**Joint Submission to**

**Public Bill Committee**

# Nationality and Borders Bill
## Part 1 (Nationality)

**September 2021**

### Introduction:

1. This joint submission by the Project for the Registration of Children as British Citizens (PRCBC) and Amnesty International UK solely concerns Part 1 (Nationality) of the Bill.

   a. PRCBC is the UK's leading organisational expert on rights to British citizenship of children and young people. It was founded in 2012 to raise awareness of children and young people's rights to citizenship and to secure those rights for the children and young people to whom they belong.

   b. Amnesty International UK is the world's largest grassroots human rights organisation. It has supported PRCBC for several years in seeking to remove barriers to children and young people exercising their rights to British citizenship.

### Overview of this submission:

2. British nationality law can be complex with some of this complexity arising from British history of Empire and Commonwealth. This is critically important to the purpose of the Bill insofar as it relates to this area of law. Its primary source is the British Nationality Act 1981 but the roots of various of the injustices, to which Part 1 of the Bill relates, pre-date that Act.

3. This submission addresses four distinct purposes of the Bill:

   i. To correct historical injustice in British nationality law that relates to discrimination against women and children born to them and discrimination against children born out of wedlock. (See Section A of this submission on **Clauses 1-3, 5 & 6**)

ii. To make further correction to British nationality law so that two types of British nationality – British citizenship and British overseas territories citizenship – are brought back into line with each other. They have fallen out of line because amendments made to the British Nationality Act 1981 since its commencement on 1 January 1983 have been solely applied to British citizenship but not to British overseas territories citizenship. (See Section B of this submission on **Clause 4**)

iii. To address further injustice in British nationality law, policy and practice. (See Section C of this submission on **Clause 7**)

iv. To remove a particular barrier to naturalisation as a British citizen that continues to obstruct the remedy of the original injustice done to members of the Windrush generation in depriving them of British citizenship. (See Section D of this submission on **Clause 8**)

v. To deprive stateless children born in the UK or a British overseas territory of their existing citizenship rights. (See Section E of this submission on **Clause 9**)

4. For reasons addressed in this submission, we strongly support proposed **Clauses 1-8** and strongly oppose **Clause 9**.

**Section A: historical injustice concerning discrimination (Clauses 1-3, 5-6):**

5. A critical purpose of the Bill is to address historical injustice in British nationality law that relates to discrimination against women and children born to them and discrimination against children born out of wedlock. The injustice done by this discrimination causes children not to be born British in circumstances where other children, whose circumstances are entirely the same but for the particular discrimination (either against women or against birth out of wedlock), are born British.

6. These clauses relate to one or both of two types of British nationality – British citizenship and British overseas territories citizenship:

   a. British citizenship is the citizenship of people connected to the UK. It provides the right to reside in the UK free of any immigration control (i.e. the right of abode) on the basis of being a citizen of the UK.

   b. British overseas territories citizenship is the citizenship of people connected to territories the UK has retained.[1] It provides the right to reside in those territories free of any immigration control on the basis of being a citizen of the territories.

7. These clauses are each concerned with the right to these types of British nationality. They each relate to rights to be registered as a British citizen or British overseas

[1] Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands etc. Schedule 6 to the British Nationality Act 1981 lists the territories.

territories citizen in circumstances where a person would have acquired that citizenship:

a. automatically on 1 January 1983;[2] or

b. at the person's birth; or

c. in a few cases, by registration had the person not been prevented by discrimination from successfully applying to be registered as British.

Discrimination against women and their children (**Clauses 1 & 5**)

8. Before the British Nationality Act 1981 was commenced on 1 January 1983, British nationality law discriminated against women. That discrimination was done by preventing British nationality being derived from a British mother in circumstances where it was derived from a British father. The 1981 Act removed that discrimination from British nationality law from the date of its commencement but did not address the impact of that discrimination prior to the Act. Many people, therefore, who would have been born British but for this discrimination continued to be excluded from British nationality after the passing of the Act.

9. A right to register as a British citizen has been introduced for people who would have been born British and thereby would have become British citizens on the creation of that citizenship by the British Nationality Act 1981.[3] No corresponding right, however, has been introduced for people who would have become British overseas territories citizens.

