



House of Commons  
House of Lords

Joint Committee on  
Human Rights

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# Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018

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**Fifth Report of Session 2017–19**

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

*Ordered by the House of Commons  
to be printed 23 May 2018*

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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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[Ms Karen Buck MP](#) (*Labour, Westminster North*)

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Evidence relating to this report is published on the relevant [inquiry page](#) of the Committee’s website.

### Committee staff

The current staff of the Committee are Eve Samson (Commons Clerk), Simon Cran-McGreehin (Lords Clerk), Eleanor Hourigan (Counsel), Samantha Godec (Deputy Counsel), Katherine Hill (Committee Specialist), Penny McLean (Committee Specialist), Shabana Gulma (Specialist Assistant), Miguel Boo Fraga (Senior Committee Assistant), and Heather Fuller (Lords Committee Assistant).

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## Summary

It cannot be right in principle that entitlement to British nationality still varies according to whether it is one's mother or one's father who is British, or whether one's parents are married or not. Entitlements to British nationality vary depending on when and where one was born, and one's links to the UK. Historically, British nationality law only allowed a legitimate child to acquire nationality by descent and only through the male line. It therefore discriminated against those born to British mothers and those whose British fathers were not married to their mothers. The law has been changed at various times to reduce this discrimination, but, despite this, some discriminatory provisions remain on the statute book. This Remedial Order aims, to an extent, to eradicate that discrimination. In particular, it deals with 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. The rights of a child of unmarried parents should be equal to those of a child of a married couple. The rights of a child of a British mother should be equal to the rights of a child of a British father.

Section 4C of the British Nationality Act 1981 (“BNA”) was introduced to address the discrimination against people whose mothers, rather than their fathers, were British citizens. Sections 4F–4I of the BNA were introduced to address discrimination against people whose parents were not married. However, some anomalies have remained. Therefore, these categories of people still face discrimination in some circumstances, as compared to children of married parents, or children whose father, rather than mother, is British. One example is the requirement for them to prove good character—a requirement that does not apply to those acquiring British nationality by descent as a legitimate child of a British father.

This proposal for a British Nationality Act 1981 (Remedial) Order 2018 is the Government's response to the Declaration of Incompatibility made by the Supreme Court in the case of *Johnson v Secretary of State for the Home Department* [2016].<sup>1</sup> The Supreme Court found that the BNA was incompatible with Article 14 (principle of non-discrimination) read with Article 8 (right to private and family life) of the European Convention on Human Rights (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. The Supreme Court made a Declaration of Incompatibility accordingly.

A further Declaration of Incompatibility was made (with Government consent) in similar terms in *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department*. This was in relation to the application of the good character requirement to registration pursuant to section 4C of the BNA to individuals who 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.

The purpose of the proposed draft British Nationality Act 1981 (Remedial) Order 2018 is to remedy these incompatibilities with ECHR rights (and therefore this discrimination),

<sup>1</sup> *Johnson v Secretary of State for the Home Department* [2016] UKSC 56.

by removing the good character requirement from registrations pursuant to sections 4C and 4G to 4I of the BNA, as well as some registrations pursuant to section 4F of the BNA.

The power to amend statute by delegated legislation is unusual and circumscribed. The Committee considers that the procedural requirements of the Human Rights Act 1998 (“HRA”) have been met in this case. The reasons for using a remedial order rather than a Bill are sufficiently “compelling reasons”. Further, remedying the incompatibility by way of a non-urgent order, rather than an urgent order, strikes a reasonable balance between the need to avoid undue delay before remedying the incompatibility and the need to allow proper opportunity for parliamentary scrutiny.

The Committee notes that in most of these cases, there is no fee for an application for British citizenship. However, those who made an application under section 4F of the BNA will have had to have paid a fee. We recommend that the Home Secretary ensure that individuals whose earlier applications were rejected because of this discrimination will not need to pay a fee twice.

The proposed Remedial Order still partially retains the good character requirement for some applications under section 4F of the BNA. The Committee raises particular concerns relating to the continued (partial) application of the good character requirement to applications made by children under section 4F. The Committee considers that there are significant problems with the way this is applied to children.

In the course of our scrutiny of this proposed Remedial Order we raised a number of related areas with the Home Secretary where it appeared British Nationality law could still be discriminatory. The Immigration Minister’s response included a commitment to consider these matters and to respond substantively by the end of May. In particular, we welcome the assurance that the discrimination concerning British Overseas Territories Citizenship, and the need for consultation with the Overseas Territories, is now on the Department’s agenda and that they are working to remedy this. We look forward to further information.

***The Committee welcomes the Government’s decision to use the remedial order process in this case and to take active steps to remedy this discrimination. The Government should address the points we make about ensuring fees are not paid twice by people previously discriminated against under section 4F applications. We recommend that the Government then lay the draft order before both Houses. In the report we also raise a number of significant concerns about other related areas of discrimination in British nationality law, and invite the Home Secretary to make sure such discrimination is rapidly ended.***

# 1 Introduction

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## The Issue that the proposed draft Order addresses

1. This proposed 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. As concerns nationality by descent, British nationality law historically only allowed for this for legitimate children and only through the male line. This therefore discriminated against those born to British mothers and those whose British fathers were not married to their mothers. Attempts have been made to remedy this. In particular, section 4C of the BNA was introduced to address the discrimination against people whose mothers, rather than their fathers, were British citizens. Sections 4F–4I of the BNA were introduced to address discrimination against people whose parents were not married. However, some anomalies have remained, meaning that some children whose mother, rather than father, is British, or whose parents were unmarried, continue to be discriminated against. One such example is the requirement for them 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. This proposal for a British Nationality Act 1981 (Remedial) Order 2018 is the Government’s response to the Declaration of Incompatibility made by the Supreme Court in the case of *Johnson*.<sup>2</sup> 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. The Supreme Court made a Declaration of Incompatibility accordingly. A consent Order and accompanying Declaration of Incompatibility were made in similar terms in the case of *David Fenton Bangs*,<sup>3</sup> 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.

4. The purpose of the proposed draft British Nationality Act 1981 (Remedial) Order 2018 is to remedy these incompatibilities with ECHR rights (and therefore this discrimination), by removing the good character requirement from registrations pursuant to sections 4C and 4G to 4I of the BNA, as well as some registrations pursuant to section 4F of the BNA.

**5. The Committee welcomes the Government’s action in proposing the draft Order to remedy the incompatibility in the British Nationality Act 1981 with the Convention rights to private and family life and to non-discrimination, and to make the necessary consequential amendments that follow from those changes.**

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<sup>2</sup> *R (on the application of Johnson) v Secretary of State for the Home Department* [2016] UKSC 56.

<sup>3</sup> *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department*.

## Role of the Joint Committee on Human Rights

6. The Human Rights Act 1998 (HRA) provides that where a court has found legislation to be incompatible with a European Convention on Human Rights 1950 (ECHR) right, Ministers may correct that incompatibility through a “Remedial Order”, and may use such an Order to amend primary legislation.<sup>4</sup> There are special provisions to ensure that this power is not used inappropriately. In the non-urgent procedure, a proposal for a draft has to be laid before Parliament for 60 days, during which representations may be made. If the Government decides to proceed, it will then lay a draft Order, accompanied by a statement responding to the representations and explaining what changes, if any, have been made to the draft in consequence. In order to be made, the draft Order must be approved by each House of Parliament, a further 60 days after laying.<sup>5</sup>

7. A proposal for a draft British Nationality Act 1981 (Remedial) Order 2018, together with the required information,<sup>6</sup> was laid before both Houses on 15 March 2018.

8. The Standing Orders of the Joint Committee on Human Rights (JCHR) require us to report to each House our recommendation as to whether a draft Order in the same terms as the proposal should be laid before Parliament, and we may also report on any matter arising from our consideration of the proposal.<sup>7</sup> The Committee reports on the technical compliance of any remedial order with the HRA and notes whether the special attention of each House should be drawn to the Order on any of the grounds specified in the Standing Orders relating to the Joint Committee on Statutory Instruments (JCSI).

9. We issued a call for evidence on the Government’s proposal<sup>8</sup> on 16 March 2018 and received six 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.<sup>9</sup> We have also been in contact with officials from the Home Office who have been helpful throughout. Further, on 18 April 2018, the Chair wrote a letter to the Home Secretary seeking further clarifications as to certain elements relating to the proposed British Nationality Act 1981 (Remedial) Order 2018, as well as to related points of potential discrimination in British nationality law. On 4 May 2018 Caroline Nokes MP, the Minister for Immigration, replied to the Chair by letter.<sup>10</sup>

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4 See Human Rights Act 1998, [section 10](#) & [schedule 2](#)

5 There is also an urgent procedure, in which the Minister may lay a made order, but there is a period of 120 days (divided in two 60 day periods) during which representations may be made and responded to. In both cases, each House of Parliament must then approve the Order if it is to have effect (or continuing effect in the case of the urgent procedure).

6 “Required information” means (a) an explanation of the incompatibility which the (proposed) order seeks to remove, including particulars of the relevant declaration, finding or order; and (b) a statement of the reasons for proceeding by way of remedial order and for making an order in those terms (See Human Rights Act 1998, Schedule 2, [paragraph 5](#)).

7 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\(c\)](#).

8 Home Office, [Incompatibility under the Human Rights Act 1998: A remedial order to amend the good character requirement at section 41A\(1\) of the British Nationality Act 1981](#), March 2018.

