

Written evidence from the Project for the Registration of Children as British Citizens (PRCBC) and Amnesty International UK (BNA0003)

Introduction:

1. This submission is divided into three sections. These respond to the specific questions raised by the Committee in inviting submissions. Further information is contained in an appendix providing brief background in relation to the relevant statutory provisions and their origins.
2. The submission concerns the incompatibility and the remedial order. In this regard, it is important to distinguish between historical injustice in British nationality law, specific provisions for registration of British citizenship introduced to correct or mitigate some of this injustice and the application of a good character test for such registration. The incompatibility concerns this latter – the application of the good character test. While in this submission it is necessary, in order to understand the incompatibility, to address aspects of historical injustice relating to the relevant registration provisions, this submission is not concerned directly with the matter of historical injustice in British nationality law – that being a complex matter stretching far beyond the present incompatibility and remedial order.
3. **In short, we welcome the introduction of the remedial order. However, the incompatibility goes further than is addressed in the order. At a minimum, this should be remedied by omitting paragraph 2(3) and making a consequential amendment to paragraph 4(3) of the order.**

Whether the remedial order removes the incompatibility with Convention rights identified by the courts:

4. The incompatibility to be removed concerns the application of a good character requirement¹ for registration as a British citizen where rights to register² were introduced to remove or mitigate past injustices in British nationality law. In broad terms, there are two injustices these rights were introduced to correct. Firstly, circumstances where mothers were prevented to pass on their citizenship in circumstances in which a father could do so.³ Secondly, circumstances in which a person, but for having been born out of wedlock,⁴ would have born or otherwise automatically acquired British citizenship or would have been entitled to register as British.⁵
5. The application of the good character requirement has prevented the intended removal or mitigation of past injustice by introducing a bar to the registration of British citizenship that did not exist or would not have applied at the time when that citizenship would have been acquired or registered but for the past injustice.

¹ Section 41A, British Nationality Act 1981.

² Under sections 4C, 4F, 4G, 4H and 4I of the British Nationality Act 1981.

³ Section 4C of the British Nationality Act 1981 relates to these circumstances.

⁴ Strictly, the correct terminology would be born 'illegitimate' rather than 'out of wedlock' because the question of illegitimacy falls to be determined by the laws of the country or territory in which the father was domiciled.

⁵ Sections 4F, 4G, 4H and 4I of the British Nationality Act 1981 relate to these circumstances.

6. That good character requirement applies to persons aged 10 years or older.
7. As regards those people who would have been born with or otherwise automatically acquired British citizenship, the remedial order will remove the incompatibility, which currently prevents them from registering as British citizens. This will be done by the amendment contained at paragraph 2(2) of the remedial order.
8. As regards the group of people who would have been registered as British, the remedial order will remove the incompatibility for only some of them.⁶ Those for whom the incompatibility will be removed are those who would have been registered for reasons connected to their being stateless.⁷
9. Those who would have been registered on other grounds⁸ will not have the incompatibility removed. They will continue to be prevented from registering as British citizens on grounds of character where at the time they would have registered, but for the original injustice done to them, there was no good character requirement or, even though it had been introduced, it would not have applied because they were below the age of 10 years. The amendment to be made by paragraph 2(3) of the remedial order, together with paragraph 4(3), will retain the incompatibility as described here.
10. The circumstances of this group of people were not directly addressed in the judgment of the Supreme Court in *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56. The Court there declared upon the incompatibility of the good character requirement in relation to “*various categories of people who would automatically have become UK citizens had their parents been married to one another at their birth*” (paragraph 39).⁹
11. Nonetheless, the remedial order is not limited to the group directly addressed in that judgment since it will also remove the incompatibility for some of those persons who would have been registered as British for reasons connected to their being stateless.
- 12. The remedial order should remove the incompatibility for everyone to whom it applies. This can most conveniently be done by removing paragraph 2(3) of the remedial order and making a consequential amendment to paragraph 4(3) of the order.**
13. While this may remove the good character requirement for some people who would not have been able to register as British until they were 10 years or over, the following points support the wider removal of the incompatibility:

⁶ These are those people to whom registration under section 4F of the British Nationality Act 1981 relates.

