Submission to the UK Government Home Office Consultation on its 'New Plan for Immigration'

May 2021

1. Introduction

The European Network on Statelessness welcomes the opportunity to make this submission to the UK Government Home Office consultation on its 'New Plan for Immigration'. Our submission focuses on Chapter 3 of the 'New Plan for Immigration' and, specifically, the proposed amendment of the British Nationality Act 1981, Schedule 2, Paragraph 3 ('BNA Sch. 2 Para. 3'). This provision entitles children born in the UK who are and always have been stateless to acquire British citizenship after living in the UK for five years. The Home Office has indicated that the proposed amendment would limit this provision to apply only to children who are stateless and have proven that they cannot acquire the nationality of their parents.

The European Network on Statelessness is a civil society alliance with over 160 members in 41 European countries, including 44 organisations and individual associate members based in the UK. We are committed to ending statelessness and ensuring that everyone living in Europe without a nationality can access the rights to which they are entitled under international law. We have undertaken significant research and advocacy on childhood statelessness in Europe and have been undertaking dedicated research on childhood statelessness in the UK supported by the Paul Hamlyn Foundation since June 2020. Our engagement with our UK members and other stakeholders, including lawyers, academics, NGOs, and community organisations, informs this submission. Our report on childhood statelessness in the UK will be published in the coming weeks (an embargoed copy is available on request).

We commend current proposals that would end historic discrimination in British nationality law, and we acknowledge other recent efforts by the UK Government to improve its approach to the protection of stateless persons.

We recommend that no amendment is made to BNA Sch. 2 Para. 3 without further detailed, independent study and a comprehensive impact assessment of any potential amendment on children in the UK who are stateless or at risk of statelessness. We note that the Home Office has not published evidence to justify its stated rationale for amending this provision, nor indicated that it has undertaken any assessment of the impact of such an amendment on stateless children, nor considered their views or best interests. A detailed study should examine the UK's duties to children, compliance with international law relating to stateless children, and options that would improve the UK's approach to preventing statelessness, including the possibility of re-introducing birthright citizenship.

2. The UK's international legal obligations

BNA Sch. 2 Para. 3 is based on the UK's existing obligations under international law. The wording of any amendment must comply with these legal obligations and needs to contain appropriate safeguards for all children born in the UK who would otherwise be stateless.

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The 1961 Convention on the Reduction of Statelessness (1961 Convention) seeks to prevent statelessness from occurring and to provide remedies when it does occur. It states at Art 1(1):

> *A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted: (a) at birth, by operation of law, or (b) upon an application being lodged with the appropriate authority…*

The UK is obligated to comply with the 1989 Convention on the Rights of the Child (CRC), which protects all children's right to a nationality and identity (Art 7-8) and requires that States consider children's best interests '*as a primary consideration*' '*in all actions concerning children*' (Art 3). In addition, Art 2 prohibits discrimination, and Art 12 requires respect for the views of the child. As a result, States must give high priority to a child's views and best interests in relation to decisions about their nationality and that of their family members, without discriminating based on the parents' status. The UN Committee on the Rights of the Child, which oversees compliance with the CRC, has issued many recommendations to States relating to a child's right to nationality. More information about this is available here, and our 2020 joint submission to the CRC Committee on issues relating to stateless children in the UK is here.

The United Nations General Assembly has given the Office of the United Nations High Commissioner for Refugees (UNHCR) a mandate to protect stateless persons. UNHCR issues guidelines and advises States on how to interpret international law relating to stateless persons, including Guidelines on Statelessness No. 4: *Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*. These Guidelines provide governments with guidance on how the 1961 Convention should be interpreted with respect to children. The Guidelines should be given considerable weight, in accordance with UNHCR's mandate.