9 [www.parliament.uk/jchr](http://www.parliament.uk/jchr)

10 See Annex, which contains both letters.

## Matters for consideration

10. In order to consider the proposed order adequately, the Committee generally asks:
- Have the conditions for using the remedial order process (section 10 and Schedule 2 HRA) been met?
  - Are there “compelling” reasons for the Government to remedy the incompatibility by remedial order?
  - Is the procedure adopted (non-urgent or urgent) appropriate?
  - Has the Government produced the required information and effectively responded to other requests for information from the Committee?
  - Does the proposed order remedy the incompatibility with Convention rights and is it appropriate? For example, is any additional provision contained in the proposed order appropriate and *intra vires*—and does the proposed order omit additional provisions which it should have contained?
  - Are the criteria of technical propriety applied by the JCSI satisfied?
11. The relevant grounds on which the JCSI can draw a statutory instrument to the special attention of each House are:<sup>11</sup>
- that it imposes a charge on the public revenues or requires payments to be made to a public authority;
  - that there appears to have been unjustifiable delay in the publication or laying of the Order before Parliament;
  - that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
  - that for any special reason its form or purport calls for elucidation;
  - that its drafting appears to be defective; or
  - on any other ground which does not impinge on its merits or the policy behind it.

## British Nationality Legislation & Legislative History

12. British nationality law has evolved over the years, from the original focus on allegiance to the Monarch under common law (principally through being born within the Crown’s territories), to developments in the 1700s and 1800s additionally contemplating the possibility for naturalisation as British, or nationality by descent (through the male line). It was during this period that increasingly complex rules tended to treat women differently from men—a woman’s right to nationality tended to rely on her husband’s nationality, and a woman was not able to pass on her nationality to her child. Similarly, rules developed so that nationality by descent through the male line could only be passed on to legitimate

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11 House of Commons, Standing Orders No. [151\(1\)\(B\)](#).

heirs.<sup>12</sup> These discriminatory approaches to nationality law—and especially to nationality by descent—continued into the British Nationality Act 1948 and its successor, the British Nationality Act 1981.

13. Current rules governing the acquisition of British nationality are found in the British Nationality Act 1981 (“BNA”), which creates different categories of British nationality—British Citizenship (for those with a close link to the UK), British Overseas Territories Citizenship, British Overseas Citizenship, British Nationals (Overseas), British Subjects, and British Protected Persons. The proposed British Nationality Act 1981 (Remedial) Order 2018 focusses only on provisions relating to British Citizenship, although later in the Report we note that similar concerns around discrimination may well apply to the provisions relating to other categories of British nationality.

14. The BNA has been amended many times. In particular, section 4C BNA was added by the Nationality, Immigration and Asylum Act 2002<sup>13</sup> (and then amended by the Borders, Citizenship and Immigration Act 2009)<sup>14</sup> in order to remedy discrimination whereby only men (and not women) could pass on British citizenship by descent. Sections 4F–4I BNA were added by the Immigration Act 2014<sup>15</sup> in order to remedy discrimination as between children whose parents were married and those whose parents were not married.

15. Section 41A BNA<sup>16</sup> provides that certain applications for British nationality made by a person aged 10 years or older must be accompanied by proof of good character. In particular, section 41A means that all applications for British citizenship under the provisions of sections 4C and 4F–4I (that sought to remove underlying discrimination in British nationality legislation) need to be accompanied by proof of good character. This was the case even though, for many of the underlying rights to British nationality (had there not been the discrimination), that right was either automatic (so no application was needed, let alone proof of good character), or that underlying right or application process did not require proof of good character (see section entitled “Automatic entitlement, entitlement upon registration, discretion following application” at paragraphs 23–25). This led to a system whereby for many British nationality applications, those who had originally suffered discrimination needed to comply with the additional hurdle of proving good character, while those who had not been discriminated against did not need to prove good character.

16. Good character is not defined in the BNA, but rather in a Home Office policy document “Good Character: Nationality Policy Guidance”.<sup>17</sup> The Courts have ruled that Home Office decision-makers, when undertaking a good character assessment, should make an overall assessment as to the character of the applicant, including taking into account evidence of positive good character. However, the guidance principally focuses the minds of Home Office decision-makers on when to refuse on grounds of bad character.

12 See e.g. [The British Nationality and Status of Aliens Act 1914](#).

13 Nationality, Immigration and Asylum Act 2002, c. 41, [section 13\(1\)](#).

14 Borders, Citizenship and Immigration Act 2009, c. 11, [section 45](#) and Schedule 1, [Part 2](#).

15 Immigration Act 2014 c. 22, [section 65](#).

16 Section 41A BNA was added by the Borders, Citizenship and Immigration Act 2009 (c. 11, [section 47\(1\)](#)) and was amended by the Immigration Act 2014 (c. 22, Schedule 9, [paragraph 70\(3\)](#)).

17 Home Office, [Good Character: Nationality Policy Guidance](#), 27 July 2018

17. The proposed draft British Nationality Act 1981 (Remedial) Order 2018 is focussed on those discriminatory provisions, especially on the extent that good character is required for applications under sections 4C and 4F–4I BNA, where proof of good character is not required for acquisition of British nationality by those who did not suffer the discrimination.

## Litigation history

18. In *Johnson*,<sup>18</sup> the Supreme Court found that it was incompatible with Article 14 (principle of non-discrimination), as read with Article 8 (right to private and family life) of the ECHR to impose a good character requirement on individuals who would, but for their parents' marital status, have automatically acquired British citizenship at birth.

19. This is supported by ECHR case law which has recognised that citizenship, though not a free-standing right, can be a part of a person's social identity, which is a part of their private life under Article 8 ECHR. Furthermore, birth out of wedlock is a "status" for the purposes of discrimination contrary to Article 14 ECHR, see *Marckx v Belgium* (1979).<sup>19</sup> In particular, in *Genovese v Malta* (2011)<sup>20</sup> the European Court of Human Rights held that if a State recognises citizenship by descent, then it must be recognised without discrimination.

20. In *Johnson*, the Supreme Court went on to issue a Declaration of Incompatibility in relation to paragraph 70 of Schedule 9 to the Immigration Act 2014, which inserted into section 41A(1) of the BNA, a reference to sections 4F - 4I BNA. These sections relate to various categories of people who would automatically have become UK citizens (or in the case of applications under 4F, people who would have been entitled to be registered as UK citizens) had their parents been married to one another at their birth. As Lady Hale said, "it is not reasonable to impose the additional hurdle of a good character test upon persons who would, but for their parents' marital status, have automatically acquired citizenship at birth, as this produces the discriminatory result that a person will be deprived of citizenship status because of an accident of birth which is no fault of his."<sup>21</sup>

21. In the case of *David Fenton Bangs*,<sup>22</sup> the Home Secretary agreed to the making of a declaration of incompatibility, by way of a consent order, in relation to the application of the good character requirement to registration pursuant to section 4C BNA (which provides a registration route for persons who would have automatically become UK citizens at birth had their mothers been able to pass on their citizenship). This consent order was approved by the Administrative Court on 4 July 2017. Its accompanying declaration of incompatibility provided that "section 47(1) of the Borders, Citizenship and Immigration Act 2009 is incompatible with Article 14, read with Article 8, of the [ECHR], in so far as it introduces [section 41A into the BNA, which applies] a "good character" requirement to applications for registration under section 4C of the [BNA]".

22. It is worth noting that in addition to the requirements of domestic legislation and the ECHR which were considered in the above litigation, certain UN Conventions that the UK has ratified could also be engaged here. Article 9 of the UN Convention on the

18 *R (on the application of Johnson) v Secretary of State for the Home Department* [2016] UKSC 56.

19 *Marckx v Belgium* (1979) 2 EHRR 330.

20 *Genovese v Malta* (2011) 58 EHRR 25.

21 [2016] UKSC 56, para 38.

22 *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department*.

Elimination of All Forms of Discrimination against Women 1979<sup>23</sup> requires States to give women equal rights with men to acquire, change or retain their nationality, and also equal rights with men with respect to the nationality of their children. This would therefore be relevant in the case of *David Fenton Bangs*. Article 7 of the UN Convention on the Rights of the Child 1989<sup>24</sup> provides for the right of a child to acquire nationality—and this right must be applied without discrimination as to sex or any other status, such as the type of family that the child comes from (Article 2 of the UN Convention on the Rights of the Child). Finally, Article 3 of the UN Convention on the Rights of the Child requires that all decisions relating to a child are taken in the “best interests of the child”. To that extent it is also worth noting that section 55 of the Borders, Citizenship and Immigration Act 2009<sup>25</sup> places a duty on the Home Secretary to safeguard and promote the welfare of children in matters relating to asylum, immigration and nationality.<sup>26</sup> This means that the Home Secretary should consider very carefully the impact of the good character requirement on children and should ensure that the best interests of the child are indeed paramount in cases relating to nationality applications by children.

### **Automatic entitlement, entitlement upon registration, or discretion following application**

23. There are different references in the relevant documents to an “automatic” entitlement to British citizenship, an entitlement following registration, or alternatively a discretionary power of the Home Secretary to grant a person British citizenship upon an application. This reflects the different types of entitlement to British nationality. An “automatic” entitlement to British citizenship tends to be reserved for cases where the individual concerned has such a clear and obvious link to the UK (e.g. by birth in the UK to British parents) that automatic citizenship is reasonable and sensible. Others with less of a nexus to the UK might be entitled to British citizenship upon application (so would have a right to citizenship but only if an application is submitted), and others might have a right to apply (where it is within the discretion of the Home Secretary whether to grant British nationality).

24. At first reading these distinctions between automatic British nationality, an entitlement to British nationality and a discretionary power to grant British nationality following an application, might seem to have the potential to produce unfair and arbitrary results. In particular, those applying under sections 4C, 4F, 4G, 4H or 4I BNA need to go through the bureaucracy of submitting an application rather than benefitting from automatic British nationality (which some of them would have, had there not been the original discrimination). Moreover, evidence to the Committee highlighted that there could be other hurdles and impacts on an individual associated with needing to apply and complete the citizenship process (e.g. getting statements from family members and other proof) as compared to those merely acquiring British citizenship automatically.

