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Citizenship and Race

Introduction

This article considers the racialised underpinning of British citizenship, using citizenship deprivation powers as a primary focus.¹ Racial difference lay at the heart of the British Empire, and it also lies at the heart of modern citizenship law, underpinning its development and evolution. Different classes of British subjects have experienced and still experience different standards of law and justice. British citizenship remains ill-defined, and Parliament remains the key authority to decide on who a British citizen is and what rights and duties this status has. Recent literature on British citizenship has focused on controversial elements of British citizenship law, pointing to the unequal and racialised use of the powers of citizenship deprivation. But the influence of race and racialisation goes much deeper than this. The racialisation of modern citizenship laws can only be properly understood by viewing the entire structure of subjecthood and citizenship and its history as racialised.

Citizenship as a statutory, not a constitutional, right

The common law accepts there are “constitutional” rights.² These include unimpeded access to the courts,³ the right of abode,⁴ and the common law right of freedom of expression.⁵ The “principle of legality” means these fundamental rights can only be overridden by Parliament with express language or necessary implication. In the absence of these, the courts presume that the words of Parliament were subject to the basic rights of the individual.⁶

However, citizenship is not such a constitutional right.⁷ Instead, citizenship is a statutory right governed by Parliament.⁸ For Hayley Hooper, this distinction shows that the common law provides greater judicial protection to substantive rights according to their source, as opposed to their gravity (erroneously in her view).⁹ But this means that the UK Parliament (both historically and today) retains a great deal of power and control over who is recognised and who can register as British, and the role of the courts is reduced to one of statutory interpretation, rather than protecting constitutional rights.¹⁰ One of these powers is the removal of British citizenship.

Unequal citizenship removal

Section 40 of the British Nationality Act 1981 (BNA 1981) lays out two categories of citizenship deprivation. Section 40(3) states citizenship can be deprived if a person has become a registered or naturalised citizen by means of fraud, false representation, or concealment of a material fact. Section 40(2) states citizenship can be deprived if it is “conducive to the public good”. This is the same test that is used for deporting foreign nationals, meaning there is no extra protection given to British citizens.

¹ I use the term “British citizen/ship” to refer to citizens and citizenship of the United Kingdom.

² For more detail on this, see Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (London: Bloomsbury 2020).

³ *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] A.C. 869 at [33]-[36], [43].

⁴ *R (on the application of Bancoult) v Secretary of State For Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 A.C. 453.

⁵ *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 A.C. 696.

⁶ *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 A.C. 115, at 131 (Lord Hoffmann).

⁷ *R (on the application of AKH and others) v Secretary of State for the Home Department* [2009] EWCA Civ 287, [2009] 1 W.L.R. 2049. [10].

⁸ *R (on the application of O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] A.C. 255 at [33] (Lord Hodge).

⁹ H. Hooper, “Justice for one side alone? *R. (on the application of Begum) v Special Immigration Appeals Commission*” [2022] P.L. 1, 8-9.

¹⁰ *O* at [43] (Lord Hodge).

It is the Home Secretary who decides what is “conducive to the public good”, and courts generally defer to this judgment.¹¹ There is no statutory definition of the term.¹² Under the Convention on the Reduction of Statelessness 1961 there are a number of protections against an individual being made stateless.¹³ The UK has a reservation to the Convention, allowing the UK to deprive a naturalised person of their nationality on the grounds of disloyalty to the state, or if they act in a manner prejudicial to the vital interests of the nation.¹⁴ Yet the test of “conducive to the public good” is broader than the exceptions in the reservation.