Key relevant points in these Guidelines include:

1) To determine whether a child would 'otherwise be stateless', decision-makers must assess all relevant evidence, including any statements of the child concerned and/or their parents or guardians, the laws and practices of the countries of possible nationality [often requiring expert evidence], and relevant documents such as birth certificates, identity documents, correspondence with diplomatic missions of other States, and interviews or testimony (Para 21).
2) Refusal to recognise a person as a national may occur when a State: 1) explicitly declares that the person is not a national or 2) fails to respond to inquiries about whether the individual is a national (Para 19).
3) Under certain limited circumstances, a State is not required to grant its citizenship to children born on its territory, even if they would otherwise be stateless. If the child could acquire a nationality by declaration or registration with a parent's State of nationality, then the State of birth is not required to grant its citizenship to the child *only if*:

- '[T]he child concerned can acquire the nationality of a parent immediately after birth'; and
- The parents' State of nationality 'does not have any discretion to refuse the grant of nationality'; and
- The child's parents are in fact able to register the child with the State of their nationality; and
- There are no 'good reasons' why the parents do not wish to register their child with the State of their nationality. Authorities must consider 'whether an individual could reasonably be expected to take action to acquire the nationality in the circumstances of their particular case' (Paras 24-26).

4) 'Because of the difficulties that often arise when determining whether an individual has acquired a nationality, the burden of proof must be shared between the claimant and the authorities of the … State to obtain evidence and to establish the facts' (Para 20). If a State requires that a child has 'always been stateless' to acquire its nationality, it is presumed that the child has in fact always been stateless, and the State has the burden to prove the contrary (Para 48).
5) A State's decision-makers must apply Art 3 and Art 7 of the CRC and adopt an appropriate standard of proof, e.g., a 'reasonable degree' standard. 'Requiring a higher standard of proof would undermine the object and purpose of the 1961 Convention' (Para 21).
6) States need to adopt special procedures to address the challenges faced specifically by children, especially unaccompanied children (Para 21).
7) Refugee parents must not be expected to register their children as nationals of their country of nationality. Refugee children who automatically acquire at birth a parent's nationality [from the country of origin] should have the *option* to register as a national of the country of birth (Paras 27-28).
8) If a State's laws provide for stateless children born in the territory to be *registered* by application rather than automatically acquire nationality of the State of birth, the State is 'obliged to provide detailed information to parents of children who would otherwise be stateless about the possibility of acquiring the nationality, how to apply and about the conditions which must be fulfilled'. This information must be provided directly to the parents – general information is not enough (Paras 53-54).
9) Any fees for applications to register a stateless child as a national must not prevent a child from being granted nationality of the country of birth (Para 54(b) and fn 39).

In addition, the UK is obligated to adhere to the European Convention on Human Rights, which guarantees freedom from inhuman and degrading treatment or torture (Art 3), the right to respect for private and family life (Art 8), and the prohibition of discrimination (Art 14). The European Court of Human Rights has issued several decisions which confirm that nationality is an element of a person's identity and statelessness is relevant to considerations of the right to respect for private life (e.g., *Genovese v Malta* (2011), *Mennesson v France* (2014) and *Hoti v Croatia* (2018)). In addition, in some situations, statelessness can implicate Art 3 rights, where it results in inhuman or degrading treatment.

3. Relevant UK jurisprudence

The UK Government's proposed amendments appear to relate to the decision in *MK v SSHD* [2017] EWHC 1365 (Admin) (*MK India*). In that case, the High Court held that for a stateless child to have an entitlement to British citizenship under BNA Sch. 2 Para. 3, there is no requirement that the child could not acquire another nationality. If the BNA is amended, that holding may be superseded. However, we remind the Home Office of the following points, which will continue to be relevant:

1) The UK Government '*is not entitled to impose requirements that make it impossible for an individual to obtain a benefit that is his by statute*'. The Home Office requirement to produce confirmation from the Indian authorities that a child's birth had not been registered with the Indian authorities and the child was not a national of India could be impossible to prove, as there was no central registry of Indian birth registration or of Indian citizenship (Para 40).
2) Although the Judge found that no adequate evidence had been submitted demonstrating that it was not possible to register a child born in the UK to Indian parents as an Indian citizen, we note that in many circumstances, there are very significant practical and/or legal barriers to registration of a child as a citizen of a parent's country of nationality.
3) We note the Judge's reference to the possibility that parents may have 'good reasons' for not wishing to register their child as a citizen of their home country (see Para 26). This phrasing appears in other UK jurisprudence and in the UNHCR Guidelines cited above.
4) A child's best interests *must* be adequately considered and a primary consideration in decisions about their nationality.

