WORKSHOP 4: Registration of British Citizenship and Good Character
21 November 2020, 2-4pm, via Zoom

Relevant legislation:

1. The good character requirement is a statutory requirement. It is found in section 41A of the British Nationality Act 1981. Insofar as it is relevant to British citizenship, that section provides:

41A Registration: requirement to be of good character

(1) An application for registration of an adult of 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.

(1A) An application for registration of an adult or young person as a British citizen under section 4F, so far as the relevant provision (as defined in section 4F(2)) is section 1(3), 3(2) or 3(5), must not be granted unless the Secretary of State is satisfied that the adult or young person is of good character.

(5) 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.

2. As can be seen from the statutory language:

- where the requirement applies it is mandatory: “an application for registration… must not be granted unless…”;

- the requirement does not apply to children under the age of 10: “an application for registration of an adult or young person…”;

- the requirement is that the applicant is (not was) of good character: “…is of good character”; and

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• the requirement only applies to registration under specified provisions: for example, applications under section 4C, 4G and paragraph 3 of Schedule 2 (and certain provisions of section 4F) are not listed and are, therefore, free from this requirement.

Relevant UKVI Guidance:

3. The Secretary of State has published guidance concerning the application of the good character requirement. That guidance is *Nationality: good character requirement*, version 2, published on 30 September 2020. The guidance states:

   *This guidance tells caseworkers how to consider whether a person applying for British citizenship meets the good character requirement.*

4. As discussed below, this guidance:

   • makes no adequate or effective distinction between the circumstances of children and adults;
   
   • makes no adequate or effective distinction between offending during childhood or offending in adulthood; and
   
   • makes no distinction between the requirement of good character for registration (section 41A) and the requirement of good character for naturalisation (paragraphs 1(1)(b) and 3(c) of Schedule 1).

Relevant international law:

5. The Secretary of State must have regard to the following:

   • **the best interests of the child:** section 55 of the Borders, Citizenship and Immigration Act 2009 requires that regard is had to the need to safeguard and promote the welfare of children (which the courts have held to effectively incorporate the ‘best interests’ duty from Article 3 of the 1989 UN Convention on the Rights of the Child); and

   • **The right to respect for private life:** Article 8 of the 1950 European Convention on Human Rights (as incorporated by the Human Rights Act 1998).

6. Of particular interest in relation to the ‘best interests’ duty are Articles 7, 8 and 40 of the UNCRC, which include respectively rights of children to nationality, identity and rehabilitation.

Relevant caselaw:

7. The following concern the application of the good character requirement:
• **R (SA) v SSHD [2015] EWHC 1611 (Admin):** application of the requirement to children;

• **R (Poloko Hiri) v SSHD [2014] EWHC 254 (Admin):** application of the requirement in relation to naturalisation; and

• **R (Johnson) v SSHD [2016] UKSC 56:** incompatibility of the requirement being applied in relation to section 4G registration.

8. The following concern the importance of citizenship:

• **R (PRCBC, O & A) v SSHD [2019] EWHC 3536 (Admin):** impact upon children, who identify as British, of being prevented from registering; and

• **ZH (Tanzania) v SSHD [2011] UKSC 4.**

9. The following establish the application of Article 3 of the UNCRC in relevant Home Office guidance and decision-making:

• **ZH (Tanzania) v SSHD [2011] UKSC 4;**

• **R (MM (Lebanon) & Ors) v SSHD [2017] UKSC 10.**

10. The following establish the relevance of citizenship to respect for private life:

• **Case of Genovese v Malta (Application No. 53124/09), October 2011, ECtHR; and**

• **Williams v SSHD [2015] EWHC 1268 (Admin).**

11. The following concern the importance of Article 40 of the UNCRC:

• **R (SA) v SSHD [2015] EWHC 1611 (Admin):** in connection with an application for registration as a British citizen under section 3(1); and

• **Case of Maslov v Austria (Application No. 1638/03), June 2008, ECtHR Grand Chamber: in connection with deportation.**
Introduction to good character on applications for registration:

12. The Project for the Registration of Children as British Citizens (PRCBC) has amassed several years' experience of successfully registering children and young people as British citizens, including where the child or young person has an offending history or other matters relating to character have arisen. This session draws on that experience. It also draws on PRCBC's wider experience of advising and assisting children and young people in relation to considerations of character and in conducting and commissioning research, including legal research, into the application of the good character requirement.¹

13. PRCBC's experience indicates that where a child has an offending history or other matters relating to character have arisen, it will be especially important to consider the prospects that any application may be refused and the ultimate possibility of bringing a claim for judicial review before the High Court.