The Court of Appeal in the *Pham* case in 2018 stated that the test could be satisfied in many ways, including where the individual has “fundamentally repudiated the obligations which he owes as a citizen”.¹⁵ These obligations are not defined anywhere, and “[t]he precise grounds are a matter for the Secretary of State”, and they include “unacceptable behaviour”.¹⁶ This means that an individual’s character is assessed against the public good. These values apply negatively to both British citizens and naturalised citizens, focusing as they do on how an individual fails to be a “public good”, according to the judgment of the Home Secretary.¹⁷

Citizenship deprivation powers were extended further a decade ago. The Immigration Act 2014 was Parliament’s response to the Supreme Court judgment of *Al-Jedda*, where the Court ruled that a person’s British citizenship cannot be removed if it would mean that they were stateless.¹⁸ The 2014 Act allows the Secretary of State to make a naturalised citizen who is not British-born stateless if it is conducive to the public good (using the same test as contained in the BNA 1981). It also must be shown that the individual has conducted themselves in a way that is seriously prejudicial to the vital interests of the nation, and there are reasonable grounds to believe they can obtain another nationality.¹⁹ The 2014 Act applies to people who are not British born, but even those born as British citizens can also be stripped of their status. Further than this, the UK Parliament has also legalised “no notice” deprivations of citizenship, meaning that an individual does not even need to be informed in order for their citizenship status to be removed.²⁰

Citizenship deprivation measures have been criticised by scholars as bypassing human rights norms, and reasserting national membership as a privilege and as a way to protect a national community’s identity.²¹ Scholars have objected to this with rights-based arguments,²²

¹¹ British Nationality Act 1981, s.41A.

¹² S. Mantu, “Citizenship deprivation in the United Kingdom: Statelessness and terrorism” (2014) 19 *Tilburg Law Review* 163.

¹³ Convention on the Reduction of Statelessness, art 8, 989 UNTS 175, entered into force 13 December 1975.

¹⁴ UNHCR, “Declarations and Reservations to the 1961 Convention on the Reduction of Statelessness, as of 20 September 2006” <https://www.unhcr.org/uk/media/declarations-and-reservations-1961-convention-reduction-statelessness>.

¹⁵ *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064, [2019] 1 W.L.R. 2070, at [52] (Arden LJ).

¹⁶ *ibid.*

¹⁷ Z.B. Naqvi, “Coloniality, Belonging and Citizenship Deprivation in the UK: Exploring Judicial Responses” (2022) 31(4) *Social & Legal Studies* 515, 527-528.

¹⁸ *Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62, [2014] A.C. 253.

¹⁹ Immigration Act 2014, s.66.

²⁰ Nationality and Borders Act 2022, s.10(6); *R (D4) v Secretary of State for the Home Department* [2022] EWCA Civ 33, [2022] 2 W.L.R. 785

²¹ É. Fargues, “The revival of citizenship deprivation in France and the UK as an instance of citizenship renationalisation” (2017) 21 *Citizenship Studies* 984.

²² L. Zedner, “Citizenship Deprivation, Security and Human Rights” (2016) 18 *European Journal of Migration and Law* 222.

objections that citizenship removal undermines broader work to eradicate statelessness,²³ and that deprivation has been used inconsistently and politically.²⁴

Paul Scott noted the modern law of deprivation in the UK has “an obvious racial dimension”, in that powers are used more against those individuals whose families who may be recent arrivals to the UK, and therefore are more likely to have another nationality.²⁵ In other words, these powers are used most against non-White racialised migrants or citizens. These include British citizens who have at least one foreign parent, as they will often have inherited their parent’s nationality depending on the nationality laws of the country in question. If a person can only hold British nationality, then they cannot have that citizenship removed. This is the case irrespective of their crimes or actions. If a person is eligible to hold more than one nationality, then their British citizenship can be revoked. But this distinction still means that people who have only ever held British citizenship or nationality from birth can have that British citizenship removed.

In February 2015 Shamima Begum and two of her classmates, all aged 15, left the UK to join Islamic State in Syria. In news reports, Shamima was described as being an “enforcer” in Islamic State’s morality police, and allegedly tried to recruit other young women to join the group. In February 2019, the Home Secretary notified Shamima that he intended to deprive her of her British citizenship. This decision was based in part on information that could not be made public in the interests of national security.