10. **Clause 1** is to correct that omission. While we strongly support this clause, we have two concerns relating to its drafting.

    a. The drafting of **Clause 1** does not follow the language previously adopted to address for British citizenship the injustice that it is to address for British overseas territories citizenship.[4] We understand there is some concern that the earlier language may be too complex. Ministers should be invited to make clear what difficulties have arisen from that complexity and why it is not being removed from the existing provision concerning British citizenship.

    b. **Clause 1** introduces new section 17A. Subsections (a) and (b) of new section 17A include the term "*had P's parents been treated equally*". The difficulty with such wording is it tells nothing of the direction in which equality is to be achieved or indeed at what place. While we do not doubt the positive intention behind **Clause 1**, it ought to be amended to make that intention clear.

[2] When the British Nationality Act 1981 was commenced.

[3] That correction was made by section 4C of the British Nationality Act 1981, which was first introduced by section 13 of the Nationality, Immigration and Asylum Act 2002.

[4] The comparator provision is section 4C of the British Nationality Act 1981

11. Apart from these matters of drafting of **Clause 1**, our concerns relate to implementation. Since those concerns relate to several of the clauses in Part 1 (Nationality) of the Bill, we address these separately at the end of this Section.

12. **Clause 5** relates to one further matter concerning discrimination against women. We support this clause. Its purpose is to tidy up some of the language of the British Nationality Act 1981 that is intended to correct that discrimination. The current statutory language has caused significant problems.[5] These were eventually corrected by the Supreme Court.[6] This clause, therefore, following the court's judgment, is simply to make clear what was intended all along. The clause creates no new rights but rather makes clear the existing rights on the face of the Act.

Discrimination against children born out of wedlock (**Clauses 2 & 6**)

13. British nationality law has long discriminated against children born out of wedlock – preventing British nationality being derived from a British father if the father was not married to the child's mother. The British Nationality Act 1981, when first passed, did not correct this discrimination.

14. However, since the Act was introduced, there have been various amendments to remove this discrimination from British citizenship.[7] Those amendments have created rights to be registered as a British citizen for some of the people affected by this discrimination. No corresponding right, however, has been introduced for people who would have become British overseas territories citizens but for this discrimination.

15. **Clause 2** is intended to correct that omission. We support this clause.

16. However, **Clause 2** is not by itself sufficient to correct the discrimination relating to British citizenship. Indeed the relevant legislation has led to an anomaly. This anomaly is to be corrected by **Clause 6**, which we also support.

17. The anomaly is as follows. People, who would have been born a British citizen but for their father not being married to their mother, now have a right to be registered as a British citizen if they were born before 1 July 2006. This applies whether or not the mother was married to someone else at the time of the person's birth. However, people born on or after that date, who similarly would have been born a British citizen but were not because their father was not married to their mother, do not have a corresponding right. The courts have declared this discrimination to be incompatible with the Human Rights Act 1998.[8]

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[5] The relevant law, facts and history are described in the Supreme Court judgment in *Advocate General for Scotland v Romein* [2018] UKSC 6.

[6] *ibid*

[7] That correction was partially made by amendment to section 50 of the British Nationality Act 1981 by section 9 of the Nationality, Immigration and Asylum Act 2002; and partially by sections 4E-J of the British Nationality Act 1981, which were introduced by section 65 of the Immigration Act 2014.

[8] *K (a child) v Secretary of State for the Home Department* [2018] EWHC 1834 (Admin)

18. **Clause 6** is intended to correct this injustice. We support this clause. It does so only for British citizenship. This is because the correction of this for British overseas territories citizenship is built into **Clause 2**.

Rights for British overseas territories citizens to become British citizens (**Clause 3**)

19. **Clause 3** is to create a new statutory entitlement for British overseas territories citizens, for whom **Clauses 1 or 2** correct historical injustices, to become British citizens by registration. There is already a power for the Secretary of State, at her discretion, to register a British overseas territories citizen as a British citizen.[9] However, the long exclusion by British nationality law of people, to whom **Clauses 1 and 2** apply, provides real purpose to create this entitlement to registration in some recognition of the long injustice they have suffered under UK law. We, therefore, support **Clause 3**.