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23 UN Treaty Series, vol. 1249, p.13.

24 UN Treaty Series, vol. 1577, p. 3.

25 Borders, Citizenship and Immigration Act 2009, c. 11.

26 This was considered by the Supreme Court in *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4, in which Lady Hale set out how the ‘spirit’ of Article 3 of the UN Convention on the Rights of the Child is translated into national law in s.55 of the Borders, Citizenship and Immigration Act 2009 (and s. 11 Children Act).

25. However, as is clearly explained in paragraphs 38 and 39 of the judgment in *Johnson*, there could be good reasons for that distinction, particularly where a person has not automatically acquired citizenship at birth and “where a person has not automatically acquired citizenship at birth, it is reasonable to expect him to apply for it, even if he is entitled to be registered if he does so”.<sup>27</sup> To provide otherwise could mean that one automatically imposed British citizenship on a person who did not want it, and who might, as a result, lose their existing nationality (where, for example, their country of other nationality did not recognise dual citizenship). As their Lordships note in *Johnson*, requiring applications for those entitled to British citizenship, but who did not automatically acquire British citizenship at birth, “avoids the risk of inconvenient results and provides everyone with clarity and certainty”.<sup>28</sup>

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27 *R (on the application of Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, at paragraph 39.

28 *R (on the application of Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, at paragraph 39.

## 2 Procedural Requirements

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### Compelling Reasons and Use of the Remedial Power

26. Since remedial orders are a type of delegated legislation which can be used to amend statutes, there are controls on their use. A Minister may only use the remedial power under the HRA if that Minister considers that there are “compelling reasons” to do so. The Government’s reasons for using a remedial order are set out in the statement of required information in the Paper which accompanies the proposed draft order.

27. The “compelling reasons” cited by the Government include the need to address instances of discrimination swiftly, and that the current legislative programme offers no prospect of a suitable primary legislative vehicle (meaning that waiting for a Bill would be likely to cause significant delay).

28. We are grateful for the information provided by the Home Office as part of the “required information”<sup>29</sup> and overall consider that these are indeed good reasons. In particular, we welcome the point that “the Government takes discrimination seriously and is of the view that instances of [discrimination] should be remedied swiftly”.

29. We note that the Home Office’s view is that “the legislative programme as currently foreseen offers no prospect of a suitable primary legislative vehicle in which these changes could be included”. In a letter dated 18 April 2018, we asked the Home Office for further clarification as to why the changes envisaged would not fall within the scope of the legislation announced in the Queen’s Speech to establish “new national policies on immigration”. The Minister for Immigration replied by letter to the Chair on 4 May 2018 that:

“the Government takes its obligations in relation to the European Convention of Human Rights seriously and is committed to remedying the incompatibility identified at the earliest opportunity. Given the courts’ decisions last year in the case of *Johnson* and the application of *David Fenton Bangs*, we did not want to risk any further delay”.

30. While we welcome the Government’s commitment to the European Convention of Human Rights and to addressing incompatibilities without undue delay, we note that the Government did not offer an explanation specifically as to why it had not considered (or, perhaps, had considered but dismissed) using this session’s announced Immigration Bill. Generally, the Committee would be cautious about the use of a remedial power where a topical Bill was imminent and would have expected a more convincing and specific response from the Minister to this question concerning the Immigration Bill. We are therefore left in a somewhat awkward position as to whether we consider that there are “compelling reasons”, given the absence of a fuller explanation from Home Office Ministers as to the potential use of the Immigration Bill.

31. Moreover, some of those giving written evidence noted concerns about wider discrimination on the face of British nationality legislation which could also benefit from being rectified as part of a Bill. We share many of these concerns, as we highlight later in this Report.

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29 As required by [paragraph 3](#) of Schedule 2 to the Human Rights Act 1998.

32. These concerns do not necessarily mean that a remedial order would not be appropriate. Notably, we understand that the Immigration Bill could well take some time and is some way off introduction. Moreover, this would seem to be confirmed by the Immigration Minister’s concern not to “want to risk any further delay” when she replied to this point. Overall, given the pressing need to address the discrimination identified in *Johnson* and *David Fenton Bangs* there do seem to be compelling reasons to proceed by remedial order. However, it does suggest that there is scope for the Home Secretary to use the forthcoming Immigration Bill to address remaining discrimination in British nationality law—and possibly also to consolidate and bring clarity to the existing law.

## Use of the Non-Urgent Procedure

33. Remedial orders can be made by urgent or non-urgent procedure. The Government’s reasons for proceeding by way of the non-urgent procedure are set out in the information accompanying the proposed draft Order.

34. The Government notes that 16 cases have been placed on hold since the judgment in *Johnson*, although the Government recognises that the actual number of people impacted may be greater. The Government also notes the significance of the rights affected by the incompatibility. Balancing the significance of the rights, the impact on the individuals affected, the small number of cases on hold and the need to legislate in an open and transparent manner that allows appropriate opportunity for debate and discussion, the Government considers that the non-urgent process is most appropriate.

35. Much of the information provided by the Home Office is helpful in relation to the use of the non-urgent procedure. However, the Committee notes that whilst the Home Office has referred to the impact on individuals concerned being a factor, it has not provided any further information as to what constitutes that impact. The Committee has previously called on Departments to include within this information some consideration of, and information as to, the impact on the individuals concerned. For example, paragraph 50 of the first Report on the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (Remedial) Order 2010<sup>30</sup> provides that “full information on the ongoing impact of a violation subject to a proposal for a remedial Order [ ... ] should always be included with the required information prepared”.

36. In the letter from the Chair to the Home Secretary dated 18 April 2018, we asked for an explanation from the Home Office as to the impact of the current violation on the individuals concerned. In the response dated 4 May 2018, the Immigration Minister noted:

“the impact of the incompatibility means that certain individuals who the courts have identified have a right to British citizenship are not able to make an application to do so until the legislation is amended. The continuing incompatibility will mean that they are unable to obtain a British passport and the benefits which are gained from British citizenship. Where we have been made aware of individuals affected by the incompatibility who do not have an immigration status we have taken action to put them in a comparable position by granting indefinite leave to remain. This will

30 Joint Committee on Human Rights, Fifth Report of Session 2010–11, [Proposal for the Asylum and Immigration \(Treatment of Claimants, etc\) Act 2004 \(Remedial\) Order 2010](#), HL Paper 54, HC 599

ensure that they can work in the UK and are able to access public funds. For individuals who are overseas the impact may be on their ability to come to the UK. Where we are made aware of individuals affected, we will consider their individual circumstances on a case-by-case basis.”

37. We welcome this further information and some of the assurances it gives as to the intended treatment of those affected pending the entry into force of this proposed Remedial Order. We encourage the Home Office to minimise the impact of this discrimination in any of its decision-making.

**38. Overall, we are satisfied that there are compelling reasons to proceed by Remedial Order and that this is a valid use of the remedial power.**

**39. More specifically, Committee considers that the non-urgent procedure strikes a reasonable balance between the competing considerations of the need to avoid undue delay in remedying the incompatibility with human rights standards and the need to afford a proper opportunity for parliamentary scrutiny of changes to primary legislation. Further, we welcome some of the explanations that the Home Office has given as to the intended treatment of those affected pending the entry into force of those amendments and we encourage the Home Office to minimise the impact of this discrimination on those people in any of its decision-making.**

**40. As we describe later in this report, other discriminatory provisions appear to remain on the face of British nationality legislation. It would be beneficial for the Home Secretary to introduce a Bill of wider scope to remove all remaining discrimination in British nationality law—and which could consolidate and bring clarity to the existing law. We recommend that the Government bring forward the necessary legislation to remedy this remaining discrimination at the first available opportunity.**

### 3 Requirement for good character for children under section 4F

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41. Section 4F allows for certain applications for British nationality to be made by people who would have been granted British nationality under section 1(3), 3(2), 3(5) BNA, or paragraph 4 or 5 of Schedule 2 to the BNA, had their parents been married. The underlying entitlements to British nationality vary. Section 1(3) applies to a child born in the UK whose parent has since settled in the UK or become a British citizen. Section 3(2) BNA applies to a child with certain links to the UK whose parent is a British citizen by descent and whose grandparent is a British citizen (not by descent). Section 3(5) applies to a child who is in the UK for a certain period of time and whose parent is a British citizen by descent (and where parental consent is given for the British citizenship application). Paragraphs 4 and paragraph 5 of the Schedule 2 relate to stateless persons.

42. The proposed Remedial Order has deliberately reinstated the good character requirement<sup>31</sup> for applications under section 4F where the underlying entitlement to British citizenship requires good character—i.e. as concerns sections 1(3), 3(2) and 3(5) of the BNA.

43. Many of the submissions questioned the requirement for children to prove good character in relation to applications under section 4F. Some highlighted specific discriminatory consequences that arose from the requirement for these children to prove good character. We have therefore considered these points in turn below.

44. We understand the explanation given by the Home Office as to the distinction now being drawn between requiring good character under section 4F where the underlying registration provision is section 1(3), 3(2) or 3(5) of the BNA (which require good character to be shown) and not requiring good character under section 4F where the underlying registration provision is paragraph 4 or 5 of Schedule 2 to the BNA (which do not require good character to be shown). In essence, the distinction made between the different provisions of section 4F therefore merely reflects and follows through from the requirements of those underlying provisions.

