A Fateful Legacy of Childhood: the Deportation of Non-citizen Offenders from the UK

Abstract: This article argues that individuals who arrive in the UK as children, or who are born in the UK to those arriving as migrants, should never be deported as a consequence of criminal offending, even as adults. When individuals arrive in the host country as children they typically have no agency in such decisions and so did not choose to be put at the risk of deportation as a further consequence of offending, nor could they be expected to have done so. The risk of deportation was simply put on them by the actions of others and therefore they should not be subjected to an additional, discriminatory consequences for their offences. This article presents a maximalist and minimalist policy response. The maximalist response is to exclude all those who arrive in the UK as children from the legal power of deportation. The minimalist policy response is to exempt from deportation anyone who could have become a British citizen (and thus immune from deportation) *but for* the fact that they were a child at the earliest point at which they could have done so.

1. Introduction

During 2020, while the coronavirus pandemic took hold, over 300,000 people signed a petition seeking to stop the threatened deportation of Osime Brown to Jamaica. Osime had left Jamaica at the age of four and had not been there since. When he was nineteen, he was convicted of robbery of a mobile phone from a teenager, attempted robbery and perverting the course of justice, and given a five-year prison sentence. He was released at the age of 21 but faced deportation to Jamaica under the terms of the UK Borders Act 2007. Serious concerns were expressed not only over the conviction (which involved the application of the controversial 'joint enterprise' principle) but the fact that Osime is autistic, does not fully understand his situation, and would have no support in Jamaica, where he would suffer severe hardship. By December 2020, 55 Members of Parliament and a number of prominent public figures had taken up his case.[1]

It is possible that the threat to deport Osime could be withdrawn under the existing law. However, as will be shown, that outcome would involve discretionary evaluations by the Home Office, and possibly the tribunals and the courts. It is the contention of this article that a case

[1] Mattha Busby, 'More than 100 public figures call for halt to Osime Brown deportation' (*The Guardian*, 12 December 2020) <https://www.theguardian.com/uk-news/2020/dec/12/public-figures-call-for-halt-osime-brown-deportation-priti-patel> accessed 22 February 2021

like that of Osime should not even reach that stage, and that could be achieved by a relatively minor change in the law. Part 2 of this article briefly sets out the relevant UK deportation law, and the relevant case law of the European Court of Human Rights. Here and throughout this article, when we refer to deportation, we refer exclusively to expulsion from the UK as a consequence of criminal offending. This article is concerned with the possible deportation of those who arrived in the UK as children (those under the age of 18) or who were born here.

In part 3 we argue that individuals who arrive in the UK as children, or who are born in the UK to those arriving as migrants, should never be deported as a consequence of their criminal offending, even as adults. Our principal argument is that when individuals arrive in the host country as children they typically have no agency in such decisions. They simply find themselves in that jurisdiction, *a fortiori* if they are born there. They did not choose to be put at the risk of deportation as a further consequence of offending, nor could they be expected to have done so. The risk of deportation was simply put on them by the actions of others. From their individual standpoints, they are in no different position from the state's nationals, and therefore should not be subjected to the discrimination of being subjected to an additional consequence for their offences.

We also present in part 3 a maximalist and minimalist policy response to the above. The maximalist response is to exclude all those who arrive in the UK as children from the legal power of deportation. The minimalist policy response is that deportation should not apply where, *but for* the inaction of their parents or carers, the individual would have acquired British nationality in their childhood. As such they would have become British and could never have become subject to a deportation order, whatever the seriousness of their criminal record or other personal circumstances.

Part 4 presents secondary, but important, arguments in favour of our policy positions. Part 5 addresses some of the primary objections to our 'but for' test, objections which highlight why this minimalist position is very much a second-best alternative.

Our argument is directed at the state's response to the specific class of foreign nationals convicted of criminal offences, and maintains that to subject to possible deportation those who are non-citizens and had arrived as children or were born here is unjustified discrimination. Immigration removal (applicable simply 'if the person requires leave to enter or remain in the United Kingdom but does not have it')[2] is not explicitly addressed in this article. As such, our

[2] Immigration and Asylum Act 1999, s10(1).

position does not automatically extend to other circumstances in which children may be subject to removal in the immigration system. For example, our maximalist policy proposal does not apply to individuals who arrive as the child dependents of an adult migrant and where the adult migrant's leave to remain has expired whilst the dependent is still a child and as a consequence the child faces removal as part of the family unit. To extend the maximalist position to this situation would make it almost impossible to enforce any form of immigration control against adult immigrants who have children. However, children who are removed from the UK as part of the family unit upon the expiry of a parent's immigration leave can suffer other kinds of unfairness. Some of the substantive arguments pursued in this article may apply to these other cases of unfairness in the immigration system, but it is beyond its scope to directly address these.

2. The current law

The current law upon which the government can order that a foreign-born non-citizen who commits an offence in the UK to be deported is complex, being a patchwork of statute, UK case law, and case law of the European Court of Human Rights. We summarise each in turn.

A. Deportation

The statutory basis for deportation lies in section 5 of the Immigration Act 1971 under which 'A person who is not a British citizen is liable to deportation from the United Kingdom if— (a) the Secretary of State deems his deportation to be conducive to the public good', supplemented by Section 32 of the UK Borders Act 2007 (headed 'Automatic Deportation'), subsection 4 of which states that for the purposes of that section, 'the deportation of a foreign criminal is conducive to the public good' and subsection 5 which requires the Secretary of State to make a deportation order in respect of such a person who is convicted in the UK of a criminal offence for which they are sentenced to a period of imprisonment of at least twelve months. 'Automatic' deportation does not apply to those who are 'under the age of 18 on the date of conviction',[3] but this is not a bar on deporting those who offend as children: the Secretary of State can still assess it to be in the public interest to deport a young offender.

As could be expected, such a broad discretion is subject to a range of exceptions, set out in section 33 which includes where this would breach the person's rights under the

[3] UK Borders Act 2007, s. 33 (3).

European Convention on Human Rights.[4] In addition, the Immigration Act 2014, inserting s.117C into the Nationality, Immigration and Asylum Act 2002, developed criteria to guide the use of the discretion to deport, which includes the statement that 'The deportation of foreign criminals is in the public interest'. This is further refined by providing that: 'The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal'; that if the sentence is for under four years (medium term offenders) the public interest still requires deportation unless (Exception 1) the person has been lawfully resident in the United Kingdom for most of his or her life, is socially and culturally integrated in the United Kingdom, and there would be very significant obstacles to (the deportee's) integration into the country to which (he or she) is proposed to be deported.; or (Exception 2) where the person has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of the deportation on the partner or child would be unduly harsh. However, if the sentence is for four years or more (or less than four years but Exception 1 and 2 are not made out), it is stated that 'the public interest requires deportation unless there are very compelling circumstances, over and above' the exceptions (just) described.[5]

B. Arrivals as children in UK case law

Most of the law and discussion around children in this area arises when their interests are affected by deportation decisions concerning their parents or other family members. In such situations, *ZH (Tanzania)(FC) (Appellant) v Secretary of State for the Home Department*[6] made it clear that, while in deportation cases the best interests of the child are of primary importance, they may be outweighed by countervailing factors. Later cases have attempted to provide a structure for applying the test, which Lord Kerr said in *H (H) v Deputy Prosecutor of the Italian Republic, Genoa* required:

> a sequencing of, first, consideration of the importance to be attached to the children's rights (by obtaining a clear-sighted understanding of their nature), then an assessment of the degree of interference, and finally addressing the question

[4] UK Borders Act 2007, s. 33 (2)(A).

