



House of Commons

House of Lords

Joint Committee on Human
Rights

**Good Character
Requirements: Draft
British Nationality Act
1981 (Remedial) Order
2019 - Second Report**

Twentieth Report of Session 2017–19

*Report, together with formal minutes relating
to the report*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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**appointed 4 July 2019 in place of Lord Morris of Handsworth*

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Publication

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Summary

There are three issues at the heart of this problem—discrimination, children’s rights and access to justice, in the application of British nationality law.

The first problem relates to provisions which discriminate as to how individuals can acquire British nationality through descent—depending on whether a person’s mother or their father was British and depending on whether or not their parents were married. These provisions have been held by the Courts to constitute unlawful discrimination and the Courts consequently made a Declaration of Incompatibility in relation to these provisions in the cases of *Johnson*¹ and *David Fenton Bangs*,² finding that the application of the good character requirement to these individuals was discriminatory and contrary to their human rights under the Human Rights Act 1998 (HRA) and the European Convention on Human Rights 1950 (ECHR). This draft Order seeks to remove that discrimination, which is welcome. However, we are concerned that some of those who have previously been discriminated against will continue to face barriers impeding their right to British citizenship. Moreover, wider issues of unacceptable discrimination are still present on the statute book within the sphere of British nationality law and this deeply concerns the Committee, as we set out in our First Report. We consider that the Home Office should take urgent steps to remove all unacceptable discriminatory provisions from UK legislation.

Secondly, the application of good character requirements to children raises concerns that the rights of the child—and in particular the requirement that the best interests of the child be a primary consideration—are not being respected in the application of nationality law to children living in the UK.

Good character requirements were introduced into British nationality law initially only to apply to adults who sought to become British citizens through naturalisation, generally already having a connection with another country and having moved to the UK as adults. In the last decade or so these good character requirements have been extended to apply to children who are entitled to be British citizens, due to their close connection with the UK. Many of these children were born in the UK, have lived in the UK their whole lives (or nearly their whole lives) and regard themselves as British—and indeed anyone meeting them would assume they were British. The Committee is concerned that an unduly heavy-handed approach to the good character requirement is depriving children who have lived in the UK all of their lives from their right to British citizenship. Indeed, most of the children affected do not even have a criminal conviction.

1 R (on the application of Johnson) v Secretary of State for the Home Department [2016] UKSC 56. The Supreme Court found that the British Nationality Act 1981 was incompatible with Article 14 read with Article 8 of the ECHR in that it imposed a good character requirement on individuals who would, but for their parents’ marital status, have automatically acquired citizenship at birth.

2 R (on the application of David Fenton Bangs) v Secretary of State for the Home Department. A consent Order and accompanying Declaration of Incompatibility were made in the case of *David Fenton Bangs*, in relation to the application of the good character requirement to registration pursuant to section 4C of the British Nationality Act 1981 to individuals that would, had their British mother been able to pass on nationality in the same manner as a British father, have automatically acquired citizenship at birth.

Finally, cuts in legal aid and access to legal advice, in conjunction with other measures, mean that it is now harder than ever for individuals to obtain the advice that they need to be able to access justice and enforce their human rights. This can be all the more important relating to citizenship rights as these touch upon the very identity of a person and their rights to live in the country where they were born, have grown up and with which they identify and have their cultural links and identity. This identity is crucial as it then enables those individuals to be able to enjoy their other basic human rights. These issues can affect children who are entitled to British citizenship (on application). Indeed, even the cost of fees for children entitled to British citizenship are so high as to risk depriving some children of their right to British citizenship.

Issues relating to access to justice and support in getting citizenship status recognised have also arisen in the Committee's recent work in relation to EU citizens' rights post-Brexit—we have therefore included a final chapter raising issues in this context.

1 Introduction

The legislative and litigation context

1. British nationality law previously only granted automatic British nationality by descent to children born in wedlock to British fathers. This draft Remedial Order concerns the right of a child of a British parent to become a British citizen by descent from their British parent—irrespective of whether it is their mother or their father who is British; and irrespective of whether their parents are married or not.

2. Previous efforts have been made to address the historic discrimination in British nationality law—section 4C of the British Nationality Act 1981 (BNA) was introduced to address discrimination against people whose mothers, rather than their fathers, were British citizens and sections 4F-4I BNA were introduced to address discrimination against people whose parents were not married. However, some anomalies in treatment remain meaning that the discrimination persists. The most significant is the requirement for these children to prove good character (a requirement that did not apply to those acquiring British nationality by descent as a legitimate child of a British father).

3. The Courts consequently made a Declaration of Incompatibility in relation to these provisions in the cases of *Johnson*³ and *David Fenton Bangs*,⁴ finding that the application of the good character requirement to children whose mother was British, or whose parents were unmarried, was discriminatory and contrary to their human rights under the Human Rights Act 1998 (HRA) and the European Convention on Human Rights 1950 (ECHR).

The role of the Joint Committee on Human Rights

4. To seek to remedy this incompatibility identified by the Courts, the Government laid a proposal for a British Nationality Act 1981 (Remedial) Order 2018 together with the required information on 15 March 2018. The Committee considered this matter in its Report “Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018”⁵ (referred to throughout this report as the “First Report”).

3 *R (on the application of Johnson) v Secretary of State for the Home Department* [2016] UKSC 56. The Supreme Court found that the BNA was incompatible with Article 14 read with Article 8 of the ECHR in that it imposed a good character requirement on individuals who would, but for their parents’ marital status, have automatically acquired citizenship at birth.

4 *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department*. A consent Order and accompanying Declaration of Incompatibility were made in the case of *David Fenton Bangs*, in relation to the application of the good character requirement to registration pursuant to section 4C of the BNA to individuals that would, had their British mother been able to pass on nationality in the same manner as a British father, have automatically acquired citizenship at birth.

5 Joint Committee on Human Rights, Fifth Report of Session 2017–19, [Proposal for a draft British Nationality Act 1981 \(Remedial\) Order 2018](#), HC 926 / HL Paper 146. A fuller explanation of the legislative and litigation history and context can be found in this Report, in particular its chapter 1.