Begum had the deprivation of her British citizenship upheld by the Supreme Court, agreeing with the Home Secretary’s determination that she was eligible for Bangladeshi citizenship by descent.²⁶ Bangladeshi citizenship law is scattered across many legal instruments, but on one reading Begum could have been considered a Bangladeshi national when her UK citizenship was removed because dual citizenship is possible under Bangladeshi law if the individual is aged under 21.²⁷ Begum never visited Bangladesh, had no ties to the country, did not speak the language, and the Bangladeshi government has no intention of granting her citizenship, going so far to say that she would likely receive the death penalty if she moved there.²⁸ As of late 2024, Begum remains *de facto* stateless, living in a Syrian refugee camp. She is not allowed to return to the UK to challenge her citizenship removal until the Home Secretary decides she no longer poses a risk.²⁹

The powers of citizenship removal are exercised not on the basis of the seriousness of an individual’s actions. These powers are being exercised against British born British citizens who happen, *by chance of birth*, to have the wrong parentage. This is akin to a modern-day bill of attainder, banishing those who are viewed of as a threat to the state.³⁰ This racialised inequality is a symptom of the wider structural role race plays in citizenship law.

²³ A. Harvey, “Deprivation of Nationality: Implications for the Fight Against Statelessness” (2016) 31 *Questions of International Law* 21.

²⁴ J. Kerr, “‘Take heed what thou doest: for this man is a Roman’—the arbitrary use of deprivation of citizenship as a public relations management tool” (2019) 33 *Journal of Immigration, Asylum and Nationality Law* 332.

²⁵ P. Scott, “Renouncing British Citizenship” (2021) 35 *Journal of Immigration, Asylum and Nationality Law* 7, 9.

²⁶ *R (on the application of Begum) v Secretary of State for the Home Department* [2021] UKSC 7, [2021] A.C. 765.

²⁷ F. Uddin, “Shamima Begum may be a Bangladeshi Citizen After All”, *EJIL Talk!*, 14 March 2019, <https://www.ejiltalk.org/shamima-begum-may-be-a-bangladeshi-citizen-after-all/>.

²⁸ A. Korteweg et al, “Social Reproduction Gone Wrong? The Citizenship Revocation and Rehabilitation of Young European Women Who Joined ISIS” (2023) 30(4) *Social Politics* 997, 999.

²⁹ *Begum v Secretary of State for the Home Department* [2024] EWCA Civ 152. The Court of Appeal issued a “closed” judgment here, so it is not certain what factors not discussed in open court influenced their decision.

³⁰ M.P. Lehmann, “The Bill of Attainder Doctrine: A Survey of the Decisional Law” (1978) 5 *Hastings Constitutional Law Quarterly* 767.

On race and racialisation

Citizenship is a “social practice” through which issues of national identity and belonging are addressed.³¹ To have one’s citizenship challenged is to be told you do not belong. Within the formal, legal relationship of British citizenship there are inbuilt inequalities that have rendered the rights of citizenship illusory for many citizens who are racialised through their migrant origins or connections.³² These have their origins in the British Empire.³³ “Britishness” has, and historically has had, “systematic, largely unspoken, racial connotations”.³⁴ Britishness has historically been based on a norm of Whiteness. Britishness and Whiteness were coterminous in Britain’s imperial history; British imperialists defined themselves in relation to Whiteness.³⁵

“Race” is an ideological category, and “racial difference” is hierarchical and not neutral; to vary is to be defective.³⁶ Patrick Wolfe explains that race is a concept that enables or facilitates a prior exercise of power; racialisation is the *activation* of that concept in the production of racial subjects.³⁷ Everyone is racialised. White people are racialised as White, a point often overlooked.³⁸ Sara Ahmed explains that the world was made White through colonialism, home only for bodies “that can inhabit whiteness”.³⁹ Over thirty years ago, Cheryl Harris made the point that racial identity and property are deeply interrelated concepts, and Whiteness should be understood as a form of property. Property here refers to all of a person’s legal rights.⁴⁰ The status of “Whiteness” is the right to a White identity, and it is accompanied by a set of assumptions, privileges, and benefits (which could include an assumption of belonging to a polity).⁴¹ Race and racialisation must be seen, and their implications explored, otherwise we risk equating what is neutral and normal as White.⁴²

From imperial subjecthood to racialised citizenship

British nationality law has its origins in mediaeval England. Subjecthood applied to anyone who was born in the dominions and allegiance of the Crown.⁴³ This provided a common bond between people of distant lands in times of Empire.⁴⁴ There was one status for “formal members” under the nationality law of the British Empire: British subject.⁴⁵

The common law principle of allegiance was placed on statutory footing in 1914, setting out a broad definition of a British subject, designed to maximise the reach of colonial rule. A “natural-born British subject” encompassed any person “born within His Majesty’s

³¹ S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004).