[5] *HA (Iraq) v Secretary of State for the Home Department; RA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, paras 20-21.

[6] [2011] UKSC 4.

> whether [the government's action] justifies the interference. This is not merely a mechanistic or slavishly technical approach to the order in which the various considerations require to be evaluated. It accords proper prominence to the matter of the children's interests.[7]

The narrower issue with which this article is concerned, namely, the deportation of a foreign national offender who had arrived in the UK as a child, was expressly considered by the Court of Appeal in *Akinyemi v Secretary of State for the Home Department*,[8] where the Home Secretary had ordered the deportation to Nigeria of a person who had been born in the UK, but not acquired citizenship, and who had been sentenced to four years imprisonment for causing death by dangerous driving, and had also been convicted of a variety of other offences. The order had been upheld by the Upper Tribunal Immigration and Asylum Chamber. However, the Court of Appeal overturned that decision, remitting the case for a second re-hearing, referring to the judgment of Lord Reed in *Hesham Ali v Secretary of State for the Home Department*[9] who, after considering the relevant case law of the ECtHR, expressed the view that:

> when assessing the length of a person's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it makes a difference whether the person came to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult.[10]

In *Akinyemi*, Sir Ernest Ryder said:

> In particular, the extent to which a foreign criminal who was born in the UK and has lived here all his life must be considered alongside all the other factors that

[7] [2012] UKSC 25 at para 98. See also *Jo and Others (Section 55 duty) Nigeria* [2014] UKUT 517 (IAT); *MK (Section 55 – Tribunal options)* [2015] UKUT 223 (IAC).

[8] [2019] EWCA Civ 2098.

[9] [2016] UKSC 60.

[10] Ibid, para 26.

relate to the public interest in deportation before that is balanced against an assessment of the article 8 factors.[11]

However, it is not spelled out what it is about that factor that, in Lord Reed's words, 'makes a difference' in the assessment of the public interest, or how it could be relevant, if at all, (for example) to reducing the weight to be given to the seriousness of the offence. Why should it matter to the protection of the public that the person threatening it arrived here as a child? The fact that this case was returning for a re-hearing a second time illustrates the complexity and inevitable subjectivity of the judgments that must be made.

C. Arrivals as children in ECtHR Case Law

Not surprisingly, much of the litigation around these provisions concerns whether, even if the criteria for assessing the public interest are thought to be satisfied, the deportation would breach the person's rights under the European Convention on Human Rights (ECHR). As the Court of Appeal said in *NA (Pakistan) v Secretary of State for the Home Department*: '… [T]he Secretary of State and the tribunals and courts will have regard to the Strasbourg jurisprudence when applying the tests set out in our domestic legislation'.[12]

The jurisprudence of the European Court on Human Rights (ECtHR) on this issue has recently been usefully analysed by Carmen Draghici in *The Legitimacy of Family Rights in Strasbourg Case Law*.[13] She points out how in 1997, in *Boucheilkia v France*,[14] the court accepted that states were entitled to order the expulsion of alien criminals in pursuance of their right to maintain public order, but that, under article 8 ECHR, this needed to be necessary in a democratic society, justified by a pressing social need and proportionate. The subsequent case law involves the way individual rights, including family and private life rights, have been balanced against the exercise of that entitlement. As Draghici observes, these are 'eminently fact-specific' evaluations,[15] such as weighing the seriousness of the offence against the extent

[11] [2019] EWCA Civ 2098, para 53.

[12] [2016] EWCA Civ 662, para. 38.

[13] Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law* (Oxford, Hart Publishing, 2017), 357-68.

[14] [1997] App. No. 23078/93.

[15] Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law* (Oxford, Hart Publishing, 2017), 359.

to which the person had lost or maintained links with the country of origin or integrated into the host community.[16] In *Üner v The Netherlands*[17] the Grand Chamber considered the totality of a person's social ties as relevant to the evaluation. These and many other cases show that, as Draghici puts it, 'The balancing exercise in this area remains complex and highly subjective',[18] so much so that another commentator has concluded that 'as long as the (court) does not provide a principled statement of which criteria will be assigned primary weight, the balancing exercise will continue to allow for diametrically opposed inferences'.[19] These types of evaluation are mirrored in the UK legislative provisions, as for example set out in the 'Exceptions' mentioned earlier, which are refined by Part 13 of the Immigration Rules.

It is clear that the provisions for deportation described above apply whatever age the person was when they arrived in the host country. With respect to the jurisprudence of the ECtHR, this was spelled out with great clarity by the majority of the Grand Chamber in in *Üner v Netherlands*:

> The state is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there'[20] and that 'these principles apply whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there.[21]

However, the ECtHR also finds that, although the principles of an Article 8 ECHR private and family life balancing exercise between the rights of individuals and the public interest in the control of aliens applies equally to those who enter the host state as children, the balance is set differently. In *Maslov v Austria*,[22] the applicant arrived in Austria lawfully with his parents,

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[16] See *El Boujadi v France* App. No 25613/94); *Baghli v France,* App. No. 34374/97; *Dalia v France* App. No. 26102/95; *Boultif v Switzerland* App. No. 54273/00.

[17] [2006] App. No. 46410/99.

[18] Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law* (Oxford, Hart Publishing, 2017), 359.

[19] C. Steinforth, '*Üner v the Netherlands*: Expulsion of Long-Term Immigrants and the Right to respect for Private and Family Life' (2008) 8 Human Rights Law Review 185, 195.

[20] [2004] App. No. 46410/99, para 54.

[21] ibid. para 55.

[22] [2008] App. No. 16380/3

aged six years old.[23] He committed a string of criminal offences and the state sought his expulsion.[24] The Grand Chamber found that:

> when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult.[25]

Foreign nationals who were born in the host state or 'moved there in their early childhood' are thus in a 'special situation' and therefore their deportation – even when they have committed criminal offences – requires that 'very serious reasons' must be present in order to justify the deportation.[26] However, this treats those factors simply as factual components in the assessment of the individual's 'social, cultural and family ties' and not as having normative value in themselves. Analysing the ECtHR case law, Marie-Bénédicte Dembour argued that:

> Strasbourg has never offered quasi-nationals firm protection. One could even say that the common fate of a case involving a quasi-national convicted of a crime and facing deportation has always been rejection[27]

Our argument is based on normative rather than doctrinal foundations: the law on deporting those who arrived in the UK as children ought to be amended because that is what is right, rather than because it is what the ECtHR jurisprudence demands. The Parliamentary Assembly of the Council of Europe has actually recommended that 'Under no circumstances should expulsion be applied to people born or brought up in the host country'.[28] Indeed, the

[23] ibid. para 11.

[24] ibid. para 12-17.

[25] ibid. para 73.

[26] ibid. para 74-5.

[27] Marie-Bénédicte Dembour, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg' (2003) 21 Netherlands Quarterly of Human Rights 63, 80.

[28] Parliamentary Assembly of the Council of Europe, 'Recommendation 1504 (2001): Non-Expulsion of Long-Term Immigrants' (14 March 2001) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16881&lang=en> accessed 22 February 2021.

ECtHR's failure to provide absolute protection against deportation for those who arrived in the host state as children is vulnerable to the same normative argument that we present here.

