

# A Legal Analysis of Incorporating Into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998

Alison Harvey, No5 Chambers

MARCH 2020



**Coimisiún na hÉireann  
um Chearta an Duine  
agus Comhionannas**  
Irish Human Rights and  
Equality Commission



**NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION**

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## Structure of this paper

<b>A. THE RESEARCH QUESTION POSED</b>	1
<b>B. THE COHORT</b>	1
B.1. THE PERSONS CONCERNED	1
B.2. THE RIGHTS AT ISSUE	4
B.2.i “identity”	4
B.2.ii “the birthright ... to identify themselves and be accepted”	9
<b>C. THE LAW</b>	10
C.1. BRITISH NATIONALITY AND UK IMMIGRATION LAW	10
C.1.i “Parent”	12
C.1.ii “settled”	12
C.1.iii Loss	18
C.1.iv Fees	18
C.2. BRITISH AND IRISH NATIONALITY LAW	20
C.3. IRISH NATIONALITY LAW	23
C.3.i “Parent”	30
<b>D. STATELESSNESS</b>	31
<b>E. CONCLUSIONS AND RECOMMENDATIONS</b>	37
E.1. LEGISLATIVE OBJECTIVES	37
E.2. GETTING THE COHORT RIGHT	37
E.2.i Parents	37
E.2.ii The children of Irish citizens and persons entitled to reside without limit of time	40
E.2.iii The Right of abode	42
E.3. THE RIGHT OF ELECTION	44
E.3.i Renunciation and resumption	50
E.3.ii Stateless children	50
<b>F. THE KEY PARTS OF THE STATUTE BOOK, LEGISLATION AND GUIDANCE POTENTIALLY REQUIRING AMENDMENT</b>	51
F.1. STATUTE	51
F.1.i Immigration Act 1971	51

<i>F.1.ii</i>	<i>British Nationality Act 1981</i>	51
<i>F.1.iii</i>	<i>Immigration Act 2014</i>	53
<b>F.2.</b>	<b>STATUTORY INSTRUMENTS</b>	53
<i>F.2.i</i>	<i>British Nationality (General) Regulations 2005</i>	53
<i>F.2.ii</i>	<i>Immigration (Certificate of Entitlement to the Right of Abode in the United Kingdom) Regulations 2006</i>	53
<i>F.2.iii</i>	<i>Immigration and Nationality (Fees) Order 2016</i>	54
<i>F.2.iv</i>	<i>Immigration and Nationality (Fees) Regulations 2018 (SI 2018/330) or any successor instrument</i>	54
<b>F.3.</b>	<b>GUIDANCE</b>	54
<i>F.3.i</i>	<i>Nationality Guidance: Registration as a British citizen: children</i>	54
<b>G. RISKS OF INADVERTENT LOSS OF RIGHTS AND WAYS TO ADDRESS THESE</b>		<b>55</b>
<b>H. ANY PRACTICAL AND ADMINISTRATIVE CONSEQUENCES THAT MAY ARISE FROM ANY LEGISLATIVE AMENDMENT, AND, IF SO, HOW THESE MAY BE RESOLVED</b>		<b>57</b>
<b>I. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS</b>		<b>60</b>
<b>I.1.</b>	<b>LEGISLATIVE OBJECTIVES</b>	60
<b>I.2.</b>	<b>RECOMMENDATIONS</b>	60
	<b>Getting the cohort right</b>	60
	<i>Parents</i>	
	<i>Recommendations 1-3</i>	
	<i>The children of Irish citizens and persons entitled to reside without limit of time</i>	60
	<i>Recommendations 4-6</i>	
	<i>The Right of abode</i>	61
	<i>Recommendation 7</i>	
	<i>The right of election</i>	61
	<i>Recommendations 8-23</i>	
	<i>Renunciation and Resumption</i>	62
	<i>Recommendations 24-25</i>	
	<b>Other matters</b>	62
	<i>Recommendations 26-37</i>	

## A. THE RESEARCH QUESTION POSED

1. The research question posed is:

One of the founding principles of the Belfast (Good Friday) Agreement 1998 ('the 1998 Agreement') was the recognition by the two Governments and all participants, on a 'no detriment' basis, of:

