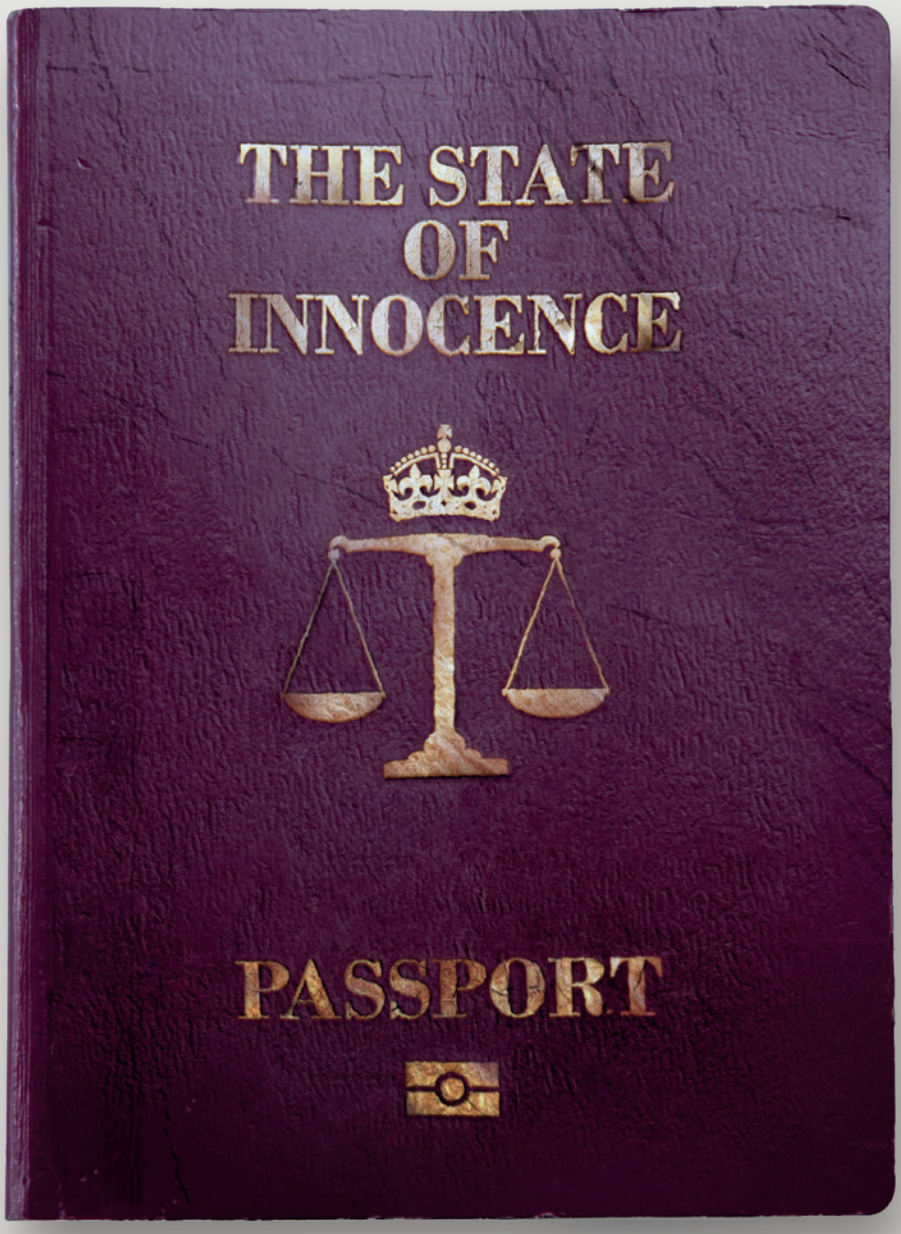
commons



How the requirement to declare nationality is undermining equality before the law

May 2020

About Commons

Commons is the not-for-profit criminal law firm, which was set up to put social justice at the heart of legal practise.

- We believe in rights and we believe in change which is why we do outreach and project work alongside our defence case work.
- We measure our successes not in profit and shares but in the impact of our work on our clients, on the people and organisations we partner and the communities we engage with.
- We want to be at the forefront of using new technology and developing new ways of thinking about the justice system.

The co-founders of Commons, Sashy Nathan, Rhona Friedman and Ben Stuttard trained and worked at some of the UK's leading law firms and have experience of cases with an international element and cases of national significance.

Acknowledgments

We would like to thank the hundreds of people nationwide who volunteered their time to observe court proceedings and provide us with their detailed notes. Thanks also goes to clients who provided us with insights into their cases and the legal practitioners who took the time out of their busy practices to provide full responses to our survey. The report would not have been possible without your work.

This research has been assisted by a number of consultants to the firm including lawyer and journalist, Charlotte Threipland; criminal defence and human rights barrister, Audrey Mogan; and bar graduate, Charlotte Clark.

Front page passport design: Ben Twiston Davies (photographer), Rob McDonald (retoucher) and Tara Tate (designer)

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Executive Summary

When Theresa May's government passed a law requiring all defendants in criminal proceedings to declare their nationality alongside their name, address and date of birth, the legislation sailed through Parliament with little scrutiny or criticism. This information was intended to assist the government in deportation of foreign national offenders but there was no assessment of the impact of introducing the issue of nationality into criminal proceedings. This is the first time the issue has been examined.

The 'nationality requirement' compels all defendants in criminal proceedings to declare their nationality to the court at the start of their case and it is a separate criminal offence for failure to comply. However, our research indicates that since the nationality requirement was implemented in November 2017, it has racialised courtrooms across the country. It is impacting not only defendants but also judges, magistrates, court staff and lawyers. Over the last eighteen months, we found:

- 96% of the legal practitioners surveyed did not believe in the policy. Many reported that inserting the issue of nationality into the criminal process from the outset has polluted the sanctity of fair trial rights and perceptions of justice.
- 79% of the legal practitioners we surveyed have had a client provide the Court with their ethnicity or race instead of or in addition to their nationality. Almost 60% said this happened frequently (once to a few times per week). 35% said it happened every now and again and only 8% said it rarely happened.
- Nationality was also conflated with race and / or ethnicity in 22% of the hearings we observed. This is normally out of confusion "Black Caribbean" and sometimes it is said with an element of pride, "White Anglo-Saxon Protestant".
- Court staff including District Judges, Magistrates and Legal Advisors are reported as embarrassed about asking the question and on occasion find it necessary to apologise for doing so.
- Two thirds of defendants who were not asked for their nationality by the court were observed to be white.
- Defendants reported that they did not understand why the court needed information about their nationality and wondered if it would affect the outcome of their case or their sentence.
- Despite the criminal sanction, there were no prosecutions in 2018 for failure to provide nationality and there remains uncertainty as to how such prosecutions would be brought.

These findings are yet another blow to the integrity of our criminal justice system which is according to some in crisis and *"at breaking point"*.[1] The unintended consequences of this policy are far reaching and it must be reviewed.

The United Kingdom has one of the most historic and valued legal systems in the world, built up on principles of fairness over centuries. Equality before the law should be at the heart of this and at the heart of our shared national identity.

1. See the Law Society's Criminal Justice System in Crisis Parliamentary Briefing, January 2019: https://www.lawsociety.org.uk/policy-campaigns/public-affairs/parliamentary-briefing/criminal-justice-system-in-crisis

Introduction

By virtue of section 162 of the Policing and Crime Act 2017, as amended by The Criminal Procedure (Amendment No. 4) Rules 2017, defendants in England and Wales are required to provide the court with their nationality. Failure to provide this information, or providing incomplete or inaccurate information, without a 'reasonable excuse' is punishable with up to 51 weeks imprisonment, a fine or both.

The government's stated purpose for the nationality requirement policy is to "remove as many Foreign National Offenders as quickly as possible" (see Appendix III). Yet the policy applies whether there is a conviction or not.

Regardless of the outcome of the case, information obtained under the policy is stored on the court's internal system for six years and on the court's "official register" indefinitely. We know that the information is automatically shared with the police case management system. It can also be shared with the Border and Immigration Agency and other government departments (see Appendix VI).

The Immigration Acts of 2014 and 2016 introduced a range of checks and controls that required employers, landlords, doctors and teachers to conduct immigration checks. The nationality requirement appeared to continue this reach of immigration control outside of immigration arenas.

In light of this, and reports and statistics that demonstrate how bias can creep into the criminal justice system, we at Commons decided the nationality requirement required further investigation. This is the resulting report. It concerns how the requirement is being implemented across the courts, what impact it is having on the perception of fairness in the justice system and what the experiences are of the defendants subject to it.

The research is based on the views and experiences of 134 lawyers and practitioners; volunteer court observers who witnessed 527 criminal hearings across 33 different Magistrates' Courts nationwide; and personal accounts from Commons' clients who have been defendants in criminal cases.

The report is designed to inform lawyers, academics, journalists and indeed anyone with an interest in ensuring fairness in the criminal justice system in England and Wales.

2. See the (1) the Lammy Review: https://www.gov.uk/government/organisations/lammy-review; (2) Amnesty International Trapped in the Matrix: https://www.amnesty.org.uk/london-trident-gangs-matrix-metropolitan-police; and (3) the Ministry of Justice, Statistics on Race and the Criminal Justice System 2016: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/669094/statistics_on_race_and_the_criminal_justice_system_2016_v2.pdf

