



Children: Persistent offending as a bar to naturalisation, Deportation and Exile

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Immigration consequences of childhood offending

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Immigration consequences of childhood offending

- 1. Deportation**
- 2. Bar to naturalisation as a British citizen – the “good character requirement”**



Deportation: what is it?

- **What is deportation?**
 - **Form of forcible removal of non-British citizens**
 - **Operates as permanent ban on re-entry until and unless revoked**
 - **Presumption against revocation for at least 10 years (for sentences of imprisonment of less than 4 years) or indefinitely (for sentences at least 4 years) unless certain exceptions apply**



Deportation: statutory regime

- **General power lies under section 3(5) of Immigration Act 1971 (“IA 1971”): “a person is liable to deportation from the United Kingdom if:**
 - (a) The Secretary of State deems his deportation to be *conducive to the public good* ...”**
- **Most often, but not always, due to criminal offending**



Deportation: statutory regime

- **Another power under section 3(6) IA 1971:**

“Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.”



Deportation: statutory regime

- **UK Borders Act 2007 (“UKBA 2007”) provides a regime for “automatic deportation”**
- **Under section 32:**
 - **s32(4): the deportation of a “foreign criminal” is conducive to the public good for the purposes of section 3(5) IA 1971**
 - **s32(1)-(2): a “foreign criminal” is a person who is not a British citizen and who has been sentenced to a period of imprisonment of at least 12 months**



Deportation: statutory regime

- Under section 38(1)(c) UKBA 2007, a “period of imprisonment of at least 12 months:”

“includes a reference to a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for at least 12 months”

- **BUT** an individual can still be liable to deportation even if their sentence is of less than 12 months’ duration...



Deportation: statutory regime

- **For the purposes of the Immigration Rules and the Nationality, Immigration and Asylum Act 2002, a “foreign criminal” means a person who is not a British citizen and has been convicted in the UK of an offence and who**
 - (i) has been sentenced to a period of imprisonment of at least 12 months,**
 - (ii) has been convicted of an offence that has caused serious harm, or**
 - (iii) is a persistent offender**



Persistent offending

- **Most deportation cases involving childhood offending involve “persistent offenders”**
- ***Binbuga v SSHD* [2019] EWCA Civ 551 at 40-41; *SC (Zimbabwe) v SSHD* [2018] EWCA Civ 929 at 50-60:**
 - **someone who “keeps on breaking the law”**
 - **decision makers will need to look at the whole history and overall pattern of offending**
- **Fact that offences committed when individual is a child will be relevant to merits of appeal on Article 8 grounds**



Naturalisation: the good character requirement

- **In order to naturalise as a British citizen under section 6(1) of the British Nationality Act 1981, the applicant must be “of good character” (Schedule 1)**
- **“Good character” not defined in the 1981 Act but set out in detailed Home Office policy guidance**
- **Latest version is *Nationality: good character requirement* dated 30 September 2020 and available on Home Office website**
- **Takes into account not offending and very wide range of non-criminal behaviour**



Naturalisation: the good character requirement

- **Good character requirement applies to all applicants aged 10 or over at the time of application**
- **Guidance states that:**

“When assessing whether a child is of good character, you must take account of any mitigation relevant to the child’s particular circumstances. Where a child has been convicted of a criminal offence, sentencing guidelines require that any custodial or non-custodial sentence is adjusted to take into account the child’s age and particular circumstances and any mitigating factors such as their ability to understand the consequences of their actions”



Naturalisation: the good character requirement

“Therefore although the criminal sentence thresholds for refusal and non-custodial sentencing guidelines for adults. will normally apply to a child who has been convicted of a criminal offence, the lesser sentence handed down to them will mean they are automatically less likely to meet the higher thresholds....

