Home Office

The Government Response to the fifth report from the Joint Committee on Human Rights, Session 2017-19 (HC 926, HL paper 146): Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018

January 2019

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STATEMENT OF SUMMARY OF REPRESENTATIONS ON THE BRITISH NATIONALITY ACT 1981 (REMEDIAL) ORDER 2019

Introduction

1. This Act paper presents a further draft proposal for a Remedial Order to Parliament, together with the Government's response to the Joint Committee on Human Rights' (JCHR) report of 31 May 2018, and representations received from the UK Overseas Territories Association (UKOTA) on the same date.

2. On 15 March 2018, the Government laid a first draft proposal for a Remedial Order in accordance with section 10(2) and paragraph 1(1) of Schedule 2 to the Human Rights Act 1998. The purpose of the Order is to correct incompatibilities in the British Nationality Act 1981 (BNA) with the European Convention on Human Rights (ECHR), 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.*

3. This summary of representations is made in accordance with the requirements of paragraph 3(2) of Schedule 2 to the Human Rights Act 1998.

4. While we have engaged with the Committee's points below, the Committee will note that a number of their recommendations are outside the specific scope of this Remedial Order. We will welcome the views of the JCHR when a legislative opportunity to revisit nationality law arises.

Representations from the UK Overseas Territories Association (UKOTA)

5. Representations from the UKOTA related to what they viewed as the ongoing discrimination against children, who are now adults, who were born outside the British Overseas Territories between 1947 and 2006 to British Overseas Territories' fathers. UKOTA state that these children are denied the retrospective right to claim their fathers' nationality by descent because of the fact that they were born outside of marriage. They asked for confirmation that the Order would be used as an opportunity to remedy this discrimination which was omitted from the series of amendments to the BNA introduced by the Immigration Act 2014 due to the late stage at which they were introduced.

6. Section 65 of the Immigration Act 2014 provides for registration as a British Citizen for persons born before 1 July 2006 to a British father, where their parents were unmarried at the time of their birth. It provides an entitlement to be registered for those who would have become British automatically had their parents been married at the time of their birth, and

for those who would currently have an entitlement to registration but for the fact that their parents were not married at the time of their birth.

7. Section 65 was introduced into the Immigration Act 2014 at a very late stage of the parliamentary process. It was recognised that to create a route for people to become British Overseas Territory Citizens would require wider consultation with Governors and territory governments, which was not possible due to the constraints of the parliamentary timetable.

8. The Government considers that the issues raised by the UKOTA go beyond the incompatibility rulings and are therefore outwith the scope of the Remedial Order. Consultation will be undertaken with the Overseas Territories at a point where a suitable legislative vehicle has been identified. In the light of this, the revised draft proposal for a Remedial Order does not contain any substantive amendments from the earlier draft in this respect.

Response to recommendations in the JCHR's report of 31 May

9. **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)**

10. **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)**

11. **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)**

12. The Government welcomes the Committee's recommendations and agreement that the use of a Remedial Order through the non-urgent procedure is appropriate. The recommendations detailed in paragraph 40 are addressed at paragraphs 30 and 31 of this Statement.

13. **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).**

14. The good character requirement applies to those aged 10 and over as that is the age of criminal responsibility. Children as young as 10 can and do commit very serious acts of criminality such as murder and rape, and the Government does not consider it appropriate to adjust the good character policy so that such acts would effectively become inadmissible when assessing a minor's suitability for British citizenship.

15. The Government does not consider this to be at odds with the statutory obligation in section 55 of the Borders, Citizenship and Immigration Act 2009, or that it would be appropriate to simply ignore such heinous crimes. However, where a child has been convicted of a criminal offence, sentencing guidelines require that any custodial or non-custodial sentence is adjusted to take into account the child's age and particular circumstances and any mitigating factors such as their ability to understand the consequences of their actions. Therefore, although the same policy applies to children and adults alike, the lesser sentence handed down to children will frequently mean they are less likely to meet the threshold for refusal of citizenship.

16. **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).**

17. There is no reliable basis for concluding that all children in this situation would have made an application when they were under the age of 10 if they had been allowed. To remove the good character requirement from all children in this situation would thus be a disproportionate response, and not in accordance with the Government's policy set out above. For these reasons the Government does not agree with the suggestion that the good character requirement should be removed for this particular cohort of children, or that unlawful discrimination remains on this issue.

18. **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).

19. Adults have never been able to apply for British citizenship under limbs (1)(b)(i), (ii) or (iii) of section 4F as these routes are solely for children. It would be a significant change to the statutory scheme, outside the scope of this Order, to make such an amendment. Furthermore, an adult who should have been entitled to apply under those limbs are still able to acquire citizenship, for example through naturalisation under section 6 of the BNA. It should also be noted that, from 1987 discretion could be used to grant applications under section 3(1) from those who were under 18 and could have been eligible under the provisions for registering children born overseas to British citizens had the applicant's mother been married to the applicant's natural father at the time of the applicant's birth. The Government is therefore of the view that ongoing discrimination against an adult who may have been eligible to apply as a child does not persist.

