Joint Committee on Human Rights
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From Rt Hon Harriet Harman MP, Chair

Rt Hon Amber Rudd MP
Home Secretary
Home Office
2 Marsham Street
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Dear Amber

The British Nationality Act 1981 (Remedial) Order 2018

1. 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.

2. 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

3. 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.

4. 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

5. 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

6. 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?

7. 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

8. 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

9. 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 had 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

10. 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

11. 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

12. 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.

Yours sincerely

Harriet Harman

Rt Hon Harriet Harman MP
Chair