

Reasserting Rights to British Citizenship by Registration: the requirement of good character

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At a glance

This article is the fourth in a series by the authors for this journal concerning rights of registration to British citizenship. With these articles the authors seek to raise awareness of these rights and the importance of their exercise; and explore the various ways these rights have been undermined by developments of law, policy and practice over the years following the introduction of the British Nationality Act 1981.

The statutory requirement of good character that applies to certain, but not all, rights of registration is a particularly damaging example. It has created a serious rupture at the heart of the Act, excluding some British people from their citizenship on the basis of an assessment of character that most of their peers will never endure.

1. Introduction

On 1 January 1983, the British Nationality Act 1981 ('the 1981 Act') came into force. The Act created British citizenship. This was to establish a new nationality of the United Kingdom to clearly distinguish the people belonging to the United Kingdom from the people belonging to its former colonies, including various territories over which it retained sovereignty. In doing this, Parliament changed the fundamental basis upon which British nationality law was to operate including by no longer recognising *ius soli* as a basis for conferring nationality. Instead, the 1981 Act was underpinned by a principle of connection. The aim was to define a citizenship – the people possessing and entitled to possess it – on the basis of their strength of connection to the territory to which that citizenship relates. British citizens were thenceforth to be the people connected to the United Kingdom.¹

As more fully discussed in an earlier contribution to this journal,² rights of registration had a vital place in this aim of the 1981 Act. One especially important example of this, lies in the various entitlements of children born in the United Kingdom to be registered as British citizens. These entitlements were expressly intended to ensure that ending *ius soli* did not exclude children born in the United Kingdom, whose connection – while not clear at their

1 This was identified in the White Paper, *British Nationality Law: Outline of Proposed Legislation*, July 1980, Cmnd. 7987, that preceded the Act; and in the parliamentary debates, eg, *Hansard* HC, 3 June 1981: Cols 979-980 per Mr Timothy Raison, Minister of State, Home Office.

2 Solange Valdez-Symonds and Steve Valdez-Symonds, 'Reasserting Rights to British Citizenship through Registration' (2020) 34(2) *Journal of Immigration, Asylum and Nationality Law* 139.

birth – became clear by growing up here. It is vitally important that discussion of the good character requirement, to which this article relates, starts from an understanding of these origins of British citizenship and the place of registration in securing the parliamentary purpose intended when creating that citizenship.

On its commencement, the 1981 Act, as its predecessor,³ contained no character requirement relating to registration. This reflected the purpose of registration, being the means to ensure the ability of all persons identified as citizens by right to vindicate that right. That has since changed. Section 41A(1) of the Act⁴ now provides:

An application for registration of an adult or young person as a British citizen under section 1(3), (3A) or (4), 3(1), (2) or (5), 4(2) or (5), 4A, 4D, 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.

That section defines an adult or young person as anyone aged 10 or over.⁵ The section expressly identifies the various registrations to which the statutory requirement of good character ('the character requirement' or 'the requirement') now applies. These are not all registrations.⁶ The range of registrations caught by the requirement has been both extended and reduced over time.

This article is divided into three main sections. Section 2 makes some general observations about the character requirement, which are necessary to understand its meaning and proper application. Section 3 addresses the application of the requirement, including by reference to practical experience. This section provides some critique of how the Secretary of State applies the requirement. Section 4 addresses the origins and history of the requirement. It gives reasons why the requirement ought not to have been introduced and explains the damage done to British citizenship by its introduction.⁷ Conclusions are summarised in Section 5.

2. General observations concerning the character requirement

This section includes some short explanation of the distinction between registration and naturalisation. However, the discussion in this article relates solely to s 41A and the requirement that applies to certain registrations. Naturalisation is undoubtedly important in its own right, but it is distinct from registration and not discussed here.

It is nonetheless necessary to identify that there are two distinct statutory provisions concerning character now contained in the 1981 Act. One has always been present. It applies exclusively to naturalisation.⁸ The other is that partially set out above – s 41A. It applies exclusively to registrations, though not all registrations.