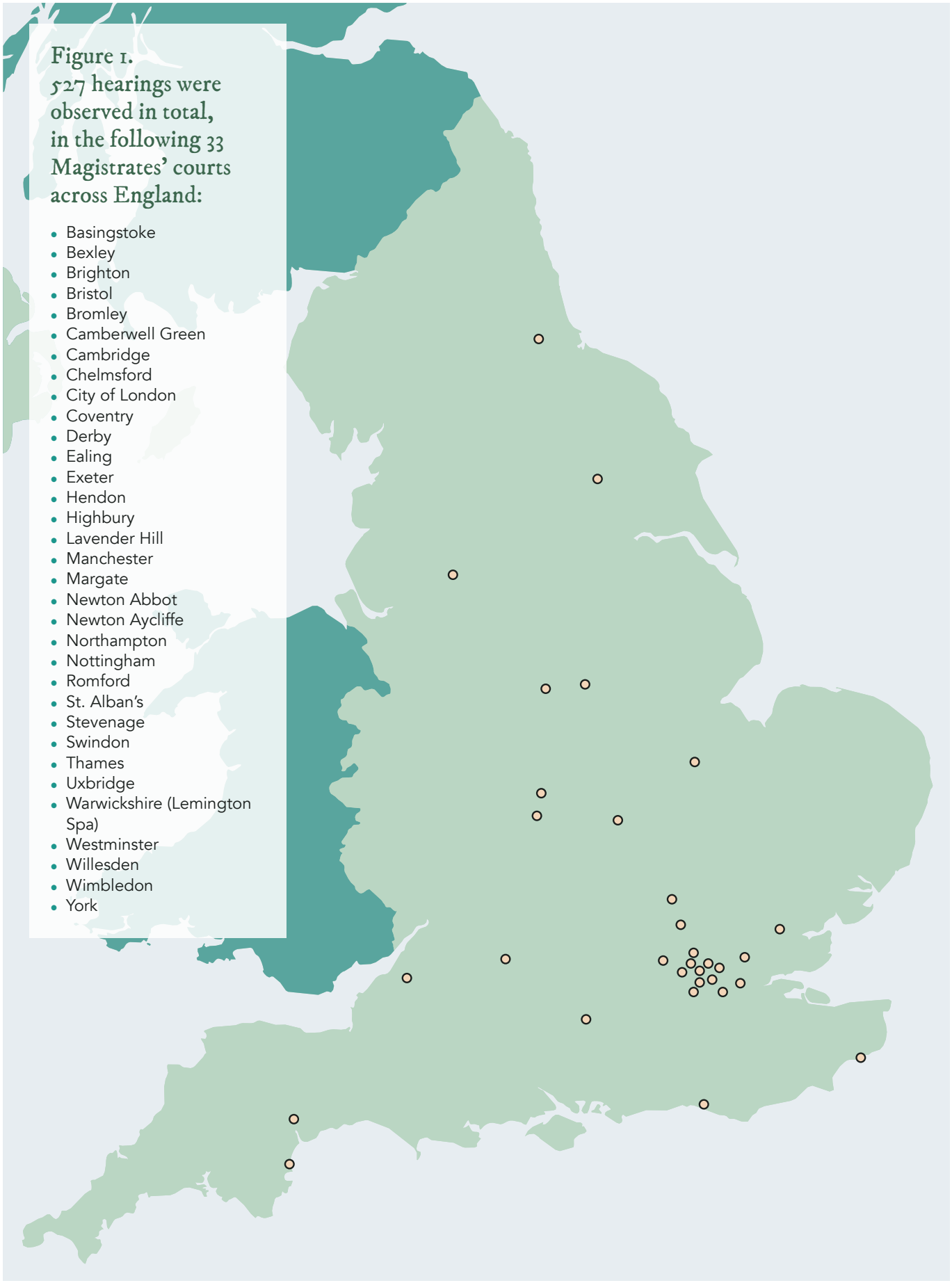


Figure 1.
527 hearings were observed in total, in the following 33 Magistrates' courts across England:

- Basingstoke
- Bexley
- Brighton
- Bristol
- Bromley
- Camberwell Green
- Cambridge
- Chelmsford
- City of London
- Coventry
- Derby
- Ealing
- Exeter
- Hendon
- Highbury
- Lavender Hill
- Manchester
- Margate
- Newton Abbot
- Newton Aycliffe
- Northampton
- Nottingham
- Romford
- St. Alban's
- Stevenage
- Swindon
- Thames
- Uxbridge
- Warwickshire (Lemington Spa)
- Westminster
- Willesden
- Wimbledon
- York

How is the nationality requirement being implemented?

At what stage are Courts asking about nationality?

The declaration of nationality is mandatory only at first appearance hearings in the Magistrates' Court and in the Crown Court.[3] The court may require a defendant to provide their nationality at subsequent hearings in either court and indeed our research confirms it is being asked far more frequently than strictly required.

Results show that courts are asking defendants for their nationality at hearings other than the first appearances (see Figure 2a and 2b). This may be due to a variety of reasons including that the digital case management system, that records the information, is different in the Magistrates' and Crown Courts. As these systems are not synchronised, when a case is sent from one court to the other, the nationality information is not included meaning the defendant is often required to repeat their information to the court.

Removal of foreign offenders

The stated purpose of the policy is for the removal of foreign offenders, but if this was the case, a defendant's nationality only becomes potentially relevant upon their conviction at the end of the case not at the start. It is unknown why the question is being mandated under the Criminal Procedure Rules at the very start of the criminal process, regardless of guilt.

One practitioner pointed out that:

> *"The question regarding nationality should only be asked upon conviction. At present all defendants are asked their nationality at the start of proceedings and when they are identified and before their plea is entered. There is no purpose in obtaining the nationality details of those who are acquitted as deportation proceedings should not be taken on the back of an acquittal save in the most exceptional circumstances."*

Bail applications

Over 20% of practitioners reported hearing the question being asked in bail applications in the magistrates' or crown courts. Our data from the court observers show that of the hearings where the nationality question was asked, 16% were bail applications.

This may be of particular importance because of the potential impact that the requirement could have on the outcome of bail applications. The likelihood to abscond is a legitimate objection against bail so it is possible to see how a person's nationality might be used as evidence towards this. We know of a case where the defendant was deemed by the judge to be more likely to abscond as a result of being French. This information was submitted to the Court solely because of the nationality requirement. Had the provision not been in place, the defence could have chosen not to disclose this information and the outcome may have been different.

The upshot is that defendants are possibly being forced, under threat of criminal sanction, to provide information to the Court that might adversely impact their applications for bail. This is a problematic issue requiring urgent further research.

3. Rules 3.13 and 3.27 of the Criminal Procedure Rules 2015 (as amended)

Figure 2a. The hearings at which courts require defendants to give their nationality (views of legal practitioners):

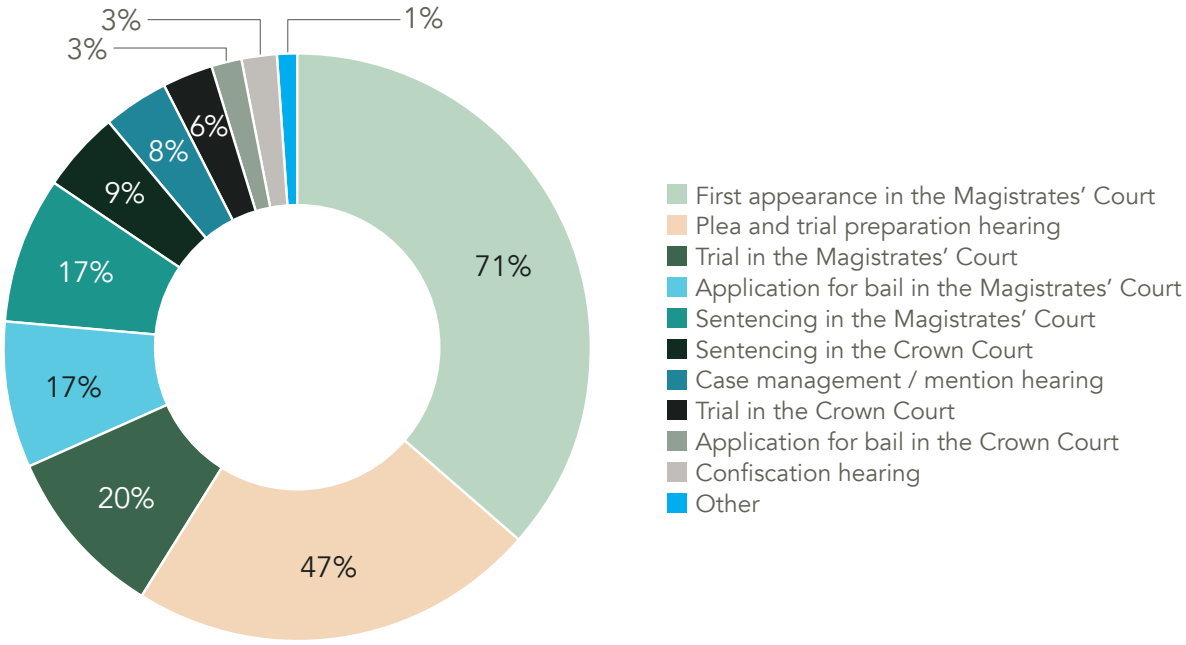
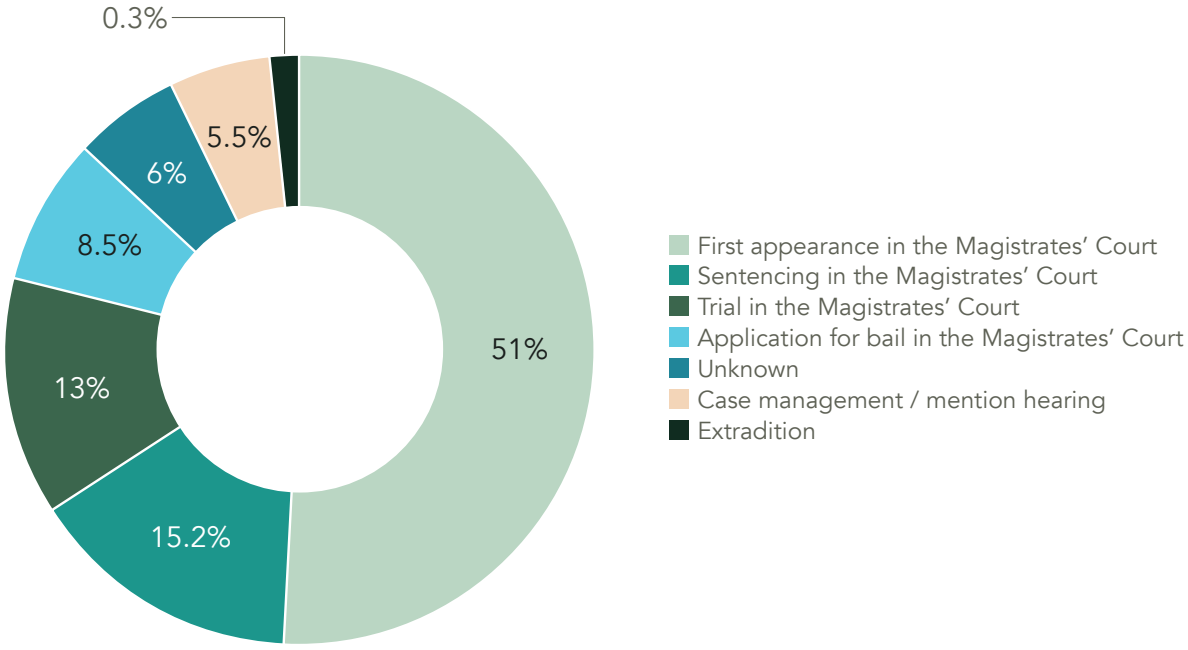


Figure 2b. The hearings at which courts require defendants to give their nationality (court observer results):



Inconsistency in implementation

Results from court observers show that even when the question is mandatory often it is not asked. In almost half (46%) of the First Appearance hearings observed in Magistrates' Courts, the question was not asked. We know that in just over 15% of hearings, the question was asked in writing on what is known as the 'defence advocate's slip'. However, in 10% of hearings the question was not asked at all. One barrister at court told a volunteer court observer that *"while he was aware of the nationality question being introduced, he did not see it often taken up in court"*.