⁷ That is registration under section 4F(1)(b)(vi) or (v) of the British Nationality Act 1981. These provisions concern people who would have been entitled to have been registered as British by reason of being born stateless had their fathers been married to their mothers.

⁸ That is under section 4F(1)(b)(i), (ii) or (iii) of the British Nationality Act 1981. These provisions concern people who would have been entitled to register as British during their childhood had their fathers been married to their mothers. Section 4F(1)(b)(i) concerns people born in the UK, who would have been so entitled on their fathers becoming British or settled. Section 4F(1)(b)(ii) concerns people born outside the UK, who would have been so entitled either by reason of their being stateless or by reason of their father having spent 3 years in the UK prior to their birth. Section 4F(1)(b)(iii) concerns people born outside the UK, who would have been so entitled after spending 3 years in the UK with their parents.

⁹ The persons who would have automatically become British are those who would have been born British or who would have automatically acquired British citizenship.

- a. The government has already in drafting the order confirmed its intention to go further than the express declarations made, at least in so far as concerns certain persons who would have registered for reasons connected to statelessness. We support this.
- b. In doing so, the government has also accepted the principle that in order to right the injustice done to those who would have been registered but for being born out of wedlock, it is reasonable or necessary to make provision for those who might not have been registered even had the past injustice not existed. Again, we support this.
- c. Neither the explanatory note nor explanation of the incompatibility published with the remedial order provides explanation for the different approach in removing the incompatibility for some people and not others.
- d. Registration under statelessness provisions of the British Nationality Act 1981 is generally not made subject to the good character requirement. The application of the good character requirement to the relevant statelessness provisions may be considered incompatible because the stateless people who would have registered under these provisions, but for being born out of wedlock, could never have been subjected to the requirement. However, each of the other provisions relating to registration concern people who equally could not have been subjected to the good character requirement at the time they would have been registered had they not been born out of wedlock.
- e. Firstly, one of these provisions¹⁰ relates solely to people who would have been entitled to register as British at the time of their birth.
- f. Secondly, some of the people to whom this provision relates would have been entitled to be registered by virtue of their being stateless (i.e. the very same grounds as applies in the registration-related cases to which the order already goes further than the judgment in *Johnson*).¹¹
- g. Thirdly, many of those to whom the remaining two provisions¹² apply would have been entitled to register as British long before they reached the age of 10 years.
- h. Fourthly, the good character requirement was first introduced in its relevant statutory form, affecting registration of children aged 10 years or over, on 4 December 2006.¹³ Many of those, who would have been entitled to register as British but for being born out of wedlock, would have been entitled to do so before that date.

14. We note briefly that there are further groups of people for whom the remedial order will not prove effective. There are persons who should have been entitled to register¹⁴ but have, while the incompatibility has remained outstanding, become adults and thus unable to now fulfil the relevant requirements.¹⁵ The order should make provision for those persons who

¹⁰ Section 4F(1)(b)(ii) of the British Nationality Act 1981.

¹¹ Section 4F(1)(b)(ii) relates to those who could have been registered at birth by reason of section 3(2) of the British Nationality Act 1981, which applies to, amongst others, certain children born stateless. See fn 8.

¹² Section 4F(1)(b)(i) & (iii) of the British Nationality Act 1981.

¹³ Section 58 of the Immigration, Asylum and Nationality Act 2006.

¹⁴ Under section 4F of the British Nationality Act 1981.

were prevented from registering on 6 April 2015¹⁶ by the good character requirement, and are now unable to do so having become adults. There are children of people who should have been entitled to register¹⁷ who would have been born British or with an entitlement to register as British. There also children of persons who should have been able to register under any of the relevant provisions¹⁸ but have since died. Had their parents registered as British citizens they may have been born British or acquired rights to register.