3 The British Nationality Act 1948.

4 Introduced on 13 January 2010 by commencement of s 47, Borders, Citizenship and Immigration Act 2009. However, s 58 of the Immigration, Asylum and Nationality Act 2006 first introduced the requirement. The core substance of the requirement as first introduced by the 2006 Act is in all material respects the same as that introduced by the 2009 Act. The latter gave effect to a consolidation of British nationality law by placing the requirement in the British Nationality Act 1981 rather than it remaining in the 2006 Act and separated from that 1981 Act.

5 Section 41A(5).

6 Moreover, it is not only s 41A(1) that defines the range of registrations caught by the character requirement. In relation to registration as a British citizen, s 41A(1A) and (2C) must also be considered. Other subsections apply to other categories of British nationality.

7 Other British nationalities are not the focus of this article, though the authors note the rather similar circumstances relating to British overseas territories citizenship in particular.

8 Paragraph 1(1)(b) of Schedule 1, British Nationality Act 1981.

There are other distinctions between the two provisions that must be considered. The statutory wording is different.⁹ The people to whom the provisions apply and the circumstances in which they apply are also different. Registration applies to children and adults, whatever their capacity may be.¹⁰ Naturalisation is only available to persons ‘of full age and capacity’.¹¹ Registration is a right, in nearly all cases delivered by way of statutory entitlement. Naturalisation is always a matter of the Secretary of State’s discretion.

As regards entitlements to registration, the wording of the relevant provisions must be considered more closely. An entitlement to registration under the 1981 Act is generally provided in the following terms (for example taken from section 1(4) of the Act) or in very similar terms:

A person ... who is not a British citizen ... shall be entitled, on an application for his registration as a British citizen ... [if the person meets the conditions specified in the relevant registration provision]... to be registered as such a citizen ...

The character requirement in s 41A of the 1981 Act does not change this. The statute, therefore, continues to recognise the person’s entitlement to be registered as a British citizen even where the requirement applies. However, s 41A may bar the Secretary of State from acting upon the entitlement.

To properly understand the nature and extent of the character requirement that applies to registration, these distinctions must be considered holistically. They must also be understood in their proper context. In short, registration as a British citizen is the means by which Parliament sought to address the circumstances of people connected to the UK but whose connection was not capable of recognition through an automatic right of acquisition of citizenship (eg at birth). This is its fundamental distinction from naturalisation – a separate process for adults who have migrated to the UK, been permitted to settle and who wish to make their connection with this country.

3. Application of the character requirement

There is no statutory definition of what is character, what constitutes good character or of the circumstances in which the Secretary of State should be satisfied a person is of good character.

Having regard to the requirement’s context, the relevant question is whether the Secretary of State ought to be satisfied as to the good character of a person, who has made an application to be registered as a British citizen and fulfils all the conditions of any of the various statutory entitlements to be registered as such a citizen. In answering this question, effect must be given to the matters addressed in section 2 above.

If the Secretary of State determines he is not satisfied of such a person’s good character and therefore considers himself prevented from registering the person as a British citizen, the result is to deprive that person of their statutory right to the citizenship of the country to which they are connected. It is strongly arguable, therefore, that the requirement’s application must

9 *ibid.* The wording of paragraph 1(1)(b) is ‘(1) ... the requirements for naturalisation as a British citizen under section 6(1) are, in the case of any person who applies for it ... (b) that he is of good character; ...’. This requirement also applies to naturalisation under s 6(2) by way of paragraph 3(1)(e) of the Schedule.

10 Section 4L(1), British Nationality Act 1981 provides an exception to this.

11 Section 6(1) and (2), British Nationality Act 1981. Where it is in a person’s best interests, the requirement to be of full capacity may be waived, not the requirement to be of full age: see s 44A of the Act.

not create a high bar for the person to overcome and must take care to avoid excluding people on the basis of any narrow determination of their character.

