Dear Harriet,

The British Nationality Act 1981 (Remedial) Order 2019

I am writing in response to the issues raised in the Committee’s second report on the revised draft British Nationality Act 1981 (Remedial) Order.

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

2. We will continue to keep nationality law under review.

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

4. I have reissued the Explanatory Memorandum with the corrected wording.

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

6. I welcome the Committee’s confirmation that the requirements of the Human Rights Act 1999 for the use of the remedial power have been met in this case and that the draft Order remedies the incompatibility identified by the Court.’

7. The Committee concludes, after taking into account representations made, that the special attention of each House is not required to be drawn to the draft Order on any of the relevant grounds, or on any other grounds. However, elsewhere in
8. We consider that there are no reasons why this Order should not be agreed to by both Houses of Parliament. We therefore recommend that the draft Order should be approved. (Paragraph 20)

9. I welcome the Committee’s recommendation that the draft Order should be approved and that the special attention of each House is not required to be drawn to the draft Order.

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

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

12. We do not consider the good character requirement is contrary to the intention behind registration routes for British citizenship. When assessing good character, there is no distinction between those who have grown up in Britain and those who arrive when they are older.

13. The good character requirement applies to those aged 10 and over reflecting the age of criminal responsibility. It also reflects the value and prestige attached to acquiring British citizenship. Published guidance on the application of the requirement was updated in January and explains when it is appropriate to differentiate between a young person and an adult in the assessment of good character, as well as when it is appropriate to exercise discretion.

14. Guidance on the good character requirement is clear that consideration of the child’s best interests must be a primary consideration when making decisions that affect them. We do not consider the good character requirement to be at odds with the consideration of a child’s best interests.

15. The Home Office has also failed to explain why a child should be deprived of their right (entitlement) to British nationality due to a mere police caution. Given the Home Office’s claim that its policy is focused on “heinous crimes” such as murder and rape, it is inappropriate for children born and/or brought up in the UK to be denied nationality for minor offences. In particular, children should not be deprived of their entitlement (right) to British nationality because of a mere caution. (Paragraph 30)
16. We do not consider it appropriate to adjust the good character policy so that criminal acts committed by those over the age of criminal responsibility would effectively become inadmissible when assessing their suitability for British citizenship.

17. As explained above, published guidance explains when it is appropriate to differentiate between a young person and an adult in the assessment of good character, as well as when it is appropriate to exercise discretion. It is also clear how custodial sentences and out-of-court disposals, such as youth cautions, are considered for the purposes of assessing good character. Applications will normally be refused if such a penalty was received in the three years prior to the date of application. It is also clear that consideration of the child’s best interests must be a primary consideration in nationality decisions affecting them.

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

19. This would be a disproportionate response given that there is no reliable basis for concluding that children in this situation would have made an application for citizenship if they had been able to do so when they were under 10. There are no plans to create further exemptions to the good character requirement. Government policy is to apply the good character in line with the age of criminal responsibility. We believe this is a fair and consistent approach to considering applications for British citizenship.

20. We consider that, at the very least, the Home Secretary should make clear that it is his policy to remove, as best as possible, discrimination, and that therefore applications for naturalisation from people who would not previously have qualified for British citizenship because only their mother was British or because of their father’s marital status would be viewed favourably. (Paragraph 35)

21. It is Home Office policy to act in accordance with the domestic equalities legislation, the ECHR and the Public Sector Equality Duty. Applications for naturalisation are considered in line with published guidance and can only be granted in accordance with the statutory requirements of the British Nationality Act 1981.

22. We welcome the Home Office’s general approach in indicating that it would not wish to discriminate against individuals whose parents are now dead but would have benefited from these amendments. We note the Home Office has helpfully referenced the application routes open to such individuals in its response. However, we are concerned that the case officers processing applications from such individuals might not realise that they should not be discriminated against (particularly as they will have to apply through alternate routes as their parent has died) and therefore that they should exercise their discretion accordingly. (Paragraph 37)
23. It would therefore be helpful for the Home Secretary to make a policy announcement in relation to applications from people whose parent(s) would have benefited from the amendments in the British Nationality Act 1981 (Remedial) Order 2019, but where that parent has since died. The announcement should make clear that such applications should be viewed favourably to seek to remove, as best as possible, any discrimination they and/or their parent had faced. (Paragraph 38)

24. Current policy guidance already states that discretion should be exercised sympathetically where it is possible and appropriate to do so. We will ensure this is communicated to caseworkers responsible for considering such applications.

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

26. We intend to use the next changes to the Immigration and Nationality Fees Regulations to introduce a waiver to the application fee for those whose previous applications have been refused solely on the basis of these particular discriminatory provisions in the British Nationality Act 1981.

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

28. It is for local authorities to make decisions about children in their care. We will ensure that the Ministry of Housing, Communities and Local Government are made aware of this recommendation.

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

30. The principle of charging at above cost for children applying for citizenship has been in place for over a decade. The Immigration Act 2014 approved by Parliament sets out the governing factors that must be given regard to when setting fee levels, which include the costs of administering the service; benefits that are likely to accrue to the applicant upon a successful outcome; and the costs of operating other parts of the
immigration system. Parliament has approved increases to immigration and nationality fees, including for children to register as British Citizens, in most years since it approved the principle of over-cost recovery in 2004. All immigration fees are kept under review and we continue to reflect on the issues raised.

31. There are a number of exceptions to application fees for Leave to Remain in the United Kingdom which protect the most vulnerable, such as for young people who are in the care of a Local Authority. Fee waivers are in place for Leave to Remain and Indefinite Leave to Remain in certain circumstances, to support those who need it most, including children and young people who have spent a significant amount of their life in the UK.

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

33. We recognise the difficulties which current British nationality law presents for some British Overseas Territory citizen parents who wish to pass on their citizenship to their children and we would like to understand these concerns more fully. We are considering what possible legislation might be available in order to make any changes, should this be desired.

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

35. The Home Office has published caseworker guidance which supports decision makers in considering applications for refusal under the suitability provisions of Appendix EU. It explains when a case should be referred to Immigration Enforcement for refusal using dedicated referral criteria which take into account existing deportation thresholds.

36. Caseworker guidance will be updated and staff will be trained in advance of the end of the implementation period, in the event of a deal, or of the UK leaving the EU, in the event of no deal. This will ensure that the conduct of individuals applying to the EU Settlement Scheme is correctly considered and that the appropriate thresholds are applied, in accordance with the law.

37. In line with our recommendation above, local authorities should actively take steps to ensure that applications are submitted for all looked after children in their care with a right to British nationality—including those who are EU nationals and who may face bureaucratic hurdles post-Brexit if steps are not taken now to clarify their status and their right to British nationality. (Paragraph 56)
38. It is for local authorities to make decisions about children in their care. We will ensure that the Ministry of Housing, Communities and Local Government are made aware of this recommendation.

Rt Hon Caroline Nokes MP
Minister of State for Immigration