Concerns regarding implementation (**Clauses 1-3, 5 & 6**)

20. Our primary concern with **Clauses 1, 2, 3, 5 and 6** is not with the text. It is that, when commenced, the rights that are to be established must be accessible. There are too many examples of British nationality rights being inaccessible – the Windrush scandal is but one, albeit an especially painful and relevant example.[10] The following matters are critical:

    a. Ministers must give assurances as to how these rights will be made public and sufficiently widely publicised – not least because many of the beneficiaries will be in other territories or countries.

    b. Ministers must equally give assurances that evidential and procedural obstacles will, to the fullest extent that is practical, be removed or reduced. Biometric registration overseas and mandatory citizenship ceremonies must not, for example, prove – as they have in the past – prohibitive to the exercise of these rights. Biometric registration must not be prohibitively expensive or inaccessible. Ceremonies can be waived and this should be done where a person wishes for that or a ceremony can not be offered without undue cost or delay to the person to be registered. Where relevant information is available and can be confirmed by the Home Office or Passport Office, that should be done. People must not be obstructed by unreasonable demands for evidence. It must be understood that for some people there may be considerable obstacles to securing evidence of their rights after so many years have passed since the original injustice – e.g. due to age, decease, separation including by reason of abuse or violence – and the Home Office or Passport Office must be as helpful as possible to facilitate the exercise of these rights.

    c. Our understanding from Home Office officials is that fees will not be charged – at least not for several of these rights to be exercised. Ministers should confirm this in the debates.

[9] Section 4A of the British Nationality Act 1981, as introduced by section 4 of the British Overseas Territories Act 2002.

[10] This is briefly addressed in the *Windrush Lessons Learned Review*, March 2020, HC 93, section 2.2.3.

21. We have these same concerns in relation to **Clauses 4 and 7**, which are addressed in later Sections of this submission.

**Section B: aligning British citizenship and British overseas territories citizenship (Clause 4):**

22. In passing the British Nationality Act 1981, Parliament created British citizenship and British dependent territories citizenship (since renamed as British overseas territories citizenship).[11] In doing so, it abolished citizenship of the UK and Colonies (abbreviated to 'CUKC'). Previously, citizenship of the UK and Colonies was a unifying citizenship for all persons of the UK and its colonies.[12] The persons unified by this were, therefore, separated by the 1981 Act into two distinct groups – people connected to the UK (British citizens) and people connected to the territories (British overseas territories citizenship). While the groups were now separated, the provisions conferring rights to citizenship followed the same form only with one describing connection to the UK and the other to the territories.[13] Amendments to the 1981 Act since its enactment, particularly to British citizenship, have meant these two British nationalities are no longer aligned.[14] A further purpose of the Bill is, therefore, to realign these two types of British nationality.

23. Correcting discrimination in relation to British overseas territories citizenship is not the only way by which it is necessary to make amendment to the British Nationality Act 1981 to once again align British overseas territories citizenship with British citizenship. **Clause 4** is also necessary to achieve this.

24. This concerns children born to a British parent outside the relevant territory in circumstances where that parent too was born outside the territories. The British Nationality Act 1981 generally does not recognise such children as born with the citizenship of the parent but, in certain circumstances, there is a statutory entitlement for the child to be registered as a citizen. The period during which that entitlement is available was previously extended to throughout childhood for British citizenship.[15] This clause applies that same extension to British overseas territories citizenship. We support this clause.

**Section C: Further injustice in British nationality law, policy and practice (Clause 7):**

25. Several injustices have been identified in British nationality law, policy and practice over the years. Important provisions of this Bill are necessary to correct some of

[11] The British Overseas Territories Act 2002 renamed this citizenship: see section 2(2) of that Act.
[12] Part II of the British Nationality Act 1948
[13] See Part 1 (British citizenship) and Part II (British overseas territories citizenship) of the British Nationality Act 1981 as originally enacted.
[14] See Part 1 and Part 2 of the British Nationality Act 1981 as these are now.
[15] The original provision only provided for registration within 12 months of the child's birth. The change was made by amendment to section 3(2) of the British Nationality Act 1981 by section 43 of the Borders, Citizenship and Immigration Act 2009.

that – including where previous amendments to the British Nationality Act 1981 have only partially corrected a particular injustice. The purpose of **Clause 7** is to provide means to correct further injustices. We support this clause. However, we have concerns that need to be addressed as to how the clause will be implemented. These concerns are set out in this section.