14. Especially careful attention to evidence, evidence-gathering and chronologies is vital in such cases.²

The good character requirement for registration:

15. As briefly highlighted above, the requirement is a statutory requirement (section 41A) that applies to the registration of anyone aged 10 years or above under specified provisions of the British Nationality Act 1981. Where it applies, the requirement is mandatory. The Secretary of State must not register the person as a British citizen unless satisfied that the person is at that time of good character.

16. There is, however, no statutory definition of 'good character'. It is for the Secretary of State to determine whether the requirement is met. However, in so doing, she must have regard to such matters as:

- the statutory purpose of the requirement, which must be discerned from not only a reading of section 41A but from a reading of the British Nationality Act 1981 as a whole (with particular attention to the purpose of the statutory rights to which the provision is applied); and

- the applicable domestic and international duties concerning the rights of the child and the right to respect for private life.

17. In R (SA) v SSHD [2015] EWHC 1611 (Admin), the High Court gave the following guidance upon the application of the requirement at paragraph 64:

   a) The defendant may only exercise her discretion to grant citizenship under section 3 where she is satisfied that the person is of “good character” (section 41A(1), British Nationality Act 1981).

¹ PRCBC website page on Good character reference material: https://prcbc.org/research/
² See PRCBC appended checklists to these notes
b) In determining whether she is so satisfied, the defendant must make an evaluation of the applicant’s character based on all of the material before her. In the case of criminal convictions she will need to take into account the seriousness of the offence, mitigating factors and the severity of any sentence. In assessing the relevant of any convictions for offences committed as a child (that is, under the age of 18), regard will need to be had to the rehabilitative objectives reflected in Article 40 of the UNCRC and the primacy given there to “reintegration.”

c) The defendant must have proper regard to the guidance in the [defendant’s guidance] in undertaking any assessment of character but these cannot and should not fetter the exercise of the defendant’s discretion in any particular case. The policy reflected in the [guidance] must not be applied mechanistically and inflexibly. There must be a comprehensive assessment of character in each case which involves an exercise of judgment. It seems to me too that since it is axiomatic that the opportunities for a child or young person to establish “good” character are likely to be more limited than in the case of an adult (who may refer to patterns of employment, contributions to community or public life and the like) account must be taken of that in weighing the matters relied upon to establish good character as against those pointing the opposite way.

d) Article 8 may be engaged by a decision not to grant citizenship where the necessary threshold for an interference is reached but in any event where that decision is arbitrary or discriminatory. Further, in assessing whether there is justification for any interference with Article 8 in the case of a child (that is a person under the age of 18), regard will need to be had to the material provisions of the UNCRC. There may be little room for justifying interference with Article 8 where reliance is placed on (at least) non-violent offences committed when a minor, that is under the age of 18, having regard to the terms of Article 40 of the UNCRC.

e) Whilst section 55 of the 2009 Act may be material to the exercising of a relevant discretion in the case of an adult where there has been an historic failure to comply with section 55 which has led to a present injustice, it does not otherwise apply to the exercising of functions at a time when a person has reached the age of majority.

18. The above guidance emphasises that the assessment of a person’s character is a holistic one. It also emphasises the importance of giving particular regard to the character of children and to any offences (or other matters said to evidence bad character) during childhood.

19. Childhood is, by its very nature, a stage of life in which a person is developing. Moreover, there is growing appreciation of the significance of personal development in the early years of adulthood. Whereas it will always be necessary to properly evidence any such assertion, these factors are of additional significance.
to any assessment of character now that is made on the basis of events in a person’s past (even recent past).

20. It is necessary to note that the requirement in section 41A is distinct from the requirement that a person applying to naturalise as a British citizen must be of good character (paragraphs 1(1)(b) and 3(c) of Schedule 1). It is found in a separate provision. It applies to distinct provisions for registration of British citizenship (which establish rights to citizenship). It also applies to persons of no or reduced capacity (in contrast to naturalisation, see section 6(1) and (2): “…a person of full age and capacity…”).

The Secretary of State’s guidance:

21. It will always be necessary to consider the Secretary of State’s guidance. This is currently set out in Nationality: good character requirement, version 2, published on 30 September 2020. A key aspect of this guidance is the attribution of fixed-term tariffs to particular offences or other character matters during which it is said that an application for registration will or should normally be refused. For example, the guidance includes:

**Sentence-based thresholds**

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 out-of-court disposal that is recorded on their criminal record which occurred in the 3 years prior to the date of application.