3. The argument against deportation and removal of those who arrive in the UK as children, and policy responses

A preliminary issue concerns the nature of a deportation order in the circumstances of a case like that of Osime Brown. In *Üner v The Netherlands*, three dissenting judges (Costa, Zupancic and Turmen) characterised deportation as a penalty which was additional to the original sentence, thus failing to treat such a person equally to nationals who were in the same position.[29] It was therefore discriminatory and violated the fundamental principle of justice that people in similar circumstances should be treated equally. It could be added that observance of that principle should form part of the public interest and of the requirement that the state action be in accordance with the law and have a legitimate aim.

This argument may however be challenged on the ground that such deportation is not a punishment, so this is not a 'double penalty', but is a *preventive* measure, which states are entitled to take to protect their society. This was indeed the position of the majority in *Üner v The Netherlands*. But this requires closer analysis. States indeed have a duty to protect their societies, but are required to exercise this through laws that are justly applied. Hence, outside emergencies, citizens may not be interned without charge or trial solely for security reasons. Even in an emergency, when the UK government attempted to do this to non-citizens but not to its own citizens, the House of Lords, in the *Belmarsh* case[30] held that this was not a necessary distinction which would justify derogation from the European Convention on Human Rights, and that legislation to this effect was discriminatory and incompatible with the Human Rights Act 1998.

But it may be said that the case of offenders is different, since deportation follows criminal conviction. Yet this linkage pushes the action closer to one of punishment, thus re-asserting the arguments of the previous paragraph. And even if the action is seen as substantially preventive, is it not still discriminatory? Against that position, it could be argued that immigrants who offend are not in the same position as national offenders in that, by opting

[29] [2004] App. No. 46410/99, para 5 of the dissent.

[30] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56.

to reside in the host country, immigrants can reasonably be expected to undertake to abide by that country's laws (at least if they are human-rights compliant) while they do so, and that by breaking those laws they forfeit that position. Foreign nationals are frequently perceived as 'guests' in the host state and foreign national offenders are thus 'particularly undeserving of sympathy because they have betrayed the hospitality of the society'.[31] The additional punishment of deportation for contravening the law could thus be justified (again, subject to the human rights and exceptional circumstances referred to earlier) against the charge of discrimination.

Yet, whatever merit the general argument for deportation holds, it cannot be applied to those who arrive in the host country as children who typically have no agency in such decisions.[32] They simply find themselves in that jurisdiction, *a fortiori* if they are born there. They did not seek the hospitality of the host country or choose to be put at the risk of such further consequences of offending, nor could they be expected to have done so. The risk was simply put on them by the actions of others. From their individual standpoints, they are in no different position from the state's nationals, and therefore should not be subjected to the discrimination of being subjected to additional consequences for their offences.

Because of the above, we argue that the very ground upon which deportation of offenders who migrated as adults might be justified removes any justification for the deportation of foreign national offenders who arrived as children or who were born in the host country. We therefore argue that as a matter of policy, no one who arrived in the UK as a child should be made subject to deportation: there ought to be an absolute statutory bar. This is our maximalist policy proposal.

This proposal is strengthened by the result of negotiations between the British and Jamaican governments whereby it was agreed that those deportees who had been under twelve years old when they came to the United Kingdom should not be included in a deportation flight.

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[31] Matthew Gibney, 'Deportation, Crime, and the Changing Character of Membership in the United Kingdom' in Katja Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013), 218

[32] In this article, we refer to the ability to freely choose a particular outcome. This article is concerned with the child's agency over the decision to migrate to the UK or to be born there. For wider discussions of issues of agency in migration, see: Marta Bivand Erdal and Ceri Oeppen, 'Forced to Leave? The Discursive and Analytical Significance of Describing Migration as Forced and Voluntary' (2018) 44 Journal of Ethnic and Migration Studies 981; Nicholas van Hear, Oliver Bakewell and Katy Long, 'Push-Pull Plus: Reconsidering the Drivers of Migration' (2018) 44 Journal of Ethnic and Migration Studies 927. For research on children's political agency to define themselves in the context of irregular immigration status, see: Jacob Lind, 'The Duality of Children's Political Agency in Deportability' (2017) 37 Politics 288.

The fact that those offenders who had arrived in the UK when aged 12 or below were not deported was the result of a 'deal' between two governments and did not reflect any change in the law or general policy.[33] As such, it is unclear what arguments persuaded the government to change tack in this case. However, we argue that precedent has now been set for the political acceptability of excluding those who arrived in the UK as children from deportation.

We also suggest a minimalist – and very much second-best – policy response. This proposal would be to create a statutory bar from deportation for anyone who could have become a British citizen (and thus immune from deportation) *but for* the fact that they were a child at the earliest point at which they could have done so. This minimalist policy response is also justified primarily on the basis that children lack sufficient agency to independently make an application to acquire British citizenship, in their own best interests, whilst still a child. Where a child could have become a British citizen, but an application was not made on their behalf when they were first entitled to it, the risk of deportation was put on them by the actions of others not just by bringing them into the UK but further by the failure to obtain for them British citizenship.

4. Secondary arguments for the policy positions

In addition to our central normative argument – that children lack agency in the decision to bring them into the UK or to not apply for British citizenship, and therefore to bring them under the risk of deportation – we suggest five further or secondary arguments for our policy proposals: (A) that children face legal barriers to obtaining British citizenship because they are children; (B) that children face financial barriers; (C) that the principle of the best interests of the child also applies; (D) that the existing private life exceptions to deportation are in breach of the UNCRC, and; (E) that obtaining citizenship of one's country of habitual residence is in the best interests of children, and so our policy proposals therefore address a historical injustice where individuals have been unable to obtain citizenship as children.

The secondary arguments apply to both our maximalist and minimalist policy proposals, although they may speak with more force for one or the other. The arguments are to

[33] Dianne Taylor, 'Jamaicans who came to UK as children will be left off deportation flight' (*The Guardian*, 29 November 2020) <https://www.theguardian.com/politics/2020/nov/29/jamaicans-came-to-uk-children-left-off-deportation-flight> accessed 22 February 2021.

an extent interconnected, but they may also stand independently and the successful refutation of one would not mean that the others cannot still stand.

These secondary arguments are specific to the issue of citizenship acquisition, and therefore do not speak more widely to broader objections to the practice of deportation, raised in multiple literatures, such as that deportation is a discriminatory additional punishment;[34] it is objectionable for the UK to use deportation to disclaim responsibility for its' own offenders;[35] or arguments based on the connection of the foreign national offender to the UK, of the kind frequently raised under Article 8 ECHR appeals against deportation.

A. Legal barriers to obtaining citizenship

There are significant barriers to citizenship acquisition which are relevant to the situation of an individual who arrived in the UK as a child and faces deportation as an adult. Firstly, children cannot naturalise as British citizens in their own right: an applicant for naturalisation must be over the age of 18.[36] A child can be registered as a British citizen under s1(3) of the British Nationality Act 1981 (BNA) if either of their parents becomes a British citizen or settled in the UK,[37] and makes an application for the child to be so registered. However, the parent(s) of a foreign national child might not be able to settle or obtain citizenship for reasons that do not apply to the child. For example, the parent(s) might have been out of the UK for work or family commitments for too many days to qualify for Indefinite Leave to Remain ('settled status') or for citizenship even though the child might otherwise meet the residency conditions.[38] The parent(s) might be unable to pass the English language or life in the UK tests, or meet the good character requirements: all situations which are outside of the control of the child. In these situations, the child is unable to obtain British citizenship because of the parents' failings even in situations where they would otherwise qualify. The child's right to access citizenship is

[34] e.g. Victor S Navasky, 'Deportation as Punishment' (1959) 27 University of Kansas City Law Review 213.