26. **Clause 7** introduces a new discretion to register adults as British citizens or British overseas territories citizens where this is immediately necessary or appropriate in view of some historical injustice, act or omission by a public authority or other exceptional circumstances [see new sections 4L(1) and 17H(1)]. This is very welcome. It reflects the underlying purpose of all rights of registration under the British Nationality Act 1981 to ensure citizenship is the right of all persons connected to the UK or the British overseas territories respectively.

27. However, **Clause 7**, particularly as it relates to "*historical legislative unfairness*", raises the concern that it may be relied upon by Ministers to avoid making necessary amendments to the British Nationality Act 1981 in the future that may be required specifically to correct such injustice. That must not be the result. When an injustice of that nature is identified, Ministers must also take appropriate action to correct it on the face of the Act.

28. Our further concern is that **Clause 7** must generally be given real practical effect. It must not become a mere token statutory provision. Since registration requires someone to make a formal application, **Clause 7** will be ineffective if the uncertainty of the result of an application coupled with any cost or other impediment to doing so deters people from making applications. In such circumstances, **Clause 7** could stand redundant on the statute book because nobody to whom it ought to apply knows about it, or is sufficiently encouraged or enabled to apply for the discretion to be exercised. The following matters, therefore, must at a minimum be addressed:

    a. It is generally inappropriate – as with registration more generally – for the Secretary of State to charge prohibitive and above-cost fees that prevent people exercising their rights to British citizenship. The fee is made even more prohibitive if it is not possible to assess in advance that an application will be successful because there are no fixed criteria by which the right to be registered will be assessed.

    b. Ministers should also be pressed to give the assurance that where an individual application is successful, there will be positive action to ensure other potential applicants are made aware of their equal or similar right to register at discretion. This requires that where an example of unfairness, act or omission by a public authority or exceptional circumstances, on which it is right or necessary to exercise the discretion, is identified, there should be appropriate publicity given to this. There should also be formal updating of public-facing policy. It must be made clear that others in the same circumstances will succeed with their applications to be registered if they make them. Without this, people will continue to be excluded from citizenship in circumstances where it is clearly intended they should not be.

c. Moreover, the last point must be applied equally to both British citizenship and British overseas territories citizenship. Where any specific type of injustice or exceptional circumstance is identified on an application for any one of these British nationalities, the publicity and policy change must be made clear for both.

**Section D: Naturalisation and the Windrush scandal (Clause 8):**

29. **Clause 8** is the one provision in Part 1 (Nationality) of the Bill that concerns naturalisation. Naturalisation is the means by which an adult migrant or refugee with connections elsewhere, who has become settled in the UK or UK territories, may establish their connection with the UK or those territories by becoming a citizen. Naturalisation is always at the discretion of the Secretary of State and subject to specific statutory requirements, most of which the Secretary of State has power to waive.

30. We support this clause. Its immediate necessity arises from the circumstances of people of the Windrush generation, many of whom were deprived of their rights to register their British citizenship by the Home Office failure to ensure people were both aware of their rights and of the need to exercise them and were able to do so.[16] Indeed, the department expressly discouraged people from exercising them.[17] It has since become necessary to use naturalisation, without a fee, as the means to put people in the position they should have been all along as British citizens.[18] However, since some people were wrongly exiled from the UK – either by being removed or not permitted to return – this remedy has been inadequate for some people who were only recently able to return.[19] The barrier stems from a requirement for naturalisation that a person must be present in the UK at a fixed point, five or three years before the date of their application to naturalise.[20] This clause provides power to waive that requirement so that this barrier can, as it clearly should in the circumstances described here, be removed.

**Section E: Stateless children (Clause 9):**

31. **Clause 9** is intended to disentitle many stateless children born and growing up in the UK from their existing statutory right to British citizenship. We oppose this clause, which should be removed from the Bill.

32. The clause creates an additional and unjustified hurdle to stateless children's registration as British citizens of satisfying the Secretary of State that they cannot

[16] See *Windrush Lessons Learned Review*, *ibid*

[17] *Ibid*, section 2.2.4. This was especially oppressive given that the statutory entitlement to register was time-limited and that time limitation had been explained by Ministers as being to encourage people to exercise their right.

