



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

Paper to lie before both Houses of Parliament for 60 days during which time representations may be made, in accordance with Schedule 2 of the Human Rights Act 1998

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.

Presented to Parliament pursuant to paragraph 3(1) of Schedule 2 to the Human Rights Act 1998

March 2018



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Required Information (Paragraph 3 of Schedule 2 to the Human Rights Act 1998)

1. EXPLANATION OF THE INCOMPATIBILITY WHICH THE PROPOSED DRAFT BRITISH NATIONALITY ACT 1981 (REMEDIAL) ORDER 2018 SEEKS TO REMOVE, INCLUDING PARTICULARS OF THE RELEVANT DECLARATION, FINDING OR ORDER.

Section 41A of the British Nationality Act 1981 (“the Act”) provides that an application for registration as a British citizen made under certain provisions in that Act, by a person aged 10 years or older, must not be granted unless the Secretary of State is satisfied that the applicant is of good character.

The British Nationality Act 1981 (Remedial) Order 2018 (“the Remedial Order”) removes the good character requirement from registration pursuant to sections 4C and 4G to 4I of the Act, as well as from registration pursuant to section 4F of the Act in particular cases.

Sections 4F to I

In the case of *Johnson v Secretary of State for the Home Department* [2016] UKSC 56, the Supreme Court found that it was incompatible with Article 14, read with Article 8, of the European Convention on Human Rights (ECHR) to impose a good character requirement on individuals who would, but for their parents’ marital status, have automatically acquired citizenship at birth.

The Supreme Court went on to issue a declaration of incompatibility against paragraph 70 of Schedule 9 to the Immigration Act 2014, which inserted into section 41A(1) of the Act a reference to sections 4F, 4G, 4H and 4I. In doing so, the Supreme Court observed that these sections ‘relate to various categories of people who would automatically have become UK citizens had their parents been married to one another at their birth.’

It is noted that, contrary to the terms of the Supreme Court’s declaration of incompatibility, section 4F of the Act does not relate to persons who would have automatically become British citizens had their parents been married to one another at birth. Rather, it provides a registration route for persons born before 1 July 2006 who would currently be entitled to be registered as a British citizen under section 1(3) or 3(2) or (5) of, or paragraph 4 or 5 of Schedule 2 to, the Act, but for their parents’ marital status. This has implications for the approach adopted in relation to section 4F applications (see below).

Section 4C

Following ‘Johnson’, in the case of *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department*, the Secretary of State for the Home Department agreed to the making of a declaration of incompatibility, by way of consent order, in relation to the application of the

good character requirement to registration pursuant to section 4C of the Act. Section 4C 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. The Administrative Court approved the consent order on 4 July 2017.

Mirroring the approach taken in *Johnson*, where the Supreme Court declared as incompatible the provision of primary legislation which introduced the good character requirement in question, the declaration of incompatibility was framed in the following terms:

“Section 47(1) of the Borders, Citizenship and Immigration Act 2009 is incompatible with Article 14, read with Article 8 of the European Convention on Human Rights, in so far as it introduces into the British Nationality Act 1981 a new section 41A applying a good character requirement to applications for registration under section 4C of the British Nationality Act 1981”.

2. REASONS FOR PROCEEDING UNDER SECTION 10 AND FOR MAKING AN ORDER IN THOSE TERMS

i) The use of a Remedial Order

The Government considers that there are compelling reasons for proceeding under section 10 of the Human Rights Act 1998 to make a Remedial Order rather than by way of primary legislation.

The issues addressed by the UK domestic courts concern discrimination against individuals. The Government takes discrimination seriously and is of the view that instances of this should be remedied swiftly. It would therefore be undesirable for undue delay to occur before the incompatibilities are remedied particularly given 16 cases have since been placed on hold by UK Visas and Immigration (UKVI). We will continue to hold applications from those affected by these changes until the Remedial Order comes into force.

It is generally desirable for amendments to primary legislation to be made by way of a Bill. We have considered whether to use other relevant primary legislation to remedy the incompatibilities. However, given the legislative programme as currently foreseen offers no prospect of a suitable primary legislative vehicle in which these changes could be included, waiting for an appropriate slot is likely to cause significant delay.