³² D. Prabhat, “Unequal citizenship and subjecthood: a rose by any other name...?” (2020) 71 *Northern Ireland Legal Quarterly* 175, 176.

³³ *ibid*, 176.

³⁴ The Parekh Report, *The Future of Multi-Ethnic Britain: Report* (London: Profile Books, 2000), p.38.

³⁵ C. Hall, *Civilising Subjects: Metropole and Colony in the English Imagination, 1830-1867* (Cambridge: Polity Press 2002).

³⁶ P. Wolfe, “Race and racialisation: some thoughts” (2002) 5 *Postcolonial Studies* 51, 52.

³⁷ *ibid*, 58.

³⁸ “Black” and “White” are deliberately capitalised in this piece. Racial identities are social constructs. To capitalise “Black” whilst keeping “white” in lower case affirms the hegemony of White/ness and treats it as the societal norm, from which all other identities diverge.

³⁹ S. Ahmed, “A phenomenology of whiteness” (2007) 8 *Feminist Theory* 149, 153.

⁴⁰ C. Harris, “Whiteness as Property” (1993) 106 *Harvard Law Review* 1707, 1725.

⁴¹ *ibid*, 1713.

⁴² R. Eddo-Lodge, *Why I’m No Longer Talking To White People About Race* (London: Bloomsbury, 2017), p.85.

⁴³ *Calvin’s Case* (1608) 77 ER 377.

⁴⁴ H. Muller, *Subjects and Sovereign, Bonds of Belonging in the Eighteenth-Century British Empire* (Oxford: Oxford University Press, 2017).

⁴⁵ R. Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (London: Frank Cass, 2002), p.40.

dominions and allegiance” and anyone whose father was, at the time of birth, a British subject.⁴⁶ This effectively confirmed a right of free movement of British subjects throughout British territory, but the perception of legal equality was illusory.

The 1914 Act stated that colonial authorities were not precluded “from treating differently classes of British subjects”.⁴⁷ Racial difference was codified in an imperial statute.⁴⁸ The Empire was presented as a benevolent civilising mission to millions of non-Europeans, but this mission depended on the unequal subordination of these millions to the authority of a small ruling British elite.⁴⁹ The promise of free movement was marked by discriminatory policies, with racial qualifications added to entry and settlement criteria in colonies, additional fees for non-White racialised migrants, or fixing the number of passengers of one ethnicity as a ratio of total ship’s passengers. Racial power was fused to the foundation and architecture of imperial rule.⁵⁰ Different classes of British subjects experienced different standards of colonial law and justice, as was evidenced in the aftermath of the Morant Bay Rebellion in Jamaica in 1865.⁵¹ Some people and bodies were entitled to space, presence, resources and opportunities and others were not.⁵² For example, in the British West African colonies after 1870, Black African subjects were steadily denied access to positions of authority in the state and the church.⁵³ This was not always a one-way street. It is important to note that colonial subjects were never merely passive. Many mobilised subjecthood as a category to agitate for rights, seeking equal rights and the protection of the common law.⁵⁴

Racial difference in restricting British citizenship

This racial difference was reproduced in the British Nationality Act 1948 (BNA 1948), which gave British subjects in the UK and the Empire the new status of Citizens of the United Kingdom and Colonies (CUKC).⁵⁵ The Act intended to ensure White British people remained free to settle in the colonies and White citizens from the “White Dominions” would be free to reside in Britain.⁵⁶ By creating a further category of “British subjects without citizenship”, legislators demonstrated that the position of White British settlers was of the utmost importance. “British subjects without citizenship” were persons who could become citizens of an emerging independent Commonwealth country under that country’s citizenship law. If they did not acquire such citizenship, they would acquire CUKC.⁵⁷

The BNA 1948 led to increasing numbers of citizens of the “new Commonwealth” arrived seeking employment in post-war Britain.⁵⁸ This was seen as a threat to the country’s

⁴⁶ British Nationality and Status of Aliens Act 1914, s.1.