- the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose.<sup>1</sup>

The research should identify and make recommendations on the legislative steps required to incorporate this commitment into UK nationality and immigration law. It should:

- identify the key parts of the statute book potentially requiring amendment;
- develop detailed legislative objectives (short of legislative drafting) that would achieve the policy aim;
- identify risks of inadvertent loss of rights (e.g. statelessness; or uncertainty for those who may have difficulty in proving British citizenship, or their descendants; or which may reduce rights of stateless persons, asylum-seekers or other categories of migrant person) and propose ways to address these through legislative objectives or otherwise;
- identify any practical and administrative consequences that may arise from any legislative amendment, and, if so, how these may be resolved.

2. The Joint Committee also commissioned, in parallel, research into issues arising from the UK and EU commitment to facilitate continuing EU citizenship rights, opportunities and benefits in Northern Ireland after Brexit. These include matters of the position of Irish nationals, and joint Irish British nationals, among others, under UK immigration law and those areas in which a person's status, rights and entitlements under UK law are affected by that person's immigration status.

## B. THE COHORT

### B.1. THE PERSONS CONCERNED

3. The 10 April 1998 Treaty between the Government of Great Britain and Northern Ireland and of the Government of Ireland provides at Article 1 that the governments:

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

4. Annex 2 *Declaration on the Provisions of Paragraph (vi) of Article 1 In Relationship to Citizenship* provides:

The British and Irish Governments declare that it is their joint understanding that the term "the people of Northern Ireland" in paragraph (vi) of Article 1 of this Agreement

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<sup>1</sup> Agreement between the Government of the UK and the Government of Ireland, paragraph (vi), endorsed by all participants under Constitutional Issues section of Belfast Good Friday Agreement, paragraph 1(vi).

means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

5. The multiparty agreement between the two governments and the eight political parties provides that the participants:

- (vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

6. It is worth pausing over “or is otherwise entitled to reside in Northern Ireland without restriction on their period of residence”.

7. The British Nationality Act 1981 s 50 states:

- (1) “settled” shall be construed in accordance with subsections (2) to (4);

- (2) Subject to subsection (3), references in this Act to a person being settled in the United Kingdom or in a British overseas territory are references to his being ordinarily resident in the United Kingdom or, as the case may be, in that territory without being subject under the immigration laws to any restriction on the period for which he may remain.

- (3) Subject to subsection (4), a person is not to be regarded for the purposes of this Act—

- (a) as having been settled in the United Kingdom at any time when he was entitled to an exemption under section 8(3) or (4)(b) or (c) of the Immigration Act 1971 or, unless the order under section 8(2) of that Act conferring the exemption in question provides otherwise, to an exemption under the said section 8(2), or to any corresponding exemption under the former immigration laws; or

[... [*relates to the Overseas Territories* ]]

- (4) A person to whom a child is born in the United Kingdom after commencement is to be regarded for the purposes of section 1(1) as being settled in the United Kingdom at the time of the birth if—

- (a) he would fall to be so regarded but for his being at that time entitled to an exemption under section 8(3) of the Immigration Act 1971; and

- (b) immediately before he became entitled to that exemption he was settled in the United Kingdom; and

- (c) he was ordinarily resident in the United Kingdom from the time when he became entitled to that exemption to the time of the birth;

but this subsection shall not apply if at the time of the birth the child’s father or mother is a person on whom any immunity from jurisdiction is conferred by or under the Diplomatic Privileges Act 1964.

8. Section 8(3) of the Immigration Act 1971 concerns diplomats and sections 4(b) and (c) visiting forces. They are not in point. Section 8(2) of the 1971 Act provides:
  - (2) The Secretary of State may by order exempt any person or class of persons, either unconditionally or subject to such conditions as may be imposed by or under the order, from all or any of the provisions of this Act relating to those who are not British citizens.
9. “[I]mmigration laws” are defined in s 50(1) of the British Nationality Act 1981 for the purposes of the Act:
  - (a) in relation to the United Kingdom, means the Immigration Act 1971 and any law for purposes similar to that Act which is for the time being or has at any time been in force in any part of the United Kingdom;
  - (b) in relation to a British overseas territory, means any law for purposes similar to the Immigration Act 1971 which is for the time being or has at any time been in force in that territory;
10. This definition does not appear to include the European Communities Act 1972 or any legislation made under it<sup>2</sup>. Schedule 3 to the Immigration (European Economic Area) Regulations 2016, however, provides at paragraph 2:

**Person not subject to restriction on the period for which they may remain**

- 2.—(1) For the purposes of the 1971 Act and British Nationality Act 1981, a person who has a right of permanent residence under regulation 15 must be regarded as a person who is in the United Kingdom without being subject under the immigration laws to any restriction on the period for which the person may remain.
  - (2) But a qualified person, the family member of a qualified person, a person with a derivative right to reside and a family member who has retained the right of residence must not, by virtue of that status, be so regarded for those purposes.
11. EU nationals who have not acquired permanent residence are treated for nationality law purposes as persons with restrictions on their stay. Their children will not be born British. This has been the case since 2 October 2000<sup>3</sup>.
12. It is important to recognise that the cohort of persons identified as the beneficiaries in the agreement is not coterminous with the cohort of persons who:
  - » Were born in Northern Ireland;
  - » Are entitled to citizenship of Ireland; and
  - » Currently hold British citizenship.
13. The cohort includes children. It includes adults who do not have, or who no longer have, mental capacity to make decisions for themselves. It does not exclude persons who are, for example, imprisoned or absent from the territory.

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2 See further the discussion of *Capparrelli (EEA Nationals – British Nationality)* [2017] UKUT 00162 (IAC) (27 April 2017) below.

3 Immigration (European Economic Area) Regulations 2000 (SI 2000/2326). Again, see further the discussion of *Capparrelli* below.

14. The cohort does not include a person such as Ms McCarthy whom the European Court of Justice in **Case C-434/09 of 5 May 2011**, held not to benefit from EU free movement law rights in the UK when she wished to bring her partner to stay with her.
15. Ms McCarthy was a dual UK Irish national not born in Northern Ireland but who had moved there from elsewhere in the UK. Nothing in the Belfast Agreement covers persons not born in Northern Ireland.

## B.2. THE RIGHTS AT ISSUE

### B.2.i “identity”

16. The UK Home Office in the De Souza<sup>4</sup> case, and some commentators, have argued that the term “identify” denotes something less than State recognition of nationality and that the birthright provisions were not intended to imply a right of election of citizenship. They place reliance on the wording of the multiparty agreement:

Article 1 (vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

17. The Upper Tribunal in the ***Secretary of State for the Home Department v Jake Parker De Souza* [2019] UKUT 355 (IAC)** (14 October 2019) held:

28. [...] Even if we assume that the legal significance of the provision regarding “the birthright of all the people in Northern Ireland to identify themselves and be accepted as Irish or British, or both” has the reach for which the claimant contends, its existence in an international treaty, whilst binding in international law, does not thereby make it binding under the domestic law of the United Kingdom.

18. Its comment seemingly in support of the “identify” approach is thus *obiter*:

39. The omission also underscores the correctness of the Secretary of State’s submission that, properly construed, Article 1(iv)/(vi) does not, in fact, involve giving the concept of self-identification the meaning for which the claimant argues. If the parties to the multi-party agreement and the governments of Ireland and the United Kingdom had intended the concept of self-identification necessarily to include a person’s ability to reject his or her Irish or British citizenship, it is inconceivable that the provisions would not have dealt with this expressly. By the same token, it is equally inconceivable that the far-reaching consequences for British nationality law would not have been addressed by the 1998 Act.

19. In my opinion these approaches ignore the express wording of the agreement “and be accepted as”.

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<sup>4</sup> *Secretary of State for the Home Department v Mr Jake Parker de Souza v* [2019] UKUT 355 (IAC) (14 October 2019).