45. However, it is not immediately clear what justification there is for requiring good character for children (over the age of 10) making these applications under section 1(3), 3(2) or 3(5) of the Act. In the letter from the Chair to the Home Secretary dated 18 April 2018, we asked for an explanation as to the policy justification for requiring good character for children applying under section 1(3), 3(2) or 3(5) of the British Nationality Act 1981 (and therefore for those applying under the related provisions on section 4F). In the response of 4 May 2018, the Immigration Minister stated “The good character requirement applies to any child aged 10 and over, in line with the age of criminal responsibility”.

46. We cannot immediately see that this answers the question as to why children should need to show good character to access their nationality, for example so that a child (of, say,

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31 Whilst good character should not necessarily be the same as not of bad character, it can be inflexible in practice. It is often difficult to get a proper individualised assessment and there is often little flexibility in the way this is applied. The only real issue in proof arises if there is some evidence of bad character (e.g. a criminal conviction) and there is a judgement to be made as to whether this conviction is sufficiently serious when balanced with other behaviour (e.g. in school, studies, work, family life) to make a determination that a person is of good or bad character.

10 or 11) can have the same nationality as its parent. The situation is exacerbated by the seeming impossibility of granting a child nationality under these provisions if they cannot show good character as there seems to be little-to-no flexibility around the character of children. This seems to conflict with the obligation to have regard to the best interests of the child and the rights of the child in general.

47. In particular, we note that section 55 of the Borders, Citizenship and Immigration Act 2009<sup>32</sup> places a duty on the Home Secretary to safeguard and promote the welfare of children in matters relating to asylum, immigration and nationality.<sup>33</sup>

**48. The wider issue of the application of the good character requirement to children in the context of seeking British nationality is something which requires further consideration.**

### **Why do children aged over 10 by the time the discrimination is removed additionally need to meet the good character requirement?**

49. Section 4F seeks to remove discrimination against children whose parents are not married. Had those children been able to apply when they were under 10, they would not need additionally to prove the good character requirement. However, for those children that were over 10 by the time this provision was introduced (or by the time their parents applied under this provision), those children would need to prove good character.

50. We note that but for the discrimination that section 4F seeks to remove, the children now needing to show good character when applying under section 4F would have been able to apply for British citizenship under section 1(3), 3(2) or 3(5) of the BNA when they were under 10 (and therefore would not have needed to prove good character). Whereas if they can only apply when they are over 10, then they have to prove good character. This creates obvious difficulties especially for those who were over 10 when section 4F was introduced. It risks perpetuating the original discrimination. This could mean that children who would have been able to apply and be entitled to British citizenship but for the discrimination, are then prevented from subsequently becoming a British Citizen because they are then over the age of 10 (and required to prove good character, which they might not have) when the discriminatory provisions were removed by section 4F. Analysed in this way, this would seem to be analogous to the situation in *Johnson and David Fenton Bangs* and therefore risks being found to be discriminatory contrary to Article 14 of the ECHR as read with Article 8 of the ECHR.

51. In the letter from the Chair to the Home Secretary dated 18 April 2018, we asked the Home Secretary to explain this apparent discrimination and what she intended to do about it. In the letter dated 4 May 2018, the Immigration Minister stated:

“Following the Supreme Court’s declaration of incompatibility and during the process of drafting the Remedial Order, we considered carefully the

32 Borders, Citizenship and Immigration Act 2009, c. 11.

33 This was considered by the Supreme Court in *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4, in which Lady Hale set out how the ‘spirit’ of Article 3 of the UN Convention on the Rights of the Child is translated into national law in s.55 of the Borders, Citizenship and Immigration Act 2009 (and s. 11 Children Act).

points raised by the Committee. However, we decided that we should maintain the good character requirement for persons aged 10 and over for the following reasons:

- a) the registration routes in section 4F are themselves subject to the good character requirement;
- b) there is little basis for a reliable finding about when a 4F applicant would have applied and whether this would have been on an earlier date when they would not have been impacted by the good character requirement;
- c) it would not be right now to put a 4F applicant aged 10 or over in a better position than a child whose parents were married;
- d) if we placed the onus on a 4F applicant aged 10 or over to prove the date on which they would have hypothetically made an application, this would very likely be based on the applicant's assertion rather than evidence and there was therefore scope for dishonesty and fraud. We considered that the practical difficulties of making a reliable finding and in establishing the necessary hypothetical facts in relation to these applications meant that this category could not reasonably be remedied."

52. We are grateful for the Immigration Minister's considered response on this point and we can understand in particular that this could place such applicants in a different position than those applying under section 1(3), 3(2) or 3(5) of the British Nationality Act 1981. However, we consider the argument around knowing whether/when a person would have applied when under the age of 10 (points (b) and (d) in the letter) to be particularly weak. Given these individuals have been discriminated against it should not be for them to prove what they would have done had they not been discriminated against—rather the Home Office should seek, as best as possible, to remove that discrimination and the impacts of that discrimination. In relation to point (c) in the letter, we doubt that removing the good character requirement for people who were unfairly precluded from applying when they were under 10 would be unfair to those whose parents were married—as that category were able to apply when they were under 10 as they did not face discrimination.

***53. Had children been allowed to apply for citizenship when they were under the age of 10, they would not have needed to prove good character. We do not consider it justified or proportionate to require children who have been discriminated against, additionally to have to prove good character when they are now finally entitled to apply following the removal of that discrimination. In our view, there is a risk that this constitutes unjustified discrimination contrary to Article 14 of the ECHR, as read with Article 8 of the ECHR. We would therefore recommend that the Home Secretary consider taking the necessary steps to eliminate such discrimination.***

### **Those now adults who are unable to apply under section 4F**

54. Similarly, there could be adults who would have been able to apply for British citizenship under the section 1(3), 3(2) or 3(5) routes of the BNA, had section 4F been introduced when they were still minors. However, as those provisions only allow for minors to apply, then they are no longer entitled to apply for British citizenship since they were

already adults by the time that section 4F was introduced and the original discrimination was addressed. This would seem to create a situation rather analogous to that of *Johnson*. It therefore would seem to risk incompatibility with human rights law and specifically Article 14 of the ECHR, as read with Article 8 ECHR.

55. We asked the Home Secretary to explain this apparent discrimination and what she intended to do about it. The Minister for Immigration replied:

“In respect of the position in relation to adults, an individual can only apply under section 4F if they are a minor because all the relevant referenced routes, namely sections 1(3), 3(2) and 3(5), are all routes for minors to apply for citizenship. Section 4F does not apply to adults. Furthermore, the position of adults in relation to section 4F does not relate to the good character requirement which is the subject of the Remedial Order.”

56. Whilst we can understand the technical argument that sections 1(3), 3(2) and 3(5) are only available to children, we note that this does not resolve the continuing effects of the discrimination felt by those who were barred, by discriminatory provisions, from applying when children.

**57. *We consider that those who should have been entitled to apply for British citizenship under limbs (1)(b)(i), (ii) or (iii) of section 4F BNA as children should now be able to apply as adults in order to remove this discrimination, and the ongoing impacts of this discrimination, properly. Otherwise, this provision could risk being discriminatory contrary to Article 14 of the ECHR, as read with Article 8 of the ECHR, which would risk further successful litigation against the Government and thus a further declaration of incompatibility in respect of the BNA. We therefore recommend that the Home Secretary address this discrimination.***

### **Difference in treatment as between stateless children and other stateless persons: the good character requirement**

58. One result of the provisions relating to section 4F is that stateless persons applying under limb (iv) or (v) of section 4F(1)(b) BNA do not need to show good character, but stateless children applying under limb (ii) of section 4F(1)(b) BNA do need to show good character. The rationale for the distinction in relation to the different categories of stateless persons covered by section 4F is not immediately clear to us (even though we understand that 4F is rather parasitic on the underlying provisions). In particular, our concern is that section 3(2) (to which limb (ii) cross-refers) relates to stateless children (who do need to show good character under that provision) and paragraphs 4 and 5 of Schedule 2 (to which limb (iv) and (v) refers) relate to stateless persons (who do not need to show good character). We find this difficult to reconcile with the best interests of the child and with the rights of the child in general.

59. We asked for an explanation as to the policy justification for requiring stateless children to prove good character in an application made pursuant to section 3(2) of the BNA, where other nationality applications made by stateless persons under paragraph 4 or 5 of Schedule 2 to the BNA do not require a stateless person to prove good character. The Immigration Minister replied:

“Prior to 2009, section 3(2) applications had to be made within 12 months of the child’s birth. Section 3(2) was extended by the Borders, Citizenship and Immigration Act 2009 so a registration could take place at any time up to the child’s 18th birthday. In removing the 12-month cut-off date for applications under 3(2), and thus permitting applications from those aged 10 and over, it was right that we included a requirement for the person to be of good character in line with other provisions for registration and naturalisation.

Section 3(2) is not principally a provision which affects stateless children. Its main beneficiaries are those whose parents are a British citizen by descent, and the parent lived in the UK for a period of three years at any time before the child’s birth. Section 3(2) is not specifically aimed at those who are stateless, but it does remove some of the requirements where the child is stateless namely the requirements for the parent in question to be a British citizen. The fact that stateless minors can apply under this section, does not mean that it is a ‘statelessness provision’; in theory, stateless children could apply under any of the provisions—1(3), 1(4), 3(1) and 3(5), all of which have a good character requirement.”