⁴⁷ *ibid*, s.26(1).

⁴⁸ D. Killingray, “A Good West Indian, a Good African, and, in Short, a Good Britisher’: Black and British in a Colour-Conscious Empire, 1760–1950” (2008) 36(3) *The Journal of Imperial and Commonwealth History* 363, 363.

⁴⁹ M.J. Wiener, *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870-1935* (Cambridge: Cambridge University Press, 2008), pp.1-2.

⁵⁰ R. Mawani, *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (Durham: Duke University Press, 2018), p.137.

⁵¹ P. Gopal, *Insurgent Empire: Anticolonial Resistance and British Dissent* (London: Verso, 2019), ch 2.

⁵² N. El-Enany, *(B)ordering Britain: Law, Race and Empire* (Manchester: Manchester University Press, 2020), p.ix.

⁵³ D. Northup, “Becoming African: Formation Among Liberated Slaves in Nineteenth-Century Sierra Leone” (2006) 27(1) *Slavery & Abolition* 1.

⁵⁴ S.E. Merry, “Law and colonialism” (1991) 25 *Law and Society Review* 889.

⁵⁵ M. Everson, “‘Subjects’, or ‘citizens of Erewhon’? Law and non-law in the development of a “British citizenship” (2003) 7(1) *Citizenship Studies* 57, 77.

⁵⁶ Prabhat, “Unequal citizenship and subjecthood: a rose by any other name...?”, 186.

⁵⁷ A. Dummet, “Nationality and immigration status” in A. Dummet (ed), *Towards a Just Immigration Policy* (Hendon: Cobden Trust 1986) 143.

⁵⁸ T. Choudhury, “The radicalisation of citizenship deprivation” (2017) 37(2) *Cultural Social Policy* 225, 230.

social cohesion, which was wrongly premised on the view that the UK was homogenously White.⁵⁹ To defend this imagined homogeneity, draft government reports suggested that “coloured workers” would struggle to find employment because of their “irresponsibility, quarrelsomeness and lack of discipline” and Black men were “slow mentally” and in general “not up to the standards required by British employers”.⁶⁰ (White) migrants from Europe were “of great benefit to our stock”, whereas Black men from the colonies were “unreliable and lazy”.⁶¹ Subsequent citizenship legislation targeted non-White racialised migrants or citizens. In 2022, a leaked Home Office report found that:

[D]uring the period 1950-1981, every single piece of immigration or citizenship legislation was designed at least in part to reduce the number of people with black and brown skin who were permitted to live and work in the UK.⁶²

This legislation includes the Commonwealth Immigrants Acts of 1962 and 1968, the Immigration Act 1971, and the BNA 1981. The citizenship removal powers contained in the 1981 Act must be seen in light of this design. The 1962 Act stated that Commonwealth citizens holding passports not directly issued by the UK Government would be subject to immigration controls upon entering Britain. This Act meant that people who lacked residence rights were disproportionately non-White.⁶³ The rule operated as “a polite way of allowing Whites in and keeping ‘coloureds’ out”.⁶⁴