20. Commentators point to the differences between Annexes A and B. Annex B makes provision for the substitution of Article 2 of the Irish Constitution. Annex A, which deals with UK legislation, does not touch on citizenship.
21. It is difficult to read the “identify” approach as compatible with the terms of the research brief to which this paper responds. It is for those who receive this paper to weigh the proposals put forward, which are proposals as to how election might be achieved, against the proposals for alternative approaches. I do, however, make a few remarks about the two approaches.
22. The Government of Ireland has concerned itself with election. While the UK Home Office has advanced the “identify is not election” approach in the *De Souza*<sup>5</sup> case it has also pointed to the provisions for renunciation of British Citizenship in s 12 of the British Nationality Act 1981<sup>6</sup>, suggesting recognition of a need to go beyond an identification that does not involve State recognition.
23. In an earlier case on the same point, the unreported *Mr Abdul Khalique v Secretary of State for the Home Department IA/07412/2013*<sup>7</sup>, the Home Office relied on the right to renounce as fulfilling its obligations under the Belfast Agreement. Nothing in the Upper Tribunal determination suggests that it advanced the “identify not elect” point at all. Upper Tribunal judge Kopieczek described the respondent Secretary of State’s position thus:

16. In relation to the nationality point, it was accepted on behalf of the respondent that the Home Office position is that a person such as the appellant’s partner has a constitutional right to choose Irish or British citizenship or both. On the other hand, in the light of the British Nationality Act, she had never renounced British nationality and therefore would be viewed as both British and Irish.

24. The reference is to how the appellant’s partner “would be viewed” rather than to how she would view herself. Upper Tribunal judge Kopieczek went on to hold:

22. So far as the nationality point is concerned, the appellant’s skeleton sets out a number of authorities on the issue in terms of the relationship between the Northern Ireland Act 1998 and the Belfast Agreement. It seems to me that those authorities which consider in various different respects the impact of the Belfast Agreement reveal that an individual does constitutionally have the right to identify themselves as either British or Irish or both, as set out in Article 1(vi) of the Belfast Agreement. Article 1(vi) provides that the two Governments:

“recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future changes in the status of Northern Ireland”.

23. I need only refer to the decision in *Robinson v Secretary of State for Northern Ireland and Others (Northern Ireland)* [2002] UKHL 32 in support of the proposition that the Northern Ireland Act 1998 was passed to implement the Belfast Agreement which,

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5 *Mr Jake Parker de Souza v Secretary of State for the Home Department EA/06667/2015*.

6 Discussed below.

7 Available at <https://tribunalsdecisions.service.gov.uk/utiac/ja-07412-2013> (accessed 25 December 2019).

amongst other things, recognises the right of the people of Northern Ireland to identify themselves as Irish, or British, or both.

24. So much, it seems to me, was also conceded on behalf of the respondent at the hearing before me. [...]

25. The Secretary of State did not attempt to challenge the decision of the Upper Tribunal.
26. Those who support the “a right to identify is not a right to elect” approach would argue that the current distinction in UK law between nationals and the settled is not great and indeed is less for Irish nationals than for others, as discussed below, and that this is a reason why the key issue is how persons identify themselves, rather than how the State identifies them.
27. Following the *McCarthy* case, the UK treated persons born in Northern Ireland who are beneficiaries of the Belfast Agreement in the same way as Ms McCarthy, who, as set out above, was not a beneficiary of the agreement<sup>8</sup>. It treated beneficiaries of the agreement, along with other dual British and Irish citizens, as persons caught by the judgment. The De Souza's are fighting this treatment on the basis that Ms De Souza is a beneficiary of the Belfast Agreement.
28. Some have argued that the Belfast Agreement demands only that those who identify as Irish under the Belfast Agreement<sup>9</sup> be treated no less favourably than Irish nationals under EU law and that the focus should be on securing the equivalent of EU law rights for them. This is a programme, especially in the light of possibility of the UK's leaving the EU, and on terms yet to be established, for a legislative agenda arguably far more complex than that with which I am asked to deal. Relevant questions are being explored in the parallel research project identified at the beginning of this paper. The UK Government appears to have taken a step in this direction in its 8 January 2020 paper *New Decade, new approach*<sup>10</sup>. Annex A thereto: *UK Government Commitments to Northern Ireland* provides:

### **Delivering on our commitments**

#### ***The Belfast (Good Friday) Agreement***

13. The Government has reviewed the consistency of its family migration arrangements, taking into account the letter and spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it.

