v Secretary of State for the Home Department* [2014] EWHC 254 (Admin) that it was irrational to refuse an application for naturalization on good character grounds on the basis that the applicant had a conviction for speeding for which he had received a fine of £100 and 5 points on his driving licence (para.

28). That decision powerfully illustrates the extremely wide discretion that the Secretary of State has to determine the meaning of 'good character', at least in relation to adults.

The Secretary of State's policy

10. The Secretary of State has a policy entitled *Nationality: good character requirement* which was introduced on 14th January 2019 to replace the Nationality Instruction *Annex D to chapter 18: The good character requirement.*

11. It 'applies to applications for registration and naturalization from those who are aged 10 or over at the time the application is made'. In the introduction, it says:

> The BNA 1981 dos not define good character. However, this guidance sets out the types of conduct which must be taken into account when assessing whether a person has satisfied the requirement to be of good character.
>
> Consideration must be given to all aspects of a person's character, including both negative factors, for example criminality, immigration law breaches and deception, and positive factors, for example contributions a person has made to society. The list of factors is not exhaustive.

12. The policy then sets out a non-exhaustive list of 'factors to consider' which are criminality; international crimes, terrorism and other non-conducive activity; financial soundness; notoriety; deception and dishonesty; immigration related matters and previous deprivation of citizenship.

13. With regard to 'criminality' the guidance says:

> Having a criminal record does not necessarily mean that an application will be refused. However, a person who has not shown respect for, or is not prepared to abide by, the law is unlikely to be considered of good character.
>
> An applicant will normally be refused if they:
> - have a criminal conviction which falls within the sentence based thresholds;
> - are a persistent offender;
> - have committed an offence which has caused serious harm;

- have committed a sexual offence or their details are recorded by the police on a register.

14. As far as 'sentence based thresholds are concerned, the guidance says:

> An applicant will normally be refused if they have received:
>
> - a custodial sentence of at least 4 years;
> - a custodial sentence of at least 12 months but less than 4 years unless a period of 15 years has passed since the end of the sentence;
> - a custodial sentence of less than 12 months unless a period of 10 years has passed since the end of the sentence;
> - a non-custodial sentence or other out of court disposal that is recorded on their criminal record which occurred in the 3 years prior to the date of application.

15. Under the hearing 'application of the requirement to young persons' the guidance says:

> The good character requirement applies to a person who is aged 10 or over at the date of application. When assessing whether a child is of good character, you must take account of any mitigation relevant to the child's particular circumstances. Where a child has been convicted of a criminal offence, sentencing guidelines require that any custodial or non-custodial sentence is adjusted to take into account the child's age and particular circumstances and any mitigating factors such as their ability to understand the consequences of their actions. Therefore although the criminal sentence thresholds for refusal and non-custodial sentencing guidelines for adults will normally apply to a child who has been convicted of a criminal offence, the lesser sentence handed down to them will mean they are automatically less likely to meet the higher thresholds.
>
> Consideration must also be given to any subsequent mitigation put forward by the applicant that was not taken into account at the time of sentencing.

You may exercise discretion where a child's criminality would result in a lifetime refusal of any citizenship application (i.e. over 4 years in prison). In these cases the amount of time passed since the crime should be weighed up against any evidence of rehabilitation.

The need to distinguish between adults and children

16. There are fundamental differences between adults and children (including 'young people'). In *R v Durham Constabulary ex parte R (FC)* [2005] UKHL 21, for example, Lord Bingham said (para. 20):

> Children and young persons are, ex hypothesi, immature, and so liable to be more vulnerable than adults and more amenable to education, training and formative influences. That is why statutes habitually distinguish between children and young persons on the one hand and adults on the other.

17. In *R v G* [2003] UKHL 50 Lord Steyn said

> Ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society. In 1990 the United Kingdom ratified the Convention on the Rights of the Child (Cm 1976) which entered into force in January 1992. Article 40(1) provides:
> "States parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." (Emphasis added.)
> This provision imposes both procedural and substantive obligations on state parties to protect the special position of children in the criminal justice system.