[35] Mary Bosworth, 'Subjectivity and Identity in Detention: Punishment and Society in a Global Age' (2012) 16 Theoretical Criminology 123, 132

[36] British Nationality Act 1981, s6.

[37] British Nationality Act 1981, s1(3).

[38] e.g. present in the UK under the short-term care of a friend or relative (not that unlikely a prospect considering that the parent only has to miss the residency period by a single day to not qualify).

restricted because the state assesses their parents, not the child,[39] and this results in the person becoming vulnerable to deportation when an adult.

Secondly, even when a child can be registered as British under s1(3) BNA, they may not be for a number of reasons, including lack of knowledge of this entitlement or of the need to make an application to benefit from it, the cost of applications, lack of legal aid or advice, and evidential difficulties.[40] However, registration under s1(3) BNA can *only* be done for a child,[41] so if a person was not registered whilst they were entitled to be as a child, they cannot make an application when they have full agency as an adult. Instead, the opportunity to become a British citizen on this legal ground disappears when they turn eighteen.

Thirdly, a child can be registered as British under s1(4) BNA if they were born in the UK, lived there for the first ten years of their life, and were not absent for more than 90 days in any of those first ten years. Although an application for s1(4) BNA registration can be made as an adult, by that time the individual may be barred from registration because they have committed criminal offences, and thus no longer 'of good character'.[42] The fact of having committed criminal offences in later life would not be a problem if they had become British citizens at age ten, the earliest possible point that they could have registered,but an age when they lacked agency to make their own application.

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[39] The discretionary power of the SSHD under s3(1) BNA is unlikely to provide practical assistance to a child in these circumstances as the guidance is clear that:

> 'To register a child under this provision you should normally be satisfied that one of the parents is either a British citizen or has applied to be registered or naturalised as a British citizen and the application is going to be granted, and either: • the other parent is settled in the UK • the other parent is unlikely in the short or medium term to be returnable to their country of origin and there is no other reason to believe that the child's future lies outside the UK'

A situation where the child cannot be registered under s1(3) BNA because their parent does not meet the statutory requirements for naturalisation, would likely fall foul of this guidance.

(Home Office, 'Registration as British Citizen: Children' (version 6.0, 16 April 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879763/registration-as-a-british-citizen-children-v6.0ext.pdf> accessed 23 February 2021, page 29.)

[40] Solange Valdez-Symonds, 'Children's Rights to British Citizenship' in Devyani Prabhat (ed), *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Edward Elgar Publishing 2019).

[41] British Nationality Act 1981, s1(3)(b): '…shall be entitled to be registered as a British citizen if, while he is a minor… an application is made for his registration as a British citizen.'

[42] Immigration, Asylum and Nationality Act 2006, s58.

Finally, the Secretary of State's discretionary ability to register any child as a British citizen also expires when the person turns eighteen years old.[43] So an individual who missed out on any of the above means of registration as a child cannot successfully apply for a discretionary grant of citizenship when they become an adult with full agency in order to remedy the failure to register them when they were a minor without agency.

Our minimalist policy proposal – of exempting from deportation anyone who could have become a British citizen (and thus immune from deportation) *but for* the fact that they were a child at the earliest point at which they could have done so – would clearly cover all the above cases where the child missed out on obtaining citizenship because, as children, they lacked agency to make their own application. It would exempt from deportation those who missed out on British citizenship because (a) they are now adults but were not registered when their parent(s) became settled or British; (b) they were excluded from naturalisation for being under-18, at a time when they met the other legal requirements for naturalisation,[44] or; (c) they would now not meet the good character requirement, but would have done so (and thus been entitled to citizenship) at the earliest point that they became eligible. A 'but for' test would recognise that the person is only in the position they are in now because they did not become a British citizen because of factors connected with their status as children.

Our maximalist policy proposal – to exempt from deportation all those who arrived in the UK as children – would also remedy those situations where children cannot obtain British citizenship for reasons beyond their control and would additionally benefit those who would not meet the 'but for' citizenship test. The conditions for becoming a form of 'quasi-national' with additional legal protections against deportation should necessarily be lower than the conditions for full citizenship.

B. Financial barriers to obtaining citizenship

As well as the significant legal barriers to children obtaining citizenship, there are substantial financial barriers to children obtaining citizenship. From April 2018, the fee for registering children as British citizenship was £1,012. As Solange Symonds-Valdez of the Project for the Registration of Children as British Citizens argues:

[43] British Nationality Act 1981, s3(1): 'If while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen.'

[44] The life in the UK test and English language test requirements would also have to be waived as one cannot go back to the point at which one would have had to pass these tests in order to sit them.

> The Home Office is also failing in its duty to give primary consideration to the best interests of children by setting a fee, which effectively deprives many of them of the British citizenship they could otherwise register.[45]

As well as the fees being a practical barrier to many families, children's lack of agency generally also means that they lack agency in financial affairs. As the second author argued in relation to paying fees for Immigration Tribunal appeals:

> Children are economically inactive because, generally, they are prohibited by law from working. Even when they have financial resources they most often do not have personal control over its disposal. This means that they lack the personal financial resources that are the necessary precondition of having a genuine choice as to whether to deploy those resources in bringing a paid-for immigration appeal.[46]

The same point applies directly to the question of applying for citizenship: children do not either have the independent financial means, and/or the agency to independently choose to deploy any financial means that they do have, to pay for a citizenship application of their own.

There are many reasons why financial barriers to citizenship are problematic – and are well described elsewhere[47] – but our aim is not to critique the general functioning of UK nationality law. Our policy proposals both deal specifically with ensuring that individuals who were financially barred from accessing citizenship entitlements as children – either practically because of cost or because of their lack of agency – do not suffer the worst possible consequence (deportation) of not being able to afford registration of their legal right to citizenship.

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[45] Solange Valdez-Symonds, 'Children's Rights to British Citizenship' in Devyani Prabhat (ed), *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Edward Elgar Publishing 2019), 84. This argument was validated by the Court of Appeal finding the £1,012 unlawful on these grounds in *Project for the Registration of Children as British Citizens & Anor v Secretary of State for the Home Department* [2021] EWCA Civ 193.

[46] Jonathan Collinson, 'Immigration Tribunal Fees as a Barrier to Access to Justice and Substantive Human Rights Protection for Children' [2017] Public Law 1, 9.

[47] Solange Valdez-Symonds, 'Children's Rights to British Citizenship' in Devyani Prabhat (ed), *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Edward Elgar Publishing 2019); *Project for the Registration of Children as British Citizens & Anor v Secretary of State for the Home Department* [2021] EWCA Civ 193.