5. A revised draft British Nationality Act 1981 (Remedial) Order 2019 was subsequently laid before Parliament on 2 May 2019.⁶ This was accompanied by the Government's Response⁷ to the Committee's earlier Report.

6. The Committee's Standing Orders require us to report to each House—

- Whether the special attention of each House should be drawn to the draft Order on any of the grounds on which the Joint Committee on Statutory Instruments may so report in relation to most other statutory instruments; and
- Our recommendation whether the draft Order should be approved.⁸

7. We issued a call for evidence⁹ on the Government's draft Order and received seven written submissions. We are grateful to all those who responded to our call for evidence or drew our attention to other relevant information. A list of those who contributed is included at the back of this Report and all written submissions we received can be found on our website.¹⁰ We note the issue raised that “good character” is not the only difference for those who have been discriminated against under the previous law. Such people also have to go through different processes, including the oath-swearing ceremony (and indeed having to pay a substantial fee).¹¹ We also note the calls from those who are British Nationals (Overseas) who consider that the law should be changed so that those with British Nationality (Overseas) should be allowed to convert that nationality to British Citizenship.¹²

6 Draft SIs: [The British Nationality Act 1981 \(Remedial\) Order 2019](#)

7 Home Office, [The Government Response to the fifth report from the Joint Committee on Human Rights, Session 2017–1 \(HC 926, HL paper 146\): Proposal for a draft British Nationality Act 1981 \(Remedial\) Order 2018, January 2019](#)

8 House of Commons, Standing Orders, Public Business 2017, HC 4, [152\(B\)](#), and The Standing Orders of The House of Lords relating to Public Business 2016, HL Paper 3, [72\(c\)](#)

9 Draft British Nationality Act 1981 (Remedial) Order 2019 – [Terms of Reference](#)

10 Joint Committee on Human Rights, Draft British Nationality Act 1981 (Remedial) Order 2019 - [Publications](#)

11 See [DBA0002](#) [Mr Geoffrey Dickson], and [DBA0005](#) [Tabitha Sprague]

12 See [DBA0001](#) [Mr Ka Wa Fan]

2 The Government’s draft Order and its response to our first Report on the proposal for a draft Order

Government’s response to our first Report on the proposal for a draft Order

8. In our first Report, we considered that the procedural requirements of the HRA had been met—the Government’s reasons for proceeding by way of remedial order were sufficiently compelling and that using the non-urgent procedure struck a reasonable balance. However, we noted that the Government had not sufficiently explained why other Bills announced in the legislative programme could not be used to legislate for this topic.¹³ We also encouraged the Government to minimise the impact of this discrimination on those people affected pending the entry into force of these amendments.

9. In Chapter 3 of our first Report, we raised concerns about the application of the good character requirement to children and, in particular, the discriminatory application of this requirement to children who had already been discriminated against. We consider this further in Chapter 3 of this Report.

10. In Chapter 4 of this Report, we follow-up on three responses from the Home Office where we consider that clearer and fairer policies would assist in remedying the situation of individuals who have previously been discriminated against.

11. In Chapter 5 of this Report, we follow-up on the issue of discrimination in relation to British Overseas Territories Citizenship.

12. In our first Report, we recommended that the Home Secretary should introduce a Bill of wider scope, at the first available opportunity, to remove all remaining discrimination in British nationality law, given the other discriminatory provisions that appear to remain on the face of British nationality legislation. In particular, in Chapter 5 of our first Report, we raised a number of examples of such discrimination that were apparent on the face of British nationality legislation. The Government’s response is that it acknowledges the concerns raised by the Committee, it will monitor any remaining potentially unlawful discriminatory aspects of nationality legislation and will consult if it becomes apparent that further changes are necessary.¹⁴

13. The Government should act without delay to ensure a fair, non-discriminatory approach to UK nationality law that is also in line with the rights of the child.

13 The Home Office have subsequently informed the Committee that there are not any relevant Bills suitable as legislative vehicles for which the amendments relating to these declarations of compatibility would be within scope.

14 In relation to the recommendation for consolidation for improved accessibility of British nationality law, the Government response was slightly different in that the Government states that it “will consider consultation when a suitable legislative vehicle has been identified” (see paragraph 32 of the Government response).

Statement of ECHR compatibility

14. We note that the Government’s “Statutory Instrument Practice” Guide¹⁵ provides in paragraph 2.12 that an ECHR compatibility statement “should always be made regarding secondary legislation which amends primary legislation”. It requires that such a statement should be included in the Explanatory Memorandum accompanying a statutory instrument.

15. We would therefore expect the usual formulation for the ministerial statement to record that the Minister considered that the Order “is compatible with Convention rights”. We note that in the version of the Explanatory Memorandum accompanying the previous proposal in 2018, the ministerial statement said that the provisions of the Order made “citizenship law compatible with the Convention and address the historic discrimination identified by the Supreme Court”. However, in the Explanatory Memorandum accompanying the draft Order, the statement omits any reference as to whether or not the Minister, Caroline Nokes, considers the Order to be compatible with human rights. It simply says: “In my view the provisions of the British Nationality Act 1981 (Remedial) Order 2019 address the historic discrimination identified by the courts”.¹⁶ Although the Home Office undoubtedly meant to be helpful, straying from standard wording can cause confusion as to whether or not the Minister considers that the Order is compatible with human rights. Home Office officials have informally confirmed that the Minister does consider the Order to be compatible with human rights and is prepared to clarify that in a statement of compatibility.

16. We expect to receive clear Ministerial statements of compatibility for all remedial Orders. Ministers should make a clear statement of compatibility reflected in the Explanatory Memorandum accompanying all remedial orders. In relation to this Order, the Minister should reissue the Explanatory Memorandum with a corrected, clear statement of compatibility.

Does the draft Order remedy the incompatibility?

17. The draft Order does remedy the incompatibilities identified in the two judgments—even if related parts of British nationality law require further legislative and policy action to address wider human rights issues, relating to rights of the child and non-discrimination. However, there are risks that the approach taken to children who were discriminated against but who are over the age of ten (or who are adults) by the time the discrimination is removed, perpetuates that discrimination.