However, in the case of non-custodial sentences and out-of-court disposals, if a person was convicted within 3 years of submitting the application, but more than 3 years have passed on the date the application is decided, the application must not be refused solely on this basis. However, where there are other issues of concern, previous offences may be considered relevant when considering good character as a whole.

*It is the whole sentence imposed by the court that counts, not the time served by the applicant.*

The Rehabilitation of Offenders (Northern Ireland) Order 1978 still applies to applicants who reside in Northern Ireland. This means that the fact that a conviction is spent will be relevant to these applications. In such cases, see Rehabilitation Periods.
22. A starting point will be to consider whether, if that guidance is applied by the decision-maker, an application for registration will be granted or refused. For example, has the tariff for a particular offence expired?

- If the answer to the question of whether the applicant should be regarded as of good character under the guidance, this is likely to be the end of the consideration of character. It will be necessary to clearly indicate on any application how this is the answer to be arrived at under the guidance.

- If the answer to the question of whether the applicant would be regarded as not of good character under the guidance, this should not be the end of consideration of character. The guidance is not law. Moreover, there are various ways in which the guidance is especially inadequate insofar as it applies to children and young people.

23. There is very little in the guidance that considers the particular circumstances of children and young people:3

- There is a standard direction concerning “The best interests of a child”.

- The section on “Application of the requirement to young persons” generally directs decision-makers to apply the sentencing thresholds in the same way as these are applies to adults because the youth justice system will, it is said have already had regard to the young person’s age in sentencing.

- There is a generally positive direction concerning the immigration history of children:

  > When assessing failure to comply with immigration requirements, it will normally be appropriate to disregard failure relating to a child when assessing their good character, if it is accepted this was outside their control. For example, where a parent applied for the child to come to the UK as their dependant but failed to apply for an extension of leave when the child’s temporary leave expired, the child should not be penalised.

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24. None of this on its face is adequate direction to decision-makers on any of the following matters (which will, therefore, need to be considered and addressed both by representations and with evidence):

- The particular duty to promote the rehabilitation and reintegration of children. The guidance is silent on how this duty is to be met by the decision-maker.
- The position of children as compared to adults. The guidance does not set out a distinct approach (save as regards in relation to immigration history).
- The particular developmental stage of life that is childhood and early adulthood. The guidance makes no distinction between these stages of life and later adulthood; and gives no direction to decision-makers concerning the degree to which a young person’s character may change or the speed of that change.
- The distinction between registration and naturalisation. The guidance makes no distinction, yet the statutory requirement is not the same for each – it is to be found in distinct provisions of the Act and it applies in markedly different circumstances. Registration is a statutory right that is under most provisions of the Act a statutory entitlement and for the purpose of securing British citizenship for all persons connected to the UK – with especial importance for children and young people growing up in the UK having been born here or brought here at a young age. Registration also applies to people of no or reduced capacity (whose actions cannot therefore be properly attributed to their character or attributed in the same way as persons of full age and capacity).
- The guidance generally fails to direct the decision-maker to assessing whether a person is of good character; as distinct from applying tariffs that effectively bar a person from citizenship on the basis of past events indicative of bad or poor character.

25. It should be assumed that the decision-maker will apply the guidance rigidly, even though that is not lawful: per R (SA) v SSHD [2015] EWHC 1611 (Admin). Accordingly, it is vital that any application is prepared on the basis that judicial review proceedings (see below) may ultimately be required; and a careful and thorough approach to evidence will therefore be vital.
Acquiring and presenting evidence in relation to good character:

26. The evidence and how it is presented will generally be of the utmost importance in registration applications to which the good character is relevant. The following are of particular significance:

- evidence establishing the importance of citizenship to the child or young person;
- evidence mitigating the degree to which any particular event or events (including all offences) indicate badness of character;
- evidence showing that any particular event or events (including all offences) are no longer demonstrative of character;
- evidence demonstrating goodness of character; and
- a detailed chronology

27. It will generally be critically important to acquire and consider the following sources of evidence (where applicable):

- ACRO subject access request;
- police service records;
- criminal justice records, including e.g. any relevant sentencing remarks;
- social services records;
- health (GP surgery/NHS) records; and
- education records.