14. The Government will change the rules governing how the people of Northern Ireland bring their family members to the UK. This change will mean that eligible family members of the people of Northern Ireland will be able to apply for UK immigration status on broadly the same terms as the family members of Irish citizens in the UK.

5. This immigration status will be available to the family members of all the people of Northern Ireland, no matter whether they hold British or Irish citizenship or both, no matter how they identify.

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8 See Daniel Holder, *The Right to be British, or Irish, or both*, 23 April 2019, available at <https://thedetail.tv/articles/the-right-to-be-british-irish-or-both> (accessed 1 September 2019).

9 They do not always specify whether they limit their argument to the beneficiaries of the Belfast Agreement or are suggesting the persons such as Shirley McCarthy should benefit.

10 Available at <https://www.dfa.ie/media/dfa/newsmedia/pressrelease/New-Decade-New-Approach.pdf> (accessed 11 January 2020).

29. Detailed proposals have yet to be published but it is understood that “eligible” family members may reflect limits on the cohorts of proposed beneficiaries, perhaps a limited period for such applications.
30. Against the “identify is not a right to elect” it can be argued that it is a hollow “right” that gives no effect vis à vis the State to the way in which you identify yourself, especially given that immigration status is increasingly relevant to all aspects of life in the UK: to employment<sup>11</sup>, to the ability to rent property<sup>12</sup>, to being able to drive,<sup>13</sup> to holding a bank account<sup>14</sup> and to accessing the National Health Service without charge and not having to pay up front for any medical care provided<sup>15</sup>. Irish citizens have, to date, been protected from these measures and treated in the same way as British citizens but the measures illustrate the diverse rights which have been, and can be, made conditional on immigration status. The spectre of confusion over the way EEA nationals, including those with rights of permanent residence under EU law, will be treated after Brexit has brought the risks of not being able to assert one’s status home to many. Consequences flow from citizenship: the nationality of children; the entitlement to diplomatic and consular protection<sup>16</sup>; liability for a range of criminal offences<sup>17</sup>, to name just three.
31. The current minimal distinctions between the settled and the citizen were last under threat in the Borders, Citizenship and Immigration Act 2009, part two, albeit that the Act carved out a “Common Travel Area Entitlement” for Irish citizens, designed to be inserted into in the British Nationality Act 1981 Schedule 1, paragraph 11(5) but never brought into force:

*(5) A person has a qualifying CTA entitlement if the person—*

*(a) is a citizen of the Republic of Ireland,*

*(b) last arrived in the United Kingdom on a local journey (within the meaning of the Immigration Act 1971) from the Republic of Ireland, and*

*(c) on that arrival, was a citizen of the Republic of Ireland and was entitled to enter without leave by virtue of section 1(3) of the Immigration Act 1971 (entry from the common travel area).*

32. This language echoes s 1(3) of the Immigration Act 1971 which provides:

*(3) Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act; and in this Act the United Kingdom and those places, or such of them as are not so excluded, are collectively referred to as “the common travel area”*

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<sup>11</sup> Immigration Act 1971 s 24B read with Immigration Asylum and Nationality Act 2006 s 15-25.

<sup>12</sup> Immigration Act 2014 s 21 and see s 33A.

<sup>13</sup> Immigration Act 1971 s 24C read with Immigration Act 2014 ss 46, 47.

<sup>14</sup> Immigration Act 2014 s 40 to 42.

<sup>15</sup> National Health Service (Charges to Overseas Visitors) Regulations SI 2015/238.

<sup>16</sup> See *Nottebohm (Second Phase) (Lichtenstein v Guatemala)*, judgment of April 6th, 1955: I.C. J. Reports 1955, 4 and Article 1 of the International Law Commission’s Draft Articles on Diplomatic Protection, 2006.

<sup>17</sup> See e.g. the Offences Against the Person Act 1861 and the offences of murder and manslaughter, see the War Crimes Act 1991 and the Modern Slavery Act 2015 and see the Treason Acts. Further, albeit somewhat outdated, information, is provided in Lord Goldsmith QC’s *Citizenship: our common bond* 11 March 2008.

and indeed, some commentators talk of a “CTA entitlement” when describing the rights of citizens of Ireland in the UK. That jargon is not used in this paper.