According to a senior partner at a London-based criminal defence firm, there is one court where the staff are routinely refusing to ask the question as a result of their objection to the policy. This claim was supported by six court observer results obtained from the same court where the nationality question was not asked at all. The observer spoke to the court clerk about this and was told *"the nationality question was done administratively."*

> *"My experience is that whether the requirement is enforced can depend on the court centre, the judge, the court clerk or whether there is a busy list. Recently I have been in the embarrassing position of warning a defendant that the question will be asked and then it is not asked. In the last few weeks the question was not asked of my client in Wood Green, Snaresbrook and Lewes."*
>
> Barrister, 18 years call

Two practitioners surveyed suggested that not only do some courts actively object to the question, some do not place importance on the response provided. One stated:

> *"If they come out with nonsense e.g. 'Shepherd' no one bats an eyelid."*
>
> Solicitor

One client informed us that when he and some of his co-defendants refused to provide their nationality to the court, the Court put down 'British' anyway.

An embarassed courtroom

Several practitioners stated that the question causes embarrassment or discomfort in the courtroom.

> *"It makes me feel incredibly uncomfortable."*
>
> Barrister
>
> *"It's hard to sit through."*
>
> Solicitor
>
> *"It embarrasses judges and court staff and assists neither prosecution nor defence."*
>
> Crown Prosecution Service barrister
>
> *"Magistrates / District Judge's don't like asking for it, and sometimes make sarcastic comments expressing their frustration and embarrassment about having to ask for it."*
>
> Solicitor

A criminal defence solicitor described that he *"frequently hear clerks, Magistrates and District Judge's apologising for having to request the details and expressing their own lack of understanding as to why the question has to be asked"*.

This view is supported by at least two court observers. One stated that a defendant who held a British passport had also told the court that he was also *"half Greek"*. *"At this point"* the court observer noted, *"the Magistrate Mr. Dennis interjected and said to the court that it was an 'embarrassment' that they had to ask that question, that they 'do not like doing it' and it was an 'imposition from on high'. The recorder who asked the question verbally agreed."*

Another observer noted that he had spoken to the court clerk who said *"everyone 'finds it uncomfortable' asking the nationality question and 'I don't know why they ask it'"*.

It appears that the sense of embarrassment is felt not just by court staff but by the defendants themselves. One barrister said, *"the sense of discomfort and fear generated by it for non-British nationals is palpable"*. According to others, this is amplified when a defendant is confused by the question and does not know how to answer it correctly. Two practitioners felt so strongly about the requirement that they described how they routinely refuse to complete the nationality line when asked to complete the defence advocate's slip.

Figure 3a. How would you describe your legal practice?

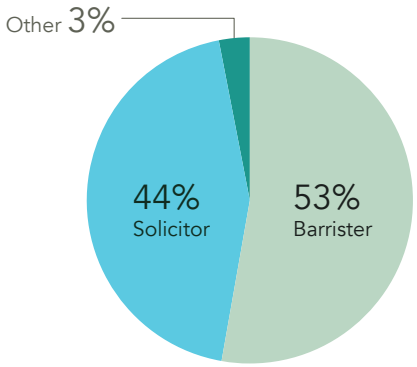
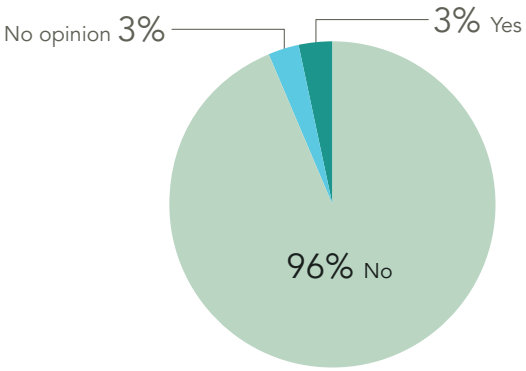


Figure 3b. Do you believe all defendants in criminal proceedings should be required to provide their nationality, alongside their name, date of birth and address?



Case study: Roland

Roland and four others were arraigned on one count of criminal damage at the Crown Court. Roland refused to provide his nationality. Subsequently, three of the four other defendants also refused to give their nationality. The last two defendants were self-representing.

Upon hearing this the judge stated that she would enter British as the answer to the nationality question on behalf of all defendants. She asked Counsel if they sought to make any representations and none did.

Comment: this situation demonstrates the lack of standard practice as to how courts deal with a defendant's failure to provide their nationality.

Roland's defence barrister knew he was British, so no representations were made and the Court was not misled. However, if the defendant was not British, the situation becomes increasingly complicated. Counsel would be faced with the choice between breaking privilege or misleading the Court.

We also now know that two of the five defendants were not in fact British nationals. By answering the question incorrectly on their behalf, the judge potentially implicated the defendants in a criminal offence (providing false information is a criminal offence).

There are an increasing number of unrepresented defendants in the criminal courts[4] and 20% of the defendants whose hearings were observed as part of this study were unrepresented. Such defendants are unlikely to be advised that a failure to answer the nationality question or to give false information is a criminal offence. Although ignorance of the law is not a defence to a criminal charge, this particular offence is not easily recognisable as being a criminal offence.

4. Criminal court statistics quarterly, England and Wales January to March 2016: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/533097/criminal-court-statistics-jan-mar-2016.pdf

No sanctions applied

What happens when an individual refuses to provide their nationality to the court when asked, or if they provide false information? These are both criminal offences that could result in a prison sentence of up to 51 weeks.[5] But our research shows that in reality the sanction is not applied.

Information obtained under Freedom of Information Act requests show that there were no prosecutions under this provision in 2018.[6] In response to our questions regarding what processes (if any) are undertaken by a court when an individual fails to answer the nationality question, the Ministry of Justice told us the following:

"The courts and judges will explain what is needed from defendants and provide support to them so that they can effectively respond. However, purposefully failing to provide the information required could result in the prosecutor starting proceedings against the defendant for an offence under s.162. It is the responsibility of the police and the Crown Prosecution Service to make decisions on prosecutions, not the court."

A lack of prosecutions is not, it seems, because people always comply with the nationality requirement. Nine practitioners remembered an incident where their client refused to answer the question.

> *"It is not entirely clear… [what the consequences are] for refusing to give your nationality. There is inconsistency across courts as to how rigidly this is applied."*
>
> Solicitor

There was one incident in the court observer results where the defendant refused to answer. The observer noted that the *"defendant appeared angry and stated 'I'm a Martian' clearly avoiding the question. The clerk said, 'okay you don't have to answer that'"*. It may be relevant that the defendant in this hearing was BAME.

One client (see Roland's case study on the previous page) recalled two appearances in which he and co-defendants refused on principle to give this information. There was no sanction applied. In one of the hearings, despite now knowing, the Judge wrote them down as being British. This raises concerns (as discussed further in the case study). One practitioner pointed out that a failure to provide an accurate answer to the question could have negative consequences for a defendant later down the line:

"I would imagine that the UKVI [UK Visas and Immigration] would seek to rely on any failure to answer the question at all or truthfully in later deportation reasons letters".

Our research shows that there is no standard practice as to how non-compliance with the nationality requirement is dealt with.[7] The fact that it can result in custody of up to 51 weeks makes this particularly concerning. The rule of law demands clarity, particularly around criminal matters which can result in prison sentences.

Case study: Javad

"I was born in Afghanistan but I grew up in Britain. I have British / Afghan dual nationality. In early 2019 I was in the Crown Court because I was facing a trial for money laundering.

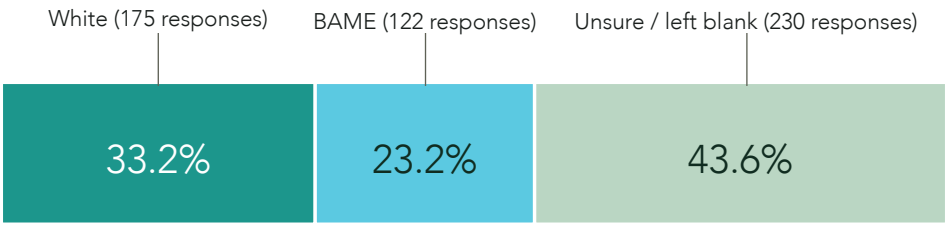
I was asked by the court to give my nationality. When they asked me, loads of things were going on in my mind. Firstly, I wasn't sure how I was supposed to answer the question. I think I said I'm Afghan but I have a British passport.

Secondly, I didn't understand why they were asking me because it had nothing to do with the offence I was charged with. I wondered if it could affect my case. The question felt like it was somehow a criticism. I thought that the fact that I am Afghan might add to my punishment."

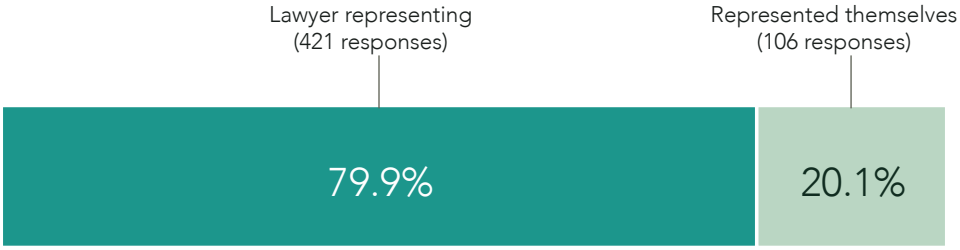
5. Section 162(3) Policing and Crime Act 2017. See Appendix I
6. See Appendix VI
7. The Criminal Procedure Rules were updated on 12 May 2020 with new guidance on how prosecutions should be commenced.

Figure 4. Court Observer Results

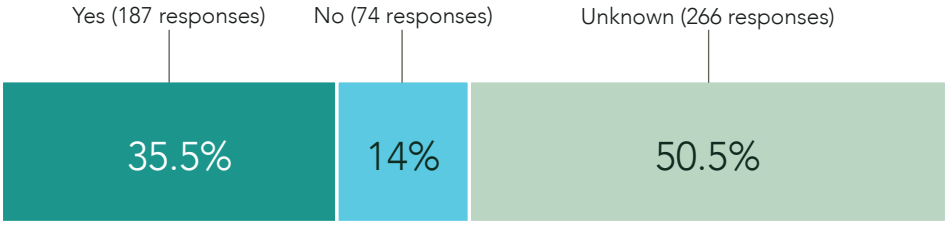
What race did the defendant appear to be?



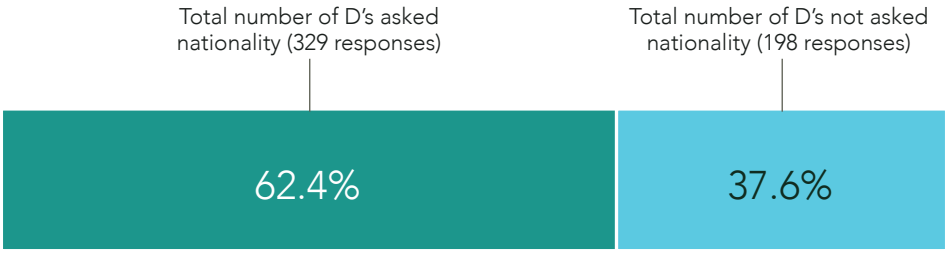
Was the defendant represented by a lawyer or on their own?