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

Naturalisation: the good character requirement

- **Includes a table of “tariffs”: periods of exclusion from qualifying for naturalisation following conviction**
- **For DTOs, only the custodial element of the sentence is to be taken into account for these purposes**



Deportation and Exile

Greg Ó Ceallaigh, Garden Court Chambers

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Deportation and Exile

- The purpose of this talk is to:
 - Give an overview of how deportation works and how we got here
 - Examine the position of young adults who have lived all or most of their lives in the UK and face deportation
 - Engage with the qualitative difference between deportation for those people and for other migrants



“Not Fit For Purpose”: The relentless march of terrible immigration law

- In 2006 Home Secretary Charles Clarke had to resign when it transpired that over 1000 foreign national criminals had been released without deportation being considered. Since then there have been the following major changes to deportation law:
 - UK Borders Act 2007 (introducing “automatic deportation” and detention while *considering* whether to deport)
 - June 2012 Immigration Rules (“defining” when deportation would be proportionate for Article 8 ECHR)
 - Immigration Act 2014 (limitation of rights of appeal, again “defining” when deportation would be proportionate for Article 8 ECHR – now in primary legislation)
 - Immigration Act 2016 (creating the hostile environment, deport-first-appeal-later)
- All of this has been aimed at the tabloid spectre of the foreign criminal – and reducing discretion for judges



Who are these foreign criminals?

- For the purposes of the Nationality, Immigration and Asylum Act 2002 a “foreign criminal” is a person:
 - (a) who is not a British citizen,
 - (b) who has been convicted in the United Kingdom of an offence, and
 - (c) who—
 - (i) has been sentenced to a period of imprisonment of at least 12 months,
 - (ii) has been convicted of an offence that has caused serious harm, or
 - (iii) is a persistent offender
- That includes:
 - Someone who has lived most of his/her life in the UK
 - Someone who has lived most of his/her life in the UK lawfully
 - Someone who was born in the UK
 - Someone whose offending was when they were a child



What happens to a foreign criminal?

- A foreign criminal (or someone who cannot prove their nationality/right to reside fast enough) upon completion of their criminal sentence will be:
 - detained
 - considered for deportation
- Detention will in practice be in prison, at least initially
- Detention may be for a very lengthy period, particularly if someone has been resident in the UK for a long time making obtaining documentation to assist with removal practically difficult



Case study: *Vassallo v SSHD* [2016] EWCA Civ 13

- Home Office attempt to deport a 65 year old Italian man who had lived lawfully in the United Kingdom since he arrived aged 4 in 1952
- Appellant was a repeat offender (nonviolent burglaries)
- Home Office spent 4 years and went all the way to the Court of Appeal trying to deport him to Italy, which he had not been to since he left except for a family holiday in the early 1970s



Case study: *Sam Louis v Home Office* [2021] EWHC 288 (QB)

- Came to the UK aged 13 in 2002/2003, was effectively “abandoned” and ended up in care
- No attempt was made to regularise his status for years, before an application was made in 2007, including his identity documents from Congo
- Committed a robbery on a bus 31st October 2009 (no use of violence) and was sentenced to 18 months’ imprisonment
- As he met the criteria for automatic deportation (over 1 year sentence) he was considered for deportation:
 - Entered immigration detention on 19 May 2011 – but remained in prison
 - Home Office took 2 years to decide whether to deport him at all
 - Was detained for 4 ½ years
 - By the time of his release he had spent 15% of his life in immigration detention



What is the test for deportation of a foreign criminal?

- Where someone who was born or grew up in the UK is facing deportation, in most cases their key protection will be their right to private and family life under Article 8 ECHR
- Both the old pure proportionality exercise and the provisions of the Immigration Rules on deportation have been superseded by primary legislation (*Binaku (s. 11 TCEA; s. 117C NIAA; para 399D)* [2021] UKUT 34 (IAC))
- Section 117C of the 2002 Act is the most critical provision in a deportation case



S117C of the Nationality, Immigration and Asylum Act 2002

"(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ('C') **who has not been sentenced to a period of imprisonment of four years or more**, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where – (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.

...