18. We consider that the procedural requirements of the Human Rights Act 1998 for the use of the remedial power have been met in this case and consider that the draft Order remedies the incompatibility identified by the Courts.

19. The Committee concludes, after taking into account representations made, that the special attention of each House is not required to be drawn to the draft Order on any of the relevant grounds, or on any other grounds. However, elsewhere in this Report, we do highlight related concerns in relation to British nationality law.

15 The National Archives, [Statutory Instrument Practice](#), 5th edition, January 2017

16 Home Office, [The Government Response to the fifth report from the Joint Committee on Human Rights, Session 2017–19 \(HC 926, HL paper 146\): Proposal for a draft British Nationality Act 1981 \(Remedial\) Order 2018](#), January 2019

20. *We consider that there are no reasons why this Order should not be agreed to by both Houses of Parliament. We therefore recommend that the draft Order should be approved.*

3 Good character and children

The application of the good character requirement to children

21. In Chapter 3 of our first Report, we highlighted that the approach taken in the proposed remedial Order to section 4F would mirror the approach taken in relation to the underlying requirements to which it cross-refers—i.e. it would remove the discrimination but would still require some children to prove good character where the underlying provisions required good character. The Committee could not understand (and had not received an adequate explanation from the Home Office) why children should need to show good character to access their nationality and status, for example so that a child (of say 10 or 11) can have the same nationality as her or his parent and siblings. We raised concerns that this seemed to conflict with the obligation to have regard to the best interests of the child and the rights of the child in general (see section 55 Borders, Citizenship and Immigration Act 2009¹⁷ as well as the UN Convention on the Rights of the Child 1989). We also noted that this situation was exacerbated by an inflexible approach to applying the good character test.

22. In this context it is useful to consider the origin of these provisions. The BNA replaced the previous basis for acquiring British nationality (which had been based on birth in the UK) with broadly 3 types of basis for acquiring nationality:

- a) Automatic entitlement to British nationality for those born in the UK to a British parent (or a settled parent). These people are automatically British.
- b) Entitlement to British nationality on application for those with a specified very close connection to the UK (e.g. born in the UK and living in the UK for their childhood), who should therefore have an entitlement (i.e. a right) to nationality. These are people who most would assume to be British.
- c) Application for British nationality on discretion (e.g. for those naturalising as British). These applications are based on the discretion of the Home Secretary, given that such individuals would normally have originally had a close connection with a country other than the UK.

23. When the BNA was introduced, the good character requirement only applied to the third category of people; in general, these were adults who had subsequently moved to the UK but had started out life with closer links to another country. It was felt inappropriate to apply extra tests to the first two categories of people as they had such close ties to the UK (e.g. having grown up and lived all of their lives in the UK).

24. However, some changes were introduced in 2006¹⁸ and 2009¹⁹ that applied the good character requirements to the second category of people, which included children²⁰ who had been born in the UK and had lived their whole lives in the UK, knowing no other country or culture. As the Immigration Law Practitioner’s Association (ILPA) said in evidence to us:

“ILPA remains concerned about the requirement that children who are entitled to registration as British citizens are subject to the good character test. This was introduced with no real discussion about its effects and has resulted in children who would otherwise have been entitled to the citizenship of the country where they were born or have spent all their formative years being refused citizenship, or being deterred from applying at all for fear of being refused. We [...] urge the government to change it in the near future.”²¹

25. At the time that these provisions were introduced Ministers referred to children with an entitlement to British nationality as “coming” to the UK (similar to adults seeking naturalisation), although that is not the case for these children who are born or have grown up in the UK. They face this additional good character hurdle, which was originally intended for individuals who moved to the UK, rather than those who grew up in the UK.²² This has led to many arguing that it is inappropriate to apply the good character requirements to children who were born in and/or have grown up in the UK, having the UK as the principal country with which they have a close connection.²³ The House of Lords Select Committee on Citizenship and Civic Engagement has found it hard to accept that the good character test should be applied to young children. It recommended that “the Government should reconsider the age from which the “good character” requirement applied for the acquisition of British citizenship by registration”.²⁴ The Committee shares these concerns.

26. It is inappropriate to apply the good character requirement to young children with a right to be British, where the United Kingdom is the only country they know and where they have grown up their whole lives here.

27. In the Parliamentary debates on extending the good character requirement to children who were entitled to be British, much was made by Government Ministers of “heinous crimes” of the most serious type—indeed the parliamentary debates focused only on those “heinous crimes”. This same narrative is contained in the Home Office’s response

18 Immigration, Asylum and Nationality Act 2006, [chapter 13](#)

19 Borders, Citizenship and Immigration Act 2009, [chapter 11](#)

20 The Good Character test is applied to children as young as ten years old. The Home Office argues that this is so that it is in line with the age of criminal responsibility in England, Wales and Northern Ireland, which is the lowest age of criminal responsibility in Europe and one of the lowest worldwide. It is well below international standards where the minimum age is considered to be twelve (see for example, the UN Committee on the Rights of the Child, Concluding Observations on the United Kingdom, 2007, 2008, 2016). Very young children are therefore being affected by these rules.

21 See [DBA0006](#) [Immigration Law Practitioners’ Association]

22 See the details on this set out in the joint evidence from Amnesty International UK and the Project for the Registration of Children as British Citizens - [DBA0007](#)

23 See [DBA0006](#) [Immigration Law Practitioners’ Association] and [DBA0007](#) [Amnesty International UK and the Project for the Registration of Children as British Citizens]

24 See Chapter 9, paragraph 460 of the House of Lords, Select Committee on Citizenship and Civic Engagement, [The Ties that Bind: Citizenship and Civic Engagement in the 21st Century Contents](#), Session 2017–19, HL Paper 118

at paragraphs 14–15 which also refers to “heinous crimes”. However, the good character test applies also to cautions, minor offences and a whole host of activity (including non-criminal activity such as financial soundness, notoriety and immigration related issues)—it is not only focussed on the most serious crimes. Indeed, half²⁵ of the children denied their “entitlement” (i.e. right) to British nationality on good character grounds have not even received a criminal conviction (having merely received a police caution)—let alone been prosecuted for “heinous crimes”.