Did the slip, that the defence lawyer fills in for the court, request details about their client's nationality? (Court ushers consulted)



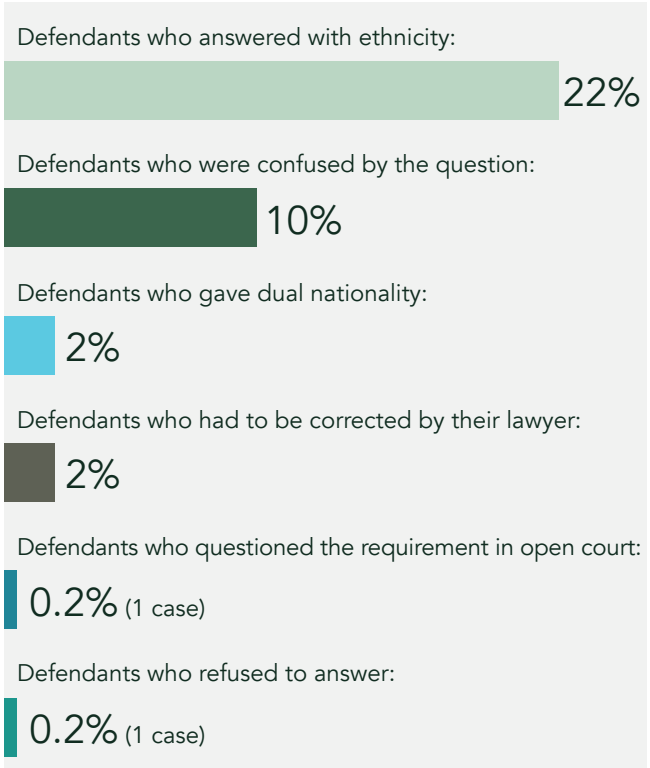
Was the defendant asked to give details of his or her nationality?



How do defendants understand the nationality requirement?

69% of defendants observed in court answered the nationality question accurately without any problems. 22% responded with their ethnicity or race and 10% were confused by the question. Six defendants (2%) gave a dual nationality (some without any issues). A further six had to be corrected by their barrister and one refused to answer the question.

Figure 5. Court observer results on defendants' understanding:[8]



Practitioners supported the view that the nationality question often causes confusion amongst defendants:

> *"it often confuses defendants who give a variety of answers some of which are not nationalities at all"*
> Solicitor
>
> *"mostly [my clients] are completely puzzled by the question put by the court".*
> Barrister, 45 years call

Some practitioners pointed out that this confusion can be amplified where a defendant is vulnerable (i.e. youths or those with mental health problems). This was an issue picked up by court observers:

> *"The defendant looked confused and stared silently at the clerk, until she prompted, 'British?' and then agreed."*
> Court observer
>
> *"The defendant didn't seem to know his nationality; looked up at the ceiling confusedly. The clerk prompted 'British?' to which he agreed (defendant old and appeared confused generally)."*
> Court observer

Some of the more remarkable answers given by defendants range from *"cockney"* to *"Church of England"*. The ex-footballer, Paul Gascoigne was reported as answering the question, *"White Anglo-Saxon Protestant."*

Confusion can also be generated when a defendant has dual nationality.

8. One important caveat to these results is that some defendants had the question phrased in such a way that they only had to answer "yes" or "no" (i.e. the question being "are you British?"). The results may have been different if, like it was to the majority of defendants, it had been asked as an open question.

At least two practitioners described their clients having dual nationality and simply not knowing what to say. Attempts are made by court staff to try and help defendants that are confused by the question by asking what passport they have. Some practitioners pointed out that this can create its own problems:

> *"When defendants are uncertain of the answer court legal advisors usually ask what their passport states. Many defendants being of minimal means do not have passports… [it] frequently causes unnecessary discomfort and embarrassment to defendants."*
>
> Solicitor

> *"Youth defendants are less likely to understand the question. I have heard it re-phrased as 'if you had a passport, what kind of passport would it be?' but this is actually a more difficult question."*
>
> Barrister, 3 years call

One practitioner stated that legal advisers ask:

> *"...bizarre questions in order to find out their nationality such as 'were you born in this country?'"*
>
> Solicitor

A court observer said that one defendant *"was confused as to how to answer the question. The clerk asked, 'what type of passport do you hold' and the defendant answered that he was Jamaican"*. It is of course possible that he might have had a Jamaican passport but still have British citizenship.

Two practitioners pointed out that the confusion caused by the nationality question could be detrimental to the substantive proceedings. The nationality question is asked in court just before the most crucial moment when a defendant has to enter their plea:

> *"I expect that confusion causes them to be thinking about their mistake, rather than focus on the next part of proceedings."*
>
> Barrister

Case study: Ravina

My parents were born in Bangladesh, but I do not have Bangladeshi nationality.

I was at the Magistrates Court in December 2017 for the offence of not complying with a school attendance order.

While in court I was asked to give my nationality. I don't remember exactly what I said but I think I said I was British. I understood the question because I studied sociology but I can imagine that some people might think they are being asked what their ethnicity is.

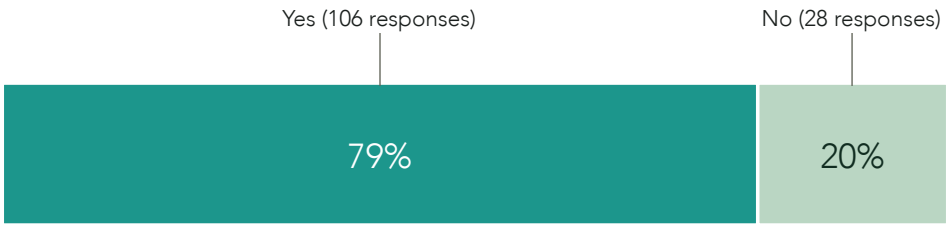
The question made me feel uncomfortable. Growing up in the UK I have faced a lot of discrimination in my life and that question just felt like a continuation of that. I often feel as though I am being singled out because of my ethnicity.

It was also an added pressure to deal with in the courtroom. I was already very nervous. The question made me feel like I may not be treated fairly.

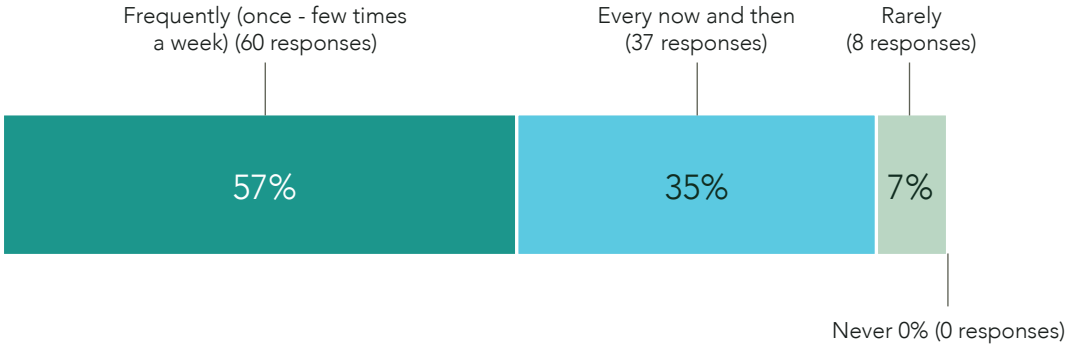
Because of my experience of being an ethnic minority in the UK some of these concerns may have already been in the back of my mind – even without being asked to give my nationality. However, even though I am British, when I was asked the question, I felt that even before my criminal trial had begun, my differences were being highlighted. The question bought all of my concerns about discrimination to the surface."

Figure 6. Practitioner Survey Results

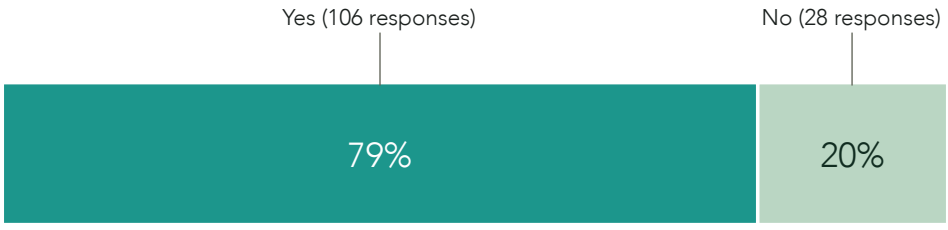
Have you had a defendant provide the court with their ethnicity and/or race instead of their nationality? *134 out of 134 answered*



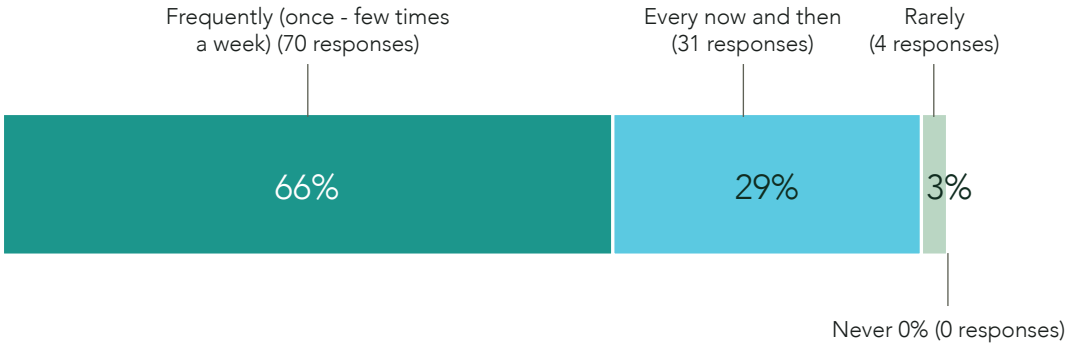
...How often?
105 out of 134 answered



Have you had a defendant provide the court with their ethnicity and/or race, in addition to, their nationality? *134 out of 134 answered*



...How often?
105 out of 134 answered



Ethnicity and Race

In 67% of the cases in which the defendant was not asked for their nationality (and where the race of the defendant had been noted by the court observer) the defendants were white.

One of our court observers, having sat through eight hearings where the question was not asked (seven of which were First Appearances, where the question is mandatory) noted:

> *"In my observations at Newton Aycliffe Magistrates' Court, many if not all of the defendants were born and raised in County Durham and Darlington, where the population is predominantly white and British. Therefore, the question of nationality was never raised or even seemed to be of any concern for the magistrate bench."*
>
> Court observer

If, as our research suggests, the question is being asked disproportionately to BAME people than to white people, this would amount to direct discrimination against BAME groups and would need to be addressed urgently.