4. Current gaps in the legal framework

We are concerned that the proposed amendment of BNA Sch. 2 Para. 3 could violate international law and, crucially, could result in more children being left in limbo in the UK. We know from the work of our UK members that some children who are stateless or at risk of statelessness in the UK are already falling through gaps in the current legal framework (see Section 6). At present, the UK is already failing to comply with some of its international legal obligations, including:

- **UK Government decision-makers do not always give adequate weight to a child's views or best interests.** For example, an inspection of Home Office decisions relating to the 'good character' requirement in children's citizenship applications found that in very few decisions was there evidence that the child's best interests had been considered at all. Although BNA Sch. 2 Para. 3 does not have a good character requirement, this is indicative of the Home Office's approach to decision-making on children's citizenship applications.
- **UK Government decision-makers do not always correctly assess all relevant evidence relating to statelessness or nationality.** For example, a UNHCR audit found that the Home

Office sometimes failed to consider 'vital information' relating to nationality in the context of applications for leave as a stateless person under Immigration Rules (Part 14).

- **The UK Government does not acknowledge that it should share the burden of proof with stateless children applying for British citizenship**, nor has it adopted a presumption that stateless children applying for British citizenship are stateless unless the Government proves otherwise.
- **The UK Government does not apply the recommended standard of proof in decisions about statelessness**, but rather applies the higher 'balance of probabilities' standard.
- **The UK Government has not introduced adequate special procedures for stateless children**, which could include, for example, appointment of guardians; free legal assistance for all children by child specialists; interviews undertaken by staff trained in best practices for interviewing children; provision of information in formats accessible to children.
- **The UK Government does not routinely provide information about British citizenship to parents of children born in the UK**, including for parents of children who are stateless or at risk of statelessness.
- **The UK Government has set the fees for children's registration as British citizens at a level that prevents some stateless children who are entitled to British citizenship from accessing it**.

For more information (including detailed references) on law, policy, and practice in relation to statelessness and nationality in the UK, please see the UK country profile in our Statelessness Index.

5. Data

Data published by the Home Office and the Children's Commissioner for England relating to stateless children leaves many questions unanswered. There has been a significant increase in the number of stateless children registering for British citizenship since 2016, but the causes for this are, as yet, unexplained, and could arise from various factors. The numbers have been *decreasing* since 2018, and the reasons for this are also unclear. Data published by the Children's Commissioner for England (Table 8.1) shows that applications to register as British citizens by persons who are and always have been stateless rose and declined, as follows:

2015: 0
2016: 35
2017: 1,165
2018: 1,710
2019: 1,140

For comparison, data published by the Home Office shows that the overall number of people (stateless and non-stateless categories) applying to *register* (i.e. not including those applying to *naturalise*) for British citizenship fluctuates somewhat from year to year, but in recent years has

been lower than 10 years ago. In 2011, the figure was 53,389. From 2016 to 2020, the annual figures ranged from approximately 41,000 to 49,000 (Table Cit_D01).

The Home Office has not published any information about the numbers of cases in which it considers that parents *chose not to register* their children as citizens of their country of nationality. Nor has the Home Office published evidence demonstrating that it has adequately considered whether and in how many cases there are barriers to parents registering their children as citizens of their country of nationality, or good reasons for them not to do so. Without this vital data and other relevant information, it is premature to consider amending BNA Sch. 2 Para. 3.

We note that the requirement to wait five years from birth before registering a stateless child as a British citizen under BNA Sch. 2 Para. 3 means that any child eligible to register in 2016 would have been born in 2011 or earlier (and so on for later years). This means that any failure on the part of parents to register their children as citizens of a country of nationality would have occurred five or more years prior to 2016. The *MK India* judgment was issued in 2017, so the increase in numbers of stateless children registering as British in 2017-18 cannot reasonably be construed as being due to parents intentionally keeping their child stateless so that they could register for British citizenship under BNA Sch. 2 Para. 3 following this judgment.