28. We note that the Independent Chief Inspector of Borders and Immigration has also raised concerns that the way that the Home Office is applying the good character test to children risks being at odds with the Home Office’s statutory responsibilities in relation to “safeguarding and promoting the welfare of children or to making the ‘best interests’ of the child a primary consideration”.²⁶ He has called for the guidance to be updated to reflect these responsibilities. His concerns were that the approach was inflexible, rigid and did not reflect an individualised assessment looking at the whole character of a child (as is required by the caselaw relating to good character). The Home Office has attempted to rectify this by including more references to the best interests of the child (in line with its domestic and international law obligations). However, the updated guidance still applies the same test to children born in the UK and who have grown up in the UK, as it does to adults who moved to the UK later in life. It still applies a threshold test for criminality for children which includes cautions. It also seems that, to date, the best interests of the child and child safeguarding obligations are not being adequately taken into consideration in Home Office decision-making.²⁷

29. We note in its response to the Committee that the Home Office has again been unable to explain or justify why the good character test is applied to children who have grown up all their lives in the UK and know no other country. We are concerned that this policy is preventing children whose only real connection is with the UK from becoming British—contrary to the intention behind the “entitlement” route to British citizenship for children who have grown up in the UK. In particular, we are most concerned that this is affecting children as young as ten years old who have lived all of their lives in the UK. *The Government should review the application of the good character test to children with a right to British citizenship who have grown up in the UK, in particular, carefully reflecting its obligation to consider the best interests of the child when considering the impact on children with such a close connection to the UK.*

30. The Home Office has also failed to explain why a child should be deprived of their right (entitlement) to British nationality due to a mere police caution. *Given the Home Office’s claim that its policy is focused on “heinous crimes” such as murder and rape, it*

25 See Independent Chief Inspector of Borders and Immigration, [A re-inspection of the Home Office’s application of the good character requirement in the case of young persons who apply for registration as British citizens, August 2018 – January 2019](#), April 2019, at paras 3.6 and 8.13; that of the 28 children refused on good character grounds, 16 had only a caution and did not have a criminal conviction. Therefore well over half of children with a right to British nationality (who had grown up in the UK) who were refused British nationality on good character grounds did not even have a criminal conviction.

26 See Independent Chief Inspector of Borders and Immigration, [A short inspection of the Home Office’s application of the good character requirement in the case of young persons who apply for registration as British citizens, February – April 2017](#), July 2017

27 See Independent Chief Inspector of Borders and Immigration, [A re-inspection of the Home Office’s application of the good character requirement in the case of young persons who apply for registration as British citizens, August 2018 – January 2019](#), April 2019, at paras 8.22–8.30

is inappropriate for children born and/or brought up in the UK to be denied nationality for minor offences. In particular, children should not be deprived of their entitlement (right) to British nationality because of a mere caution.

4 Applications by those who have previously been discriminated against

The application of the good character requirement to children who have already been discriminated against

31. In paragraphs 49–53 of our first Report, we raised concerns that children who had been discriminated against solely because their parents were not married should not then need to prove good character once that discrimination was removed. We noted that had these children been allowed to apply for citizenship when they were under the age of 10 (i.e. not been discriminated against by being prevented from applying at that age), they would not have needed to prove good character, whereas anyone over the age of 10 when the discrimination is removed will have to prove good character. We raised concerns that there is a risk that such an approach constitutes unjustified discrimination contrary to Article 14 ECHR as read with Article 8 ECHR.

32. The Home Office response was to argue that “there is no reliable basis for concluding that all children in this situation would have made an application when they were under the age of 10” and the Home Office Ministers therefore considered it reasonable to maintain the good character restriction for all of the children who had been discriminated against when they were under the age of ten.

33. The Committee considers that the Home Office has erred in approaching the legal test in this manner. We are dealing here with children who were discriminated against unlawfully when they were under the age of 10. In seeking to remedy that discrimination, the Home Office is refusing to put them in the same position as they would have been if discrimination had not prevented them from applying when they were under ten, but is instead requiring them to prove good character—something that it only requires for older children or adults. The test for fairness that the Home Office should have asked itself is not “would *all* of the children that we have discriminated against unlawfully necessarily have made an application when they were under the age of 10”. Rather, the Home Office should ask itself “would some of the children that we have discriminated against unlawfully have made an application under the age of 10 and therefore are we continuing to discriminate against them unlawfully by treating them differently from the children whose parents were married and therefore who we did not discriminate against”? The answer to that question is obviously “yes”.

34. We consider that the Home Office is leaving itself open to successful legal challenge by requiring from children against whom it has previously discriminated additional requirements (good character) that would not have applied had they been able to apply as young children. We recommend that the Home Office reconsider its position in respect of children which it has previously discriminated against so that they can obtain British nationality without discrimination or superfluous requirements.

The situation of adults who were discriminated against when children

35. In paragraphs 54–57 of our first Report we raised concerns that people who had been unlawfully discriminated against when children (and therefore deprived of their entitlement to British nationality) were then still deprived of their *entitlement* to British nationality as they had since become adults and the route under section 4F BNA only applies to minors. The Home Office response to this was to argue that those individuals who had been unlawfully discriminated against could ask the *discretion* of the Home Secretary to grant them nationality through naturalisation and also to argue that they could have applied as minors asking for the general discretion of the Home Secretary to grant them nationality through section 3(1) of the BNA. However, such an approach fails to appreciate the difference between an entitlement to British nationality and a discretion on the part of the Home Secretary to grant British nationality. The crucial difference between these two routes to British nationality is what lies at the heart of the *Johnson* and *David Fenton Bangs* cases, which this Order seeks to address. Indeed, it is not impossible that such a person would be unable to meet the naturalisation criteria (possibly because of the discrimination that they had previously faced because their parents were not married). ***We consider that, at the very least, the Home Secretary should make clear that it is his policy to remove, as best as possible, discrimination, and that therefore applications for naturalisation from people who would not previously have qualified for British citizenship because only their mother was British or because of their father's marital status would be viewed favourably.***

The situation of a person whose parent has since died

36. In paragraph 70–72 of our first Report we raised concerns about discrimination against those whose parent(s) may have benefited from these amendments (and therefore who, in turn, might have benefited) but whose parent(s) have since died. The Home Office response was that the intention had not been to discriminate against those people and to note a number of other provisions that might apply to an individual's case meaning that that person could still apply for British nationality. However, it is not clear from the information provided that this would cover all those affected.