18. The special position of children in the criminal justice system was discussed at length in *R (C) v Secretary of State for the Home Department* [2013] EWHC 982 (Admin); [2014] 1 WLR 1234.

The United Nations Convention on the Rights of the Child

19. The United Nations Convention on the Rights of the Child ('CRC') recalls in the preamble that 'the United Nations has proclaimed that childhood is entitled to special care and assistance'. Article 1 of the CRC says that a child 'means every human being below the age of 18 years'. Thus, as far as the CRC is concerned, a 'young person' to whom s. 41A of the BNA refers is a child.

20. Article 3(1) provides 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

21. The UN Committee on the Rights of the Child (established under CRC article 43) in *General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para. 1)* (made pursuant to CRC art. 45(d)) said that the child's best interests is a threefold concept consisting of (para 6):

    a. a substantive right: the right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general…

    b. a fundamental, interpretative legal principle; if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best

interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation[1];

c. a rule of procedure: whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's best interests have been weighed against other considerations, be they broad issues of policy or individual cases.

22. Article 40(1) of the CRC recognizes 'the right of every child … recognised as having infringed the penal law to be treated in a manner … which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.

23. Commentary on article 40 (inter alia) is provided by the Committee on the Rights of the Child in *General Comment No 10 (2007): Children's rights in juvenile justice.* At para. 10 it says:

> In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be the primary consideration. Children differ from adults in their physical and psychological development, and their emotional

1. The General Comment thereby reflects what was said by Thomas Hammerberg, Commissioner for Human Rights, Council of Europe in 'The principle of best interests of the child – what it means and what it demands from adults' which was that 'the Convention does not offer any definite statement of what is in the best interests of an individual child in a given situation. It does, however, provide a normative framework that defines those interests to some extent. Since Article 3 is one of the general principles and an 'umbrella' provision, it should always be linked to other articles in the Convention. The substantive articles of the Convention give clear directions and limits on how children should and should not be treated. Though necessarily general and incomplete, a reasonable first building block towards the definition of what is in the best interests of the child is he sum total of the norms in the Convention'.

> and education needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.

24. At para. 11 the Committee said that article 6 of CRC, the right to live, survival and development 'should result in a policy of responding to juvenile delinquency in ways that support the child's development'.

25. At para. 13 the Committee describes article 40(1) as providing 'a set of fundamental principles for the treatment to be accorded to children in conflict with the law', one of which is (with original emphasis):

> *Treatment that takes into account the child's age and promotes the child's reintegration and the child's assuming a constructive role in society.* This principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to implementation of all measures for dealing with the child…

26. Article 40(4) requires states to provide a 'variety of dispositions' to 'ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'.

27. In *R v Durham Constabulary ex parte R (FC)* [2005] UKHL 21, having regard to the CRC, inter alia, Lady Hale said:

> It is in everyone's interests that children should be brought up to be decent law-abiding members of society. Both national and international law recognize that the

> criminal justice system is part of that process of bringing them up. The straightforward retributive response which is proper in the case of an adult offender is modified to meet the needs of the individual child. In national law, this is still reflected in section 44(1) of the Children and Young Persons Act 1933: "every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person …"

Applicability of the CRC in domestic law

28. On 6th December 2010 the Children's Minister, Sarah Teather MP said to Parliament (HC Deb, 6 December 2010, col 7 WS):

> I can therefore make a clear commitment that the Government will give due consideration to the UNCRC articles when making new policy and legislation. In doing so, we will always consider the UN Committee on the Rights of the Child's recommendations but recognize that, like other state signatories, the UK Government and the UN committee may at times disagree on what compliance with certain articles entails.

29. In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, para. 23 Lady Hale said of article 3(1) of the CRC

> This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in

relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".

30. Section 55 of the Borders, Citizenship and Immigration Act 2009 relevantly says:

(1) The Secretary of State must make arrangements for ensuring that –

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK, and

(b) …

(2) The functions referred to in subsection (1) are –

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) …

(3) A person exercising any of those functions must, in excercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

(4) …

(5) …

(6) In this section –

"children" means persons who are under the age of 19;

31. The statutory guidance given pursuant to Borders, Citizenship and Immigration Act 2009, s. 55, *Every Child Matters: Change for Children* (November 2009) says at para. 2.6

> The UK Border Agency acknowledges the status and importance of the following: … the UN Convention on the Rights of the Child. The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in the UK domestic legislation and policies.