***60. In order to remove the discrimination highlighted above, we recommend that the Home Secretary should remove the requirement for stateless children to prove good character in applications made under section 3(2) BNA, and in related applications made under section 4F; children should not be treated less fairly than other stateless persons.***

## 4 Fees Applicable for a re-application following removal of the discrimination

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### Fees for Applications under Section 4F

61. We note the reference in the required information explaining that no application fee is charged for these applications “with the exception of applications made under 4F”. We further note the undertaking that “applicants who have previously been refused on character grounds will have the opportunity to reapply when the good character requirement is removed”. This is positive; however, it was not clear to us if applicants who have previously paid an application fee for a section 4F application and been refused on character grounds under 4F would need to pay a further application fee for such a reapplication.

62. In the letter from the Chair to the Home Secretary dated 18 April 2018, we sought clarification as to whether applicants who have previously been refused on character grounds under 4F would need to pay an application fee for a reapplication following this change to the requirements. In the reply of 4 May 2018 the Immigration Minister stated:

“Individuals will be charged a fee for any application made under section 4F of the British Nationality Act 1981. Section 4F remains a registration route for British citizenship and in accordance with Schedule 8 of the Immigration and Nationality (Fees) Regulations 2018 a fee is required. This applies where an applicant submits a second application under the same registration route.”

63. Whilst the Committee can understand generally why a fee may be charged for applications, we think it is wrong to charge a person a second time for a re-application when their original application was rejected on discriminatory grounds. This effectively amounts to a discrimination charge that only those who have been discriminated against need pay, effectively charging them double someone who was not discriminated against. Further we consider that it would be within the powers of this proposed Remedial Order to make this sort of consequential amendment to the Immigration and Nationality (Fees) Regulations 2018.

***64. 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 recommend 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 (e.g. by making a consequential amendment to the Immigration and Nationality (Fees) Regulations 2018).***

## 5 Other Matters Arising

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### Impossibility of the requirement to register a birth at a consulate in the past

65. In *The Advocate General for Scotland v Romein* [2018] UKSC 6, the Supreme Court considered the rather peculiar outcome of section 4C of the BNA, in that Ms Romein was required to fulfil all of the statutory conditions as if the discrimination had not been in place at the time of her birth. This included the requirement that she should have been registered at a consulate within one year of her birth, even though any consulate would have refused to register her at such a time as only her mother (and not her father) was British. The Supreme Court held that the only way in which effect can be given to section 4C(3) BNA is “to treat the registration condition in section 5(1)(b) [of the British Nationality Act 1948] as being inapplicable in cases where citizenship is claimed by descent from a mother”. This means we now have a situation where it is not clear on the face of the Statute (without being aware of this judgment) whether an individual can satisfy these conditions.

66. It is also unclear whether there are other situations where a similar reading might be required in order to achieve a just and non-discriminatory result. We are concerned that the Home Secretary is not actively seeking to remove all discriminatory provisions from the Statute book.

67. We asked whether the Home Secretary agreed that it would be preferable to clarify on the face of the Statute that certain requirements in the underlying entitlement to British citizenship do not need to be met if it is impossible (or very difficult) for those subject to the original discrimination to meet those requirements due to the original discriminatory provisions. We also asked whether the Home Secretary was aware of any other provisions (other than section 5(1)(b) of the British Nationality Act 1948, which was the subject of the judgment in *The Advocate General for Scotland v Romein* [2018] UKSC 6) where there are conditions that are impossible (or very difficult) for those subject to the original discrimination to meet, due to the original discriminatory provisions. The Immigration Minister told us:

“In response to the *Romein* judgment, application forms and guidance have been amended. These amendments make clear that those applying to register under section 4C(3) on the basis of citizenship by descent from their mother, are not required to have registered, or attempted to register, the birth. The guidance which accompanies the application form ‘UK(M)’ and the guidance for caseworkers, both available on GOV.UK, have made the requirements clear and we are not aware of anyone experiencing difficulties.

Nor am I aware of any other conditions contained within nationality provisions which would be unduly difficult, or impossible, for those subject to the original discrimination to meet.”

68. We are grateful for the reassurance from the Immigration Minister that the guidance makes clear the obligations on applicants and also that she is not aware of any other conditions that could make it unduly difficult or impossible for applicants subject to prior discrimination. Nonetheless we consider it important to ensure that the legislation is clear.

69. *We recommend that the Home Secretary take steps to address and remove examples of apparent discrimination that continue on the face of British nationality legislation, such as that identified in the case of *The Advocate General for Scotland v Ramein* [2018] UKSC 6.*

### **Application by a person whose parent has since died**

70. There will be some persons whose parent could have benefited from the provisions in the proposed Remedial Order remedying the discrimination which that parent has faced (and who therefore themselves should be entitled to British citizenship by descent through that parent). If that parent has since died, that parent will not be able to apply under the provisions of the BNA, as amended by the proposed Remedial Order—most likely meaning that the child of that parent themselves will be deprived of the ability to apply for British citizenship, meaning that there are continuing effects of the discriminatory provisions.

71. We asked if the Home Secretary agrees that this (presumably unintended) discriminatory consequence is of concern, and how the Home Secretary intends to accommodate applications for British Citizenship from such individuals. The Immigration Minister replied in the letter of 4 May 2018:

“There was no intention to discriminate against those whose parents may have benefited from the Remedial Order but have since died. However, although we cannot assume that those parents would have registered as British, and that in turn they would have gone on to register their child. I have asked my officials to consider this issue further with the aim of providing a recommendation to the Committee by the end of May.”

72. *We are pleased with the confirmation from the Immigration Minister that there is no intention to discriminate against those whose parents may have benefited from these amendments but have since died. We recommend that the Home Secretary consider how best to accommodate British nationality applications from individuals who would have been entitled to British citizenship had their (now deceased) parent been able to apply under section 4C, 4F, 4G, 4H or 4I BNA, as amended by the proposed Remedial Order. We look forward to receiving the recommendations and solutions as to how best to address this issue from the Immigration Minister by the end of May, as indicated in her letter.*

### **Discrimination and British Overseas Territories Citizenship**

73. The changes introduced by sections 4C and 4F–4I of the BNA (and being amended by this proposed Remedial Order) only relate to British citizenship and not to any of the other types of nationality covered by the British Nationality Act—in particular British Overseas Territories Citizenship (“BOTC”).

74. The ECHR extends to the British Overseas Territories (Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, St Helena, Ascension and Tristan da Cunha, South Georgia and South Sandwich Islands, Sovereign Base Areas of Akrotiri and Dhekelia, and the Turks and Caicos Islands). Therefore, the

discrimination under Article 8 ECHR as read with Article 14 ECHR is also relevant unlawful discrimination when applied to citizenship provisions affecting these overseas territories.

75. It is for the Westminster Parliament to legislate for BOTC nationality rules and this is therefore within our remit. We note that the original discriminatory provisions in the BNA still exist in relation to BOTC citizenship. It is difficult to see why the situation is remedied for children of British mothers (but not BOTC mothers) and children of British fathers who were not married to their mothers (but not BOTC fathers who were not married to their mothers) - especially given that the provisions according both types of nationality are dealt with in similar terms in the same piece of legislation—the BNA. Such discrimination should not be allowed to persist. As one person contributing evidence to our inquiry put it, “we have an unequal situation affecting the same category of people under the same nationality law”.

76. Furthermore, because people discriminated against in this way would be unable to obtain BOTC citizenship, they would therefore also be unable to obtain British citizenship through the operation of section 3 of the British Overseas Territories Act 2002, which granted those with BOTC citizenship (other than through the Sovereign Base Areas in Cyprus) automatic additional status as British citizens.

77. The same discriminatory provisions as between obtaining British nationality by descent from a British mother as compared to a British father, and depending on the marital status of one’s parents, would also seem to remain for the other types of British nationality—British Overseas Citizens, British Nationals (Overseas), British Subjects and British Protected Persons.

78. In the letter from the Chair to the Home Secretary dated 18 April 2018, we asked the Home Secretary what she intended to do to remedy this discrimination (discrimination as between women and men, and also discrimination based on marital status) on the face of the BNA in respect of British Overseas Territories Citizenship. The Immigration Minister replied:

“The section 4 provisions, introduced to eliminate historical discrimination, and which are the subject of the Remedial Order, apply to persons entitled to be registered as British citizens only. Section 41A(2) sets out that the good character requirement applies to applications for registrations made by persons aged 10 and over for British Overseas Territories Citizenship (BOTC). In respect of these registrations, the sections it refers to are 15(3) or (4), 17(1) or (5), 22(1) or (2), or 24. Any amendments to persons entitled to be registered as BOTCs will require consultation with the Overseas Territories and this is now on our agenda. I am grateful to the Committee for bringing this to my attention. I will ask my officials to consider this for the next draft of the Remedial Order in consultation with representatives in the BOTCs.”

**79. 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.*

## **Other potentially discriminatory provisions in British Nationality Law**

80. We note that a number of provisions of British nationality legislation would appear, at face value, to suggest other areas of British nationality law could potentially contain unjustifiable discriminatory provisions. We asked the Home Office for an assessment and explanation in general as to whether such discrimination does in fact persist in British nationality law, as well as a reasoned explanation for the Home Office’s view in respect of the specific instances raised in that letter. In her letter of 4 May 2018 the Immigration Minister undertook to give us a substantial response on these issues by the end of May.