Notwithstanding the above, the Secretary of State generally applies the character requirement in precisely the same way that he applies the character requirement that applies to naturalisation. In doing so, he has for many years tended to apply a formulaic approach to criminal sentences. This approach has been to treat the type and level of sentence (custodial or non-custodial; and, if custodial, the length of sentence) for any conviction as determining the lengthy period for which the person is to be treated as not of good character and thereby excluded from citizenship.

Under his current guidance to his decision-makers,¹² the Secretary of State continues to apply that approach to determining nationality applications made before 31 July 2023. The approach under the new guidance is hard to assess as decision-making in this area generally takes several months. There will have been few decisions on applications made since that date.

The motivation for the change in the guidance is unclear. However, it coincided with a number of letters before claim and claims for judicial review issued by PRCBC, which in part challenged the formulaic approach to criminal sentences that had initially derived from the guidance. In any event, the Secretary of State's treatment of offending is not obviously improved by the new guidance, which gives broad direction to decision-makers that anyone identified as a persistent offender or identified as having caused serious harm 'will normally be refused'. Although it now includes some express reminder to decision-makers of the need to consider other matters, and that a person may be of good character notwithstanding offending, the guidance remains dominated by consideration of offending and sentence length and/or type.

Accordingly, while the Secretary of State expressly states in his guidance that the assessment must be of all aspects of a person's character, including both positive and negative aspects, the guidance – as is reflected in many decisions the authors have seen – tends to direct the decision-maker to focus specifically on offending with a strong presumption that an offence will in itself determine someone not to be of good character. There are at least three ways in which this approach is wrong.

Wrongly treating past offences as a proxy for current character

First, nowhere does the statute treat past offending as a proxy for character. The requirement concerns a current assessment of character; and while regard may be had to past offending, treating the past as determining the present is a fundamental error. That is especially so in relation to young people. As the Court of Appeal has recently reaffirmed, it is well known to the criminal justice system that:

52. ... the brains of young people are still developing up to the age of 25, particularly in the areas of the frontal cortex and hippocampus. These areas are the seat of emotional control, restraint, awareness of risk and the ability to appreciate the consequences of one's own and others' actions; in short, the processes of thought engaged in by and the hallmark of, mature and responsible adults. It is also known that adverse childhood experiences, educational difficulties and mental health issues negatively affect the development of those adult thought processes. Accordingly very particular

¹² *Nationality: good character requirement*, version 4.0 ('the Guidance'), 31 July 2023.

considerations apply to sentencing children and young people who commit offences. It is categorically wrong to set about the sentencing of children and young people as if they are “mini-adults”. An entirely different approach is required.¹³

The Secretary of State has long failed to understand, still less apply, any of this. His approach gives no particular regard to the circumstances of young adults. Even after recommendations of the Chief Inspector of Borders and Immigration,¹⁴ his guidance has failed to set out any significantly distinct approach to applying the requirement to children’s circumstances with the implied assumption that any relevant considerations concerning a young person’s age will inevitably be reflected by the sentencing court.¹⁵

This simply avoids the critical matter of assessing character currently. While a court will consider mitigation at the time of sentencing, it is not concerned with assessing the person’s character – let alone making a future prediction as to that. As the Court of Appeal emphasises, the years up to 25 constitute a critical time of neurological, psychological and emotional development. A person’s character may change, and change radically, over this period. Fixing a person’s character as ‘criminal’ or ‘bad’ by reason of offences during this period is not consistent with the statutory requirement for a current assessment.

The Secretary of State’s treatment of offending during childhood or young adulthood is plainly wrong. However, his treatment of later offending is wrong for similar reasons. Character can and does change. Indeed, rehabilitation (which would entail some notion of character reform) is a specific purpose of the criminal justice system. The Secretary of State’s approach fails to give any real effect to these matters.

Wrongly excluding other, particularly positive, considerations relating to character

Second, as the High Court has emphasised, the character requirement requires holistic assessment.¹⁶ All aspects of character – positive and negative – are to be considered. The Secretary of State’s approach, as consistently revealed by decisions to refuse registration, tends either to focus exclusively on offending or treat offending as determinative notwithstanding other evidence.