6. Case studies and key issues of concern

Given the lack of clarity in the data, we carried out research with our UK members and other stakeholders working with children affected by statelessness in the UK. We asked them to provide us with case studies and information from their work with affected individuals and communities to illustrate the key issues currently faced by stateless children and those at risk of statelessness in the UK. Any identifying information has been changed to protect children's privacy.

Aisha

Aisha is six and was born in the UK. Her mother is a national of a country in the Middle East, and her father is stateless. Aisha has one younger sibling (born in the UK and not yet five years-old) and one older sibling (born outside the UK). The Home Office has recorded Aisha and one of her siblings as nationals of their mother's country of nationality, but Aisha and her siblings are stateless. They did not inherit a nationality from their mother because her country of nationality is one of 25 countries that do not permit women to confer their nationality to their children on an equal basis with men; and their father has no nationality. Although born in the UK, Aisha and her younger sibling did not acquire British citizenship at birth, because neither parent had indefinite leave to remain at the time of their births. Aisha's parents and elder sibling previously had limited leave to remain in the UK, but at present, no one in the family has leave to remain. Aisha's father applied for leave to remain as a stateless person more than two years ago under Part 14 of the Immigration Rules and is still waiting for a decision. Aisha's father applied to register Aisha as a British citizen before she was five years old and took out a loan to pay the

Home Office fee, but the application was refused. Aisha's parents did not understand the relevant laws and were unable to get competent legal advice about their children's citizenship applications, because, her father says, '*Solicitors are very expensive and no-one took the case on legal aid*.' Aisha is now entitled to be registered as a British citizen under BNA Sch. 2 Para. 3, as a stateless child born in and resident in the UK for more than five years, but the family cannot afford to pay the application fee of £1,012. There are potential legal solutions for other family members, but the family's situation remains unresolved at present. Aisha's father says Aisha and her older sibling are already noticing that there are things the family cannot do because they do not have British citizenship or leave to remain in the UK.
(Information provided to ENS by Aisha's father)

Julia

Julia is a pre-teen child who was born in the UK and who has no recent family history of migration. Her mother and maternal grandmother (both deceased) were British citizens. However, the mother's name on Julia's birth certificate differs from the name on the mother's birth certificate, without any documentary explanation (such as a deed poll or marriage certificate). Further, the grandmother's name on the grandmother's birth certificate differs from that on the mother's birth certificate, without documentary explanation. The family has a chaotic history and are known to social services. Neither the Passport Office nor the Home Office have accepted the significant evidence from the local authority that the family connection has been established, and that Julia automatically acquired British citizenship at birth. As such, Julia has been treated as a non-citizen, even though she was a British citizen at birth and remains so. A legal advisor has assisted her to make British citizenship and passport applications, but her situation remains unresolved.
(Information provided to ENS by Julia's legal advisor)

Children in State care

Several ENS members and other stakeholders have expressed strong concerns about stateless children or children at risk of statelessness in State care. For example, in evidence provided to ENS in January 2021, JustRight Scotland identified 22 children and young people (not in the asylum process) with whom they have worked since 2017 who had insecure immigration status in the UK or were undocumented and could not access or prove citizenship of any country. Most of these children and young people were in the care of a local authority, although some were still in their family units. Many of the children had spent long periods of time in care before they were referred for legal advice on their immigration or citizenship status. The average age at referral to JustRight Scotland was 12 years-old (ranging from seven to 17 years-old). JustRight Scotland noted that local authority staff generally lacked awareness of British nationality and immigration law, or the immigration impact of taking a non-British citizen child into care (i.e., that where a child is dependent on their family's limited leave to remain, taking them into care may end the child's leave to remain and require an application to be made). Children in such situations often have little or no evidence relating to their nationality. They often face evidentiary difficulties in seeking to meet the requirements to prove their British or any other citizenship, including, for

example inability to register their birth in another country or acquire/prove a nationality due to missing or flawed documents or because registration requires the consent of one or both parents (where parents are unavailable or uncooperative).