(6) In the case of a foreign criminal **who has been sentenced to a period of imprisonment of at least four years**, the public interest requires deportation **unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2...**"

Socially and culturally integrated?

- In *CI(Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 2027 Leggatt LJ gave guidance on this issue
- Case concerned a man who came to the UK aged 1 and the SSHD sought to deport him when, aged 20, he committed a series of offences.
- Leggatt LJ held:

“...[r]elevant social ties obviously include relationships with friends and relatives, as well as ties formed through employment or other paid or unpaid work or through participation in communal activities. However, a person's social identity is not defined solely by such particular relationships but is constituted at a deep level by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging. The importance of upbringing and education in the formation of a person's social identity is well recognised, and its importance in the context of cases involving the article 8 rights of persons facing expulsion because of criminal offending has been recognised by the European Court.”



Very significant obstacles to reintegration?

- In *Secretary of State for the Home Department v Kamara* [2016] EWCA Civ 813 Sales LJ gave guidance on this issue

“...the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.”



Deportation or exile?

- There is an enormous difference between deportation of a person who was born in or grew up in a country and a person who is a relatively recent arrival:
 - It is effectively punishment by transportation/exile
 - It is a punishment that is usually far more severe than any criminal sanction – not just separation from family and friends but (in practice) severing from everything you know
 - It is something many people will never recover from
 - It is effectively the exportation of criminals – not popular with countries of return
- As Sedley LJ held in *HK(Turkey) v SSHD* [2010] EWCA Civ 583:

“35. If there is a gap in the tribunal’s reasoning, it is their apparent omission of the fact that the respondent had been here since the age of six. The number of years a potential deportee has been here is always likely to be relevant; but what is likely to be more relevant is the age at which those years began to run. Fifteen years spent here as an adult are not the same as fifteen years spent here as a child. The difference between the two may amount to the difference between enforced return and exile. Both are permissible by way of deportation, but the necessary level of compulsion is likely to be very different.”



Deportation or exile?

- The approach of Sedley LJ in *HK(Turkey)* and other cases has been disapproved of since the introduction of the S117C criteria. In *Binbuga v SSHD* [2019] EWCA Civ 551 the Court held at §72:

“Caution therefore has to be exercised in placing reliance on cases which pre-date the statutory regime, such as HK (Turkey). On any view it is not appropriate to refer to or rely upon the individual being a “home grown” criminal or offender.”
- Nowhere do the legislative criteria take account of the fact of the key qualitative difference between deportation and exile



The view from Strasbourg – *Boultif v Switzerland*

- In *Boultif v Switzerland* (2001) 33 EHRR 50 the European Court of Human Rights held that in an Article 8 ECHR deportation case the key issues will be these:
 - the nature and seriousness of the offence committed by the applicant
 - the duration of the applicant's stay in the country from which he is going to be expelled
 - the time which has elapsed since the commission of the offence and the applicant's conduct during that period
 - the nationalities of the various persons concerned
 - the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life
 - whether the spouse knew about the offence at the time when he or she entered into a family relationship
 - and whether there are children in the marriage and, if so, their age
 - the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin



The view from Strasbourg – *Maslov v Austria*

- In *Maslov v Austria* [2009] INLR 47 the European Court of Human Rights held:

“74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there (see Üner, § 58 in fine).

*75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country **very serious reasons** are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile.”*
- However a person is not a “settled migrant” for *Maslov* purposes unless that residence was lawful (*DM (Zimbabwe) v SSHD* [2015] EWCA Civ 1288; *Pormes v the Netherlands* [2020] ECHR 572) though it need not *all* be lawful (*CI (Nigeria) v SSHD* [2019] EWCA Civ 2027).



Double punishment? Apparently not...

- In *AT (Pakistan) v SSHD* [2010] EWCA Civ 567 the Court of Appeal held that automatic deportation is not a penalty for the purposes of Article 7 ECHR (no punishment without law).
- In *CG v Bulgaria* (1365/07) the Strasbourg Court held that the protections of Article 7 ECHR do not apply to deportation decisions at all.
- The Court also held in *Üner v Netherlands* (2007) 45 EHRR 14 that deportation on top of a criminal sentence is not a double punishment “*either for the purposes of art.4 of Protocol No.7 or more generally*”.