32. At paragraph 2.7 it says:

> The UK Border Agency must also act according to the following principles:
>
> - Every child matters even if they are someone subject to immigration control;
> - In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children;
> - …
> - Children should be consulted and the wishes and feelings of children taken into account…

33. For the purposes of this advice, no distinction is drawn between, on the one hand, the obligation under CRC article 3 to treat the best interests of the child as a primary consideration and the obligation under s. 55 to have regard to the need to safeguard and promote the welfare of children who are in the UK. The close relationship between them was acknowledged in, for example, *R (C) v Secretary of State for the Home Department* [2013] EWHC 982 (Admin) [2014] 1 WLR 1234 where Moses LJ said (para. 39) 'the guiding principle for safeguarding

and promoting the welfare of children is described in article 3.1 of the UNCRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative or legislative bodies, the best interests of the child should be a primary consideration".

Article 8

34. For the convincing reasons given in *R (SA) v Secretary of State for the Home Department* [2015] EWHC 1611 (Admin), para. 77 together with the gravity of withholding citizenship to a child, the making of decisions in this context and the formulation of policy fall within article 8 of the ECHR. However, because of the domestic law applicability of the CRC as set out above, it is not necessary to rely on article 8 for the issues raised below to be justiciable.

Application of these principles

35. 'Good character' being a 'rather nebulous requirement' (Woolf MR in *Fayed* [1998] 1 WLR 763) and one which is not defined in the statute is therefore very open to interpretation by the Secretary of State. As long as the interpretation she adopts in respect of adults cannot be castigated as being unreasonable, the Courts will not interfere (see e.g. *Amirifard* and *Hiri*).

36. However, when deciding what that requirement is to mean in relation to children (as distinct from adults), the Secretary of State is not simply at liberty to adopt any interpretation of good character so long as it is a reasonable one. When deciding what 'good character' means for the purpose of formulating general guidance for decision makers and for the purpose of determining individual applications for citizenship the Secretary of State is obliged to treat the best interests of the child (i.e. child applicants generally or an applicant child in particular) as a primary consideration. That is because of article 3 of the CRC which the Secretary of State is obliged to apply by the statutory guidance adopted pursuant to Borders, Citizenship and Immigration Act 2009, s. 55 (*Every Child Matters*).

37. In this context (i.e. of drafting guidance and making individual decisions), CRC article 3 is applicable in each of the three facets referred to in *General Comment No 14*, i.e. as a 'substantive right', 'a fundamental, interpretative legal principle' and 'a rule of procedure'.

The substantive right

38. The individual child applicant and the class of potential child applicants generally have a substantive right to have their best interests assessed and taken as a primary consideration. The Secretary of State is therefore obliged to determine what is in the best interests of the child in relation to the granting or withholding of citizenship. Making the best interests determination requires the Secretary of State 'within the specific factual context of the case, [to] find out what are the relevant elements in a best-interests assessment, give them concrete content, and assign weight to each in relation to one another' (*General Comment No 14,* para. 46). The assessment must be conducted in the light of understanding that 'the ultimate purpose of the child's best interests should be to ensure the full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child' (*General Comment No 14,* para. 51).

39. What has to be assessed is the impact on the child's best interests of the adoption of a definition of 'good character' which will result in the refusal of citizenship to a child otherwise entitled to be registered as a British citizen. The grant or refusal of citizenship is not directly in issue but the interpretation of good character that is adopted will determine the outcome of the citizenship application. Therefore it is possible to refer to the impact on the child's best interests of being granted or refused citizenship as shorthand for the effects on the child of the adoption of a particular definition of good character.