[18] One week after apologising to the House over the Windrush Scandal, the then Home Secretary, Rt Hon Amber Rudd, made a commitment to the House that naturalisation of victims of the scandal would be available for free: *Hansard* HC, 23 April 2018 : Col 620

[19] See e.g. *Windrush Lessons Learned Review*, *ibid*, p27 (cases of Veronica, Jocelyn, Pauline and Vernon).

[20] See e.g. paragraph 1(2)(a) of Schedule 1 of the British Nationality Act 1981

secure some other nationality. This is in addition to a child having to show that they were born stateless in the UK, have remained stateless throughout their life and have lived for at least five continuous years in the UK at the point of exercising their statutory entitlement to be registered as a British citizen.[21] For many years these requirements have together proved to be an extremely high barrier to stateless children securing the citizenship of the UK in which they were born, live and are connected to. Clarification of the relevant law by the High Court in 2017, and awareness raising work by PRCBC, European Statelessness Network[22] and others, have enabled several children to make applications to be registered under the statutory provisions that are expressly intended to reduce statelessness.[23] However, prior to this, applications were so few as to be negligible indicating both the profound inadequacy of previous Home Office operation of the present provision and the strong likelihood that there have been a growing number of children living stateless in the UK in contravention of the original parliamentary purpose, pursuant to the UK's international commitments, to reduce statelessness.

33. The purported justification for this draconian measure bears no relation to any matter over which the child has any control or influence or bears any responsibility for. [24] It is suggested that there are some parents who may choose not to exercise a right to register their child with a nationality of another country and so leave their child stateless for the purpose of securing British citizenship. There is no evidence presented for this assertion. In any event, an application for registration of a stateless child's entitlement to British citizenship is a complex matter, which itself has long been an effective and unjust deterrent to the exercise of the right.

34. The Human Rights Memorandum prepared for the Bill does nothing more than assert that the Home Office "*has carefully considered the best interests of the child throughout the formulation of all the policy given effect in this Bill*";[25] and asserts that the clause is "*reasonable*" and that the department "*is satisfied that this is compatible with*" its international law obligations.[26] Nowhere in any of this is there even an attempt to set out what are the best interests of the affected children, let alone how these are addressed by the clause or how these may be considered to be outweighed by what would have to be very substantial considerations.[27]

35. It is readily apparent that children and their rights are again being overlooked or ignored by the Home Office. This is especially cruel given the impact will be to leave a child stateless – possibly throughout childhood – in circumstances where the child will have been born in the UK and grown up here, developing their identity and connection here alongside their peers, only to discover at some point that, however

[21] Under paragraph 3 of Schedule 2 to the British Nationality Act 1981

[22] See e.g. https://www.statelessness.eu/updates/blog/windrush-scandal-exposes-what-may-lie-ahead-children-born-uk-growing-without

[23] See section 36 of the British Nationality Act 1981

[24] *New Plan for Immigration: policy statement,* March 2021 very briefly summarises the Government's purpose in bringing forward this clause at p16

[25] Paragraph 83

[26] Paragraphs 81 and 84

[27] The department is under a statutory duty to ensure primary consideration is given to children's best interests: section 55 of the Borders, Citizenship and Immigration Act 2009.

connected they may be in every sense of that word to this country, this country, in the most profound sense, rejects them.

36. This clause is an affront to domestic and international law concerning children's rights and statelessness.[28] It is also, more basically, an affront to children. It will impose the most profound of exclusions upon children – denial of any citizenship and particularly citizenship of the place where they were born and live and the only place they know. The exclusion and alienation that will be inflicted on a child through their formative years will be highly damaging to their personal development and any feelings of security and belonging. This clause should be deleted.

**Acknowledgment:**

37. We are particularly grateful to the British & British Overseas Territories Citizenship campaign and the UK Citizenship Equality campaign, each based in the USA, for meeting with us and sharing their personal insight and experience of various of the historical injustices to which Part 1 relates and of the effectiveness of some of the previous corrective measures that have been introduced. We are also grateful to current and former clients of PRCBC, who have shared their own experiences of exclusion from the citizenship with which they identify, is held by their peers and to which they are entitled.

[28] Including the 1961 UN Convention on the Reduction of Statelessness (particularly Article 1) and the 1989 UN Convention on the Rights of the Child (particularly Articles 3, 7 & 8).