The future?

- There is some more helpful recent caselaw at Court of Appeal level (e.g. *CI(Nigeria)*) but generally the Courts are loathe to recognise the qualitative difference between exile and deportation.
- This is something that lawyers and campaigners will need to push.
- It remains the case that if a person fulfils the incredibly wide deportation criteria, the Home Office will always always always try to deport them.
- In November 2020 Detention Action carried out a poll that found that nearly eight in 10 (77%) agreed that those who came to the UK as children should not be subject to automatic deportation
- Nevertheless the relentless right-wing media campaign continues – and Priti Patel is planning to make appealing even more difficult



Age-Crime Curve

Dr Tim Bateman, Academic at University of
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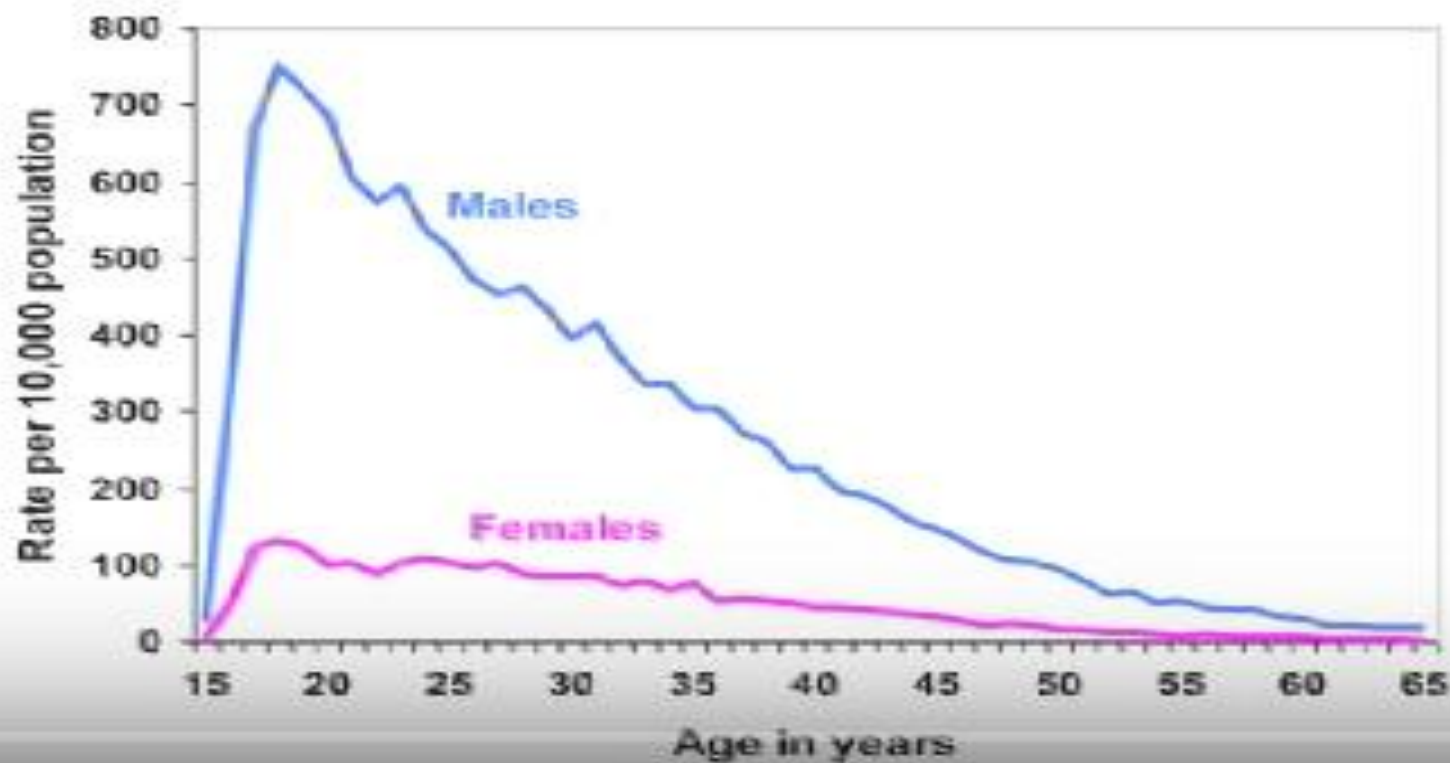