37. **We welcome the Home Office's general approach in indicating that it would not wish to discriminate against individuals whose parents are now dead but would have benefited from these amendments. We note the Home Office has helpfully referenced the application routes open to such individuals in its response. However, we are concerned that the case officers processing applications from such individuals might not realise that they should not be discriminated against (particularly as they will have to apply through alternate routes as their parent has died) and therefore that they should exercise their discretion accordingly.**

38. ***It would therefore be helpful for the Home Secretary to make a policy announcement in relation to applications from people whose parent(s) would have benefited from the amendments in the British Nationality Act 1981 (Remedial) Order 2019, but where that parent has since died. The announcement should make clear that such applications should be viewed favourably to seek to remove, as best as possible, any discrimination they and/or their parent had faced.***

5 Fees for children who are entitled to be British

Payment of fees for re-applications by those who have previously been discriminated against

39. In Chapter 4 of our first Report, we raised concerns that people who have been refused British nationality because of discrimination should not have to pay an application fee a second time to reapply once that discrimination is removed. We therefore recommended that the Home Office take steps to ensure that those previously discriminated against do not have to pay the application fee when reapplying under section 4F (for example by the Home Office making a consequential amendment to the Immigration and Nationality (Fees) Regulations 2018). The Home Office responded that it “is giving careful consideration to the Committee’s recommendation” but has not (yet) sought to make any such amendment to those Regulations (for example through using the draft remedial Order to make such an amendment). We have now received a letter from the Minister of State for Immigration, Caroline Nokes,²⁸ that she will amend the Fees Regulations at the next available opportunity (which is likely to be October 2019) to address the issue identified by the Committee in relation to the double payment of fees. We welcome this and look forward to hearing further from the Home Office on progress towards these changes.

40. In our First Report we recommended that people who had been refused British nationality because of discrimination should not have to pay an application fee a second time to reapply once that discrimination was removed. The Committee welcomes the decision taken by the Immigration Minister to amend the Fees Regulations at the next opportunity to ensure that people previously discriminated against do not have to pay an application fee a second time. The Committee looks forward to receiving an update on progress to address this issue.

Cost of fees for Children

41. Fees for children entitled to British nationality to register as British are very expensive. During parliamentary debates when the BNA was introduced, debate focussed on fees for registration not being at a deterrent level.²⁹ However, notwithstanding the original intention that the fees should not be seeking to raise revenue from children with a right to British nationality, these fees are now well above cost recovery.³⁰ This means that children from more disadvantaged backgrounds, and children in local authority care who are less likely to be able to afford the fees are more likely to be disadvantaged by the fee level impeding their ability to register as British nationals. We share the concerns on this

28 Letter from Rt Hon Caroline Nokes MP, Minister of State for Immigration, to Chair, regarding [British Nationality Act 1981 \(Remedial\) Order 2019 Fees for Repeat Nationality Applications](#), dated 25 June 2019

29 See for example, Hansard HC, British Nationality Bill, Standing Committee F, 12 May 1981, col 1883–1884: “We do not wish to deter applicants by setting the fees at a totally impossible level.

30 This is set out in the 2019 Report by the Chief Inspector of Borders and Immigration which makes clear that the average processing cost is £372, whereas the Home Office charge children £1012 for the application (see paras 7.4–7.9 of the [Report](#))

expressed by the House of Lords Select Committee on Citizenship and Civic Engagement.³¹ Moreover, we are concerned that a child's access to her or his right to British nationality depends on whether or not their parents (or primary carer) knows of the need to register and can afford to register that child.

42. Local authorities should ensure that children in their care with an entitlement to British citizenship (whether or not they have another citizenship) should be registered as British to ensure they maintain their status and rights upon leaving care.

43. Home Office fees for children who have a right to be British should be proportionate to the service being offered and should be priced at a rate that is accessible for children accessing their rights. This is not the case at the moment since fees for children are three times more than the cost of the service—four-figure fees merely to register an existing right to be British are unacceptable. Disproportionately high fees should not exclude children from more vulnerable socio-economic backgrounds from accessing their rights.

31 See for example the Recommendation at paragraph 492 of the House of Lords, Select Committee on Citizenship and Civil Engagement, [The Ties that Bind: Citizenship and Civic Engagement in the 21st Century Contents](#), Session 2017–19, HL Paper 118

6 Overseas Territories

44. In our First Report we expressed concern that similar changes were not being concurrently made for all types of British nationality. We noted that the human rights violations were identical—and should be remedied. We also noted that it was for the Westminster Parliament to legislate for British nationality rules—including in respect of British Overseas Territories Citizenship (BOTC). We recommended at paragraph 79 of our First Report:

“We consider that it is unacceptable that discrimination in acquiring British nationality persists (including for British Overseas Territories Citizenship), depending on whether a person’s father or mother was a British Overseas Territories Citizen, or whether or not their parents were married. This type of discrimination in the BNA should be remedied for all types of British nationality and we recommend that the Home Secretary take urgent steps to bring forward legislation to do so. We welcome the Immigration Minister’s undertaking, in response to our letter, to pursue work to remove this discrimination with regard to British Overseas Territories Citizenship and we look forward to receiving updates on the progress of that work to eliminate this discrimination.”

45. The Government responded at paragraph 29 of its Response:

“Having considered this further, the Government has concluded that, given its narrow scope, the use of this Remedial Order is not appropriate to deal with the issues raised regarding British Overseas Territories Citizenship. Consultation will be undertaken with the Overseas Territories at a point where a suitable legislative vehicle has been identified.”