28. Having regard to the above sources of evidence, it will normally be necessary to secure a detailed statement from the child or young applicant addressing:

- how she, he or they meet the other requirements for British citizenship;
- the importance to her, him or them of being registered with British citizenship; and
- why she, he or they should be considered to be of good character.

29. Other important sources of evidence may include:
• statements, letters or references of third parties attesting to the child or young person’s character, any relevant mitigating factors and/or the importance of British citizenship to her, him or them; and

• expert (e.g. social work, psychiatric) evidence relevant to assessing the child or young person’s character.

30. The importance of thorough evidence-gathering cannot be understated. It should be assumed that the decision-maker will be looking to find reasons to refuse an application where any issue of character appears to arise. Evidence and representations will therefore be needed providing a clear analysis of why the child or young person should be assessed to be of good character.

Disclosure of offences:

31. Whether a Home Office application form is or is not used (see below), it is critically important not to create a ‘character’ problem in the making of an application. For example, the Secretary of State’s guidance states:

Failure to disclose information required in a nationality application

Where the applicant fails to disclose information that would result in the application being refused on good character grounds, the applicant must be refused and any further application for citizenship will normally be refused for the next 10 years. This applies unless it is accepted that the failure to disclose was unintentional and a genuine error.

Deception in previous applications

An application will normally be refused where there is evidence that a person has employed deception either:

• during the citizenship application process
• in a previous immigration application in the previous 10 years

It is irrelevant whether the deception was material to the grant of leave or not.

An application will normally be refused if there has been any deception in the 10 years prior to the application for citizenship. For these purposes, the deception is regarded as continuing until the date on which it is discovered or admitted. For example, if a person used deception in an application in 2008 but that was discovered or admitted to in 2010, the 10-year period would start in 2010.

32. With this in mind it is especially important to consider what is stated in any representations or evidence submitted with an application, including on a form if that is used. It may be useful, if enclosing an up-to-date ACRO subject access request, to directly reference that as providing disclosure of offending rather than
appearing to fully itemise offences. A similar approach may be useful if using a relevant Home Office form (see below).

33. Maintaining a full chronology may be especially important to ensure all offences have been identified and considered.

**Home Office application form and procedure:**

34. Generally, under paragraph 1 of Schedule 1 to the British Nationality (General) Regulations 2003, SI 2003/548, there is no prescribed form in citizenship applications. Similarly, online applications are not mandatory. Given the complexity of applications for registration where issues of character arise, it is generally advisable to use postal application form. This may help to ensure that all relevant information is included and make clear to the Secretary of State the basis upon which the application is being made.

35. Given the use of the relevant Home Office form is not mandatory, it may be useful to consider whether mark the form as “see material provided with this application” and include an up-to-date ACRO subject access request rather than seeking to itemise all offences on the form.

**Remedy for refusal:**

36. As with all refusals of registration, the remedies available are by way of:

   - an application to the Secretary of State for her to review the decision (internal review);
   - an application to the High Court for **judicial review** of the decision.

37. **Internal review:** Inviting the Home Office to review its decision will require a Home Office fee of £372. The review process is not prescribed for by the British Nationality Act 1981; and there is no deadline by which a request for review must be submitted. Any such request should be submitted with Home Office NR form and representations as to why the Home Office should review its decision not to register the minor. If a review is successful, the Home Office review fee will be reimbursed.

38. **Judicial review:** If after a negative decision of an initial decision and after a review the Home Office maintains its decision to refuse, the only remedy left is an application for judicial review to the High Court. This must be issued as soon as reasonably possible and certainly within three months from the date of the review decision.

**Legal Aid:**

PRCBC is company registered in England and Wales limited by guarantee. Registered company no: 09713482.
Registered charity no: 1187681. OISC registration no: F201900114
Registered address: PRCBC, 174 Hammersmith Road, London W6 7JP
Other than controlled work being available for separated children\textsuperscript{4}, citizenship applications is not in scope of legal aid. However, in PRCBC’s experience, ECF is often granted by the LAA in good character and other complex cases.

Legal aid is also available for pre-action work under controlled work and judicial review applications under licensed work.\textsuperscript{5}

Appendices:
1) Case studies
2) UKVI Good character nationality guidance

\textsuperscript{4} LASPO Schedule 1, Part 1, par 31A. These cases are remunerated at hourly rates (par 8.84 (n) of the Immigration Specification)

\textsuperscript{5} Paragraph 19, schedule 1, Legal Aid, Sentencing and Punishment of Offenders Act 2012