Roma children

Roma Support Group reported in June 2020 that approximately 15–25% of Roma children in the UK with whom they engaged did not have any identity documents, and their parents did not know that they needed to apply to the EU Settled Status scheme (or for British citizenship) to ensure that their children's legal status did not become irregular after Brexit. The report also states that some Roma children who are entitled to British citizenship do not apply for it due to an inability to pay the Home Office fee. Roma Support Group told ENS that many people they work with do not understand that a British birth certificate is not evidence of British citizenship. Many Roma children born in the UK are not registered as nationals of their parents' countries of nationality, for a variety of reasons. For example, in one case, a mother could not obtain Romanian documents for her child because Romanian law requires that both father and mother provide valid documents to register their child for Romanian citizenship, and the mother did not have access to the father's documents. A further concern in the community is antigypsyism and discriminatory treatment on the part of the authorities of their countries of origin, including at consulates in the UK, which has caused people to be very reluctant to approach their consulates to acquire documentation. Some have tried but found the procedures complicated, lengthy, and sometimes impossible to navigate. In other cases, children whose parents sought (and were refused) asylum in the UK prior to their country of nationality joining the EU have not been registered as British citizens (or acquired any other nationality), so risk their status in the UK becoming irregular after the deadline to apply for Settled Status. Some Roma children have applied for British citizenship but have been refused on 'technicalities' such as lack of identity documents. Roma Support Group emphasises that the Home Office does not communicate directly with Roma communities to explain relevant laws, policies, and procedures. As a result, Brexit could lead to a significant number of Roma children in the UK (some of whom are stateless or at risk of statelessness) having irregular immigration status. Stateless children (and children without documents proving their nationality) may find it more difficult than other children to regularise their status and will need specialised legal assistance.

These case studies and our wider research illustrate six key issues of concern and relevance to the consultation:

1) **Requiring parents to attempt to register their child as a citizen of a parent's country of citizenship would be futile and illogical in some cases where such registration is impossible.** In Julia's case, her mother and grandmother were British, and Julia should be recognised as British from birth. Aisha *cannot* acquire citizenship from her mother by law, regardless of her parents' actions.

2) **Many parents, guardians, and caregivers do not understand the requirements that pertain to children's entitlements to British citizenship and face significant barriers to**

accessing competent legal advice. As a result of this, Aisha's father applied to register her as a British citizen too soon at significant cost to the family. Due to parents' or caregivers' lack of knowledge of relevant nationality laws, and other factors, information we gathered indicates some Roma children born in the UK and some children in State care are stateless or at risk of statelessness. Brexit could result in many (possibly stateless) children's legal status in the UK becoming irregular without specialist advice to resolve their immigration status and/or citizenship.

3) **Many children face barriers to accessing citizenship of another country, including lack of documents required to prove nationality, place of birth or parentage, flaws in documents, or discriminatory treatment by officials.** In Julia's case, vital documents contain errors. Despite evidence of the family relationship and Julia's British citizenship, problems with her documents have prevented her from being recognised as a British citizen. Some Roma parents face significant barriers to registering their children as citizens of their country of nationality, including lack of documents, antigypsyism, and (fear of) discrimination on the part of consular officials. Children in State care often have few or none of the documents required to prove citizenship of the UK or another country.

4) **Requiring children who are stateless or at risk of statelessness to go through complicated procedures to acquire or be acknowledged to have British citizenship places an unnecessary and avoidable burden on children born in the UK and fails to take into consideration the child's best interests.** Many of the children affected, such as Julia and Aisha, as well as vulnerable Roma children and children in State care, already face numerous serious hardships.

5) **Requiring stateless children to prove that they could not acquire citizenship of another country wastes individual and public resources that could be better used in other ways.** Such a requirement very often results in a complicated, time-consuming, costly endeavour for children, parents, legal advisors, social workers (where relevant), Home Office decision-makers, and judges (in judicial review cases).