Responding with ethnicity and race

In 22% of cases seen by court observers the defendants were recorded to have given their ethnicity or race as well as, or in addition to, their nationality. Some examples of the responses given:

> *"I was born in Malawi but I moved over here and am a British national."*
>
> *"Black British."*
>
> *"Black Caribbean."*

As we do not know the true nationality of the defendants, it is possible that there were others who gave their ethnicity in place of their nationality. For example, court observers noted:

> *"He was asked the nationality question and he answered 'Pakistani'. From my observation, I think that he had answered with his ethnicity rather than his nationality. Of course, you cannot ascertain nationality solely from one's appearance but from his strong regional accent, he appeared to be British Pakistani."*
>
> and...
>
> *"The defendant responded with 'Jamaican'. Although I think he had an English accent like he'd been living here for a while."*

This raises a larger question around unknown inaccuracies on how defendants' nationalities are

being recorded. Given the extent to which people are confused by the nationality question, it is perfectly possible that defendants are, without necessarily knowing it, giving an incorrect answer. This is concerning for two reasons. First, providing inaccurate information to the nationality question is a criminal offence punishable by prison. Second, the courts may be recording and storing inaccurate information and, as one practitioner pointed out, it is possible that this could be used against a defendant by the Home Office in future immigration applications.

106 of the practitioners surveyed (79%) have had a defendant provide the Court with their ethnicity and/or race instead of their nationality. Almost 60% of those practitioners said that this happened frequently (once to a few times per week). 35% said it happened every now and again and only 8% said it rarely happened.

The same number of practitioners (79%) said that they have had defendants provide the Court with their ethnicity or race in addition to their nationality. Almost 70% of those practitioners said that this happened frequently (once to a few times per week). While almost 30% said it happened every now and again. Only four said it rarely happened.

Many practitioners also described the frequency with which clients conflate nationality with ethnicity or race.

> *"pretty much every person I represent gives their ethnicity e.g. White British or Black British. Maybe because they are used to seeing this type of question in equal opportunities monitoring forms."*
>
> Solicitor and director of firm

> *"almost every client of mine provides their ethnicity or race, instead of nationality."*
>
> Solicitor

> *"almost every single client I have represented... will give an answer that is ethnicity."*
>
> Barrister

> *"some defendants look perplexed and give details about ethnicity on most occasions."*
>
> A solicitor talking of their experience sitting as a magistrate.

Describing the impact that this issue has on different defendants one barrister told us:

> *"If they are from an ethnic minority background, and British, there is often a feeling that the legitimacy of their identity is being doubted or questioned. If they are not British, the impact is worse and proceedings already feel prejudiced... If the defendant is British and White, they often reassert their identity by stating they are White British when asked for their nationality."*
>
> Barrister

A court observer noted that when a defendant responded, *"white British"* the Magistrate replied, *"not your race, please; just your nationality"*. One practitioner also noted that sometimes the District Judge or Magistrate will *"chastise"* the defendant when they give their race.

> *"Defendants usually hear the question as race not nationality. And usually the clerk doesn't care enough to clarify."*
>
> Barrister

"White British"

One suggestion that arose in both the court observation results and the practitioner surveys is that it can be white, British defendants that often state their ethnicity, or that they do so with an edge of confidence.

Court observer results showed that of those defendants who gave their ethnicity in addition to, or instead of their nationality, 71% were white. A number of practitioners also described this pattern:

> *"Curiously the only defendants I see who are keen to respond to this requirement invariably say that they are 'white British', which tells its own story."*
>
> Barrister, 8 years call

> *"If the defendant is British and White, they often reassert their identity by stating they are White British when asked for their nationality. It seems to be a mechanism by which to reassure the Court of their identity, but often may invite prejudice or assumptions against the defendant as to their political or social views."*
>
> Barrister
>
> *"'White English' is commonly a response when asked for nationality and, in my view, it's simply not appropriate."*
>
> Solicitor

Three practitioners indicated that they so often encounter this situation that in conference with any British Caucasian client before a hearing, they pre-emptively advise them not to preface 'British' with 'White'.

Case study: Jonathan

"I am a British actor and I've been on a number of major TV productions.

In May or June 2018, I was at Lavender Hill Magistrates' Court facing charges of permitting the use of a motor vehicle without insurance. It was a relatively straightforward case in which I was expecting an acquittal. I represented myself at the hearing.

I don't recall being asked what my nationality was by the Court but I would have replied 'British'. Because I'm white and middle class, it's a question that doesn't feel like it has any agenda for me and that might be why I don't remember being asked it. The lasting memory I have from the trial hearing was when I took the stand in front of three female judges and there was a moment where I saw recognition in their faces. I strongly felt that as a result of being high profile and white and privileged, I was in safe hands. I was then acquitted."

Does the nationality question affect perceptions of fairness?

Of the 134 legal practitioners surveyed in this study, 92% did not believe in the policy and many expressed strong views on the issue. The policy was frequently described as "inappropriate", others stating that it "risks bringing justice into disrepute" and "undermines justice and the reputation of British legal system".

At least four practitioners stated that it politicised the courts.

> *"Immigration enforcement should not be outsourced to the criminal courts."*
> Barrister
>
> *"The point of the criminal courts is to convict and sanction the guilty, not to act as an arm of the UK Border Agency."*
> Barrister

Only five practitioners believed that defendants should have to state their nationality in court and five had no opinion.

Fairness

90% of practitioners felt that the nationality requirement has a negative impact on the perception of fairness in the justice system. This was most often described as creating an impression that nationality will have a bearing upon the outcome of proceedings.

> *"Even asking the question leaves a suggestion of racism and xenophobia that is simply not appropriate."*
> Barrister
>
> *"It has the effect of hard wiring an element of prejudice into court proceedings, even if that is only in perception terms."*
> Barrister
>
> *"Even if it does not affect the outcome it makes it look like it could. This may make defendants of non-British nationalities feel threatened or vulnerable"*
> Barrister

Discrimination

69% of practitioners felt that the nationality requirement had a negative impact on protection against discrimination and 35.5% that the requirement had an impact on the right to a fair trial.

> *"The government ought to be well aware – thanks to the Lammy Review – that racial bias is a serious problem at every level of our criminal justice system. Forcing defendants to reveal where they come from in court can only worsen that discrimination and lead to unfair trials."*
> Barrister

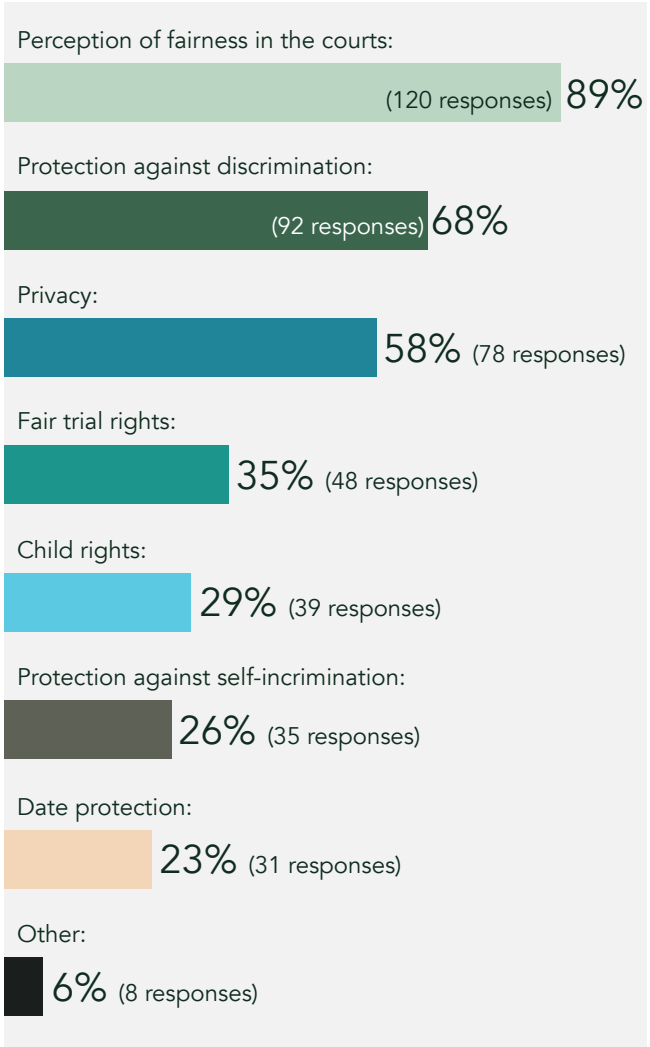
Others stated that the question has the effect of creating a sense of *"otherness"* and *"alienation"* amongst defendants in their first interactions with the court. This is likely to be particularly true for those defendants who are not British or who are British but are from an ethnic minority.

> *"It's an unnecessary requirement that further distances defendants from proceedings. This is made worse as the question is asked in an environment which is predominantly dominated by the white middle class."*
>
> Barrister, 8 years call

Further insights into a defendant's perception of the policy are gained by looking at how practitioners have described some interactions with their clients, particularly those who openly questioned or criticised the requirement.

Most defendants that questioned the requirement to declare their nationality asked their lawyer what it means, why the court needs to know and / or whether it would affect the verdict or sentence given in their case.

Figure 7. Do you believe the nationality requirement impacts any of the following? (134 out of 134 answered)



> *I was asked whether his Sudanese nationality status would mean he has a less favourable result upon conclusion of his trial."*
>
> Barrister, 12 years call
>
> *"I have experienced the shock and horror of a number of British Asian and British African defendants at their perception that they are targeted because of the colour of their skin."*
>
> Barrister, 39 years call

Two practitioners recalled clients who asked whether the nationality question was as a result of Brexit.

Two practitioners agreed with the policy overall but pointed out that its legitimacy did not extend to Youth Courts, *"given that deportation proceedings are not warranted in the case of youths identification of their nationality serves no purpose and is therefore not necessary"*.

Conclusion

This study investigates, for the first time, the requirement introduced in 2017 for defendants to state their nationality when asked to do so by a criminal court. Our research is a small snapshot of the situation. It gives evidence from 500 hearings across 30 national courts and the views of 130 lawyers.

Our overall conclusion is that the policy is undermining criminal justice and the rule of law. From a practical perspective, it is not being rolled out uniformly across the country. Some courts have their own unique practices. The question is sometimes not asked when it is mandatory to do so and asked when it is non-mandatory. Sanctions are not being applied. Many also described a palpable feeling of embarrassment in the courtroom when the question is asked.

The question is often not understood by defendants causing confusion in an already stressful situation. A significant proportion believe they are being asked for their race or ethnicity, some have even been known to give their religion. Sometimes they are corrected or "chastised" by the court for giving an incorrect answer but sometimes the incorrect answer is just left as it is. This appears to support the view, given by some lawyers in our study, that courts do not place significance on the policy. In one notable case, when four co-defendants (two of whom were not British) refused to answer, the court noted down "British" for all of them. This is concerning particularly because incorrect information being given by a defendant amounts to a criminal offence.