The difficulty here can be more profound. The High Court has identified the particular difficulty faced by children in demonstrating positive aspects of character.¹⁷ Their age necessarily means they are less likely to have had the opportunity to demonstrate positive characteristics in a place of employment or wider community engagement. These difficulties are not limited to children or may not end in childhood. The alienating effect of exclusion from citizenship is in some instances compounded by more tangible exclusions from work, study and any financial or other means to socially engage more widely. The requirement and its application can thereby create the very conditions for it never to be overcome.

13 *ZA v R* [2023] EWCA Crim 596.

14 The history of this is summarised in the ‘Summary of conclusions’ in the Chief Inspector’s report, *Re-inspection of the Home Office’s application of the good character requirement in the case of young persons who apply for registration as British citizens, August 2018-January 2019*.

15 See ‘Application of the requirement to young persons’ of the Guidance (n 12).

16 *R (SA) v Secretary of State for the Home Department* [2015] EWHC 1611 (Admin), following *R (Hiri) v Secretary of State for the Home Department* [2014] EWHC 354 (Admin).

17 *R (SA)* (n 16).

Wrongly discounting specific duties concerning children's rehabilitation

Third, there is – particularly in the case of children – a serious impact on statutory and international duties directly related to the rehabilitation of child offenders. Article 40 of the 1989 UN Convention on the Rights of the Child requires the State to promote such rehabilitation. Section 55 of the Borders, Citizenship and Immigration Act 2009 effectively incorporates the duty to give particular importance to the best interests of children.¹⁸ In doing so, art 40 must be given effect. It is also noteworthy that art 8 of the 1950 European Convention on Human Rights has long been understood to include giving effect to art 40.¹⁹

The duties and principles at stake are entirely consistent with the purposes and principles of the youth justice system. Nonetheless, they are manifestly not reflected in the Secretary of State's current approach to the character requirement as revealed by his guidance and refusal decisions.

PRCBC's experience

PRCBC has assisted and represented dozens of children and young people with applications for registration to which the character requirement is applied. It has also assisted several adults whose right to registration first arose in their childhood, but who have remained excluded from citizenship decades later. That experience shows the people affected to be largely black or brown British people, often with histories of engagement with the care, mental health and youth justice systems; and often sharing characteristics of single parentage, poverty, neglect or abuse.

The offending by which the character requirement is used to exclude people, including children, from their citizenship rights varies greatly. It includes relatively minor offences of children in care or foster homes that likely would never have come to the attention of the police or courts if the child was growing up in their parental home – such as offences of criminal damage or petty theft at home. Other offences are much more serious, carrying prolonged prison sentences. In either case, the requirement is often applied with isolated focus on the offending without any, let alone careful, consideration of the wider personal circumstances that may relate to any offence and will relate to any proper assessment of character.

In all cases, addressing the character requirement has required many hours of work in building rapport and taking detailed instructions; and in collating, analysing and presenting evidence to contradict an assumption, generally built into the Secretary of State's decision-making, that offending means bad character that should exclude someone, including a child, from citizenship for years and, in some cases, permanently. PRCBC has been able to counter that assumption in many cases, including of children, young adults and older people whose offending histories include the more serious offences referred to.

However, the capacity to secure evidence to counter the assumption has itself proved to be unequal. Some people, including children, can provide detailed explanation of their connection to the UK, their British identity and the alienating impact of exclusion from citizenship. Some have access to probation reports, medical records, local authority files and other material to demonstrate positive aspects of character and/or explanations of their offending. As PRCBC has highlighted frequently, one of the positive aspects of a person's

¹⁸ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

¹⁹ *Maslov v Austria* App no 1638/03, 23 June 2008, Grand Chamber.

character may well be their effort to avoid or overcome the circumstances in which they have offended – circumstances many other British people may never face. Some people can obtain third party character references from employers, voluntary organisations, community and church groups, and family and friends. In many instances, particularly of young offenders, PRCBC has secured independent psychiatric assessments.

