EXPLANATORY MEMORANDUM TO

THE BRITISH NATIONALITY ACT 1981 (REMEDIAL) ORDER 2019

2019 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. The draft Order is accompanied by a statement of representations made in accordance with the requirements of paragraph 3(2) of Schedule 2 to the Human Rights Act 1998. This statement was previously laid on 14th January 2019.

1.2 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 it 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.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

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).

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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 Section 47 of the Borders, Citizenship and Immigration Act 2009 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

What is being done and why?

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. Consolidation

9.1 This instrument makes technical changes to the British Nationality Act 1981 to correct specific incompatibilities with the European Convention on Human Rights. The government does not consider it appropriate to consolidate the legislation at this time, but will keep that under review.

10. Consultation outcome

10.1 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.

11. Guidance

11.1 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.

12. Impact

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

12.2 There is no impact on the public sector.

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

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

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

15. Contact

15.1 Fiona Johnstone at the Home Office, e-mail: Fiona.johnstone@homeoffice.gov.uk can answer any queries regarding the instrument.

15.2 Alison Samedi, Deputy Director for Compliance and Enforcement Policy at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

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