46. Whilst the Committee supports transparency and consultations for new policy proposals, the Committee is dismayed that efforts to remove clear human rights violations are being delayed further. We also note that paragraphs 4.1 and 4.3 of the Explanatory Memorandum accompanying this Order provide that the legislatures of the overseas territories “have not been consulted since they have no competence in matters relating to nationality and citizenship”. It is unclear why the Home Office has not already foreseen this issue and consulted, if (contrary to what it informed Parliament in its Explanatory Memorandum accompanying this Order), it considers consultation necessary. Many of those responding to our call for evidence found it difficult to understand the delay in the Government seeking to rectify the provisions relating to BOTC citizenship—as one said, “The Consultation should be happening right now, with the Home Secretary actively creating a legislative opportunity [...]”³²

47. *It is clear that the provisions of the British Nationality Act 1981 relating to British Overseas Territories Citizenship contain the same discrimination that is the object of the British Nationality Act 1981 (Remedial) Order 2019 and therefore that these provisions are not compatible with Convention rights. The Home Office and the Foreign*

32 See [DBA0003](#) [The Campaign for British/British Overseas Territories Citizenship by Descent for Children Born Out of Wedlock]. Similar points were also made in [DBA0005](#) [Tabitha Sprague] and in [DBA0006](#) [Immigration Law Practitioners Association]

and Commonwealth Office should not wait to consult on this at some unspecified point in the future, but should take action to consult and actively seek to remedy this human rights violation as swiftly as possible, rather than proffer excuses for delay.

7 EU nationals & good character post-Brexit

48. The Committee recently scrutinised the Immigration and Social Security Co-Ordination (EU Withdrawal) Bill and produced a Report on this topic.³³ This included consideration of the EU Settled Status Scheme. The idea behind this scheme is that EU citizens currently resident in the UK under EU free movement of persons rules (many of whom have lived and worked in the UK for many years), should be able to remain living in the UK with the same right to reside, work and enjoy other rights as they have previously. However, there are some aspects of the scheme that may cause confusion. One of which relates to when a person loses that right to exercise their free movement rights (or EU Settled Status rights).

49. Following Brexit, the EU Settled Status Scheme and Immigration Rules would introduce the lower threshold of “suitability criteria” (equivalent to good character requirements) before an individual can be refused residence and deported. EU nationals resident in the UK will be subject to a requirement for suitability (good character) in order to have the right to reside in the UK, which means they can be refused residence and/or deported if they have been convicted of an offence and sentenced to a term of imprisonment.³⁴ For EEA nationals resident in the UK, this would apply to convictions imposed after Brexit (or in the case of a “deal” with the EU under the Withdrawal Agreement, after a transition period).

50. That will be a higher threshold than that currently applied to them under EU law,³⁵ under which their personal conduct has to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society in order to deport an EEA national on the grounds of public security or public policy.³⁶

51. Deal or no deal, any convictions that a person receives before the relevant date are to be assessed under the current EU threshold. Any conviction after the relevant date are to be assessed under the regular good character standard for immigration into the UK. If there is a “deal”, under the Withdrawal Agreement,³⁷ the relevant date would be after a transition period. If there is no deal, this would be on the date of Brexit.

33 Joint Committee on Human Rights, Eighteenth Report of Session 2017–19, [Legislative Scrutiny: Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill](#), HC 569 / HL Paper 324

34 See Home Office, [Immigration Rules part 9: grounds for refusal](#), 25 February 2016. Broadly this excludes anyone who has been convicted of an offence and sentenced to at least 4 years imprisonment; or convicted of an offence and sentenced to at least one year’s imprisonment (in the last 10 years); or convicted to an offence and sentenced to any term of imprisonment (in the last 5 years).

35 Under EU free movement law there is a high threshold of “public policy” or “public security” (See Regulation 27 of the Immigration (European Economic Area) Regulations 2016 (S.I 2016/1052) and Articles 27 and 28 of the Free Movement Directive 2004/38/EC) in order to deport an EEA national. The rules are contained in Chapter IV of Directive 2004/38/EC. This is a difference in the criteria as compared to the “good character” requirement that is applied to refuse residence to a non-EEA national.

36 The decision to deport on the grounds of “public policy” or “public security” under EU free movement rules has to take into account proportionality; be based exclusively on that individual’s personal conduct; and that personal conduct has to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Previous criminal convictions in and of themselves cannot constitute sufficient grounds for a deportation decision – the wider threat assessment relating to that person is needed (See Article 27 of Directive 2004/38/EC).

37 The Withdrawal Agreement has been voted against by Parliament.

52. The real issue is whether the Home Office will be able, in practice, to appropriately apply the different standards (without blurring the standards or applying them in an unduly onerous manner). If the Home Office staff do not receive adequate support, guidance and training on how to do this, there is a real risk that EU nationals will be deprived of their rights. The challenge of ensuring sound application of the law is all the more concerning given the current lack of adequate legal aid to individuals facing immigration challenges. This means that there is a real risk of individuals being denied their rights and having no recourse to challenge the Government when it denies them their rights.

53. The Committee raised problems caused by a lack of legal advice to those facing immigration detention or deportation in Chapter 3 of the Committee's Report on *Immigration Detention*.³⁸ Similarly, in the *Enforcing Human Rights Report*³⁹ the Committee found that grave damage to the enforceability of human rights had been done by a combination of the reduction of scope in legal aid, changes to the financial eligibility criteria and knock-on effects on the legal profession. There are therefore real risks that the ability to enforce one's rights (including proving good character and/or the which test in applicable to a given case) is increasingly dependent on one's socio-economic status.

54. Moreover, there are concerns that without an adequate oversight mechanism, there will be limited means to ensure that the Home Office is applying this test correctly. There are particular concerns about risks that the Home Office may conflate the two tests, for example in the case of someone with convictions imposed before the relevant date (which should be subject to the existing EU threshold) and convictions imposed after the relevant date (which would be subject to the regular immigration test for good character).