20. **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).**

21. Section 3(2) does not primarily relate to statelessness, and other children applying under paragraph 3(2) have to meet the good character requirement. Stateless children are also able to apply under sections 1(3), 1(4), 3(1) and 3(5), all of which have a good character requirement. The Government does not therefore consider it appropriate to remove the requirement for some categories and not others within the same route. Stateless children are not treated less favourably, as they, like adults, are also entitled to apply under Paragraphs 4 or 5 of Schedule 2 of the BNA which does not contain a good character requirement.

22. **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).**

23. The Government is giving careful consideration to the Committee's recommendation.

24. **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).

25. The Government will monitor any remaining potentially unlawful discriminatory aspects of nationality legislation. We will consult as appropriate if it becomes apparent that further changes are necessary.

26. **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).**

27. Where the individual affected is still a minor it is open to them to apply to register as a British citizen under section 1(3) (if their surviving parent is a British citizen or settled in the UK) or under the general provision in section 3(1). A minor or an adult could also apply under section 1(4) or an adult could acquire citizenship through naturalisation under section 6 BNA.

28. **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).**

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

30. **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).**

31. **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)**

32. The Government acknowledges the concerns raised by the Committee and will consider consultation when a suitable legislative vehicle has been identified.

33. The issues set out at paragraph 81 of the JCHR's report are addressed in a separate response to the Chair of the JCHR (see Annex A).

ANNEX A: Letter from the Immigration Minister to the Joint Committee on Human Rights

The Rt Hon Harriet Harman QC MP
Chair, Joint Committee on Human Rights
Committee Office
House of Commons
London
SW1A 0AA

The British Nationality Act 1981 (Remedial) Order 2019

I am writing further to my letter of 4 May 2018 when I undertook to provide you with a more detailed response to some of the wider issues about the British Nationality Act 1981 (BNA) raised in your letter of 18 April. I am very sorry that this letter is later than I promised. These are complex and highly technical issues requiring detailed consideration, much of which has also been relevant to consideration of Windrush cases.

You were concerned that in addition to the matters addressed by the Remedial Order, the BNA may contain other potentially unlawful discrimination and asked for an assessment as to whether such discrimination does persist. A detailed explanation responding to the individual points is set out below.

I welcome the publication of the Committee's report on the British Nationality Act 1981 (Remedial) Order and agreement that the use of a Remedial Order through the non-urgent procedure is appropriate.

A revised draft Remedial Order will be laid in Parliament today. The Government's response to the recommendations in the Committee's report of 31 May is included in the summary of representations published with the draft Remedial Order. I intend to give further consideration to the Committee's recommendation about the application fee for those persons reapplying under section 4F and will provide a response to the Committee before the end of the 60-day scrutiny period.

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 one such example. The same would seem to be the case for paragraph 6 of Schedule 2 to the British Nationality (General) Regulations 2003.

The references to “father” and “mother” in sections 3(6) and 17(6) should be read in conjunction with section 50(9) and 50(9A) of the BNA. This means that consent is required from a person who meets the definition of ‘father’ or ‘mother’. In terms of a ’father’ this can be the mother’s husband at the time of the birth, a person who is the child’s father for Human Fertilisation and Embryology legislation purposes, or, in other cases, a person who can demonstrate paternity. Thus the parents do not have to have been married or in a civil partnership. The wording of these sections also allows the requirement for a parent’s consent to be waived in certain circumstances, including where one of the parents has died. Additional criteria include where a marriage or civil partnership has ended, but do not include situations where a non-formalised relationship has ended. However, in situations where a person has not been able to obtain consent within the requirements of this provision, an application can be considered at the Home Secretary’s discretion under section 3(1).

Section 4G(3) specifically provides for the registration of children whose parents were not married. Section 4G(5) allows for consent to be waived, and published guidance(**a**) sets out when this might be appropriate, including, for example, where the child has no contact with the parent who has not consented. This accommodates the situation of single parent families.

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.

A number of provisions in the BNA provide for the status of those born before 1981 when citizenship was transferred only through the male line. The provisions cited above relate to people who had originally acquired citizenship of the United Kingdom and Colonies by descent through the male line. Amending those sections would not result in equal treatment as they only apply to those who already had status before 1983, and could not have the effect of retrospectively conferring citizenship on children of British mothers or grandmothers. The issue of female transmission was addressed by introducing new provisions for the registration of children of British mothers in Section 4C.

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

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(**a**) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755505/Registration-as-a-British-citizen-children-v4.0ext.pdf at page 40

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?

Section 4C(3) of the Act allows for a person to be registered as a British citizen where they would have become a British citizen under section 5 of the 1948 Act and acquired a right of abode in the UK, had British mothers been able to transmit their citizenship in the same way as British fathers.

However, the Act was not worded in such a way as to provide for a person to acquire citizenship on the basis of a British grandmother. When section 4C was introduced by the Nationality, Immigration and Asylum Act 2002, it was clearly linked to a commitment made in 1979 to register the children of *British-born* women.