The decision to use a Remedial Order strikes an appropriate balance between the need to remedy the incompatibilities quickly without further delay and the need to allow parliamentary scrutiny of the measures proposed.

ii) The terms of the Order

The proposed draft Remedial Order 2018 removes the good character requirement from registration as a British Citizen pursuant to:

- section 4C (applicants born to British mothers prior to 1983, who would have automatically acquired British Citizenship at birth, had their mother been able to transmit her citizenship);
- section 4F (applicants born before July 2006 to an unmarried British father, who would have an entitlement to be registered under section 1(3) or 3(2) or 3(5) of, or paragraph 4 or 5 of Schedule 2 to, the Act but for their parents' marital status), where the provision under which the applicant would otherwise be entitled to be registered is paragraph 4 or 5 of Schedule 2 (concerning statelessness); and
- sections 4G to 4I (applicants born before July 2006 to an unmarried British father, who would have automatically acquired British Citizenship at birth, had their parents been married);

The Remedial Order, once in force, will apply to all applications under these sections received from the date the Order comes into force, and to all applications under these sections pending at that date.

The approach taken in respect of section 4F reflects the fact that registration for the children of married parents pursuant to section 1(3) or 3(2) or (5) of the Act is subject to the good character requirement. Maintaining the good character requirement in these areas (section 1(3), 3(2) and 3(5)) for children of unmarried parents, will ensure that persons applying to be so registered are not placed in differing positions due to their parents' marital status.

However, consistent with the fact that there is no good character requirement in respect of registration pursuant to paragraph 4 or 5 of Schedule 2 to the Act, which concern statelessness, the Remedial Order removes the good character requirement from registration pursuant to section 4F, where the provision under which the person would otherwise be entitled to be registered is paragraph 4 or 5 of Schedule 2.

This will ensure that the law will no longer be incompatible with Article 14, read with Article 8, of the European Convention on Human Rights.

iii) Use of the non-urgent procedure

Since the Supreme Court's judgment in *Johnson*, 16 cases have been placed on hold. While it is difficult to estimate the potential number of applicants impacted, the Government recognises that the actual number may be greater than 16. However, the significance of rights which are or might be affected by the incompatibility, and the impact on individuals, have been carefully considered against the need to legislate in an open and transparent manner that allows appropriate opportunity for debate and discussion. While, for the reasons set out above, there are compelling reasons to proceed by way of Remedial Order, the relatively small number of cases placed on hold, pending the Remedial Order taking effect, mitigates against the use of the urgent Remedial Order process.

The effect of the incompatibility is also alleviated (pending amendment to primary legislation) as no application fee is charged (with the exception of applications made under 4F). Applicants who have previously been refused on character grounds will have the opportunity to reapply when the good character requirement is removed.

ANNEX A: The Remedial Order

Draft Order laid before Parliament under paragraph 2(a) of Schedule 2 to the Human Rights Act 1998 (c. 42) for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2018 No. 0000

NATIONALITY

The British Nationality Act 1981 (Remedial) Order 2018

Made - - - - - ***

Coming into force - - - - - ***

The good character test in section 41A of the British Nationality Act 1981(a) has been declared(b) under section 4 of the Human Rights Act 1998(c) to be incompatible with a Convention right(d), in so far as it applies to applications for registration as a British citizen under sections 4C(e) and 4F to 4I(f) of the British Nationality Act 1981.

The Secretary of State considers that there are compelling reasons for proceeding by way of a remedial order(g) to make such amendments to the British Nationality Act 1981 as are necessary to remove that incompatibility.

In accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998, a draft of this instrument was laid before Parliament and was approved by resolution of each House of Parliament, a document containing a draft of this instrument having previously been laid before Parliament in accordance with paragraph 3(1) of that Schedule.

Accordingly, the Secretary of State makes the following Order, in exercise of the powers conferred by section 10(2) of, and paragraph 1(1)(a) and (d), (2) and (3) of Schedule 2 to, the Human Rights Act 1998.

-
- (a) 1981 c. 61. Section 41A was inserted by section 47(1) of the Borders, Citizenship and Immigration Act 2009 (c. 11) and amended by section 73(6) of, and paragraph 70(1) and (3) of Schedule 9 to, the Immigration Act 2014 (c. 22).
- (b) By the Supreme Court in the case of *Johnson v Secretary of State for the Home Department* [2016] UKSC 56, in relation to sections 4F to 4I of the British Nationality Act 1981; and by way of a consent order in the case of *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department* (claim number CO/1793/2017), in relation to section 4C of that Act.
- (c) 1998 c. 42.
- (d) See section 1(1) of the Human Rights Act 1998 for the definition of “the Convention rights” and section 21(1) of that Act for the definition of “the Convention”.
- (e) Section 4C was inserted by section 13 of the Nationality, Immigration and Asylum Act 2002 (c. 41) and amended by section 45 of the Borders, Citizenship and Immigration Act 2009.
- (f) Sections 4F to 4I were inserted by section 65 of the Immigration Act 2014.
- (g) See section 21(2) of the Human Rights Act 1998 for the definition of “remedial order”.