Finally, and perhaps most importantly, the policy is having an impact on the perception of fairness in the justice system. Some defendants, particularly non-British nationals or those from ethnic minority backgrounds, feel that they may not receive a fair trial or may be discriminated against. Justice must not only be done but be seen to be done. Trust in our justice system is crucial for the rule of law.

It is clear that the policy needs to be urgently reviewed by the government and if this does not happen, its legality should be scrutinised by the courts.

Methodology

In this study a mixed-method approach was used. Qualitative and quantitative information was collected using a combination of surveys, court observations, defendant interviews and requests under the Freedom of Information Act 2012.

The research questions

We sought to answer the following questions:

1. How is the nationality requirement being implemented across Magistrates' Courts in England and Wales
2. When a defendant is asked to state their nationality:

   a. Do they understand how to answer the question correctly (i.e. the difference between ethnicity, race and nationality)?

   b. Does it affect their perception of whether they will be treated the same as other defendants regardless of ethnicity, nationality and race?
3. What is the experience / opinion of legal practitioners on the requirement?

Court observations

We recruited volunteers, mainly undergraduate and postgraduate law students from a range of universities, to be court observers for our research. We asked them to register their interest first. During this stage, we checked their suitability for the task. If they were accepted, we provided them with a briefing note containing all necessary information for conducting the research. The volunteers then attended Magistrates' Courts across England and Wales and observed proceedings - as, when and where it was convenient to them.

Observers were asked to take detailed notes on the hearings that they observed using a worksheet as a prompt (attached at Appendix V) and were then requested to feedback this information to us. Our main concerns were around:

A. Whether and how defendants were being asked the question about their nationality;

B. The format and stage of proceedings at which the question was being asked; and

C. The way in which defendants were responding to the question.

Who were the volunteers and how were they recruited?

We contacted a number of universities in England and Wales so that they could promote the opportunity to their law students. We also contacted the human rights organisation Liberty who sent the opportunity to their pool of civil liberties volunteers.

We asked volunteers to apply by registering their interest via an online form that asked for their personal details, legal experience and motivation for applying. We accepted those students who demonstrated that they had some understanding of the law and were motivated by their interest in the research subject matter and / or gaining an understanding of how criminal law works in practice.

We had results from volunteers from the following universities:

- BPP University - various campuses
- Bristol University
- Brunel University
- Central European University
- City University Law School
- University of Brighton
- University of Cambridge
- University College London
- University of Durham
- University of Law (formerly the College of Law)
- University of Northampton
- University of Oxford
- University of Sussex
- Nottingham Trent University
- University of West London
- University of Warwick

Duplicating results

To avoid duplicating results, we asked volunteers to give details of their court visit (which court, on what day and at what time they attended as well as information on the specific hearings they saw). We then manually checked for overlaps.

Practitioner Surveys and Interviews

Surveys were sent to a number of criminal practitioners including most sets of chambers with a criminal law practice and numerous criminal law firms nationwide.

We conducted outreach over email, Twitter, LinkedIn and by telephone and were featured in a number of criminal law newsletters including the Legal Action Group, the Criminal Justice Alliance and Transform Justice.

We received 134 responses in total, which were provided by 71 barristers, 59 solicitors, three magistrates and also one journalist (a court correspondent for a prominent tabloid newspaper). The questions listed on the survey can be found at Appendix IV.

Defendant interviews and case studies

We spoke to 18 clients from Commons and asked them if they could share their experiences of being asked to give their nationality in court. The primary purpose of the interviews was to collect first hand, qualitative data addressing research question (2).

Reactions varied and based on what each one told us, we concluded that they fell into five approximate groups:

- Seven had strong feelings about the question
- Five had no memory of being asked the question
- Three had no particular feelings either way about being asked the question
- Two had objections to the question but did not feel personally affected
- One was not asked the question at all

We took statements from a range of clients that had interesting and varied perspectives on the issue. The statements are featured as case studies in this report.

Requests under the Freedom of Information Act 2012 ('FOIA')

We sent questions to the Ministry of Justice in 2018. Our questions and their full response are contained at Appendix VI.

Appendices

Appendix I - Section 162 Policing and Crime Act 2017

Policing and Crime Act 2017

UK Public General Acts 2017 c. 3 Part 9 CHAPTER 1 Requirements to confirm nationality Section 162

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Status: This is the original version (as it was originally enacted).

162 Requirement to give information in criminal proceedings

In the Courts Act 2003, after section 86 (alteration of place fixed for Crown Court trial) insert—

"**86A Requirement to give information in criminal proceedings**

(1) A person who is a defendant in proceedings in a criminal court must provide his or her name, date of birth and nationality if required to do so at any stage of proceedings by the court.

(2) Criminal Procedure Rules must specify the stages of proceedings at which requirements are to be imposed by virtue of subsection (1) (and may specify other stages of proceedings when such requirements may be imposed).

(3) A person commits an offence if, without reasonable excuse, the person fails to comply with a requirement imposed by virtue of subsection (1), whether by providing false or incomplete information or by providing no information.

(4) Information provided by a person in response to a requirement imposed by virtue of subsection (1) is not admissible in evidence in criminal proceedings against that person other than proceedings for an offence under this section.

(5) A person guilty of an offence under subsection (3) is liable on summary conviction to either or both of the following—

(a) imprisonment for a term not exceeding 51 weeks (or 6 months if the offence was committed before the commencement of section 281(5) of the Criminal Justice Act 2003), or

(b) a fine.

(6) The criminal court before which a person is required to provide his or her name, date of birth and nationality may deal with any suspected offence under subsection (3) at the same time as dealing with the offence for which the person was already before the court.

(7) In this section a "criminal court" is, when dealing with any criminal cause or matter—

(a) the Crown Court;

(b) a magistrates' court."

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Appendix II - Rule 3.27 of the Criminal Procedure Rules 2015

The Criminal Procedure (Amendment No. 4) Rules 2017

STATUTORY INSTRUMENTS

2017 No. 915 (L. 13)

SENIOR COURTS OF ENGLAND AND WALES

MAGISTRATES' COURTS, ENGLAND AND WALES

The Criminal Procedure (Amendment No. 4) Rules 2017

Made	*12th September 2017*
Laid before Parliament	*14th September 2017*
Coming into force	*13th November 2017*

The Criminal Procedure Rule Committee makes the following Rules under section 69 of the Courts Act 2003(1), after consulting in accordance with section 72(1)(a) of that Act.

Citation, commencement and interpretation

1. These Rules may be cited as the Criminal Procedure (Amendment No. 4) Rules 2017 and shall come into force on 13th November 2017.

2. In these Rules, a reference to a Part or rule by number alone means the Part or rule so numbered in the Criminal Procedure Rules 2015(2).

Amendments to the Criminal Procedure Rules 2015

3. In Part 3 (Case management)—

(a) in rule 3.13 (Pre-trial hearings: general rules), as amended by the Criminal Procedure (Amendment No. 3) Rules 2017(3)—

(i) for the heading to the rule substitute "Pre-trial hearings in the Crown Court: general rules",

(ii) after paragraph (4) insert—

"(5) The court—

(a) at the first hearing in the Crown Court must require a defendant who is present—

(i) to provide, in writing or orally, his or her name, date of birth and nationality, or

(ii) to confirm that information by those means, where the information was given to the magistrates' court which sent the defendant for trial; and

(b) at any subsequent hearing may require such a defendant to provide or confirm that information by those means.",

(iii) at the end of the note to the rule insert—

"*Under section 86A of the Courts Act 2003(4), Criminal Procedure Rules must specify stages of proceedings at which the court must require the information listed in rule **3.13**(5). A person commits an offence if, without reasonable excuse, that person fails to comply with such a requirement, whether by providing false or incomplete information or by providing no information.*";

(b) after rule 3.26 (Use of Welsh language at trial) insert—

"PREPARATION FOR TRIAL IN A MAGISTRATES' COURT

Pre-trial hearings in a magistrates' court: general rules

The Criminal Procedure (Amendment No. 4) Rules 2017

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Amendments to the Criminal Procedure Rules 2015

3. In Part 3 (Case management)—

(a) in rule 3.13 (Pre-trial hearings: general rules), as amended by the Criminal Procedure (Amendment No. 3) Rules 2017(1)—

(i) for the heading to the rule substitute "Pre-trial hearings in the Crown Court: general rules",

(ii) after paragraph (4) insert—

"(5) The court—

(a) at the first hearing in the Crown Court must require a defendant who is present—

(i) to provide, in writing or orally, his or her name, date of birth and nationality, or

(ii) to confirm that information by those means, where the information was given to the magistrates' court which sent the defendant for trial; and

(b) at any subsequent hearing may require such a defendant to provide or confirm that information by those means.",

(iii) at the end of the note to the rule insert—

"*Under section 86A of the Courts Act 2003(2), Criminal Procedure Rules must specify stages of proceedings at which the court must require the information listed in rule 3.13(5). A person commits an offence if, without reasonable excuse, that person fails to comply with such a requirement, whether by providing false or incomplete information or by providing no information.*";

(b) after rule 3.26 (Use of Welsh language at trial) insert—

"PREPARATION FOR TRIAL IN A MAGISTRATES' COURT

Pre-trial hearings in a magistrates' court: general rules

3.27.—(1) A magistrates' court—

(a) must conduct a preparation for trial hearing unless—

(i) the court sends the defendant for trial in the Crown Court, or

(ii) the case is one to which rule 24.8 or rule 24.9 applies (Written guilty plea: special rules; Single justice procedure: special rules);

(b) may conduct a further pre-trial case management hearing (and if necessary more than one such hearing) only where—

(i) the court anticipates a guilty plea,

(ii) it is necessary to conduct such a hearing in order to give directions for an effective trial, or

(iii) such a hearing is required to set ground rules for the conduct of the questioning of a witness or defendant.

(2) At a preparation for trial hearing the court must give directions for an effective trial.

(3) At a preparation for trial hearing, if the defendant is present the court must—

(a) satisfy itself that there has been explained to the defendant, in terms the defendant can understand (with help, if necessary), that the defendant will receive credit for a guilty plea;

(b) take the defendant's plea or if no plea can be taken then find out whether the defendant is likely to plead guilty or not guilty; and

(c) unless the defendant pleads guilty, satisfy itself that there has been explained to the defendant, in terms the defendant can understand (with help, if necessary), that at the trial—

(i) the defendant will have the right to give evidence after the court has heard the prosecution case,

(ii) if the defendant does not attend, the trial is likely to take place in the defendant's absence, and

(iii) where the defendant is released on bail, failure to attend court when required is an offence for which the defendant may be arrested and punished and bail may be withdrawn.

(4) A pre-trial case management hearing must be in public, as a general rule, but all or part of the hearing may be in private if the court so directs.

(5) The court—

(a) **at the first hearing in the case must require a defendant** who is present to provide, in writing or orally, his or her name, date of birth and nationality; and

(b) at any subsequent hearing may require such a defendant to provide that information by those means.