In 1968, some 200,000 Kenyan British passport holders of Indian origin were deprived of their right to enter Kenya on racial grounds as part of Kenya’s “Africanisation” policy. This group had chosen to exercise their right under the BNA 1948 to retain CUKC rather than obtain Kenyan citizenship.⁶⁵ As CUKCs, the grouping was exempt from immigration control.⁶⁶ To exclude the possibility of these citizens coming to the UK, the Commonwealth Immigrants Act 1968 restricted entry rights to those citizens born, naturalised or adopted in the UK, or those with at least one parent or grandparent born in the UK. This created a group of persons who only held British passports, but who did not have an immediate right of entry to the UK and gave White British settlers preferential treatment.⁶⁷ The European Commission on Human Rights later ruled the exclusion of East African CUKC to constitute racial discrimination and degrading treatment.⁶⁸ Despite this ruling, the later Immigration Act 1971 introduced ‘patriality’, restricting citizenship to individuals with a grandparent born in the UK, or a parent born and naturalised in the UK.⁶⁹ As Nadine El-Enany explains, in 1971 a person born in the UK was most likely (98%) to be White.⁷⁰

⁵⁹ S. Virdee, *Racism, Class and the Racialized Outsider* (Basingstoke: Palgrave Macmillan, 2014).

⁶⁰ UK National Archives, CO 1028/22, Draft Report of Working Party on Coloured People Seeking Employment in the United Kingdom (17 December 1953).

⁶¹ W. Webster, *Imagining Home: Gender, ‘Race’ and National Identity, 1945-64* (Abingdon: Routledge, 1998), p.23.

⁶² Amelia Gentleman, “Windrush scandal caused by ‘30 years of racist immigration laws’—report”. *The Guardian*, 29 May 2022, <https://www.theguardian.com/uk-news/2022/may/29/windrush-scandal-caused-by-30-years-of-racist-immigration-laws-report>.

⁶³ Z.B. Naqvi, “Coloniality, Belonging and Citizenship Deprivation in the UK: Exploring Judicial Responses” (2022) 31(4) *Social & Legal Studies* 515.

⁶⁴ A. Kundnani, *The End of Tolerance: Racism in 21st Century Britain* (London: Pluto Press, 2007), p.21.

⁶⁵ K. Qureshi, “Kenyan Asians and the Commonwealth Immigration Act, 1968” (1968) 21(2) *Pakistan Horizon* 134.

⁶⁶ Lord Stonham, HL Deb 15 February 1968, vol.289, col.202.

⁶⁷ El-Enany, *(B)ordering Britain*, pp.109-110.

⁶⁸ *East African Asians v United Kingdom* [1973] ECHR 2.

⁶⁹ Immigration Act 1971, s.2.

⁷⁰ El-Enany, *(B)ordering Britain*, pp.117, 119.

The BNA 1981, and the citizenship deprivation powers contained within it, further equates Britishness and belonging with Whiteness.⁷¹ After 1983 the automatic right of citizenship for those born in the UK was abolished, discriminating against non-White racialised colony and Commonwealth citizens.⁷² The onus was placed on the individual to take the necessary measures to secure their legal status in the UK, which included a duty to register as a citizen for any individuals born of foreign parents. Many people eligible to register as UK citizens under the BNA 1981 did not know to do so, leading to an exclusionary effect.⁷³ The silent “illegalising” of swathes of people who had previously been lawfully resident in the UK was driven by a race-based idea of who does and does not belong, leading to the Windrush scandal.⁷⁴

The inequalities of citizenship deprivation are driven by the concept of race, in that Whiteness is assumed to be equivalent to Britishness. What you have done is much less important than where your parents are from. The unequal application of deprivation laws is the logical results of a system that privileges certain types of racialised identity.

Conclusion

Race and racialisation are at the heart of British citizenship law. The constitutional governance of the statutory rights of citizenship have entrenched the connection between Britishness and Whiteness. The inequalities in modern citizenship, and the “obvious racial dimension” to modern citizenship deprivation is not a new phenomenon.⁷⁵ It reflects an older, imperial prioritisation of racialised White Britons over non-White racialised migrants and citizens. Britishness is, and always has been, racialised.

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⁷¹ El-Enany, *(B)ordering Britain*, p.4.

⁷² Prabhat, “Unequal citizenship and subjecthood: a rose by any other name...?”, 189.

⁷³ El-Enany, *(B)ordering Britain*, p.127.

⁷⁴ Amelia Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment* (London: Guardian Faber Publishing, 2019).

⁷⁵ Scott, “Renouncing British Citizenship”, 9.