C. The relevance of the best interests of the child to the situation of adults

This position can be reinforced by reference to Article 3 of the UN Convention on the Rights of the Child (UNCRC) which requires states to make the best interests of the child a 'primary consideration' in 'all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. The principle has been referenced many times by the ECtHR,[48] and yet Draghici observes that it occupies an 'uncertain place' in the ECtHR jurisprudence.[49] It finds expression in the UK legislation in section 55 of the Borders, Citizenship and Immigration Act 2009 which requires the Secretary of State to make arrangements to ensure that her functions as regards (among other things) immigration are 'discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'. Although this might appear to exclude its application when the function pertains to persons who were children when they arrived in the UK, but are no longer so when the 'function' is discharged, closer consideration suggests that, unlike where a court or tribunal is making a decision, when the principle applies with respect to all children affected (directly or indirectly) by that decision, the state's duty under Article 3 UNCRC applies to children *generally* and arguably can therefore be said to have covered all persons who were within the jurisdiction at the time they were children.[50] An argument could be made that it is contrary to the welfare and interests of these children that, by reason only of what occurred to them as children, their entry into adulthood should be compromised by this susceptibility to deportation.

D. Inherent discrimination in the private life deportation exception

It might be argued that the 'private life' exception to deportation[51] is adequate safeguard against deporting those who arrived in the UK as children. It states that:

> Exception 1 applies where—

[48] John Eekelaar and John Tobin, 'Art.3 The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019), 97-8.

[49] Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law* (Oxford, Hart Publishing, 2017),, 368-79.

[50] For an example where the duty under Article 3 was said to apply to children generally, see *R (Alfred McConnell) v The Registrar General for England and Wales and others* [2020] EWCA Civ 559 in the context of birth registration.

[51] Nationality, Immigration and Asylum Act 2002, s117C(4)

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

However, this provision is clearly unable to answer our argument that individuals who arrive in the UK as children should be exempt from deportation because they did not have any agency in the decision to come here. For a start, it would not cover all cases of individuals who arrived in the UK as children whom our proposals would otherwise cover:

> …a 20-year-old FNO who arrived aged 10 years and one week is no less likely to be culturally and socially integrated into the UK than a 20-year-old FNO who arrived on the day of their tenth birthday. Yet the fact of the week separating their arrival alone defines their qualification for the statutory exception to deportation.[52]

Secondly, it would not even cover all those who arrived as children and would be entitled to British citizenship, but for their being children. In the above example of the arrivals aged 10, they would have been entitled[53] to naturalise as British citizens at age 15 or 16 but for the fact that children cannot be naturalised (see part 4.A, above).

We also argue that the 'private life' exception is a breach of Article 30 UNCRC, which provides for a right to cultural and linguistic identity for ethnic and linguistic minorities. Many children in diaspora communities maintain linguistic or cultural ties with their parent's country of origin, through their cultural practices and the language spoken at home, family visits, etc. Article 30 UNCRC protects children's rights to cultural and linguistic ties as an important part of their identity. British nationality law also recognises this right to identity. None of the statutory schemes for registration of children's British citizenship impose a statutory requirement of social and cultural integration in the UK, nor require obstacles to integration into the country of their existing nationality. Neither are these conditions required under the Secretary of State's statutory power to provide registration to any child by her discretion. The

[52] Jonathan Collinson, 'Suspended Deportation Orders: A Proposed Law Reform' (2020) 40 Oxford Journal of Legal Studies 291, 298.

[53] Subject to the lawfulness of residency, whether their leave to enter or remain was indefinite or not, and the number of days spent outside the UK (British Nationality Act 1981, Schedule 1).

guidance requires only that 'You must be satisfied that a child's future is clearly seen to lie in the UK'.[54] The guidance in this section is concerned with periods of absence only, and there is nothing to suggest that having linguistic or cultural ties other than with the UK indicates that the child's future is not in the UK. UK nationality law recognises the possibility that one can be legally British whilst maintaining linguistic or cultural ties to places and people who are (or who originate) outside Britain.

In contrast, to benefit from the 'private life' exception to deportation the FNO must show that they have no alternative linguistic or cultural ties as these are evidence that there are no obstacles (let alone significant ones) to integration into the country to which they are to be deported. These are not conditions that we impose on the acquisition of British citizenship. A non-British citizen in the UK exercising the right to cultural and linguistic identity as a child is then less likely to meet the statutory integration test for exemption from deportation,[55] either as a child or adult. As that person is, by definition, from an ethnic or linguistic minority the 'private life' exemption is discriminatory and thus a breach of Article 30 UNCRC.

Only by exempting all those who arrived in the UK as children can one avoid the discriminatory breach of a child's linguistic and cultural rights by imposing additional integration tests.

E. Historic Injustice[56]

Finally, we argue that obtaining the citizenship of the country in which a child resides is in their best interests.[57] The importance of British citizenship to children has been frequently acknowledged. We therefore argue that where children could have been registered as British citizens as children but are not (for whatever reason) a historic injustice has been committed: one which the state can address through our policy proposals. Solange Valdez-Symonds states that:

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[54] Home Office, 'Registration as British Citizen: Children' (version 6.0, 16 April 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879763/registration-as-a-british-citizen-children-v6.0ext.pdf> accessed 23 February 2021, page 28.

[55] *AS v Secretary of State for the Home Department* [2017] EWCA Civ 1284, [2018] Imm AR 169.

[56] We choose to use the term 'historic injustice' despite the narrow definition that has been imposed on its use in the case law: *Patel (historic injustice; NIAA Part 5A) India* [2020] UKUT 351.

[57] UK law permits dual nationality so that obtaining British citizenship is not conditional on renouncing other citizenships which may also be important for children's identity and legal rights. Where dual nationality is not permitted, the best interests of the child may exceptionally demand another outcome.

> British citizenship to a child and young adult is often about identity, integration, sense of belonging, confirmation that this is their home, having the same rights and feeling part of their peer group and much more.[58]

UK courts have recognised the importance of citizenship, especially to children:

> In *ZH (Tanzania) v SSHD* [2011] UKSC 4, [2011] 2 AC 166, Lady Hale referred at [32] to "the intrinsic importance of citizenship" and quoted with approval a statement that "the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond". In *R (Johnson) v SSHD* [2016] UKSC 56, [2017] AC 365, Lady Hale said at [2] that there are "many benefits to being a British citizen, among them the right to vote, the right to live and to work here without needing permission to do so, and everything that comes along with those rights"[59]

Some things which are in the best interests of the child are left up to the parents or guardians of children to secure for them in childhood. It may be in the best interests of the child to be made to learn German or to have a savings account opened in their name, but it is up to parents whether or not to do these things. Moreover, we do not expect the state to extend further rights to those adults whose parents did not make them learn German or set up a savings account when they were children: the state assumes that the opportunity cost of time not spent learning German or money not saved was used in other ways to further their best interests.

It may therefore be said that a parent made a choice in the best interests of their child not to apply for British citizenship, thus there is no historic injustice to their best interests that needs to be remedied in the ways we suggest. However, firstly, acquisition of British citizenship is not a matter that is entirely left to parental discretion. Parental consent is not a precondition of acquisition of citizenship by a child,[60] suggesting that the importance of

[58] Solange Valdez-Symonds, 'Children's Rights to British Citizenship' in Devyani Prabhat (ed), *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Edward Elgar Publishing 2019), 83.

[59] *Project for the Registration of Children as British Citizens & Anor v Secretary of State for the Home Department* [2021] EWCA Civ 193, [33].