[Note. At the first hearing in a magistrates' court the court may, and in some cases must, send the defendant to the Crown Court for trial, depending upon (i) the classification of the offence, (ii) the defendant's age, (iii) whether the defendant is awaiting Crown Court trial for another offence, (iv) whether another defendant charged with the same offence is awaiting Crown Court trial, and (v) in some cases, the value of property involved. See also Part 9 (Allocation and sending for trial).

Under section 11 of the Magistrates' Courts Act 1980(3), where the defendant does not attend the trial, where the defendant is at least 18 years old, and subject to some exceptions, then the court must proceed in his or her absence unless it appears to the court to be contrary to the interests of justice to do so. Where the defendant does not attend the trial and he or she is under 18 then, again subject to some exceptions, the court may proceed in his or her absence.

Under sections 8A and 8B of the Magistrates' Courts Act 1980(4), a pre-trial ruling about the admissibility of evidence or any other question of law is binding unless it later appears to the court in the interests of justice to discharge or vary that ruling.

Under section 86A of the Courts Act 2003(5), Criminal Procedure Rules must specify stages of proceedings at which the court must require the information listed in rule 3.27(5) and may specify other stages of proceedings when such requirements may be imposed. A person commits an offence if, without reasonable excuse, that person fails to comply with such a requirement, whether by providing false or incomplete information or by providing no information.]"; and

(**1**) S.I. 2017/755.

(**2**) 2003 c. 39; section 86A is inserted by section 162 of the Policing and Crime Act 2017 (c. 3), with effect from a date to be appointed.

(**3**) 1980 c. 43; section 11 was amended by section 123 of, and paragraph 1 of Schedule 8 to, the Criminal Justice Act 1988 (c. 33), section 168 of, and paragraph 39 of Schedule 10 to, the Criminal Justice and Public Order Act 1994 (c. 33), section 119 of, and paragraph 39 of Schedule 8 to, the Crime and Disorder Act 1998 (c. 37), paragraphs 25 and 26 of Schedule 32 to the Criminal Justice Act 2003 (c. 44), section 54 of the Criminal Justice and Immigration Act 2008 (c. 4) and sections 48 and 50 of, and paragraphs 2 and 4 of Schedule 11 to, the Criminal Justice and Courts Act 2015 (c. 2).

(**4**) 1980 c. 43; section 8A was inserted by section 45 of, and Schedule 3 to, the Courts Act 2003 (c. 39) and amended by SI 2006/2493 and paragraphs 12 and 14 of Schedule 5 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10). Section 8B was inserted by section 45 of, and Schedule 3 to, the Courts Act 2003 (c. 39) and amended by paragraph 51 of Schedule 3, and Part 4 of Schedule 37, to the Criminal Justice Act 2003 (c. 44).

(**5**) 2003 c. 39; section 86A is inserted by section 162 of the Policing and Crime Act 2016 (c. 3), with effect from a date to be appointed.

Appendix III - Relevant paragraphs of the explanatory notes to the Policing and Crime Act 2017

171 The UK currently has 28 international financial sanctions regimes in force including the sanctions regime targeting ISIL (Daesh) and Al-Qaida. Domestically, the UK also implements terrorist financing restrictions through the Terrorist Asset Freezing etc. Act 2010 ("TAFA"). A full list of financial sanctions regimes can be found online at HMT's financial sanctions page.

172 When sanctions are imposed by the UN or the EU, the UK acts on its international obligations to give effect to the sanctions in UK law. UN sanctions are implemented by the EU and once implemented through EU regulations, they take direct effect in the UK.

Enforcement

173 Currently the UK enacts domestic statutory instruments to make it a criminal offence to breach financial sanctions. However a licence or authorisation from HM Treasury can be granted to permit an action that would otherwise be prohibited.

174 The European Communities Act 1972 ("1972 Act") limits the maximum penalty for offences created by regulations made under section 2(2) of the Act, including offences related to breaching of financial sanctions, to two years' imprisonment (upon conviction on indictment in the Crown Court (or equivalent)) and three months (upon summary conviction in a magistrates' court (or equivalent)).

175 This is inconsistent with penalties for similar offences in other sanctions regimes, for example, offences under TAFA carry a maximum penalty of seven years' imprisonment.

176 There is also an apparent enforcement 'gap' between situations deemed serious enough to warrant prosecution for failure to comply with financial sanctions and cases where a cautionary letter may be sufficient to improve future compliance.

177 In the Summer Budget 2015 (HC264), the Chancellor announced the creation of a new Office of Financial Sanctions Implementation, which was established within the Treasury on 31 March 2016. The Budget report stated the following:

"The Office will provide a high quality service to the private sector, working closely with law enforcement to help ensure that financial sanctions are properly understood, implemented and enforced. This will ensure financial sanctions make the fullest possible contributions to the UK's foreign policy and national security goals and help maintain the integrity of and confidence in the UK financial services sector. The government will also legislate early in this Parliament to increase the penalties for non-compliance with financial sanctions."

178 To support the work of the new unit, and ensure that financial sanctions are properly enforced, Part 8 of the Bill:

- Provides for an uplift of criminal penalties for EU financial sanctions by applying a gloss to section 2(2) of the 1972 Act, and amending the Anti-Terrorism, Crime and Security Act 2001 and Counter-Terrorism Act 2008. The changes will enable the maximum custodial sentence for a criminal breach of financial sanctions to be increased from two to seven years for conviction on indictment and from three months to six months (12 months in Scotland) on summary conviction.
- Creates a monetary penalties regime for breaches of financial sanctions regimes.
- Includes financial sanctions in the list of offences to which Deferred Prosecution Agreements ("DPAs") and Serious Crime Prevention Orders ("SCPOs") apply.

These Explanatory Notes relate to the Policing and Crime Bill as introduced in the House of Commons on 19 May 2016 (Bill 3)

- Enables the temporary implementation of UN Security Council Resolutions by UK legislation until their implementation via EU law.

Miscellaneous and General

National Crime Agency

179 The NCA's core mission, as set out by the then Government in *National Crime Agency: A Plan for the Creation of a National Crime Fighting Capability* (published in June 2011), is to lead the UK's fight to cut serious and organised crime. It is responsible for tackling major organised crime, such as drug and people trafficking, serious crime such as child sexual exploitation and complex international fraud, including cyber-crime. The NCA came into being in October 2013.

180 The NCA has a strategic role, bringing together intelligence from the UK and abroad to understand the international nature of organised criminal gangs, how they operate and how they can be disrupted.

181 The NCA has more than 4,000 officers and operates across the UK, respecting the devolution of policing in Scotland and Northern Ireland.

182 The NCA has close working partnerships with other government departments, UK police forces and other law enforcement agencies. It also has the power to direct chief officers of police forces and law enforcement agencies in England and Wales to undertake specific operational tasks to assist the NCA or other partners.

183 Reflecting the experience of its initial two years of operations, clauses 130 and 131 and Schedule 14 make changes to the arrangements under which the NCA may enter into collaboration agreements with other law enforcement agencies and the enforcement powers with which the Director General of the NCA can designate officers.

Requirements to confirm nationality

184 Foreign nationals comprise 12% of the prison population in England and Wales[29]. The Government aims to remove as many Foreign National Offenders ("FNOs") as quickly as possible to their home countries, to protect the public, to reduce costs and to free up spaces in prison. The number of FNOs removed from the UK has increased from 4,539 in 2011/12[30] to 5,277 in 2014/15[31]. More than 25,000 FNOs have been removed from the UK in the period 2010 to 2015[32].

185 The Immigration Act 2014 provided for a revised deportation process so that, in cases where there is no real risk of serious irreversible harm to the individual, an FNO can only exercise his or her right of appeal from outside the UK, thereby allowing for the more rapid deportation of many FNOs. Most FNOs do not appeal once returned to their home country. By the end of 2015 more than 2,600 FNOs have been removed under the new 'deport first, appeal later' powers, since they came into force in July 2014.

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29 Offender Management Statistics Quarterly Bulletin: July to September 2015, MoJ
30 Managing and removing foreign national offenders, October 2014, NAO
31 https://www.gov.uk/government/statistics/immigration-statistics-july-to-september-2015-data-tables

32 Ibid.

These Explanatory Notes relate to the Policing and Crime Bill as introduced in the House of Commons on 19 May 2016 (Bill 3)

Appendix IV - Practitioner Survey Questions

Nationality Requirement Research:
Survey Questions Provided to Practitioners

1. How would you describe your legal practice?

    a. Solicitor
    b. Barrister

2. Do you believe all defendants in criminal proceedings should be required to provide their nationality, alongside their name, date of birth and address?

    a. Yes
    b. No
    c. No opinion

3. Does your answer to the nationality requirement differ, when asked specifically about youth defendants in youth courts?

4. Please provide your views on nationality requirements in the youth court:

5. How do you explain the nationality requirement to your clients?

6. Have you had a defendant question the requirement?

7. If yes, please comment on defendants' questions

8. Have you had a defendant refuse to give their nationality?

9. If yes to 8, please comment on defendants' refusal to give their nationality:

10. If yes to 8, how did the Court respond?

11. Have you had a defendant provide the Court with their ethnicity and/or race **instead** of their nationality?

12. If yes to 11, how often?

    a. Frequently [once - few times a week]
    b. Every now and then
    c. Rarely
    d. Never

13. If yes to 11, are the clients:

    a. Mostly youth
    b. Mostly adults
    c. Even, between adults and youth

14. Have you had a defendant provide the Court with their ethnicity or race, **in addition to**, their nationality?

15. If yes to 14, how often?

    a. Frequently [once - few times a week]
    b. Every now and then
    c. Rarely
    d. Never

16. If yes to 14, are the clients:

    a. Mostly youth
    b. Mostly adults
    c. Even, between adults and youth

17. At what stage in the proceedings has the Court required this information from your client?

    a. First Appearance in the Magistrates' Court
    b. PTPH
    c. Application for bail in the Magistrates' Court
    d. Application for bail in the Crown Court
    e. Case Management / Mention Hearing
    f. Trial in the Magistrates' Court
    g. Trial in the Crown Court
    h. Sentence in the Magistrates' Court
    i. Sentence in the Crown Court
    j. Confiscation Hearing

18. Do you believe the nationality requirement impacts any of the following?

    a. Fair trial rights
    b. Perception of fairness in the courts
    c. Protection against discrimination
    d. Protection against self-incrimination
    e. Privacy
    f. Data protection
    g. Child Rights

19. Please provide any further comments you have with respect to the nationality requirement in criminal courts

20. Please provide your professional email address

21. Please indicate if you would be happy for us to contact you further?

Appendix V - Court observer worksheet

QUESTIONS FOR VOLUNTEER COURT OBSERVERS

Court details

1. Name of Magistrates' court
2. Court room number
3. Is it a District Judge or a Magistrates bench presiding?
4. Name of District Judge / Magistrates

Case specific questions - please answer these for each hearing you observe.