40. One relevant element in the best interests assessment would have to be 'the context of international migration' in which

> children may be in a situation of double vulnerability as children and as children affected by migration who (a) are migrants themselves, either alone or with their families; (b) were born to migrant parents in countries of destination or (c) remain

> in their country of origin while one or both parents have migrated to another country. Additional vulnerabilities could relate to their national, ethnic or social origin; gender; sexual orientation or gender identity; religion; disability; migration or residence status; citizenship status; age; economic status; political or other opinions; or other status (*General Comment No 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration,* para. 3).

41. A further element in the assessment is the significance to a child of a grant or refusal of citizenship. As Woolf MR said in *R v Secretary of State for the Home Department ex parte Al Fayed* [1998] 1 WLR 763 of being refused British citizenship on character grounds:

> Apart from the damaging effect on their reputations of having their applications refused the refusals have deprived them of the benefits of citizenship. The benefits are substantial. Besides the intangible benefit of being a citizen of a country which is their and their families' home, there are the tangible benefits which include freedom from immigration control, citizenship of the European Union and the rights which accompany that citizenship—the right to vote and the right to stand in parliamentary elections.

42. As far as the citizenship of children is concerned, Lady Hale in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 at para. 33 cited the chapter by Jacqueline Bhabha entitled 'The "mere fortuity of birth?" Children, mothers, borders and the meaning of citizenship' in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik. She commended the work as contributing to a much greater understanding of the significance of citizenship in 'assessing the overall wellbeing of the child' (para. 33). In that chapter, Jacqueline Bhabha said

> Citizenship is a fundamental, constitutive social fact. It governs the relationship between the individual and the collectivity – does one "belong" or is one an

"outsider"? It may or may not affect the actual emotional attachment that a person feels to the place in which he or she lives (residence and presence of family networks are other key factors), but it certainly regulates and stimulates the insertion of the personal into the public – that is, it regulates access to an effective voice in local or national government.

Citizenship also defines the framework in which the balance between self-interest and public concern is negotiated, both by the individual citizen and by the polity, because citizens' interests are central to the assessment of what is a public good. Citizens have a privileged claim to public concern and expenditure where noncitizens do not; citizens exemplify the norm, the standard, the instantiation of national interest where noncitizens do not. In short, through their vote, their agency in public officer, their civic participation, their clout as addresses of politicians, citizens have a role in shaping the society they live in that is radically different from that of noncitizens.

A key consequence of this bundle of social facts is that public life is dominated by and organized around the perspectives of citizens. Groups excluded or marginalized from membership find their interests subordinated and their point of view neglected, even ignored. To establish their "genuine connection" to the policy and achieve their political goals, those who are excluded have to garner the support of citizens. This requires an engagement in the public sphere that may present an insurmountable hurdle – for example, a young child of undocumented parents. The invisibility of children's interests in framing of much public policy exemplifies this and is a point that will be returned to below.

Citizenship is not only a social fact. It is also the legal correlate of territorial belonging. It signifies official recognition of a particularly close relationship between person and country, typically characterized as a bundle of reciprocal rights and duties owed to the country by the citizen. The International Court of Justice articulated a classic definition of citizenship in the famous *Nottebohm* case: it is "a

> legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties".

43. She went on to say that citizenship is to be distinguished from other statuses such as indefinite or permanent residence because:

> As a marker of identity, citizenship signals "belonging" and "insider status" in a privileged way. The border – and mobility-related entitlements owed by a country to its citizens have become particularly significant: they include the entitlement to a passport, the right to consular protection abroad, the right to move in and out of the country freely and to reenter at any time irrespective of the length of absence abroad, and the entitlement, in some states such as the United States or under European Union (EU) law, to privileged family reunification opportunities. But arguably the most significant citizen-specific entitlement today is the guarantee of non-deportability, irrespective of criminal offences.

44. Jacqueline Bhaba's account of the significance of citizenship provides compelling reasons for concluding that the grant of citizenship to children will almost certainly be in their best interests and that withholding citizenship would be detrimental to their best interests and welfare.

45. It is likely that a significant proportion of the cohort of children in issue will have spent all or nearly all of their formative years in the UK. They will not have chosen to do so but will have been born in or brought to the UK by adults. They will have become the individuals they are very much as a consequence of having grown up and having been socialized in the UK. They may well have thought of themselves as being British without realizing that they were not. For such children, being denied legal recognition of the social fact of their attachment to the UK may be devastating because of its impact on the child's sense of his or her identity and attachment, quite apart from the material effect of being denied the specific rights attaching to citizenship.