Citation, commencement and extent

1.—(1) This Order may be cited as the British Nationality Act 1981 (Remedial) Order 2018 and comes into force the day after the day on which it is made.

(2) The amendments made by this Order have the same extent as the provisions which it amends.

Amendments to the British Nationality Act 1981

2.—(1) Section 41A of the British Nationality Act 1981 (registration: requirement to be of good character) is amended as follows.

(2) In subsection (1), omit “4C,” and “4F, 4G, 4H, 4I.”

(3) After subsection (1), insert—

“(1A) An application for registration of an adult or young person as a British citizen under section 4F, so far as the relevant registration provision (as defined in section 4F(2)) is section 1(3), 3(2) or 3(5), must not be granted unless the Secretary of State is satisfied that the adult or young person is of good character.”

Amendment to the Immigration Act 2014

3. In paragraph 70 of Schedule 9 to the Immigration Act 2014(a) (transitional and consequential provision), omit sub-paragraph (3).

Amendments to the British Nationality (General) Regulations 2003

4.—(1) Schedule 2 to the British Nationality (General) Regulations 2003(b) (particular requirements as respects applications) is amended as follows.

(2) In paragraph 11 (application under section 4C of the Act)—

(a) at the end of sub-paragraph (b), insert “and”;

(b) at the end of sub-paragraph (c), omit “and”;

(c) omit sub-paragraph (d).

(3) In paragraph 11B (application under section 4F of the Act) after “aged 10 or over” insert “and the provision under which the applicant would be entitled to be registered as a British citizen (as mentioned in section 4F(1)(b) of the Act) is section 1(3), 3(2) or 3(5) of the Act”.

(4) In paragraph 11C (application under section 4G of the Act)—

(a) at the end of sub-paragraph (a), omit “and”;

(b) omit sub-paragraph (b).

(5) In paragraph 11D (application under section 4H of the Act)—

(a) at the end of sub-paragraph (a), insert “and”;

(b) at the end of sub-paragraph (b), omit “and”;

(c) omit sub-paragraph (c).

(6) In paragraph 11E (application under section 4I of the Act), in sub-paragraph (1)—

(a) at the end of paragraph (a)(iii), omit “and”;

(b) omit paragraph (b).

(a) 2014. 22.

(b) S.I. 2003/548. Schedule 2 has been amended by S.I. 2005/2114, S.I. 2005/2785, S.I. 2007/3137, S.I. 2009/3363, S.I. 2011/1043, S.I. 2015/681 and S.I. 2015/1806.

Name
Minister of State
Home Office

Date

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the British Nationality Act 1981 (c. 61) (“the 1981 Act”) to remove the incompatibilities, arising from section 41A(1) of that Act, with a Convention right.

Section 41A(1) of the 1981 Act provides that an application for registration as a British citizen under certain provisions of that Act, by a person aged 10 or older, must not be granted unless the Secretary of State is satisfied that he or she is of good character.

In the case of *Johnson v Secretary of State for the Home Department* [2016] UKSC 56, the Supreme Court held that that it was unlawfully discriminatory to impose a good character test upon persons who would, but for their parents’ marital status, have automatically acquired citizenship at their birth. It subsequently made a declaration of incompatibility in relation to paragraph 70 of Schedule 9 to the Immigration Act 2014 (c. 22), which amended section 41A(1) of the 1981 Act to apply a good character test to applications for registration under sections 4F to 4I of the 1981 Act. In doing so, the Supreme Court observed that sections 4F to 4I relate to various categories of people who would have automatically become UK citizens had their parents been married to one another at their birth. However, in contrast to sections 4G to 4I, section 4F does not concern persons who would have automatically acquired UK citizenship at their birth, but for their parents’ marital status. Rather, it provides a registration route for persons who would have a current entitlement to be registered as a British citizen under sections 1(3), 3(2) or 3(5) of, or paragraphs 4 or 5 of Schedule 2 to, the 1981 Act, had their parents been married to one another at their birth. Registration under sections 1(3), 3(2) and 3(5) is subject to the good character requirement.