5. What type of hearing is it? A. First appearance B. Case Management Hearing C. Bail Application D. Trial E. Sentencing hearing F. Extradition G. Don't know
6. What criminal offence(s) is the defendant charged with?
7. Name and apparent ethnicity of defendant (if possible)
8. Was the defendant represented by a lawyer or on their own?
9. Did the slip that the defence lawyer fills in for the court, request details about their client's nationality? *(You may ask the court usher about this).*
10. Was the defendant asked to give any of the following information? *(Please note all that apply)* A. Name B. Address C. Date of Birth D. Nationality E. What type or passport they have F. The defendant was not asked any questions regarding his or her nationality, ethnicity or passport
11. What happened when the defendant was asked about their nationality? *(Please note all that apply)* A. Defendant gave ethnicity instead or alongside their nationality (e.g. "White" or "Black-British") B. There was confusion as to how to answer the question C. Defendant questioned why the Court wanted to know the information D. Defendant's answer was corrected by their barrister / solicitor E. Defendant refused to answer F. The Court asked the defendant for any dual nationalities G. The defendant answered correctly without any problems
12. If you did not hear the nationality question asked in open court, please try and speak to one of the court clerks or advocates to find out if the question was asked administratively and note their response: A. The question was asked administratively B. The question was not asked administratively C. It was not possible to speak to a court clerk or advocate
13. Please state verbatim exactly what the defendant answered in response to the nationality question and any other discussion around this issue (*use additional paper if needed*).
Please take a note of anything else you think might be relevant to this research (*use additional paper if needed*).

Appendix VI - Copies of correspondence between Commons and Ministerial departments

Ministry of Justice

[redacted]

Disclosure Team
Ministry of Justice
102 Petty France
London
SW1H 9AJ
data.access@justice.gov.uk

13 December 2018

Dear [redacted]

Freedom of Information Act (FOIA) Request – 181115016

Thank you for your request dated 15 November 2018 in which you asked for the following information from the Ministry of Justice (MoJ):

The following questions are in relation to the requirement for defendants in criminal courts to provide details of their nationality pursuant to s.162 of the Policing and Crime Act 2017, as amended by The Criminal Procedure (Amendment No. 4) Rules 2017.
If any of the individual questions result in the cost limit being exceeded can you please respond to the remainder of the questions which do not exceed the limit. I am willing to be contacted as part of this process in order to narrow the scope where cost limits may be reached If necessary.

1. Is this information stored alongside other personal details such as name, date of birth, address and/or case details?
2. How long is this information retained by the Government?
3. If a defendant provides details of both ethnicity and nationality (for example 'black British') how is this recorded?
4. If the defendant is of dual nationality (for example 'Afghan British') are both nationalities recorded.
5. Is defendant nationality information provided in court records that can be requested by members of the public and/or the media?
6. Is this information provided to any other government departments or agencies, in what form and by individual request or en masse? Is this also the same for youth defendants?
7. Have any prosecutions been brought under this legislation (for failure to provide details or providing incorrect details)? If so, what was the sanction imposed against the individual?
8. What is the process undertaken by the court when an individual fails to provide the information?

Your request has been handled under the FOIA.

I can confirm that the MoJ holds the information that you have requested and I have provided it below.

1. An individual's nationality information is stored in the courts' computer record alongside personal details such as name, date of birth and address. Currently, whilst nationality information is recorded within the courts' internal system, it is not stored on the official court record, or 'register'. However, as of 17 December 2018, this practice will change and nationality will be recorded on the official court register.

2. Under the current system, this data is kept for 6 years. However, once defendant nationality is recorded on the official court register, it will be retained permanently.

3. The defendant is not asked for ethnicity details in court and if they do reply to the question with their ethnicity, it is not recorded. The court clarifies that nationality is sought and only records that.

4. Only one nationality is currently recorded. However, system changes as of the 17 December 2018 will allow for both nationalities to be recorded.

5. This information is exempt under section 21 of the FOIA, because it is reasonably accessible to you. Rule 5.8 of the Criminal Procedure Rules governs public access to information held in court records. However, defendants' answers to the nationality question are not among the details that court staff are permitted to supply on request under rule 5.8(3)(a), (4), (6). If a member of the public, or the media, asks for that information then that person must apply to the court under rule 5.8(3)(b), (7). The principles that the court will follow are described in division I 5B of the Criminal Practice Directions.

   https://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015

6. After a case is completed, Her Majesty's Court and Tribunal Services (HMCTS) automatically sends the result to the police case management system and this information contains defendant nationality data. HMCTS do not share nationality information en masse with any other department or agency. However, defendant nationality could be shared with other agencies depending on the case outcome. Depending on the case result and relevance, information including nationality could be shared with Prison Service, Probation Service, Youth Offending Service, Border and Immigration Agency. However, this is on a case by case basis. The basic rule is the same for Youths.

7. There were no prosecutions for offences under s.162 of the Policing and Crime Act 2017 in the last year.

8. The courts and judges will explain what is needed from defendants and provide support to them so that they can effectively respond. However, purposefully failing to provide the information required could result in the prosecutor starting proceedings against the defendant for an offence under s.162. It is the responsibility of the police and the Crown Prosecution Service to make decisions on prosecutions, not the court.

Appeal Rights

If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

data.access@justice.gov.uk

2

Ministry of Justice

[redacted]

Disclosure Team
Ministry of Justice
102 Petty France
London
SW1H 9AJ

data.access@justice.gov.uk

30th September 2019

Dear [redacted]

Freedom of Information Act (FOIA) Request – 190902023

Thank you for your request dated 2nd September 2019 in which you asked for the following information from the Ministry of Justice (MoJ):

The following questions are in relation to the requirement for defendants in criminal courts to provide details of their nationality pursuant to s.162 of the Policing and Crime Act 2017, as amended by The Criminal Procedure (Amendment No. 4) Rules 2017. If any of the individual questions result in the cost limit being exceeded can you please respond to the remainder of the questions which do not exceed the limit. I am willing to be contacted as part of this process in order to narrow the scope where cost limits may be reached If necessary.

1. Please confirm that (as of 17 December 2018) this information (on nationality) is now recorded on the official court register alongside other personal details such as name, date of birth, address and/or case details?
2. Is this information now being stored by the Ministry of Justice permanently?
3. If the defendant is of dual nationality (for example 'Afghan British') are both nationalities now recorded on the court system, (as of 17 December 2018)?
4. Are there any data sharing agreements in place between different government departments or agencies, who are sharing this information?
5. To date, have any prosecutions been brought under this legislation (for failure to provide details or providing incorrect details)? If so, what was the sanction imposed against the individual?
6. What is the process undertaken by the court when an individual fails to provide the information?
7. What training / guidance has been issued to court staff and the judiciary on how to obtain this information from defendants in criminal proceedings?
8. What guidance exists or has been provided to the Crown Prosecution Service on starting proceedings against the defendant for an offence under s.162?
9. What were the results / outcomes of the Equality Impact Assessments for sections 159/160 of the Policing and Crime Act 2017?

Your request has been handled under the FOIA.

Regarding Questions 1-10 (excluding Q5), I am writing to advise you that your enquiry does not fall under the Freedom of Information regime.

It may be helpful if I explain that the FOIA gives individuals and organisations the right of access to all types of recorded information held, at the time the request is received, by public authorities such as the Ministry of Justice (MoJ). Section 84 of the Act states that in order for a request for information to be handled as a FOIA request, it must be for recorded information. For example, a FOIA request would be for a copy of a policy, rather than an explanation as to why we have that policy in place. On occasion, the MOJ receives requests that do not ask for recorded information, but ask more general questions about, for example, a policy, opinion or a decision, or asking for advice and guidance.

With regard to these questions, since you are asking for advice and guidance, this will be best dealt with by HMCTS who will process your query as Official Correspondence.

Regarding Question five, I have considered your request for information but I am unable to answer it without further clarification. Section 1(3) of the FOIA does not oblige us to answer requests where we require further clarification to identify and locate the information requested.

In order that I can determine whether the data requested is held by MoJ and whether it is exempt from disclosure under FOIA, please can you define the timescale to be applied to your request. On receipt of this information your request will be processed and issued with a new FOIA reference number.

Appeal Rights

If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

data.access@justice.gov.uk

Disclosure Team, Ministry of Justice, 10.38, 102 Petty France, London, SW1H 9AJ

You have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely

Courts and Tribunals Development Directorate, HMCTS

Ministry of Justice

Wendy Morton MP
Parliamentary Under-Secretary of State for Justice

[redacted]
Commons
The Co-op Centre
Unit 4, 11 Mowll Street
London
SW9 6BG

Your ref: SN/18/289
MoJ ref: ADR71349

19 August 2019

Dear [redacted]

LAMMY REVIEW AND SECTION 162 OF THE POLICING AND CRIME ACT 2017

Thank you for your firm's letter of 29 July to the Parliamentary Under-Secretary of State, Edward Argar MP, regarding the Lammy Review and section 162 of the Policing and Crime Act 2017. I am responding as the Minister responsible for race disparity in the justice system.

As I am sure you are aware the Government remains committed to tackling racial disparity within the justice system, and to following up the recommendations set out in David Lammy MP's review into the treatment of Black, Asian and Minority Ethnic Individuals in the Criminal Justice System. In October 2018, we published an update showing progress in tackling racial disparities in the Criminal Justice System, including an update against each of David Lammy's recommendations, and we will publish a further update before the end of this year. You will be able to find the update at: https://www.gov.uk/government/publications/tackling-racial-disparity-in-the-criminal-justice-system-2018.

Turning to your specific point regarding declaring nationality in court, as you will be aware, since November 2017 section 86A of the Courts Act 2003, as amended by section 162 of the Policing and Crime Act 2017, requires a person who is a defendant in proceedings in a criminal court to provide their name, date of birth and nationality if required to do so at any stage of proceedings by the court. This strengthens powers in relation to Foreign National Offenders by creating earlier opportunities in the Criminal Justice System to capture information, and underpins the wider policy intention of identifying Foreign National Offenders at an early stage of criminal proceedings so that, if they are sentenced to custody, they can be considered for removal from the United Kingdom if appropriate.

There remain important safeguards which ensure that the right to a fair trial is protected. Nationality information provided under these provisions is not admissible in criminal proceedings, except in relation to proceedings for an offence under this provision. Where a defendant does not understand what is meant by nationality or they require further clarification, they will be asked which county or countries they are citizens of or what passport they hold. Furthermore, this provision applies to all defendants appearing in court in person. Failing to provide a name, date of birth, and nationality without a reasonable excuse is an offence.

T 020 3334 3555
F 0870 761 7753
E https://contact-moj.dsd.io/
www.gov.uk/moj
102 Petty France
London
SW1H 9AJ

I hope this has reply has been helpful and has offered clarity regarding the work you are pursuing.

Yours sincerely

Wendy Morton.

WENDY MORTON MP

The State of Innocence

How the requirement to declare nationality is undermining equality before the law

commons

Commons
The Co-op Centre
11 Mowll Street
London
SW9 6BG

Phone: 020 3865 5403
Email: info@commons.legal
Website: www.commons.legal