[60] It is not a statutory condition under ss1(3), 1(3A) and 1(4), and the Home Office guidance is clear that the lack of parental consent for the application is not a reason to refuse an application. See Home Office, 'Registration as British Citizen: Children' (version 6.0, 16 April 2020)

citizenship to the best interests of the child outweighs the discretion of parents. Secondly, the right to citizenship is not like learning German or having a savings account started in one's name. Lacking either as adults does not restrict one's legal rights, or to the extent that they do (for example in being able to apply for a job or work visa in Germany), one can rectify the deficit (in this case, by learning German as an adult). Instead, as set out in part 4.A above, the legal qualifications necessary for acquisition of British citizenship can be irretrievably lost. Finally, it is also relevant in this context to note that the registration of children is registration of a pre-existing right to British citizenship, not an application for a benefit. To treat the registration of children as a benefit:

> wrongly treats them as both adult and migrants. Moreover, in the cases of children and adult entitled to citizenship, the benefits of citizenship have already been granted under the British Nationality Act 1981[61]

As an historic injustice, this has some parallels with the case of *R (Johnson) v Secretary of State for the Home Department*.[62] Johnson would have been born British had his parents been married at the time of his birth, and his deportation was ruled unlawful by the Supreme Court as a consequence. In this case, Johnson would have been British *but for* the sexist foundations of UK nationality law at the time of his birth. The direct discrimination in *Johnson* means the case is not a direct analogy to the wider 'but for' test proposed here. In the situations such as that of Mr Johnson, Parliament had already recognised a historic injustice by amending legislation to allow unmarried fathers to pass on British citizenship since 2006 and by allowing retrospective registration from 2014.[63] There is no equivalent recognition – yet – that there is a historic injustice where children were not registered, or able to register or naturalise as British. Subject to the arguments laid out above, the UK government could also argue that it is not an injustice that the state is responsible for (although it might be in the case of children who have been in care). But *Johnson* nevertheless provides useful parallels and inspiration: not least as

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<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879763/registration-as-a-british-citizen-children-v6.0ext.pdf> accessed 23 February 2021, page 9.

[61] Solange Valdez-Symonds, 'Children's Rights to British Citizenship' in Devyani Prabhat (ed), *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Edward Elgar Publishing 2019), 84.

[62] [2016] UKSC 56

[63] ibid. paras 9-13

to how a 'but for' test might work in practice and for the moral case for exempting from deportation those who are victims of this kind of historic citizenship injustice.

5. Objections to the policy proposals (and responses)

In this section, we anticipate and respond to four objections to the policy proposals made in this article. The first is that our maximalist position grants too wide an exemption from deportation so that undeserving cases are included. The second is that the problems and arguments identified in this article are obviated by the fact that many who miss out on citizenship as children can make successful applications as adults. Third, that the 'but for' test is inadequate, and lastly, that it is unnecessarily complex.

A. That the maximalist position grants too wide an exemption from deportation

Those proposing immigration reform have to contend with the pervasive notion 'that immigrants can and should be sorted and managed according to deservingness.'[64] In justifying our maximalist and minimalist policy proposals, we have sought to steer clear of presenting those who arrive in the UK as children as properly inhabiting the 'good' migrant paradigm, rather than possessing the 'bad' migrant 'foreign criminal' label placed on them by deportation law.[65] Critiques of our maximalist position on the grounds that it grants too wide an exemption from deportation inevitably fall within this discourse of deserving and undeserving migrants.

Three possible categories of individuals might be labelled as 'undeserving' of exemption from deportation by our critics: (1) where the child, and/or their parent(s), entered or remained in the UK without leave to enter or remain (the 'illegal immigrant'); (2) where the child commits an offence whilst a child, and; (3) where a child *with full agency* arrives in the UK and commits offences as a child or as an adult.

We argue that our primary argument – that children lack agency in immigration matters – applies to answer situations (1) and (2). Just as we argued that coming to the UK is not a decision made by the child under their own agency, likewise the child's immigration status on arrival or thereafter is not a decision made by the child. The child's immigration status is

[64] Leifa Mayers, '(Re)Making a Politics of Protection in Immigration Policy: The "Criminal Alien", Gendered Vulnerability, and the Management of Risk' (2019) 23 Citizenship Studies 61, 62

[65] Melanie Griffiths, 'Foreign, Criminal: A Doubly Damned Modern British Folk-Devil' (2017) 21 Citizenship Studies 527.

intimately connected to the status of their parents, and it is the parent who makes the decision to enter or reside without the required immigration status.[66] The immigration status of the child is a direct consequence of their lack of agency. We therefore do not believe that an argument that distinguishes between those who entered or resided as children illegally and those who entered or resided lawfully withstands scrutiny because neither child arrived with agency, and therefore did not choose to be put at the risk of deportation as a further consequence of offending.

Likewise, we do not think that it matters that the child committed offences as a child. Although children lack complete agency, they do develop it through childhood.[67] This gradual development of agency could be argued to reasonably include the understanding that they are not British citizens and that their continued presence in the UK is subject to good behaviour. We expect children from the age of ten years old (the minimum age of criminal responsibility) to develop an understanding that criminal offending can lead to imprisonment, so we can also expect foreign national children to understand that criminal offending may lead to deportation. Deportation for criminal offending is, after all, justified in part 'to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation'.[68]

Our response is that making foreign national children who commit offences liable to deportation treats those arriving in the UK as children the same as those arriving as adults. Children's lack of agency means that those arriving as children cannot be reasonably expected to have accepted being put under the risk of deportation in the first place, even if they commit offences as children. Recall that our maximalist position would not require that those who commit criminal offences as children should be immune to any consequences of their offending, only that they should not be subject to consequences in excess of those that would be applied to British children who – like foreign national children – have no say in whether they reside in the UK or elsewhere. The more complex case is that of the putative child – maybe as old as 16 or 17 years old – who arrives in the UK independently and with full agency and

[66] Jacqueline Bhabha, '"Not a Sack of Potatoes": Moving and Removing Children Across Borders' (2006) 15 Public Interest Law Journal 197, 199.

[67] John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 International Journal of Law and the Family 42.

[68] *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694, [2009] INLR 109, [15].

commits criminal offences as a child or adult. The maximalist position could be critiqued as it would also exempt these individuals from deportation.

It is important not to essentialise children, nor migrant children. Children are not always merely 'passive dependants'[69] and many older children may exercise agency in migration decisions. Yet we suggest that a legal exemption to our maximalist position (along the lines of "except where the child arrived in the UK independently with full agency") presents practical and theoretical problems which outweigh any desirability as a means of answering critics.

The predominant problem is in identifying what is meant by a child having "full agency" in their migration. There are a number of factors inherent to the arrival of many unaccompanied migrant children which impact on the exercise of agency. At the most extreme, some children are trafficked into the UK and, 'the most prevalent form of child trafficking in the UK is for forced labour in cannabis cultivation'.[70] The inability of UK authorities to adequately identify children who arrive with this most extreme constraint on their agency is described by campaigners as 'shocking'.[71] Furthermore:

> The criminalisation of child victims [of trafficking] who were forced to commit crimes as a result of their exploitation has continued, despite safeguards including CPS guidance and the statutory defence established by Section 45 of the Modern Slavery Act 2015.[72]

These identify existing weaknesses in the ability of UK authorities to identify through the application of law and guidance when a child has arrived in the UK without *any* agency. It would therefore be reckless to include an exception to our maximalist position of exempting those who arrive in the UK as children that relies on an assessment of factors more subtle than literal trafficking. Our maximalist position would have a double benefit of protecting child

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[69] Alice Bloch, Nando Sigona and Roger Zetter, *Sans Papiers: The Social and Economic Lives of Young Undocumented Migrants* (Pluto Press 2014), 36

[70] RACE in Europe, 'Victim or Criminal? Trafficking for Forced Criminal Exploitation in Europe: UK chapter' <https://www.antislavery.org/wp-content/uploads/2017/01/Criminal-or-victim-UK.pdf> accessed 5 March 2021, p2; see also, Annie Kelly, 'Enslaved on a British cannabis farm: "The plants were more valuable than my life"' (*The Guardian*, 26 July 2019) <https://www.theguardian.com/news/2019/jul/26/vietnamese-cannabis-farms-children-enslaved> accessed 5 March 2021.