6) **The disproportionately high Home Office fee for children's British citizenship applications prevents some stateless children from realising their right to British citizenship and perpetuates childhood statelessness in the UK.** The very high fee can also push some families, like in Aisha's case, into significant debt with consequent impacts on children's wellbeing.

7. Examples of good practice from other countries

Birthright citizenship

The most effective and simplest way to prevent childhood statelessness in any State is through birthright citizenship, also called *jus soli* citizenship, which means that all children born in the territory of a State automatically acquire its citizenship at birth. The UK had birthright citizenship

until the BNA 1981 came into force. Many countries still have birthright citizenship, including the United States, Canada, and most other countries in the Americas. An alternative to birthright citizenship is automatic acquisition of citizenship at birth by children born on the territory who would otherwise be stateless. Numerous European countries have variations of this type of safeguard to prevent childhood statelessness in their nationality laws, including Belgium, Bulgaria, Finland, France, Italy, Montenegro, Portugal, Serbia, Slovakia, and Spain. Finland, for example, has a nationality determination procedure to ensure that stateless children and children of unknown nationality born in Finland acquire Finnish nationality, which has been highlighted as good practice by UNHCR. In Spain, the Civil Code automatically attributes Spanish nationality at birth as a 'rebuttable presumption' to children born stateless on the territory, and there is no legal requirement for children to prove they cannot access another nationality.

Free or low-cost acquisition of citizenship for children

Most other European countries have relatively low fees for children to acquire citizenship and/or a fee waiver for children who cannot afford to pay the fee. For example, in Norway, a citizenship application is free of charge for children and costs NOK 3,700 (360 EUR) for adults. In France, the naturalisation fee is 55 EUR. In Germany, the naturalisation fee is 255 EUR and can be reduced to 51 EUR for minors on grounds of equity or public interest.

8. Recommendations

We urge the UK Government to undertake a comprehensive impact assessment and commission a detailed, independent study of childhood statelessness in the UK prior to seeking any amendment to BNA Sch. 2 Para. 3.

In considering whether any amendment to BNA Sch. 2 Para. 3 is proportionate and necessary, the UK Government must:

1) Take a child-centred approach and consider the views and best interests of all children as a primary consideration at every stage. We note that the current Home Office online consultation is restricted in its terms and conditions to persons over 16 years of age. We recommend that the Home Office facilitate ways to ensure the views of children are heard on matters affecting them in line with Art 12 CRC.
2) Comply with international law, guidance, and best practice relating to the prevention and reduction of statelessness.
3) Consider that children must not be punished for their parents' status, actions, or inaction.
4) Take steps to ensure that children are not prevented from acquiring British citizenship because they cannot afford to pay the fee to register as a British citizen.
5) Examine and publish disaggregated data relating to stateless children's applications for British citizenship.

6) Comprehensively assess the reasons why some parents, guardians, caregivers, or children do not register children as citizens of a parent's country of nationality where this is an option, including barriers they may face to doing so, and publish this assessment.

7) Consider other measures it should take to prevent and reduce childhood statelessness in the UK, including the re-introduction of birthright citizenship, and/or provisions to ensure that all stateless children in the UK acquire British citizenship through accessible procedures, as soon as possible (after birth), and with easy access to competent, free legal advice.

Above all, any amendment to BNA Sch. 2 Para. 3 must not make it more difficult for stateless children to acquire and/or prove their entitlement to British citizenship. On the contrary and in line with international norms, the Home Office should facilitate the process by removing or waiving documentation requirements that cannot be met and giving careful consideration to the best interests of the child in every individual case, as well as considering all practical and/or legal barriers to acquisition of a parent's nationality, to ensure that every stateless child born or living in the UK acquires British citizenship without undue challenges, hardships, or delay. Children have no choice in their place of birth or, generally, their country of residence. Children deserve to be citizens, have a sense of belonging and security, and be able to participate fully in all aspects of life in the country they call home.

For further information about this submission, please contact:

Nina Murray
Head of Policy & Research, European Network on Statelessness
nina.murray@statelessness.eu