46. The position of adults seeking to naturalise is likely to be very different in most cases. A far smaller proportion of that cohort will have been born in and spent their formative years in the UK. They are more likely to have chosen, as already fully formed adults, to relocate to the UK. Consequently they are unlikely to have the degree of attachment to the UK that the children being considered will have and refusal of citizenship is unlikely to have the same impact on their sense of their identity.

47. Parliament's recognition of the profound significance to be attached to the social fact of attachment to the UK established by children born and brought up here no doubt underlay the provision in the BNA for children to register as citizens as a matter of entitlement and without having to satisfy a good character requirement. A clear indication that that was the case was given by the Minister (Timothy Raison) sponsoring the provision in the Bill that became s. 1(4) of the BNA (i.e. for children born in the UK and continuously resident for ten years to register). He said (Hansard, Standing Committee F, 26th February 1981, p. 221-3):

> the first 10 years of a child's life are the formative years. By the age of 10, we believe, the child's roots could be regarded as being firmly set in this country… We have taken the view in the past that a child who has spent the first 10 years of his life here has substantial ties with this country and we believe that irrespective of his situation under immigration control, by the age of 10 those ties will be so substantial that it would be wrong to create a position whereby the child might be removed.

48. Article 40 of the CRC provides further illumination as to what is in the best interests of the child. As noted above, article 40(1) includes the right of a child convicted of an offence 'to be treated in a manner … which takes into account the … desirability of promoting the child's reintegration and the child's assuming a constructive role in society'. Moreover, article 6 which includes the child's right to development requires the policy response to juvenile delinquency to include support for the child's development. Granting citizenship would promote the child's reintegration whereas refusing citizenship would not and instead would tend to the child's estrangement.

49. It is true that article 40 is expressly concerned with criminal justice whereas the provision in issue here relates to nationality. However, in *Gray v Thames Trains* [2009] UKHL 33; [2009] 1 AC 1339 at para. 77 Lord Roger referred to the 'fundamental legal policy of preventing inconsistency in the law'. Having the rehabilitation of juvenile offenders as an objective to be achieved by the penal law but the estrangement of offenders as an objective of nationality law is to promote inconsistency, contrary to that fundamental legal policy. The better approach is to have both promoting the same objective of promoting the reintegration of juvenile offenders.

The interpretive principle

50. The child's best interests are most effectively served by the broadest possible interpretation of 'good character', i.e. an interpretation whereby children are presumed to be of good character and only cogent evidence of a propensity to engage in serious misconduct of a kind likely to cause real harm to others may result in the loss of good character.

51. The current guidance whereby any of an extremely wide range of wrong-doing may be sufficient to forego good character is detrimental to best interests, is not dictated by the terms of the statute and is therefore contrary to the interpretive principle contained within article 3.

52. Further, historical misconduct should not be treated as by itself indicative of want of good character. It is important to consider the causes of and possible mitigation for any such conduct and in doing so, it is important to recognize that it may be caused by circumstances external to the child rather than by any feature of the child's conduct.

53. As noted above, the statute does not define 'good character'. It is a provision amenable to both of the interpretations referred to above. There is no statutory bar to adoption of the first and as the first, by contrast to the second, most effectively serves the best interests of the child it is the interpretation that should be adopted.

The rule of procedure

54. Article 3 also includes a rule of procedure with which the Secretary of State must comply both when making individual decisions in respect of children and when adopting guidance as to the meaning and application of the good character requirement. Most importantly, that requires the Secretary of State to show, both in individual decisions and in the guidance, exactly what has been considered to be in the child's best interests; how those best interests may be effected by the refusal of citizenship on character grounds and how those best interests have been weighed against any countervailing considerations. (See *General Comment No 14,* para. 6).