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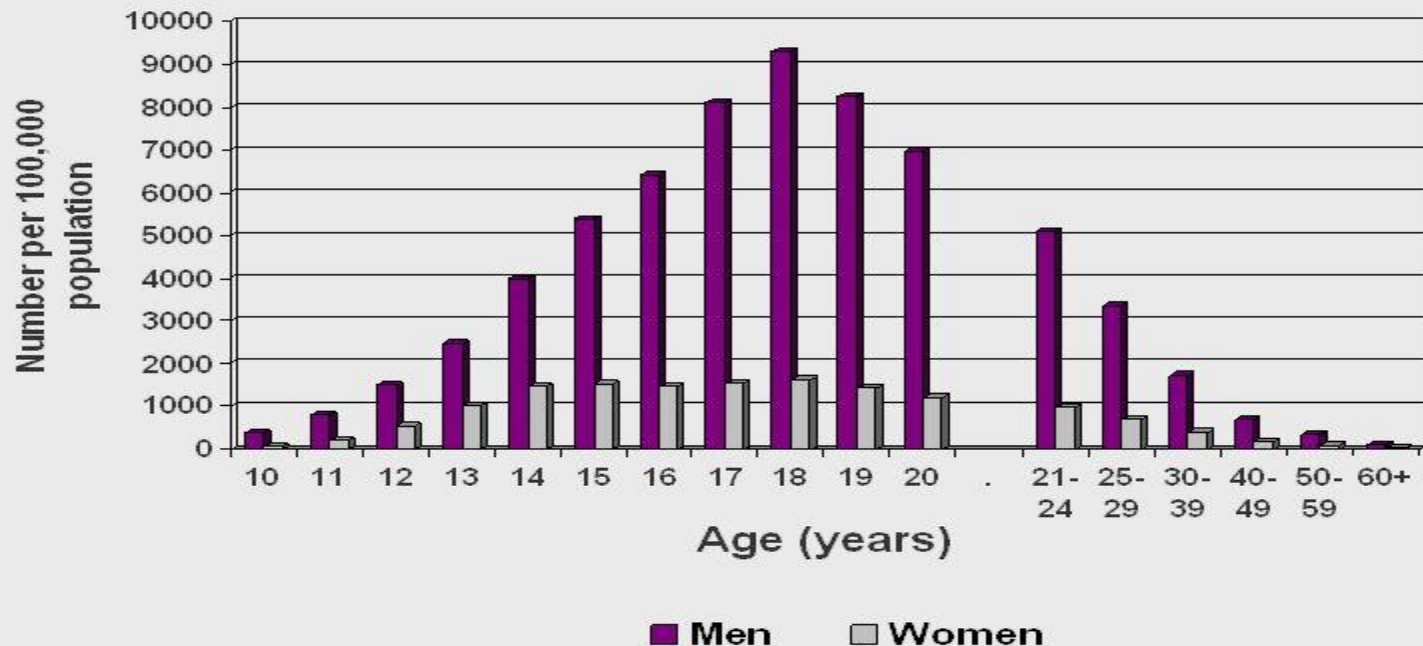
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A typical age-crime curve (McVie 2009)



The Age-Crime Curve

*Men and women found guilty or cautioned per 100,000 population:
England & Wales, 1997*



Thank you

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