The evidence is crucial to demonstrating why a current character assessment ought to be positive. It may also be important to show the unjust impact of how the character requirement is applied; and demonstrate how exclusion from citizenship undermines statutory duties, wider policy aims and international obligations to promote children’s best interests and their social rehabilitation and integration. However, that evidence is not equally available to all. Social exclusion of the very kind the character requirement is likely to exacerbate is one reason it may be less available.

Moreover, one impact of the character requirement is to undermine the protection that registration should provide children born British citizens, who for reasons of parental neglect and other social exclusion may be unable to establish their acquisition of citizenship at birth. This occurs, for example, where a child cannot identify their father or secure evidence of their father’s British citizenship or settled status at the child’s birth. The children most at risk of being disenfranchised in this way tend to share characteristics that are most likely to also put them at risk of being excluded from being registered as British citizens on character grounds.

4. The origins, history and injustice of the character requirement

The introduction of the character requirement to the Immigration, Asylum and Nationality Bill came shortly after the London bombings on 7 July 2005 by British citizens, all bar one of whom were born in the UK, killing 52 other people and injuring hundreds more. Provision for the requirement was introduced early in the Bill’s passage. At that time, the Immigration Minister expressly mischaracterised naturalisation and registration as essentially similar provisions.²⁰ The Minister in the Lords repeatedly mischaracterised the people affected as ‘people coming to the United Kingdom’.²¹

These characterisations were not merely wrong. They significantly undermined registration and its purpose; and resulted in the introduction of a requirement that has created a fundamental rupture between British people – some of whose nationality is made dependent on an assessment of their character that the majority never endure.

Moreover, when presenting the provision in the House of Lords, the Minister stated:

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.²²

Not only did the Government and Parliament of the day fail to properly assess the citizenship rights upon which they were imposing a character requirement, they did so in apparent

20 *Hansard* HC, Public Bill Committee, 27 October 2005: Columns 256 & 270, *per* Tony McNulty.

21 *Hansard* HL, 19 January 2006: Column GC279; 7 February 2006: Column 622; and 14 March 2006: Column 1198, *per* Baroness Ashton of Upholland.

22 *Hansard* HL, 13 March 2006: Col 1192, *per* Baroness Ashton of Upholland.

contemplation of a threshold of culpable conduct far higher than that which is applied by the Secretary of State in practice.

Scant attention was given to the nature and purpose of registration or to the requirement during the passage of Borders, Citizenship and Immigration Act 2009, which introduced what is now s 41A of the 1981 Act thereby consolidating the requirement.²³ The Minister steering the Bill's nationality provisions through the House of Lords stated emphatically – and wrongly – that the requirement originated from the commencement of the 1981 Act.²⁴ Clearly, he and those briefing him, as their predecessors in 2005–2006, recognised none of the distinctions between registration and naturalisation.

The limited discussion in the Commons was no better. In a relatively prolonged debate on the requirement's application, the Minister failed to identify, still less consider, these vital distinctions; and nobody corrected him.²⁵

The range of registrations caught by the character requirement has changed over time. That range has both been extended and reduced. Initially, it was extended to include registration provisions added to the 1981 Act after the requirement's first introduction in 2006. Of particular interest is the initial extension of the requirement to registration rights introduced to remedy specific historical injustices by which people, who would have been born British citizens or been made British citizens at the commencement of the 1981 Act, were excluded.²⁶ In July 2019, following declarations of incompatibility under s 4 of the Human Rights Act 1998 by the Supreme Court and High Court, the relevant registrations were removed from the scope of s 41A.²⁷

There is a correlation between the circumstances upon which these declarations of incompatibility were made and the circumstances of many other people whose registration entitlements remain subject to the character requirement.

For example, s 1(4) of the 1981 Act was included specifically to mitigate the injustice that would arise at the birth of a child, whose future it would turn out was in the UK, by the ending of *ius soli*. That principle's ending had been on the grounds that children of parents, who were neither British nor settled at the child's birth, might be mere 'birds of passage'²⁸ whose futures, and therefore connection, properly lay elsewhere.²⁹ The injustice that s 1(4) addresses was one that Parliament foresaw and accounted for. The same is true of the child who was born a British citizen but must rely on registration because they cannot prove they meet the conditions of s 1(1).