Countervailing considerations

55. The best interests of the child are 'a primary consideration' and not 'the primary consideration'. Thus if it is found that the best interests of the child require a particular outcome the decision maker then has to decide whether 'the strength of the other considerations outweighed' the best interests of the child (see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, para. 26). In order to conduct that balancing exercise, the decision maker has to have determined what is required by the best interests of the child and how much weight is to be given to those interests in the particular circumstances of the case as discussed above. The decision maker also has to determine (a) what if any considerations favour an outcome inconsistent with the best interests of the child and (b) how much weight is to be accorded to any such consideration. Only by doing that is it possible to determine whether the strength of those considerations outweigh the best interests of the child.

56. The public interest served by the good character requirement in respect of naturalization was described in the white paper *British Nationality Law* (1980) Cmnd 7987 that preceded the British Nationality Act 1981 at para. 65

> There can in the Government's view be no doubt that it would be generally offensive to public feeling if someone with recent criminal convictions were to be able to claim British citizenship as a matter of course; and the same would apply to people of dubious reputation in other ways, or known to be working against the

interests of this country or to have no sense of loyalty to it. It would not be right to devalue the naturalisation process in this way.

57. However, Parliament did not consider that there was any similar public interest that required a good character requirement to be satisfied by children or, if there was, Parliament must have considered that any such interest was outweighed by the considerations favouring registration of children by entitlement without regard to character.

58. Furthermore, there is a fundamental difference between registration of children as citizens and naturalization of adults. The provisions for registration of children recognized that their connections with the UK were of such moment as to give rise to an entitlement to citizenship without qualification by a character requirement. No doubt one reason for that was that such connections were established in consequence of the child's birth and presence in the UK which were not chosen by the child and for which adults and not the child were responsible. Another reason was appreciation of the significance to the child of such connections with the UK. By contrast, adults seeking to naturalise have generally chosen to make the UK their home; generally the UK will not be their country of birth and generally they will have strong connections with another country. That distinction meant that a degree of selectivity, manifested in the good character requirement, could be applied to citizenship applications by adults but was inapposite in relation to children because their connections with the UK might be of a qualitatively different order of significance. The Minister promoting the BNA (Timothy Raison) referred to (Hansard, Standing Committee F, 24th March 1981, p. 701)

> British citizenship by naturalization as implying not merely the absence of formal blemishes but a commitment to our society, a belief that the applicant has something to offer our society, and characteristics that it can be seen will make him a good citizen. That is what we are really looking for.

59. There is no good reason to think that the position changed since the enactment of the BNA, i.e. that by contrast to the position in 1981 it would now be so offensive to public feeling to register a child with recent convictions as a citizen that citizenship should be refused contrary to the

best interests of the child. Indeed, there are good reasons to think that the position is now even more favourable to the interests of the children. That is because of matters that include: (a) the adoption of the CRC (in 1989) since the BNA was enacted; (b) the enactment of Borders, Citizenship and Immigration Act 2009, s. 55 so that as a matter of international and domestic law there is an obligation of a kind that there was not when the BNA was enacted to treat the best interests of the child as a primary consideration; (c) as described above with reference to *ZH (Tanzania)* and Jacqueline Bhabha's work, there is now an even greater understanding than when BNA was passed of the importance of a child's citizenship.

60. Moreover, the explanation given by the Minister promoting the introduction of a good character requirement for children in the Immigration, Asylum and Nationality Act 2006 indicates that the legislative purpose was not to give effect to a consideration as broad as that 'it would be generally offensive to public feeling if someone with recent criminal convictions were to be able to claim British citizenship as a matter of course'. It is evident that there was a much narrower and more focused objective. Significantly, what became the Immigration, Asylum and Nationality Act 2006 was introduced to Parliament shortly after the 7th July 2005 bombings in London by British citizens. Baroness Ashton explained in the House of Lords, 3rd Reading (Hansard, HL 14 March 2006, col. 1192):

> We believe that it is right and proper, in general, that we should be able to say that those who have engaged in drug dealing, paedophilia or war crimes – those who are guilty of such serious crimes – fail to meet a good character test, in order to exclude them from the granting of nationality.