When the 2002 Act was passed there were statements made in Parliament that the Government could only "go so far to right the wrongs of history". The view held at that time was that to go back further in time, or to broaden the terms of the concession so as to cater for the foreign-born grandchildren and great-grandchildren of British women, would mean that the number of “what ifs” to be taken into account would become unmanageable.

The Act does not therefore allow a person to register on the basis of a British grandmother, even though, in certain limited circumstances, female transmission before 1983 would have allowed some grandchildren of British women to acquire citizenship of the United Kingdom and Colonies under section 5 of the British Nationality Act 1948.

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

Section 11(2) provides a small exception to the general rule that all citizens of the UK and Colonies who had the right of abode became British citizens. It covered children who would otherwise be stateless whose mothers were citizens of the UK and Colonies, and who were entitled to registration under section 1(1) of the British Nationality (No 2) Act 1964. In those cases a right of abode could be acquired by a person with no link with the UK (for example where the mother acquired her citizenship through a colony). It therefore seemed illogical to give a child British citizenship where the mother would not have qualified.

As this is a specific provision for people who could only have registered as a citizen of the UK and Colonies on the basis of a British mother, it is not relevant to people with British fathers.

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.

These sections again relate to people born before 1983 who acquired status under the 1948 Act. Sections 14 and 25 set out whether a person acquired citizenship "by descent" or "otherwise than by descent"; sections 23 and 30 refer to people who became British dependent territories citizens or British subjects. Under previous legislation, it was possible for a woman to acquire citizenship on the basis of her marriage to a British husband. These provisions therefore determine what the status of those women is under the current legislation, but do not create new discriminatory categories. Under the current legislation, registration and naturalisation provisions allow husbands, wives and civil partners to acquire nationality on an equal basis.

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.

These sections also relate to people born before 1983 who acquired status under the 1948 Act. Sections 14(2) and 25(2) set out that a person born before 1983 acquired citizenship "otherwise than by descent" if their father was in Crown service. As women could not pass on citizenship before 1983, this could not apply to children of British mothers.

Rt Hon Caroline Nokes MP
Minister of State for Immigration

ANNEX B: 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.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2019 No. 0000

NATIONALITY

The British Nationality Act 1981 (Remedial) Order 2019

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**) Section 1(1) of the Human Rights Act 1998 defines "the Convention rights" and section 21(1) of that Act defines "the Convention".

(**e**) Section 4C was inserted by section 13(1) 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**) Section 21(1) of the Human Rights Act 1998 defines "remedial order".

Citation, commencement and extent

1.—(1) This Order may be cited as the British Nationality Act 1981 (Remedial) Order 2019 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 they amend.

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), in sub-paragraph (b), 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 c. 22.
(**b**) S.I. 2003/548. Relevant amending instruments to Schedule 2 are S.I. 2009/3363, 2015/681.

Name
Minister of State
Date Home Office

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 incompatibilities with a right under the European Convention of Human Rights.

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. Declarations of incompatibility in relation to section 41A have been made by the courts in two cases due to unlawful discrimination against various categories of people who would have automatically become UK citizens (or had a route to apply for citizenship) had their parents been married to one another at the time of their birth.

In the case of *Johnson v Secretary of State for the Home Department* [2016] UKSC 56, the Supreme Court 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 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.

In *Johnson*, 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.

In *Bangs*, it was agreed that applying the good character test to applications for registration under section 4C of the 1981 Act was also unlawfully discriminatory.

In order to remove the incompatibility identified in these two cases, article 2(1) and (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 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. The effect of article 2(3) 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 (c.22) 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 2019

[Year] 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 Statutory Instruments

3.1 The Remedial Order is laid pursuant to the power in section 10 of the Human Rights Act 1998. A first draft proposal was laid on 15 March 2018.

4. Extent and Territorial Application

4.1 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).

4.2 The territorial application of this instrument is the United Kingdom.

4.3 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).

5. European Convention on Human Rights

5.1 The Minister of State for Immigration, the Rt Hon Caroline Nokes MP, has made the following statement regarding Human Rights:

"In my view the provisions of the British Nationality Act 1981 (Remedial) Order 2019 address the historic discrimination identified by the courts."

6. Legislative Context

6.1 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*.

6.2 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. This was repealed on 13 January 2010.

6.3 Paragraph 70 of Schedule 9 of the Immigration Act 2014 introduced section 41A of the 1981 Act, which introduced the 'good character' requirement for certain registration routes. This provision came into effect on 13 January 2010. Section 41A 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.

6.4 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).

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. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consultation outcome

9.1 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.

10. Guidance

10.1 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.

11. Impact

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

11.2 There is no impact on the public sector.

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

12. Regulating small business

12.1 The legislation does not apply to small business.

13. Monitoring & review

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

14. Contact

14.1 Fiona Johnstone at the Home Office, Telephone: 020 7035 6221 or email: Fiona.johnstone@homeoffice.gov.uk can answer any queries regarding the instrument.

14.2 Alison Samedi, Deputy Director for Illegal Migration, Identity Security and Enforcement Policy at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

14.3 The Rt Hon Caroline Nokes MP, Minister for Immigration, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

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