Following the decision of the Supreme Court in *Johnson*, in the case of *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department* (claim number CO/1793/2017), the Administrative Court agreed a consent order by which a declaration of incompatibility was made in relation to section 47(1) of the Borders Citizenship and Immigration Act 2009 (c. 11), insofar as it introduced into the 1981 Act a new section 41A applying a good character test to applications for registration under section 4C of the 1981 Act. Section 4C of the 1981 Act provides a registration route for persons who would have automatically become UK citizens had their mother been able to transmit her UK citizenship.

In order to remove the incompatibility identified by the Supreme Court in *Johnson*, article 2 amends section 41A of the 1981 Act, with the effect that a good character test no longer applies to an application for registration as a British citizen made under section 4C or 4G to 4I of the 1981 Act. In relation to section 4F, the effect of article 2 is that a good character test applies only to section 4F applications where the provision under which the person would be entitled to be registered as a British citizen, but for their parents’ marital status, is section 1(3), 3(2) or (5).

The Order also makes consequential amendments to the Immigration Act 2014 and the British Nationality (General) Regulations 2003 (S.I. 2003/548).

An impact assessment has not been produced for this instrument as no impact on the private or voluntary sector is foreseen.

EXPLANATORY MEMORANDUM TO
THE BRITISH NATIONALITY ACT 1981 (REMEDIAL) ORDER 2018
2018 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Human Rights.

2. Purpose of the instrument

2.1 The judgment of the Supreme Court in *Johnson v Secretary of State for the Home Department* found that it was incompatible with the European Convention on Human Rights (ECHR) to require applicants to meet the ‘good character’ requirement for citizenship where they were born to a British father who was not married to their non-British mother. A consent order was subsequently made in the case of *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department* that declared that it was incompatible with the ECHR to apply the ‘good character’ test to those applying for registration under the provision for people born to British mothers.

2.2 The original registration routes for the children of a) unmarried British fathers and b) British mothers were created to correct the historic discrimination that these individuals did not automatically acquire citizenship. However, by adding a ‘good character’ requirement to the registration process this disadvantaged individuals in these routes as they would otherwise have acquired British citizenship automatically without any need to register and subsequently pass a ‘good character’ test. The Remedial Order seeks to remedy these incompatibilities with the ECHR by removing the ‘good character’ requirement from these routes.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Human Rights

3.1 The Remedial Order is laid pursuant to the power in section 10 of the Human Rights Act 1998.

Other matters of interest to the House of Commons

3.2 None.

4. Legislative Context

4.1 The Remedial Order is made under section 10 of the Human Rights Act 1998 in order to remedy certain incompatibilities in the British Nationality Act 1981 (‘the 1981 Act’) with the European Convention on Human Rights, as identified by the

Courts in the cases of *Johnson v Secretary of State for the Home Department* and *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department*.

- 4.2 The ‘good character’ requirement was included in the statutory requirements for naturalisation in the 1981 Act, having also been a requirement for naturalisation under previous legislation. ‘Good character’ was then added as a statutory requirement for registration applications from 4 December 2006 by section 58 of the Immigration, Asylum and Nationality Act 2006.
- 4.3 Section 41A of the 1981 Act, which introduced the ‘good character’ requirement for certain registration routes, came into effect on 13 January 2010. This specifies that applications for registration of an adult or young person as a British citizen must not be granted unless the Secretary of State is satisfied that the adult or young person is of ‘good character’. The only exceptions to this are registration under section 4B of the 1981 Act and under Schedule 2 of that Act, both of which relate to persons with no other citizenship or nationality.
- 4.4 The registration routes at sections 4C and 4F- 4I were introduced through the Nationality, Immigration and Asylum Act 2002 and the Immigration Act 2014 respectively to correct historic discriminations that wrongfully excluded individuals who should have automatically become British citizens (see policy background for further information).

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom. It additionally extends to the Channel Islands, the Isle of Man, and all of the British overseas territories (the legislatures of which have not been consulted since they have no competence in matters relating to nationality and citizenship).
- 5.2 The territorial application of this instrument is the United Kingdom.
- 5.3 It additionally applies to the Channel Islands, the Isle of Man, and all of the British overseas territories (again, the legislatures of which have not been consulted since they have no competence in matters relating to nationality and citizenship).

6. European Convention on Human Rights

- 6.1 The Minister has made the following statement regarding Human Rights:

“In my view the provisions of the British Nationality Act 1981 (Remedial) Order 2018 make citizenship law compatible with the Convention and address the historic discrimination identified by the Supreme Court.”