There is something of an irony here. Injustices Parliament did not foresee or address at the time of making the 1981 Act have ultimately been accounted for in a way that preserves British people's right to citizenship regardless of their character. Injustices that it did foresee and

23 Introduced by the commencement of s 47 of the Borders, Citizenship and Immigration Act 2009 by art 4(f), Borders, Citizenship and Immigration Act 2009 (Commencement No 1) Order 2009, SI 2009/2731.

24 *Hansard* HL, 1 April 2009: Column 1095, *per* Lord Brett. Lord Aveling correctly identified that the requirement had only been made a part of British nationality law by the Immigration, Asylum and Nationality Act 2006, but this was the limit of any discussion about the history of the matter, let alone its relevance and impact upon rights to British citizenship by registration.

25 *Hansard* HC, Public Bill Committee, 2 June 2009: Columns 133–137 *per* Phil Woolas.

26 More fully discussed in *Journal of Immigration, Asylum and Nationality Law* (n 2).

27 This was done by the British Nationality Act 1981 (Remedial) Order 2019, SI 2019/1164, the draft of which the Joint Committee on Human Rights considered in its Twentieth Report of the Session 2017–2019, HC 1943/HL Paper 397, July 2019.

28 See the discussion in *Journal of Immigration, Asylum and Nationality Law* (n 2) 143–145.

29 A similar analysis can be applied in respect of many entitlements that are discussed in *Journal of Immigration, Asylum and Nationality Law* (n 2), including rights of both children born in the UK and children born outside the UK.

address, however, have many years later become profoundly misunderstood and made subject to the character requirement.

Section 4L of the 1981 Act has created a further anomaly.³⁰ It has introduced a discretion for the Secretary of State to register an adult as a British citizen if the person would or could have become such a citizen but for historical injustice, a public authority's act or omission, or exceptional circumstances. This is not the place for discussion of the particular provision. However, it is noteworthy that it includes discretion whether or not to apply the character requirement.³¹ By contrast, a child applying to be registered under s 3(1) for any similar reasons is caught by the requirement. This anomaly tends to emphasise just how incoherent British nationality law has been made by these various developments.

5. Conclusion

For reasons summarised in this article, the imposition of a character requirement upon rights to British citizenship has introduced a fundamental rupture at the heart of the British Nationality Act 1981. British people are made unequal in terms of their nationality rights and – given the centrality of citizenship to so much else – that inequality is profound. British people, inevitably, include people of varying character and conduct. However, for some, their character has become the means for their alienation, including in circumstances where they have been born in the UK and lived here their entire lives of many years or several decades.

Ultimately, this alienation can be, and often is, self-perpetuating and likely self-fulfilling. Exclusion from citizenship – especially but not only when accompanied by exclusion from work and public funds, liability to immigration detention and the threat of exile³² – creates a severe barrier to social rehabilitation. It can also create an even greater impediment to securing evidence to demonstrate good character (by positive social participation and engagement, and positive references as to character and reformation). By these means, a British person – entitled to the citizenship of the UK, being their country by connection and statutory right – is made forever alienated and made to feel that alienation profoundly.

The inequality and injustice introduced by the character requirement is exacerbated by how it is applied. The result is often an effective, and grossly excessive, additional punishment for criminal offending. That additional punishment is deprivation of citizenship – albeit before rather than after its acquisition – and the social exclusion and even exile that may follow. In the case of child offenders, the impact is also a fundamental nullification of domestic and international law principles that require the State to focus on aiding the child's social rehabilitation and integration.

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30 The section was introduced by s 8 of the Nationality and Borders Act 2022, commenced on 28 June 2022 by the Nationality and Borders Act 2022 (Commencement No 1, Transitional and Saving Provisions) Regulations 2022, SI 2022/590.

31 Section 4L(4).

32 Under deportation powers in the Immigration Act 1971 and/or UK Borders Act 2007.