[71] ECPAT UK, 'Child trafficking in the UK 2020: A snapshot' <https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=b92ea99a-6dd8-480c-9660-e6c0f0764acf> accessed 5 March 2021, p25.

[72] ibid, 21.

victims of trafficking from deportation as a consequence of offences committed under coercion.[73]

In situations less extreme than trafficking the question of whether a child exercises full agency in migration is theoretically tricky, to the point of making such an assessment practically impossible. Agency in migration – of adults and children – has been theorised as being a person's 'capabilities to take their aspirations and transform them into changed positions in the social – and geographical – world.'[74] Therefore, where migration is a response to conditions like poverty, war, or familial pressure to migrate, a person's ability to overcome those in other ways not involving migration – to exercise agency over *how* they change their condition in the social or geographical world – is influenced by factors such as their age.[75] In short, unaccompanied children who are not 'passive dependants' and who exercise *some* agency in their migration, may not be exercising *full* agency because their agency is constrained in ways that are still inherent to them being children:

> typically, adults are also the decision makers in a small but significant number of cases where the adult sends the child off unaccompanied […] This may occur for any number of reasons: the adult may send the child off to find bare physical safety, to enjoy economic opportunities and a better life, to join relatives who have already migrated[76]

Even when unaccompanied children are not coercively sent by a family member, pressures or expectations to migrate – for example to send remittances or to relieve burdens on the household – may be felt more keenly by children and may be less likely to be resisted. Although it may appear that the decision to migrate is one made by the child, a decision made with agency, when can it be said that the child is exercising *full* agency?

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[73] Our proposal would preclude their deportation but would not interfere with their voluntary return where that would be in their best interests. See, IOM, 'Voluntary Return and Reintegration for Survivors of Trafficking' <https://unitedkingdom.iom.int/voluntary-return-and-reintegration-survivors-trafficking> accessed 5 March 2021.

[74] Nicholas van Hear, Oliver Bakewell and Katy Long, 'Push-Pull Plus: Reconsidering the Drivers of Migration' (2018) 44 Journal of Ethnic and Migration Studies 927, 930.

[75] ibid, 930 & 933.

[76] Jacqueline Bhabha, '"Not a Sack of Potatoes": Moving and Removing Children Across Borders' (2006) 15 Public Interest Law Journal 197, 199. See also, Jennifer Allsopp and Elaine Chase, 'Best Interests, Durable Solutions and Belonging: Policy Discourses Shaping the Futures of Unaccompanied Migrant and Refugee Minors Coming of Age in Europe' (2019) 45 Journal of Ethnic and Migration Studies 293, 6.

It is the difficulty in making this assessment on a theoretical basis which leads us to believe that it would be impossible to make such an assessment in a fair and just manner in the practical forum of immigration decision-making. It is better to exempt a small number of 'undeserving' individuals from deportation than to create an exemption which might perpetuate the unjust deportation of child arrivals.

B. That citizenship applications can be made as adults

It might be argued that those who do not have registration applications made for them as children will be able to make successful applications for registration or naturalisation when they become adults. Likewise, any child who misses out on the opportunity to naturalise because they are prohibited from doing so as a child can do so as an adult. The opportunity to register or naturalise as an adult obviates the problem identified in this article. When a person arrives as a child but commits offences as an adult, the law rightfully treats them as foreigners because they did not apply for citizenship when they had the agency to do so. If as adults they did not qualify for citizenship then this indicates that they are genuinely foreign, rather than quasi-nationals, and so are rightfully made subject to the same deportation law as all other foreign nationals. Similarly to the point made in part 5.A, above, it could additionally be argued that those who arrive in the UK as children can be reasonably expected to understand that their continued presence in the UK is subject to good behaviour as adults and that the consequence of criminal offending by foreign nationals includes deportation.

We have four principal responses. The first is that these justifications for deportation treat those arriving in the UK as children the same as those arriving as adults, and therefore misses the point of our argument about children's (lack of) agency. The objection that someone like Osime Brown should have applied for citizenship when they reached adulthood is faulty because, while it could be reasonable to put such a requirement for escaping the risk of deportation on people arriving as adults because they can reasonably be expected to have accepted the risk by voluntarily coming into the jurisdiction (and therefore accepted the need to apply for citizenship to escape it), people coming as children cannot be reasonably expected to have accepted being put under this risk in the first place. The fact that their presence here was not an act of their agency should not impose on them such a burden, with its attendant costs, as the means of escaping the risk. The result is that, for no justifiable reason, these

children, when they reach adulthood, are (under the current deportation law) subject to discrimination compared to citizens, contrary to the principles of the *Belmarsh* decision.[77]

The second response is, as detailed in part 4.A above, that qualification for some kinds of citizenship acquisition (such as under BNA 1981 s1(3)) is impossible once the person has turned eighteen. As they obtain agency, their legal right evaporates. It may be that the ability to apply for citizenship as an adult reduces the moral claim to be exempt from deportation in some cases: after all the adult also has the agency to make the decision *not* to apply for citizenship, unlike the child. However, the fact that the moral claim of some is less (but not, we argue, nil) is not a good enough reason to deny a legal benefit in general.

The third response is that many young people incorrectly assume that they are British and only find out that they are not when they run into difficulties, be it interaction with the hostile environment or a threat of deportation.[78] In addition, in many cases young people over the age of 18 suffer some of the same disadvantages of those under the age of majority, including lack of (or low) income. Many remain dependent on family to greater or lesser extents and to expect individuals to suddenly obtain the material and intellectual resources to make a citizenship application on their own behalf on the day of their eighteenth birthday is contrary to the reality of the transition between childhood and adulthood.[79]

The fourth and final response is that some individuals (such as Osime Brown) will not pass the good character test in adulthood, whereas they would have done as children.[80] One may cease to be of good character for the purposes of citizenship because of criminal offending, but also because of actions short of criminality: e.g. 'notoriety', 'deception and dishonesty', and lacking 'financial soundness'.[81] However, the failure to meet the conditions of good

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[77] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56.

[78] Solange Valdez-Symonds, 'Children's Rights to British Citizenship' in Devyani Prabhat (ed), *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Edward Elgar Publishing 2019).

[79] Devyani Prabhat, Ann Singleton and Robbie Eyles, 'Age Is Just a Number? Supporting Migrant Young People with Precarious Legal Status in the UK' (2019) 27 International Journal of Children's Rights 228.

[80] Although the good character requirement must be passed by all over the age of ten years: Home Office, 'Nationality: good character requirement' (version 2.0, 30 September 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923656/good-character-guidance-v2.0-gov-uk.pdf> page 9.