Whether there are ‘compelling reasons’ to use the remedial order process

15. It is not known how many persons are affected by the outstanding incompatibility. While the Home Office are aware of 16 cases, there are likely to be several other people affected who have yet to come forward – including because they are wholly unaware of any claim to British citizenship they may have. For example, the courts’ declarations, which have led to the remedial order, concern Mr Johnson and Mr Bangs, each of whom were subjected to detention and deportation proceedings at a time when neither, it would appear, was aware or advised about any claim to British citizenship they might have. In any event, it is clear people affected by the incompatibility are subjected to very serious risk and harm.
16. The incompatibility currently denies British citizenship to people who should now be entitled to it and, as Parliament has acknowledged in seeking to correct the original injustices, ought to have been entitled to it many years and decades ago. Without British citizenship, these people are subject to immigration control. They may be barred from entering the UK or removed from it. They may be detained in pursuance of such measures. These are not mere theoretical possibilities as is shown by the experience of the two people – Mr Johnson and Mr Bangs – in respect of whom the court’s declarations have been made. Moreover, it is within our knowledge that others of the 16 people, to whose cases the Home Office refers in the information it has published alongside the remedial order, have been subjected to extended detention and deportation proceedings.
17. The recently reported circumstances of Paul Tate,¹⁹ a British citizen detained for removal from the UK, do not relate to the incompatibility. Nonetheless, they highlight the gravity of being unable to satisfy Home Office officials of British citizenship – something which those subjected to the incompatibility will remain unable to do unless and until it is removed.
18. The immigration status of each of those, who should now be entitled to register as British citizens but for the incompatibility, is likely to vary. We are aware that at least some of these people do not, for example, have indefinite leave to remain. Some may not have leave to remain at all; and may not qualify for leave, whether limited or indefinite, under the Home Secretary’s current immigration rules. In any event, merely being subject to immigration control – and not being able to show British citizenship – limits in some significant way access to public services and various other rights and opportunities available to a British

¹⁵ Section 4F has failed to fully correct for historical injustice since it requires that people still meet the requirements for registration in the provisions under which they would have been able to register, which include that they are still a child (in the non-stateless cases).

¹⁶ This is the commencement date of section 65 of the Immigration Act 2014, by which section 4F was introduced to the British Nationality Act 1981.

¹⁷ Under any of the relevant provisions. See fn 2.

¹⁸ See fn 2

¹⁹ Mr Tate’s case has been reported in *The Guardian* at <https://www.theguardian.com/uk-news/2018/apr/04/disabled-briton-held-immigration-removal-centre-four-months> and in *The Bangor Aye* at <http://www.thebangoraye.com/bangor-man-detained-four-months-deportation-centre-due-released/>

citizen in the UK. Access to healthcare, employment, rented accommodation, banking, higher education, a driving licence and social assistance are all significantly limited by reference to immigration status.

19. The potential for someone to suffer harm by reason of being unable to satisfy the Home Secretary or other public bodies and private organisations and persons of their citizenship is compounded by the general absence of legal aid available to support persons with immigration-related problems.
20. Moreover, people affected by the incompatibility are liable to be especially vulnerable to the harms and risks we have outlined. They are, necessarily, people who have done something that would put their character into question, probably having been convicted of a criminal offence. They are particularly at risk, therefore, of detention and deportation. If they have served a prison sentence, they are especially likely to need support with rehabilitation and reintegration. However, whether because of their immigration status or their being liable to deportation, this support is very likely to be difficult to access. We are aware of persons within the 16 referred to by the Home Office who have been deprived of vital support.
21. We are further aware that some of those people affected by the incompatibility have had especially unstable or abusive childhoods. Whether by reason of their social and family background or their experience of the criminal justice system, or both combined, they are very likely to have difficulties accessing services and support or enjoying a stable life. This is quite apart from the addition of barriers and stigma relating to their not having British citizenship and whatever may be their current immigration status. By way of example, we are aware of one person among the 16 of whom the Home Office is aware, whose difficulties arising from his immigration status have included his being repeatedly threatened with eviction from his bail hostel.
22. It is appropriate, therefore, that the incompatibility in British nationality law is remedied by remedial order.

Whether the non-urgent procedure is appropriate:

23. This matter has already been the subject of considerable delay. If there is to be no amendment to the remedial order to more fully address the incompatibility, it should be subject to the urgent procedure in view of the continuing and very serious impact of the incompatibility (as we have set out above). We consider the same if the order is merely amended by the omission of paragraph 2(3) (and consequential amendment to paragraph 4(3)). However, those matters to which we refer at paragraph 14 would require further amendment to the order, which may better be more quickly dealt with through the current procedure.