81. We particularly note the following issues of concern that, at face value, would seem to indicate that discriminatory provisions remain on the face of British nationality law:

- a) Certain references in the BNA seem to assume that a person’s parents must be (or must at some point have been) in a marriage or civil partnership. This would seem to introduce discrimination based on the marital status of that person’s parents and create potential difficulties for single parent households. Section 3(6) and section 17(6) of the BNA are two such examples. Similarly, other provisions requiring the consent of both parents (unless one has died) do not seem to accommodate adequately the situation of single parent families (e.g. section 4G(3) of the BNA). The same would seem to be the case for paragraph 6 of Schedule 2 to the British Nationality (General) Regulations 2003.
- b) Certain provisions provide that the relevant “qualifying connection” with the UK (or a British overseas territory) needs to be with the person’s father or his father’s father. Similarly, other provisions refer to descent in “the male line”. Such provisions therefore introduce discrimination as between those who have a British father (or paternal grandfather) and those who have a British mother (or grandmother or maternal grandfather). Such provisions include section 10(4), section 11(3), section 22(4), section 23(3)(b) and 23(5), and Schedule 8, paragraph 3(1)(b) of the BNA.
- c) Similarly, there is a lack of clarity as to the reading of section 4C of the BNA, when read with section 5(1) of the 1948 British Nationality Act. Can section 5(1) of the 1948 Act be read to substitute “mother” for “father” in that section, and therefore to remove discrimination between those whose maternal grandmothers were born in the UK and those whose maternal grandfathers were born in the UK? Or is there persisting discrimination in this respect?
- d) Some provisions only apply to people whose mothers were British (e.g. section 11(2) BNA).
- e) Certain provisions only apply to a “wife” of a British citizen and would therefore seem to discriminate against husbands of British nationals. For example, section

14(1)(b)(iii) and (iv) and 14(1)(e), section 23(1)(c), section 25(1)(e) and 25(1)(f) and section 30(b) of the BNA. We also sought confirmation from the Home Secretary that the BNA does not contain discrimination as between those who are married and those who are in civil partnerships.

- f) Certain provisions only apply to people whose fathers (and not mothers) were serving in the armed forces, Crown service or in an EU institution. For example, section 14(2) or section 25(2) of the BNA.

**82. *We therefore recommend that the Home Secretary undertake a consultation with a view to bringing forward legislation to remedy and remove all existing (or apparent) discrimination in British nationality law, including the points raised in paragraph 81 of this Report.***

### **Complexity and Accessibility of British Nationality Law**

83. In undertaking this work, the sheer complexity of the legislative framework of British nationality law is apparent. In part this is because the relevant Acts have been amended so many times that it is not easy to understand what law is current and what is not. In part this is because the multiple Acts cross refer to each other, making it difficult to read (without access to specialist resources). In part it is because certain provisions have to be read in light of particular case law (often giving interpretations that might not be apparent to those seeking to apply for nationality).

84. This means that it would be near impossible for an individual, without legal advice, to navigate this area of law and to understand their rights. Given the reduction in legal aid over recent years, there is a real risk that individuals will simply be denied meaningful access to their rights and access to justice because the law is inaccessible to non-specialists.

**85. *We recommend that the Home Secretary address the inaccessibility of British nationality law and the difficulty of navigating it in its current state. The Home Secretary should introduce a consolidating piece of legislation to help individuals seeking to use and apply these statutes. The Law Commission should consider whether it could undertake a project to clarify and consolidate British nationality law and to remove the remaining discrimination in this field.***

## Conclusions and recommendations

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1. *The Committee welcomes the Government’s decision to use the remedial order process in this case and to take active steps to remedy this discrimination. The Government should address the points we make about ensuring fees are not paid twice by people previously discriminated against under section 4F applications. We recommend that the Government then lay the draft order before both Houses. In the report we also raise a number of significant concerns about other related areas of discrimination in British nationality law, and invite the Home Secretary to make sure such discrimination is rapidly ended.*

### The issue that the proposed draft Order addresses

2. The Committee welcomes the Government’s action in proposing the draft Order to remedy the incompatibility in the British Nationality Act 1981 with the Convention rights to private and family life and to non-discrimination, and to make the necessary consequential amendments that follow from those changes. (Paragraph 5)

### Procedural Requirements

3. Overall, we are satisfied that there are compelling reasons to proceed by Remedial Order and that this is a valid use of the remedial power. (Paragraph 38)
4. More specifically, Committee considers that the non-urgent procedure strikes a reasonable balance between the competing considerations of the need to avoid undue delay in remedying the incompatibility with human rights standards and the need to afford a proper opportunity for parliamentary scrutiny of changes to primary legislation. Further, we welcome some of the explanations that the Home Office has given as to the intended treatment of those affected pending the entry into force of those amendments and we encourage the Home Office to minimise the impact of this discrimination on those people in any of its decision-making. (Paragraph 39)
5. As we describe later in this report, other discriminatory provisions appear to remain on the face of British nationality legislation. It would be beneficial for the Home Secretary to introduce a Bill of wider scope to remove all remaining discrimination in British nationality law—and which could consolidate and bring clarity to the existing law. We recommend that the Government bring forward the necessary legislation to remedy this remaining discrimination at the first available opportunity. (Paragraph 40)

### Requirement for good character for children under section 4F

6. The wider issue of the application of the good character requirement to children in the context of seeking British nationality is something which requires further consideration. (Paragraph 48)

7. *Had children been allowed to apply for citizenship when they were under the age of 10, they would not have needed to prove good character. We do not consider it justified or proportionate to require children who have been discriminated against, additionally to have to prove good character when they are now finally entitled to apply following the removal of that discrimination. In our view, there is a risk that this constitutes unjustified discrimination contrary to Article 14 of the ECHR, as read with Article 8 of the ECHR. We would therefore recommend that the Home Secretary consider taking the necessary steps to eliminate such discrimination. (Paragraph 53)*
8. *We consider that those who should have been entitled to apply for British citizenship under limbs (1)(b)(i), (ii) or (iii) of section 4F BNA as children should now be able to apply as adults in order to remove this discrimination, and the ongoing impacts of this discrimination, properly. Otherwise, this provision could risk being discriminatory contrary to Article 14 of the ECHR, as read with Article 8 of the ECHR, which would risk further successful litigation against the Government and thus a further declaration of incompatibility in respect of the BNA. We therefore recommend that the Home Secretary address this discrimination. (Paragraph 57)*
9. *In order to remove the discrimination highlighted above, we recommend that the Home Secretary should remove the requirement for stateless children to prove good character in applications made under section 3(2) BNA, and in related applications made under section 4F; children should not be treated less fairly than other stateless persons. (Paragraph 60)*

### **Fees Applicable for a re-application following removal of the discrimination**

10. *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 recommend 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 (e.g. by making a consequential amendment to the Immigration and Nationality (Fees) Regulations 2018). (Paragraph 64)*

### **Other Matters Arising**

11. *We recommend that the Home Secretary take steps to address and remove examples of apparent discrimination that continue on the face of British nationality legislation, such as that identified in the case of *The Advocate General for Scotland v Romein* [2018] UKSC 6. (Paragraph 69)*
12. *We are pleased with the confirmation from the Immigration Minister that there is no intention to discriminate against those whose parents may have benefited from these amendments but have since died. We recommend that the Home Secretary consider how best to accommodate British nationality applications from individuals who would have been entitled to British citizenship had their (now deceased) parent been able to apply under section 4C, 4F, 4G, 4H or 4I BNA, as amended by the proposed Remedial Order. We look forward to receiving the recommendations and solutions as to how best to address this issue from the Immigration Minister by the end of May, as indicated in her letter. (Paragraph 72)*

13. *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. (Paragraph 79)*
14. *We therefore recommend that the Home Secretary undertake a consultation with a view to bringing forward legislation to remedy and remove all existing (or apparent) discrimination in British nationality law, including the points raised in paragraph 81 of this Report. (Paragraph 82)*
15. *We recommend that the Home Secretary address the inaccessibility of British nationality law and the difficulty of navigating it in its current state. The Home Secretary should introduce a consolidating piece of legislation to help individuals seeking to use and apply these statutes. The Law Commission should consider whether it could undertake a project to clarify and consolidate British nationality law and to remove the remaining discrimination in this field. (Paragraph 85)*

## Annex: Correspondence

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### Letter from the Chair of the Committee to the Home Secretary regarding the British Nationality Act 1981 (Remedial) Order 2018, dated 18 April 2018

Dear Amber

The British Nationality Act 1981 (Remedial) Order 2018

The Joint Committee on Human Rights is scrutinising the proposal for a draft British Nationality Act (Remedial) Order 2018, which would remove the good character requirement from registration pursuant to sections 4C and 4G to 4I of the British Nationality Act 1981 (“the Act”). This proposal is the Government’s response to the Declaration of Incompatibility made by the Supreme Court in the case of *Johnson v Secretary of State for the Home Department* [2016] UKSC 56. The Supreme Court found that the Act was incompatible with Article 14 read with Article 8 of the European Convention on Human Rights (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. The Supreme Court made a Declaration of Incompatibility accordingly. Furthermore, a consent Order and accompanying declaration of incompatibility were made in similar terms in the case of *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department*, in relation to the application of the good character requirement to registration pursuant to section 4C of the Act to individuals that would, had their mother been able to pass on nationality in the same manner as a British father, have automatically acquired citizenship at birth.

I am writing to draw your attention to the Committee’s call for evidence in relation to this proposed remedial Order. We would welcome any evidence you may wish to submit in relation to this Order. In addition to general issues, we would be grateful if you could provide us, by 2nd May, with some further information on particular aspects relating to:

- The use of a remedial Order;
- The use of the non-urgent procedure;
- Payment of fees;
- Applications under section 4F;
- Treatment of applications by stateless persons;
- Requirement to be registered at a consulate;
- Applications by persons whose relevant parent has since died;
- British Overseas Territories Citizenship; and
- Other potentially discriminatory provisions in British Nationality Law.

### **The use of a Remedial Order**

We are grateful for the information provided by the Home Office as part of the “required information” (paragraph 3 of Schedule 2 to the Human Rights Act 1998). In particular, we welcome the views expressed at how “the Government takes discrimination seriously and is of the view that instances of [discrimination] should be remedied swiftly”. We note that the Home Office view is that “the legislative programme as currently foreseen offers no prospect of a suitable primary legislative vehicle in which these changes could be included”.