55. The Committee underlines the importance of proper application of the relevant legal tests by the Home Office when assessing the situation of EU nationals and, in particular, in relation to "suitability" (good character). The Home Office must ensure that adequate mechanisms, guidance and training are put in place to ensure there is no risk of mis-application of the relevant tests. We also stress the importance of access to legal advice for those facing deportation to ensure that they can adequately enforce their rights.

38 Joint Committee on Human Rights, Sixteenth Report of Session 2017–19, [Immigration detention](#), HC 1484 / HL Paper 278. See, for example, paragraphs 45–47 which discuss problems raised by the lack of legal advice. For example, the conclusion at paragraph 47 of that Report provides: "Article 5 (of the ECHR) provides that detainees should be entitled to take proceedings by which the lawfulness of detention should be decided speedily by a court and release ordered if the detention is not lawful. Given the challenges individuals face in detention, and the complexity of the law, legal advice and representation is crucial to help individuals to pursue their rights effectively. Legal aid is currently available to challenge detention decisions but generally not available for most immigration applications. Restricting legal aid to such challenges without addressing the underlying immigration case may undermine the effectiveness of such challenges. It may also be a false economy. Not only is detention itself expensive, but there are likely to be costs elsewhere in the system, if the lack of legal aid means it takes longer to settle someone's immigration status and wastes more court time with unrepresented individuals. It could be cheaper overall if legal advice were provided at the outset, so that all issues could be properly considered when the issues first arise and thereby reduce the need for repeated court interventions. We have already recommended that the Government consider whether immigration cases engaging the Article 8 right to private and family life be brought within the scope of civil legal aid, where they would be available on the means and merits test basis. We consider there is a case for similarly reinstating legal aid for all immigration cases."

39 Joint Committee on Human Rights, Tenth Report of Session 2017–19, [Enforcing human rights](#), HC 669 / HL Paper 171. See in particular chapter 3.

56. In line with our recommendation above, local authorities should actively take steps to ensure that applications are submitted for all looked after children in their care with a right to British nationality—including those who are EU nationals and who may face bureaucratic hurdles post-Brexit if steps are not taken now to clarify their status and their right to British nationality.

Conclusions and recommendations

1. The Government should act without delay to ensure a fair, non-discriminatory approach to UK nationality law that is also in line with the rights of the child. (Paragraph 13)

The Remedial Order

2. We expect to receive clear Ministerial statements of compatibility for all remedial Orders. *Ministers should make a clear statement of compatibility reflected in the Explanatory Memorandum accompanying all remedial orders. In relation to this Order, the Minister should reissue the Explanatory Memorandum with a corrected, clear statement of compatibility.* (Paragraph 16)
3. We consider that the procedural requirements of the Human Rights Act 1998 for the use of the remedial power have been met in this case and consider that the draft Order remedies the incompatibility identified by the Courts. (Paragraph 18)
4. *The Committee concludes, after taking into account representations made, that the special attention of each House is not required to be drawn to the draft Order on any of the relevant grounds, or on any other grounds. However, elsewhere in this Report, we do highlight related concerns in relation to British nationality law.* (Paragraph 19)
5. *We consider that there are no reasons why this Order should not be agreed to by both Houses of Parliament. We therefore recommend that the draft Order should be approved.* (Paragraph 20)

Good Character and Children

6. It is inappropriate to apply the good character requirement to young children with a right to be British, where the United Kingdom is the only country they know and where they have grown up their whole lives here (Paragraph 26)
7. We note in its response to the Committee that the Home Office has again been unable to explain or justify why the good character test is applied to children who have grown up all their lives in the UK and know no other country. We are concerned that this policy is preventing children whose only real connection is with the UK from becoming British—contrary to the intention behind the “entitlement” route to British citizenship for children who have grown up in the UK. In particular, we are most concerned that this is affecting children as young as ten years old who have lived all of their lives in the UK. *The Government should review the application of the good character test to children with a right to British citizenship who have grown up in the UK, in particular, carefully reflecting its obligation to consider the best interests of the child when considering the impact on children with such a close connection to the UK.* (Paragraph 29)
8. The Home Office has also failed to explain why a child should be deprived of their right (entitlement) to British nationality due to a mere police caution. (Paragraph 30)

Applications by those who have previously been discriminated against

9. *Given the Home Office's claim that its policy is focused on "heinous crimes" such as murder and rape, it is inappropriate for children born and/or brought up in the UK to be denied nationality for minor offences. In particular, children should not be deprived of their entitlement (right) to British nationality because of a mere caution. (Paragraph 30)*
10. *We consider that the Home Office is leaving itself open to successful legal challenge by requiring from children against whom it has previously discriminated additional requirements (good character) that would not have applied had they been able to apply as young children. We recommend that the Home Office reconsider its position in respect of children which it has previously discriminated against so that they can obtain British nationality without discrimination or superfluous requirements. (Paragraph 34)*
11. *We consider that, at the very least, the Home Secretary should make clear that it is his policy to remove, as best as possible, discrimination, and that therefore applications for naturalisation from people who would not previously have qualified for British citizenship because only their mother was British or because of their father's marital status would be viewed favourably. (Paragraph 35)*
12. We welcome the Home Office's general approach in indicating that it would not wish to discriminate against individuals whose parents are now dead but would have benefited from these amendments. We note the Home Office has helpfully referenced the application routes open to such individuals in its response. However, we are concerned that the case officers processing applications from such individuals might not realise that they should not be discriminated against (particularly as they will have to apply through alternate routes as their parent has died) and therefore that they should exercise their discretion accordingly. (Paragraph 37)
13. *It would therefore be helpful for the Home Secretary to make a policy announcement in relation to applications from people whose parent(s) would have benefited from the amendments in the British Nationality Act 1981 (Remedial) Order 2019, but where that parent has since died. The announcement should make clear that such applications should be viewed favourably to seek to remove, as best as possible, any discrimination they and/or their parent had faced. (Paragraph 38)*