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1. The remedial order concerns the application of a good character requirement for registration as a British citizen under sections 4C, 4F, 4G, 4H and 4I of the British Nationality Act 1981. These various sections of the Act seek to address two types of historical discriminatory injustices. A summary of these provisions and their origins is provided in this appendix.

Section 4C, British Nationality Act 1981

2. Section 4C concerns persons born, before the commencement of the British Nationality Act 1981 on 1 January 1983, outside of the UK to British mothers in circumstances where, had their fathers been British these children would have been born British.
3. Section 4C was first introduced into the British Nationality Act 1981 by section 13 of the Nationality, Immigration and Asylum Act 2002. At that time, the correction of injustice was limited to persons born after 7 February 1961; essentially replacing with a statutory entitlement the concession made by the Home Secretary on 7 February 1979 that the discretion to register a child as British would be exercised in favour of those who would have been born British had mothers been able to pass on their citizenship in the same way as fathers. The 1961 cut-off date reflected the timing of the concession since those born on or before 7 February 1961 would by the date of its announcement already have been adults and hence unable to benefit from it.
4. Section 4C was amended by section 45 of the Borders, Citizenship and Immigration Act 2009 to remove the 7 February 1961 cut-off thereby permitting persons born on or before 7 February 1961 to register as British citizens.

Sections 4F-I, British Nationality Act 1981

5. Sections 4F-I concern children born out of wedlock (strictly, born illegitimate²⁰) to British fathers where, had their parents been married, these children would have been born British citizens. Alternatively, they would have acquired a right to register as British during their childhood – e.g. because their father became settled or British after their birth but while they were still a child; or because they were born overseas to fathers who were British by descent. As regards those born to fathers who were British by descent, the right to register would have arisen during their childhood by reason of time spent by their father in the UK prior to their birth or time they spent with their parents in the UK after their birth. Section 4F also concerns certain children who were born stateless.
6. On 1 July 2006, the British Nationality (Proof of Paternity) Regulations 2006, SI 2006/1496 took effect, made under powers introduced into the British Nationality Act 1981 by section 9 of the Nationality, Immigration and Asylum Act 2002. This sought to remove the injustice concerning illegitimacy for those born on or after 1 July 2006. The introduction of sections 4E to 4J (providing distinct rights to register as British under sections 4F-I) by section 65 of the Immigration Act 2014 removed the 1 July 2006 cut-off so that persons born before 1 July 2006 could register as British citizens.
7. Sections 4G, 4H and 4I concern persons who would have acquired British citizenship by operation of law at the commencement of the British Nationality Act 1981 or by birth.

²⁰ See fn 4

Section 4F concerns persons who, whether at birth or later during childhood, would have acquired an entitlement to be registered as a British citizen.

Multi-generational injustice

8. It is important to note that these particular injustices in British nationality law have effects continuing across generations. This is because British citizenship of a parent is a factor which in many cases will determine the British citizenship of a child, and hence if the child's parent has been unjustly deprived of British citizenship any descendants of the parent may consequently be deprived of that citizenship.

Section 41A: good character

9. Each of the provisions contained in section 4C, 4F, 4G, 4H and 4I of the British Nationality Act 1981, therefore, concerns the correcting of historical injustice in British nationality law. Most of these provisions concern people who would have been born British but for the injustice. Certain of the provisions concern people who would have been entitled to register as British during their childhood – including, in some cases, at the time of their birth; and in many other cases while they were below the age of 10 years or at a time when there was no good character requirement for the registration of children.
10. A statutory requirement of good character was included in the British Nationality Act 1981, as originally enacted, only in respect of the naturalisation of adults. Section 58 of the Immigration, Asylum and Nationality Act 2006 first introduced a statutory requirement of good character affecting the registration of persons of age 10 years or older on 4 December 2006, including registration under section 4C. This provision was later consolidated on 13 January 2010 into the British Nationality Act 1981, becoming section 41A of that Act, by section 47 of the Borders, Citizenship and Immigration Act 2009. Section 41A was amended to include sections 4F-I by paragraph 70 of Schedule 9 to the Immigration Act 2014.

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