**We would be grateful for further explanation and/or clarification as to why the changes envisaged would not fall within the scope of the legislation announced in the Queen’s Speech to establish “new national policies on immigration”.**

### **The use of the non-urgent procedure.**

Whilst much of the information provided by the Home Office is helpful in relation to the use of the non-urgent procedure, the Committee notes that it has previously called on Departments to include within this information some consideration of, and information as to, the impact on the individuals concerned. For example, paragraph 50 of the first Report on the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (Remedial) Order 2010 provides that “full information on the ongoing impact of a violation subject to a proposal for a remedial Order [ ... ] should always be included with the required information prepared”.

**It would be useful to have an explanation from the Home Office as to the impact of the current violation on the individuals concerned.**

### **Payment of Fees**

We note the reference in the required information explaining that no application fee is charged for these applications “with the exception of applications made under 4F”. We further note the undertaking that “applicants who have previously been refused on character grounds will have the opportunity to reapply when the good character requirement is removed”. However, it is not clear to us if applicants who have previously been refused on character grounds under 4F would need to pay an application fee for such a reapplication (having previously paid an application fee for the original 4F application).

**We would be grateful for a clarification as to whether applicants who have previously been refused on character grounds under 4F would need to pay an application fee for a reapplication following this change to the requirements.**

### **Applications under section 4F**

We understand the explanation given by the Home Office as to the distinction now being drawn between requiring good character under section 4F where the underlying registration provision is section 1(3), 3(2) or 3(5) of the British Nationality Act 1981 (and therefore where the underlying provisions require good character to be shown) and not requiring good character under section 4F where the underlying registration provision is paragraph 4 or 5 of Schedule 2 to the British Nationality Act 1981 (and therefore where the

underlying provisions do not require good character to be shown). However, it would be helpful to have a rationale or policy justification for requiring good character for children making these applications.

**What is the policy justification for requiring good character for children applying under section 1(3), 3(2) or 3(5) of the British Nationality Act 1981?**

In particular, we note that but for the discrimination that section 4F seeks to remove, children would have been able to apply for British Citizenship under section 1(3), 3(2) or 3(5) of the Act when they were under 10 (and therefore would not have needed to prove good character). Whereas if they can only apply when they are over 10, then they have to prove good character. This creates obvious difficulties especially for those that were over 10 when section 4F was introduced and would seem to perpetuate the original discrimination. This could mean that a child who would have been able to apply and be entitled to British Citizenship but for the discrimination, is then prevented from subsequently becoming a British Citizen because they are then over the age of 10 (and required to prove good character) when the discriminatory provisions were removed by section 4F. Similarly, there could be adults who would have been able to apply for British Citizenship under section 1(3), 3(2) or 3(5) of the British Nationality Act 1981 had section 4F been introduced when they were still minors. However, as those provisions only allow for minors to apply, then they are no longer entitled to apply for British Citizenship because they were already adults by the time that section 4F was introduced and the original discrimination addressed.

**Does the Home Secretary agree that such individuals continue to be discriminated against by the current British Nationality Law provisions? If so, what does the Home Secretary intend to do about this?**

**Treatment of applications by stateless persons**

The rationale for the distinction in relation to the different categories under section 4F is not immediately clear to us—in particular insofar as section 3(2) relates to stateless children (who do need to show good character) and paragraphs 4 and 5 of Schedule 2 also relate to stateless persons (but who do not need to show good character).

**What is the policy justification for requiring stateless children to prove good character in an application made pursuant to section 3(2) of the British Nationality Act 1981, where other nationality applications made by stateless persons under paragraph 4 or 5 of Schedule 2 to the British Nationality Act 1981 do not require a stateless person to prove good character?**

**Requirement to be registered at a consulate**

We are aware of the recent Supreme Court judgment in *The Advocate General for Scotland v Romein* [2018] UKSC 6. This case concerned a rather peculiar outcome of section 4C of the British Nationality Act 1981, in that Ms Romein was required to fulfil all of the statutory conditions as if the discrimination had not been in place at the time of her birth—including that she should have been registered at a consulate within one year of her birth, even though any consulate would have refused to register her at such a time as only her mother (and not her father) was British. The Supreme Court held that the only way in which effect can be given to section 4C(3) is “to treat the registration condition

in section 5(1)(b) as being inapplicable in cases where citizenship is claimed by descent from a mother”. This means we now have a situation where it is not clear on the face of the Statute (without being aware of this judgment) whether an individual can satisfy these conditions. It is also unclear whether there are similar situations where a similar reading might be required in order to achieve a just and non-discriminatory result.

Does the Home Secretary agree that it would be preferable to clarify on the face of the Statute that certain requirements in the underlying entitlement to British Citizenship do not need to be met if it is impossible (or very difficult) for those subject to the original discrimination to meet those requirements due to the original discriminatory provisions? Is this Home Secretary aware of any other provisions (other than section 5(1)(b) of the British Nationality Act 1948, which was the subject of the judgment in *The Advocate General for Scotland v Romein* [2018] UKSC 6) where there are conditions that are impossible (or very difficult) for those subject to the original discrimination to meet, due to the original discriminatory provisions? If so, how does the Home Secretary intend to deal with such situations?

### **Applications by persons whose relevant parent has since died**

There will be some persons whose parent could have benefited from the provisions in the remedial order (and who therefore themselves should be entitled to British Citizenship) but for the discriminatory provisions. However, where that parent has since died, that parent will not be able to apply under the provisions of the British Nationality Act 1981, as amended—probably meaning that the child of that parent themselves will be deprived of the ability to apply for British Citizenship, due to the continuing effects of the discriminatory provisions.

**Does the Home Secretary agree that this (presumably unintended) discriminatory consequence is of concern? If so, how does the Home Secretary intend to accommodate applications for British Citizenship from such individuals?**

### **British Overseas Territories Citizenship**

The changes introduced by sections 4C and 4F–4I of the British Nationality Act 1981 (and being amended by this Remedial Order) only relate to British Citizenship and not to any of the other types of nationality covered by the British Nationality Act—in particular British Overseas Territories Citizenship. The European Convention on Human Rights (ECHR) extends to the British Overseas Territories (Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, St Helena, Ascension and Tristan da Cunha, South Georgia and South Sandwich Islands, Sovereign Base Areas of Akrotiri and Dhelekia, Turks and Caicos Islands). Therefore, the discrimination under Article 8 ECHR as read with Article 14 ECHR is relevant unlawful discrimination, also when applied to citizenship provisions affecting these overseas territories. It is for the Westminster Parliament to legislate for BOTC nationality rules—however the discriminatory provisions in the British Nationality Act still exist in relation to BOTC citizenship.

**What does the Home Secretary intend to do to remedy this discrimination (discrimination as between women and men, and also discrimination based on marital status) on the face of the British Nationality Act 1981 in respect of British Overseas Territories Citizenship?**

## **Other potentially discriminatory provisions in British Nationality Law**

We note that a number of provisions of British Nationality Law would appear, at face value, to suggest other areas of Nationality Law could contain potentially unlawful discrimination and it would be useful to have an assessment and explanation from the Home Office as to whether such discrimination does in fact persist (complete with a reasoned explanation for each instance). For example–

Certain references in the Act seem to assume that a person’s parents must be (or must at some point have been) in a marriage or civil partnership, therefore potentially introducing discrimination based on the marital status of that person’s parents and creating potential difficulties for single parent households. See section 3(6) and section 17(6) of the Act. Similarly, other provisions requiring the consent of both parents (unless one has died) do not seem to adequately accommodate the situation of single parent families–section 4G(3) of the Act is on such example. The same would seem to be the case for paragraph 6 of Schedule 2 to the British Nationality (General) Regulations 2003.

Certain provisions provide that the relevant “qualifying connection” with the UK (or a British overseas territory) needs to be with the person’s father or his father’s father. Similarly, other provisions refer to descent in “the male line”. Such provisions therefore introduce discrimination as between those who have a British father (or paternal grandfather) and those who have a British mother (or grandmother or maternal grandfather). Such provisions include section 10(4), section 11(3), section 22(4), section 23(3)(b) and 23(5), and Schedule 8, paragraph 3(1)(b) of the Act.

Similarly, there is a lack of clarity as to the reading of section 4C of the Act, when read with section 5(1) of the 1948 British Nationality Act. Can section 5(1) of the 1948 Act be read to substitute “mother” for “father” in that section, and therefore to remove discrimination between those whose maternal grandmothers were born in the UK and those whose maternal grandfathers were born in the UK? Or is there persisting discrimination in this respect?

Some provisions only apply to people whose mothers were British (e.g. section 11(2) of the Act).

Certain provisions only apply to a “wife” of a British citizen and would therefore seem to discriminate against husbands of British nationals. For example, section 14(1)(b)(iii) and (iv) and 14(1)(e), section 23(1)(c), section 25(1)(e) and 25(1)(f) and section 30(b) of the Act. It would also be helpful to have confirmation from the Home Secretary that the Act does not contain discrimination as between those who are married and those who are in civil partnerships.

Certain provisions only apply to people whose fathers (and not mothers) were serving in the armed forces, Crown service or in an EU institution. For example, section 14(2) or section 25(2) of the Act.

**We would be grateful for an assessment and explanation from the Home Office as to whether any such discrimination does in fact persist in British Nationality Law (including addressing each of the above examples), complete with a reasoned explanation for each instance.**

## Response from the Minister of State for Immigration to the Chair of the Committee, dated 4 May 2018

Dear Harriet,

### **The British Nationality Act 1981 (Remedial) Order 2018**

1) Thank you for your letter of 18 April to the Home Secretary about the British Nationality Act 1981 (Remedial Order) 2018. I have noted the Committee's call for evidence and there are no further submissions I wish to make with respect to the Order. I have set out responses to your questions below.