Fees

14. In our First Report we recommended that people who had been refused British nationality because of discrimination should not have to pay an application fee a second time to reapply once that discrimination was removed. The Committee welcomes the decision taken by the Immigration Minister to amend the Fees Regulations at the next opportunity to ensure that people previously discriminated against do not have to pay an application fee a second time. The Committee looks forward to receiving an update on progress to address this issue. (Paragraph 40)

15. *Local authorities should ensure that children in their care with an entitlement to British citizenship (whether or not they have another citizenship) should be registered as British to ensure they maintain their status and rights upon leaving care. (Paragraph 42)*
16. *Home Office fees for children who have a right to be British should be proportionate to the service being offered and should be priced at a rate that is accessible for children accessing their rights. This is not the case at the moment since fees for children are three times more than the cost of the service—four-figure fees merely to register an existing right to be British are unacceptable. Disproportionately high fees should not exclude children from more vulnerable socio-economic backgrounds from accessing their rights. (Paragraph 43)*

British Overseas Territories Citizenship

17. *It is clear that the provisions of the British Nationality Act 1981 relating to British Overseas Territories Citizenship contain the same discrimination that is the object of the British Nationality Act 1981 (Remedial) Order 2019 and therefore that these provisions are not compatible with Convention rights. The Home Office and the Foreign and Commonwealth Office should not wait to consult on this at some unspecified point in the future, but should take action to consult and actively seek to remedy this human rights violation as swiftly as possible, rather than proffer excuses for delay. (Paragraph 47)*

EEA Nationals

18. *The Committee underlines the importance of proper application of the relevant legal tests by the Home Office when assessing the situation of EU nationals and, in particular, in relation to “suitability” (good character). The Home Office must ensure that adequate mechanisms, guidance and training are put in place to ensure there is no risk of mis-application of the relevant tests. We also stress the importance of access to legal advice for those facing deportation to ensure that they can adequately enforce their rights. (Paragraph 55)*
19. *In line with our recommendation above, local authorities should actively take steps to ensure that applications are submitted for all looked after children in their care with a right to British nationality—including those who are EU nationals and who may face bureaucratic hurdles post-Brexit if steps are not taken now to clarify their status and their right to British nationality. (Paragraph 56)*

Declaration of Lords' interests⁴⁰

Interests declared:

Lord Brabazon of Tara

- No relevant interests to declare

Baroness Ludford

- No Interests declared

Baroness Massey of Darwen

- No Interests declared

Lord Morris of Handsworth

- No Interests declared

Lord Singh of Wimbledon

- No Interests declared

Lord Trimble

- No relevant interests to declare

40 A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mpslords-and-offices/standards-and-interests/register-of-lords-interests/>

Formal minutes

Wednesday 3 July 2019

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP	Lord Brabazon of Tara
Ms Karen Buck MP	Lord Trimble
Joanna Cherry QC MP	
Jeremy Lefroy MP	
Scott Mann MP	

Draft Report (*Good Character Requirements: Draft British Nationality Act 1981 (Remedial) Order 2019 – Second Report*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 56 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Twentieth Report of the Committee.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available in accordance with the provisions of Standing Order no. 134.

[Adjourned till Wednesday 10 July 2019 at 3.00pm]

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

DBA numbers are generated by the evidence processing system and so may not be complete.

- 1 Campaign for British/British Overseas Territories Citizenship by Descent for Children Born Out of Wedlock ([DBA0003](#))
- 2 Immigration Law Practitioners' Association ([DBA0006](#))
- 3 Mr Geoffrey Dickson ([DBA0002](#))
- 4 Mr Ka Wa Fan ([DBA0001](#))
- 5 Tabitha Sprague ([DBA0005](#))
- 6 The Project for the Registration of Children as British Citizens (PRCBC) and Amnesty International UK. ([DBA0007](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis	HC 774 HL 70
Second Report	Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 645 HL 86
Third Report	Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill	HC 568 HL 87
Fourth Report	Freedom of Speech in Universities	HC 589 HL 111
Fifth Report	Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018	HC 926 HL 146
Sixth Report	Windrush generation detention	HC 1034 HL 160
Seventh Report	The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards	HC 890 HL 161
Eighth Report	Freedom of Speech in Universities: Responses	HC 1279 HL 162
Ninth Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill	HC 1208 HL 167 (HC 1827)
Tenth Report	Enforcing Human Rights	HC 669 HL 171
Eleventh Report	Second Legislative Scrutiny Report: Counter-Terrorism and Border Security Bill	HC 1616 HL 195
Twelfth Report	Legislative Scrutiny: Mental Capacity (Amendment) Bill	HC 1662 HL 208
Thirteenth Report	Proposal for a draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018	HC 1451 HL 209
Fourteenth Report	Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 1547 HL 227
Fifteenth Report	Proposal for a draft Human Rights Act 1998 (Remedial) Order 2019	HC 1457 HL 228
Sixteenth Report	Immigration Detention	HC 1484 HL 279
Seventeenth Report	Human Rights Protections in International Agreements	HC 1883 HL 310
Eighteenth Report	Legislative Scrutiny: Immigration and Social Security Co-ordination (EU Withdrawal) Bill	HC 569 HL 324

Nineteenth Report	Youth detention: solitary confinement and restraint	HC 994 HL 343
First Special Report	Human Rights and Business 2017: Promoting responsibility and ensuring accountability: Government Response to the Committee's Sixth Report of Session 2016–17	HC 686
Second Special Report	Mental Health and Deaths in Prison: Interim Report: Government Response to the Committee's Seventh Report of Session 2016–17	HC 753
Third Special Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill: Government Response to the Committee's Ninth Report of Session 2017–19	HC 1578
Fourth Special Report	Windrush generation detention: Government Response to the Committee's Sixth Report of Session 2017–19	HC 1633
Fifth Special Report	Second Legislative Scrutiny Report: Counter-Terrorism and Border Security Bill: Government Response to the Committee's Eleventh Report of Session 2017–19	HC 1827
Sixth Special Report	Human Rights Protections in International Agreements: Government Response to the Committee's Seventeenth Report of Session 2017–19	HC 2199