[81] Home Office, 'Nationality: good character requirement' (version 2.0, 30 September 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923656/good-character-guidance-v2.0-gov-uk.pdf> page 9.

character as an adult are inadequate reason not to correct historic injustice in failing to register children as citizens. In *R (Johnson) v Secretary of State for the Home Department*, the Supreme Court unanimously found that:

> it is not reasonable to impose the additional hurdle of a good character test upon persons who would, but for their parents' marital status, have automatically acquired citizenship at birth, as this produces the discriminatory result that a person will be deprived of citizenship status because of an accident of birth which is no fault of his.[82]

We argue that the same applies to all who arrived in the UK as children, and particularly to those who would have become British citizens but for the fact that they were children at the time of their entitlement.

C. The proposed 'but for' test is inadequate

It might be objected that the 'but for' test proposed here is inadequate. We agree. The suggested 'but for' test would have significant blind spots, such as:

1. a child who arrived in the UK after birth, but who spent long periods in the UK without immigration leave would not be entitled to naturalisation.[83] Being in the UK without immigration leave is rarely, if ever, a decision of the child. Instead, children's immigration leave is intimately connected to the status of their parents who may make the decision to reside in the UK without leave.[84] The immigration status of the child is a direct consequence of their lack of agency.
2. a child who arrived in the UK after their thirteenth birthday and whose parents did not obtain ILR or British citizenship in that time would not be entitled to naturalisation or registration before they were eighteen. It may be said that the rationale for extending 'quasi-national' status to them is substantially reduced in any event given that they

[82] *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, para 38.

[83] Although they might, eventually, qualify through the 20-year long residency route of paragraph 276ADE of the Immigration Rules.

[84] Jacqueline Bhabha, '"Not a Sack of Potatoes": Moving and Removing Children Across Borders' (2006) 15 Public Interest Law Journal 197, 199.

arrived in the UK as older children. However, our argument is predicated on the child's lack of agency, not on claims to substantive integration, and so it applies equally forcefully to these children.

3. a child who would not pass the good character test at the earliest point at which they would be eligible for British citizenship (e.g. it arose at seventeen years old but they had first offended at age sixteen). However, making children pass the good character test for citizenship is highly problematic in and of itself.[85]

As things stand, all individuals fitting in the above examples have to run the gauntlet of the statutory 'private life exception'. That exception remains objectionable for the reasons given in part 4.D, above, and the moral claim to exemption from deportation made by all of the example individuals remains strong for the reasons given in parts 3 and 4.

D. The proposed 'but for' test is unnecessarily complex

It may be objected that operating the suggested 'but for' test is unnecessarily complex. Again, we agree when the comparison is with the alternative proposal of exempting from deportation all individuals who arrived in the UK as children. However, we argue that a 'but for' test would be easy to draft and for courts to understand, and that the successful application of a very similar test in *R (Johnson) v Secretary of State for the Home Department*[86] is evidence of this assertion.

More compelling is the problem of evidence, which is already a significant barrier to individuals proving their entitlement to citizenship as children,[87] let alone potentially many years in the future. However, we argue that the existence of some difficult cases is insufficient to undermine the proposal as a whole: but again help point to the simpler, maximalist policy proposal.

Also complex is the precise immigration status that exemption from deportation would bestow, especially where the individual is present in the UK unlawfully or where existing leave to remain can be revoked by the Secretary of State for the same reasons that they are facing

[85] PRCBC and Amnesty International, 'Children's rights to British citizenship blocked by good character requirement' (November 2019) <https://prcbc.files.wordpress.com/2019/10/joint_summary-on-good-character-requirement-in-childrens-citizenship-rights.pdf> accessed 24 February 2021.

[86] [2016] UKSC 56.

[87] Solange Valdez-Symonds, 'Children's Rights to British Citizenship' in Devyani Prabhat (ed), *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Edward Elgar Publishing 2019), 88-91.

deportation in the first place. The 'but for' test would not, by itself, grant British citizenship and a person relying on it is unlikely to qualify for citizenship (either for lack of lawful residence or ability to meet the good character test or both). Whether there is a historic injustice that needs resolving by a grant of citizenship now is a question not addressed here. However, even if British citizenship could now reasonably be withheld, successful application of the 'but for' test would provide the individual some kind 'quasi-national' protection from deportation: protection that would be rendered nugatory if they were then immediately removable for lack of leave to remain. Whether the correct response is the right to abode through citizenship or leave to remain through a grant of leave, and on what conditions, is not something that we have the space to address here: and the existence of a range of reasonable responses to this question cannot undermine or distract from the efficacy of our central argument.

6. Conclusion

It is true that the current law does not disregard the fact that a non-national offender has immigrated as a child: it will be relevant to such matters as the degree of integration into the community and the hardship involved in repatriation, and has been said to be relevant (but in an unspecified way) to the assessment of the public interest. Nevertheless, these, and other matters involved in the decision, such as the seriousness of the offence, remain matters of evaluation which can be of a very subjective nature, as the Osime Brown case illustrates. Worse still, the outcome for such people may turn on a deal between governments rather than on the application of general principles of justice.

Therefore, while such an absolute right cannot be derived from Article 8 ECHR, it is contended that as a matter of principle, rooted in justice and non-discrimination, non-citizen immigrants who were born in the host country or who arrived there as children should not be subject to deportation on the ground of their criminal record. This is strengthened if it is considered that in all its actions the state is bound under Article 3 UNCRC to give primary consideration to the best interests of these persons when they were children within its jurisdiction. This includes their best interests in successfully transitioning into adulthood. As a consequence, we argue that the state cannot subject them to the future risk of deportation should they offend.

It is open to states to address the situation directly, some seem to have done.[88] For the reasons outlined in this article we argue that the UK should follow their example. For example, section 32 of the UK Borders Act 2007 could be amended so as to restrict its operation to persons who had entered the UK after reaching the age of eighteen. This would recognise that, while it may not always be the case, children's residence is normally determined for them, so they are effectively in the same position as UK born persons. It would also demonstrate commitment to the best interests principle of the UNCRC by recognising that circumstances that are visited on people when they were children should as far as possible be resolved in accordance with what is best for them, whereas the present position effectively allows their lack of agency to work to their disadvantage.

As well as this maximalist policy position, we have presented here a minimalist policy proposal: to exempt from deportation anyone who could have become a British citizen (and thus immune from deportation) *but for* the fact that they were a child at the earliest point at which they could have done so. This proposal, also achievable through a simple amendment of section 32 of the UK Borders Act 2007, is very much second best to the maximalist proposal.

A 'but for' test of this kind would not protect from deportation all individuals who arrived in the UK as a child. This article was inspired by the plight of Osime Brown. From the publicly available information about Osime's case, we are unable to assess whether he would in fact benefit from the introduction of the 'but for' test that we propose here. That being the case, it is evident that the minimalist 'but for' proposal would address only some of the injustices which arise from making those who were born in the UK or arrived here as children liable for deportation, including some of the most egregious.

[88] App. No. 46410/99, para 39: 'Eight member States have provided in their laws that second-generation immigrants cannot be deported on the basis of their criminal record or activities: Austria, Belgium, France, Hungary, Iceland, Norway, Portugal and Sweden. Apart from Iceland and Norway, this protection is not confined to those who were actually born in the host country but also applies to foreigners who arrived during childhood (varying from before the age of three in Austria to before the age of fifteen in Sweden).' Correct as of the time of the *Üner* judgment of 2006. It is beyond the scope of this article to investigate whether this remains the correct position.