#### *The use of a Remedial Order*

**We would be grateful for further explanation and/or clarification as to why the changes envisaged would not fall within the scope of the legislation announced in the Queen's Speech to establish "new national policies on immigration."**

2) The Government takes its obligations in relation to the European Convention of Human Rights seriously and is committed to remedying the incompatibility identified at the earliest opportunity. Given the courts' decisions last year in the case of *Johnson* and the application of *David Fenton Bangs*, we did not want to risk any further delay.

#### *The use of the non-urgent procedure*

**It would be useful to have an explanation from the Home Office as to the impact of the current violation on the individuals concerned.**

3) The impact of the incompatibility means that certain individuals who the courts have identified have a right to British citizenship are not able to make an application to do so until the legislation is amended. The continuing incompatibility will mean that they are unable to obtain a British passport and the benefits which are gained from British citizenship. Where we have been made aware of individuals affected by the incompatibility who do not have an immigration status we have taken action to put them in a comparable position by granting indefinite leave to remain. This will ensure that they can work in the UK and are able to access public funds. For individuals who are overseas the impact may be on their ability to come to the UK. Where we are made aware of individuals affected, we will consider their individual circumstances on a case-by-case basis.

#### *Payment of Fees*

**We would be grateful for a clarification as to whether applicants who have previously been refused on character grounds under 4F would need to pay an application fee for a reapplication following this change to the requirements.**

4) Individuals will be charged a fee for any application made under section 4F of the British Nationality Act 1981. Section 4F remains a registration route for British citizenship and in accordance with Schedule 8 of the Immigration and Nationality (Fees) Regulations 2018 a fee is required. This applies where an applicant submits a second application under the same registration route.

*Applications under section 4F***What is the policy justification for requiring good character for children applying under section 1(3), 3(2) or 3(5) of the British Nationality Act 1981?**

5) The good character requirement applies to any child aged 10 and over, in line with the age of criminal responsibility.

**[Minors and adults caught by the good character requirement under 4F] Does the Home Secretary agree that such individuals continue to be discriminated against by the current British Nationality Law provisions? If so, what does the Home Secretary intend to do about this?**

6) Following the Supreme Court's declaration of incompatibility and during the process of drafting the Remedial Order, we considered carefully the points raised by the Committee. However, we decided that we should maintain the good character requirement for persons aged 10 and over for the following reasons:

- a) the registration routes in section 4F are themselves subject to the good character requirement;
- b) there is little basis for a reliable finding about when a 4F applicant would have applied and whether this would have been on an earlier date when they would not have been impacted by the good character requirement;
- c) it would not be right now to put a 4F applicant aged 10 or over in a better position than a child whose parents were married;
- d) if we placed the onus on a 4F applicant aged 10 or over to prove the date on which they would have hypothetically made an application, this would very likely be based on the applicant's assertion rather than evidence and there was therefore scope for dishonesty and fraud. We considered that the practical difficulties of making a reliable finding and in establishing the necessary hypothetical facts in relation to these applications meant that this category could not reasonably be remedied.

7) In respect of the position in relation to adults, an individual can only apply under section 4F if they are a minor because all the relevant referenced routes, namely sections 1(3), 3(2) and 3(5), are all routes for minors to apply for citizenship. Section 4F does not apply to adults. Furthermore, the position of adults in relation to section 4F does not relate to the good character requirement which is the subject of the Remedial Order.

*Treatment of applications by stateless persons***What is the policy justification for requiring stateless children to prove good character in an application made pursuant to section 3(2) of the British Nationality Act 1981, where other nationality applications made by the stateless persons under paragraph 4 or 5 of Schedule 2 to the British Nationality Act 1981 do not require a stateless person to be of good character?**

8) Prior to 2009, section 3(2) applications had to be made within 12 months of the child's birth. Section 3(2) was extended by the Borders, Citizenship and Immigration Act 2009 so

a registration could take place at any time up to the child's 18th birthday. In removing the 12-month cut-off date for applications under 3(2), and thus permitting applications from those aged 10 and over, it was right that we included a requirement for the person to be of good character in line with other provisions for registration and naturalisation.

9) Section 3(2) is not principally a provision which affects stateless children. Its main beneficiaries are those whose parents are a British citizen by descent, and the parent lived in the UK for a period of three years at any time before the child's birth. Section 3(2) is not specifically aimed at those who are stateless, but it does remove some of the requirements where the child is stateless namely the requirements for the parent in question to be a British citizen. The fact that stateless minors can apply under this section, does not mean that it is a 'statelessness provision'; in theory, stateless children could apply under any of the provisions—1(3), 1(4), 3(1) and 3(5), all of which have a good character requirement.

*Requirement to be registered at a consulate*

Does the Home Secretary agree that it would be preferable to clarify on the face of the Statute that certain requirements in the underlying entitlement to British Citizenship do not need to be met if it is impossible (or very difficult) for those subject to the original discrimination to meet those requirements due to the original discriminatory provision? Is this Home Secretary aware of any other provisions (other than section 5(1)(b) of the British Nationality Act 1948, which was the subject of the judgment in *The Advocate General for Scotland v Romein* [2018] UKSC 6) where there are conditions that are impossible (or very difficult) for those subject to the original discrimination to meet, due to the original discriminatory provisions? If so, how does the Home Secretary intend to deal with such situations?

10) In response to the *Romein* judgment, application forms and guidance have been amended. These amendments make clear that those applying to register under section 4C(3) on the basis of citizenship by descent from their mother, are not required to have registered, or attempted to register, the birth. The guidance which accompanies the application form 'UK(M)' and the guidance for caseworkers, both available on GOV.UK, have made the requirements clear and we are not aware of anyone experiencing difficulties.

11) Nor am I aware of any other conditions contained within nationality provisions which would be unduly difficult, or impossible, for those subject to the original discrimination to meet. However, if the Committee has any concerns I would be happy to consider these.

*Applications by persons whose relevant parent has since died*

**Does the Home Secretary agree that this (presumably unintended) discriminatory consequence is of concern? If so, how does the Home Secretary intend to accommodate applications for British Citizenship from such individuals?**

12) There was no intention to discriminate against those whose parents may have benefited from the Remedial Order but have since died. However, although we cannot assume that those parents would have registered as British, and that in turn they would have gone on to register their child. I have asked my officials to consider this issue further with the aim of providing a recommendation to the Committee by the end of May.

*British Overseas Territories Citizenship*

**What does the Home Secretary intend to do to remedy this discrimination (discrimination as between women and men, and also discrimination based on marital status) on the face of the British Nationality Act 1981 in respect of British Overseas Territories Citizenship?**

13) The section 4 provisions, introduced to eliminate historical discrimination, and which are the subject of the Remedial Order, apply to persons entitled to be registered as British citizens only. Section 41A(2) sets out that the good character requirement applies to applications for registrations made by persons aged 10 and over for British Overseas Territories Citizenship (BOTC). In respect of these registrations, the sections it refers to are 15(3) or (4), 17(1) or (5), 22(1) or (2), or 24. Any amendments to persons entitled to be registered as BOTCs will require consultation with the Overseas Territories and this is now on our agenda. I am grateful to the Committee for bringing this to my attention. I will ask my officials to consider this for the next draft of the Remedial Order in consultation with representatives in the BOTCs.

*Other potentially discriminatory provisions in British Nationality Law*

**We would be grateful for an assessment and explanation from the Home Office as to whether any such discrimination does in fact persist in British Nationality Law (including addressing each of the above examples), complete with a reasoned explanation for each instance.**

14) Finally, thank you for the further points you have noted in relation to other provisions in the British Nationality Act 1981. I have asked my officials to consider these issues and I will write again to the Committee with a substantial response by the end of May.

Rt Hon Caroline Nokes MP, Minister of State for Immigration

## Declaration of Lords' Interests<sup>1</sup>

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### **Baroness Hamwee**

- Past working relationship and continuing friendship with an individual mentioned in evidence to the committee's consideration of the draft Order
- Liberal Democrat Spokesperson on Immigration

### **Baroness Lawrence of Clarendon**

- No relevant interests to declare

### **Baroness O'Cathain**

- No relevant interests to declare

### **Baroness Prosser**

- No relevant interests to declare

### **Lord Trimble**

- No interests declared

### **Lord Woolf**

- Previously a judge and decided on nationality issues

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<sup>1</sup> 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

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**Wednesday 23 May 2018**

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP	Baroness Hamwee
Ms Karen Buck MP	Baroness Lawrence of Clarendon
Alex Burghart MP	Baroness O’Cathain
Jeremy Lefroy MP	Lord Woolf

Draft Report (*Proposal for a Draft British Nationality Act 1981 (Remedial) Order 2018*), 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 85 read and agreed to.

Annex agreed to.

Summary agreed to.

*Resolved*, That the Report be the Fifth 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.

[Adjourned till Wednesday 6 June 2018 at 3.00pm]

## Published written evidence

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

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

- 1 Alison Harvey ([BNA0001](#))
- 2 CAMPAIGNS ([BNA0007](#))
- 3 Law Society of Scotland ([BNA0002](#))
- 4 Mr Trent Miller ([BNA0004](#))
- 5 Project for the Registration of Children as British Citizens (PRCBC) and Amnesty International UK ([BNA0003](#))
- 6 Tabitha Sprague ([BNA0008](#))

## List of Reports from the Committee during the current Parliament

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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 Paper 70
Second Report	Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 645 HL Paper 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
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