7. Policy background

Application of the ‘good character’ requirement to the remedial registration routes in sections 4F – 4I

7.1 British nationality law did not allow unmarried British fathers to transmit their citizenship until 1 July 2006. The Immigration Act 2014 inserted a number of remedial registration routes into the 1981 Act, providing an entitlement to citizenship for those who would have automatically acquired British citizenship at birth, but for the marital status of their parents. That entitlement is, however, subject to the Secretary of State being satisfied that the applicant is of ‘good character’ in cases where the applicant is 10 years old or above.

7.2 In *Johnson v Secretary of State for the Home Department* the Supreme Court made a declaration of incompatibility in respect of the insertion of the ‘good character’ requirement:

“The incompatible provision, therefore, is paragraph 70 of Schedule 9 to the Immigration Act 2014, which inserts into section 41A of the 1981 Act (the requirement to be of ‘good character’) a reference to sections 4F, 4G, 4H and 4I, which relate to various categories of people who would automatically have become UK citizens had their parents been married to one another at their birth. The court will make a declaration to that effect, although it is not necessary to do so to dispose of this case.”

7.3 This instrument disapplies the ‘good character’ requirement to the remedial registration routes set out in sections 4G to 4I of the 1981 Act.

7.4 Whilst the Supreme Court also referred to section 4F of the 1981 Act, that provision does not concern persons who would have *automatically* become British citizens had their parents been married to one another at birth. Rather, section 4F provides a registration route for persons who would be entitled to be *registered* as a British citizen, if their parents were married.

7.5 Section 4F provides a registration route for persons born before 1 July 2006 who would be entitled to be registered as a British citizen under section 1(3) or 3(2) or (5) of, or paragraph 4 or 5 of Schedule 2 to, the Act, but for the marital status of their parents. Because the ‘good character’ requirement applies to applications under section 1(3) or 3(2) or (5) of the 1981 Act, the ‘good character’ requirement should continue to apply to section 4F applications where the person would be entitled to be registered as a British citizen under one of those provisions were their parents married.

7.6 As there is no ‘good character’ requirement in respect of applications under paragraph 4 or 5 of Schedule 2 to the 1981 Act, which concern stateless persons, the ‘good character’ requirement will be removed from section 4F applications where the person would be entitled to be registered as a British citizen under paragraph 4 or 5 of Schedule 2 were their parents married.

Application of the ‘good character’ requirement to the remedial registration route in section 4C of the Act

7.7 British mothers were unable to transmit their citizenship to their children born outside the UK until the 1981 Act came into force on 1 January 1983. The Nationality, Immigration and Asylum Act 2002 inserted a new section 4C into the 1981 Act, providing an entitlement to citizenship for those who would have automatically acquired British citizenship at birth, had the law provided for citizenship by descent from a mother in the same terms as it provided for citizenship by descent from a father. That entitlement to registration is also subject to a ‘good character’ requirement.

7.8 In the case of *R (on the application of David Fenton Bangs) v Secretary of State for the Home Department*, the Administrative Court agreed a consent order on 4 July 2017 which declared that:

“[s]ection 47(1) of the Borders Citizenship and Immigration Act 2009 is incompatible with Article 14, read with Article 8, of the European Convention on Human Rights, in so far as it introduces into the British Nationality Act 1981 a new section 41A applying a “good character” requirement to applications for registration under section 4C of the British Nationality Act 1981.”

7.9 This instrument therefore disapplies the ‘good character’ requirement in relation to applications under section 4C.

8. Consultation outcome

8.1 Given the nature of the amendments made to the proposed draft Order, the Home Office has not conducted a formal consultation on the draft Order. The UK Government has an obligation to correct any legislative incompatibilities with the European Convention on Human Rights.

However, the Home Office will respond to any representations made during the first 60 day period of the remedial order scrutiny process, in accordance with obligations under the Human Rights Act 1998.

9. Guidance

9.1 Information on the changes made will be available to the public and UK Visas and Immigration staff through updates to the guidance and GOV.UK.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument because no impact on the private, voluntary or public sector is foreseen.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Remedial Order remedies incompatibilities with the European Convention on Human Rights. The Home Office will review any relevant cases brought before the courts.

13. Contact

Suzanna Neskovic Pereira at the Home Office Telephone: 0207 035 4580 or email: Suzanna.Neskovic-Pereira@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.

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