61. There are public interest considerations that weigh in favour of the child. There is 'a strong public interest in ensuring that children are properly brought up' (Lady Hale, *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25; [2012] 3 WLR 90, para. 33) or as Lord Wilson said at para. 156 in the same case, there is 'the public importance that children should grow up well-adjusted'. Promotion of the child's reintegration or rehabilitation furthers that interest whereas acting contrary to the child's best interests by withholding citizenship does not.

62. If in deciding a particular application or in adopting guidance as to the good character test for children the Secretary of State adopts a more restrictive approach than that suggested here, the Court should not be confined to a *Wednesbury* review of the decision or guidance. It should be able to assess for itself the appropriateness of the balance drawn by the Secretary of State between, on the one hand, the right to British nationality which those satisfying the requirements for registration have (subject to the good character requirement) and the right of the child to have its best interests treated as a primary consideration and on the other hand, whatever countervailing considerations the Secretary of State may rely on: see for example *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591. The susceptibility of these decisions to proportionality review is a further reason (in addition to the 'rule of procedure' under article 3 of the CRC) for clear and detailed reasons to be given by the Secretary of State to explain how the potential conflict between competing interests and considerations is resolved.

Relevance of the CRC to decisions taken after the applicant turns 18

63. In *R (SA) v Secretary of State for the Home Department* [2015] EWHC 1611 (Admin) the Court held that the s. 55 duty did not apply in the case of a person who had applied to register as a citizen whilst a child but where the decision was made after the applicant became an adult. At para. 71 the judge said:

> section 55 is concerned with the date on which a relevant *function* is exercised. It seems to be that the relevant functions here are the assessment and determination of the claimant's application for registration, at which point the claimant was an adult.

64. There is a good argument for saying that the judge was wrong to treat s. 55 as not applicable where the subject of the decision was an adult.

65. Section 55(1)(a) says:

> The Secretary of State must make arrangements for ensuring that-
> (a) The functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK; and
> …

66. Section 55(3) says:

> A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

67. As can be seen, section 55 makes no express provision restricting its application by reference to the age of the subject of a decision. Rather, what it requires is that decision making (and other functions) are carried out having regard to the need to safeguard and promote the welfare of children who are in the UK. Thus, if the making of a decision (or more generally, the exercise of a function) in respect of an adult has a potential impact on children then it is a decision to which the s. 55 duties apply.

68. An obvious example of such a situation is the taking of a decision to remove the adult parent of a child. Plainly consideration has to be given to the impact of the decision on the welfare of the child, albeit the child is not a subject of the decision.

69. In the present context, the choices made by the decision maker as to the policy to be adopted and applied for determining the significance and consequences for adults of their childhood conduct affects the welfare and best interests of children. For example, if a child commits a serious offence, it is plainly in the child's best interests that that should have no impact on the child's future life as an adult rather than that it should result in e.g. deportation or withholding of citizenship after the child becomes an adult.

70. This principle was adopted by the Grand Chamber of the European Court of Human Rights in *Maslov v Austria* (2008) App 1638/03 where it said at para. 82

> The Court considers that the obligation to have regard to the best interests of the child also applies if the person to be expelled is himself or herself a minor or if – as in the present case – the reason for the expulsion lies in offences committed when a minor.

71. That principle supports an argument that, contrary to *SA,* the obligations imposed by s. 55 and the CRC article 3 require the adoption of a policy which minimizes the detrimental consequences for adults of their conduct whilst children.

Conclusion

72. The Secretary of State's recognition that the current guidance is inadequate and needs to be revised to take account of the specific situation of children gives rise to a real issue as to the legality of decision making in response to children's applications to register. One element of the requirement of legality is that an applicant should know the criteria that he or she has to meet and that will be applied to determine any application she might make. Currently, applicants are very much in the dark as to what those criteria are and whether considerations of the kind set out above may enable the character requirement to be met, contrary to the impression given by the guidance. That darkness, combined with the cost of making an application to register no doubt operate as a real disincentive to the making of applications where, at least if the current guidance is applied, refusal might be anticipated. The combination of the admittedly unlawful or at least inadequate guidance and the high cost of applying for citizenship constitute an unlawful deterrent to the making of applications for registration.