33. The negative connotations of forcing British citizenship on persons on the island of Ireland against their will (and vice versa) are the story of the struggle for independence of Ireland and the “identify not elect” approach fails to acknowledge this history.
34. International law places an increasing emphasis on the free consent of an individual to nationality in situations where a right of election may arise.
35. It is a generally accepted norm of international law that a State may not impose its nationality upon an adult against his/her will<sup>18</sup>. The UK argued forcefully for this position before the Permanent Court of International Justice in the *Tunis and Morocco* case<sup>19</sup>. A negotiated settlement was achieved.
36. While there is no question but that there is a “genuine link”<sup>20</sup> between those born in Northern Ireland and the UK State, such that no question of “imposition” arises in the initial ascription of nationality, and the UK’s right to provide diplomatic protection to British citizens born in Northern Ireland will be recognised by other States, this international law backdrop exposes the limitations of the notion that a right to “identify” is somehow equivalent to the right to elect.
37. The International Law Commission’s “Draft Articles on Nationality of Natural Persons in Relation to the Succession of States”<sup>21</sup> provide for consideration in cases of State succession of the will of the persons concerned, e.g. draft Article 8(2):
  2. A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.
38. Article 11 *Respect for the will of persons concerned*, provides that:
  1. States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.
  2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.
39. The Council of Europe in the 1997 European Convention on Nationality<sup>22</sup> and the 2006 Convention on the Avoidance of Statelessness in Relation to State Succession, adopted in 2006<sup>23</sup>, similarly emphasises the will of the persons concerned.

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18 Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Brill 1979) 95-115.

19 *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco*, 4, Permanent Court of International Justice [1923] PCU Ser. B No 4, 7 February 1923.

20 *Nottebohm Case (Liechtenstein v Guatemala) (second phase)* [1955] ICJ Reports 4.

21 International Law Commission, *Draft Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries*, 1999. (Annex to UNGA Res. 55/153, 12 Dec. 2000). See the UN General Assembly Resolution 66/92 *Nationality of natural persons in relation to the succession of States* (9 December 2011).

22 European Convention on Nationality, 1997, Article 18.

23 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, **Article 2—Right to a Nationality**. See also the Declaration on the Consequences of State Succession for the Nationality of Natural Persons (the Venice Declaration), adopted in 1980.

40. A footnote: I read the Belfast Agreement as allowing person of Northern Ireland to identify as British, or Irish, or both, not as requiring him or to hold one or the other nationality. I do not read the agreement as prohibiting persons born in Northern Ireland from exercising the right, which all British and all Irish citizens have, to renounce their British or Irish citizenship provided that this will not leave them stateless. The definition of the people of Northern Ireland, discussed above, may thus encompass persons who have renounced both Irish and British nationality, for example to take up the nationality of a third State which does not permit dual nationality. In this context the notion of identity short of nationality still has some purchase. They could continue to 'identify' as British or Irish or both without carrying either of those passports. I cannot think of situations in which identification in these circumstances would have any legal consequences, but it may be of significance to the individual. It would in no way impact entitlement to "be accepted" as British/Irish/both" but this would be irrelevant until the person sought such acceptance in the form of nationality.

**B.2.ii "the birthright ... to identify themselves and be accepted"**

41. A question arises as to whether identification as British, or Irish, or both, must be a once and for all decision, or whether a person can identify as both as British and as Irish at one point, then solely as British or solely as Irish at another. Should a parent be able to elect? Should the election of a parent be binding on a child for the whole of his or her life? If a person can change their mind, how many times? And what notice must be given?
42. These were questions that preoccupied in Upper Tribunal in the *Jake Parker De Souza* case:
37. [...] It cannot rationally be contended that an infant, for example, would be expected to give consent. But, even if it were assumed that consent becomes a prerequisite only once a person had achieved the age of majority, there remain questions as to whether, and, if so, how, such a person would be expected to signify consent. A person's nationality cannot depend in law on an undisclosed state of mind, which could change from time to time, depending on how he or she felt.<sup>24</sup>
43. The notion of a "birthright" suggests a right that is inalienable and cannot be lost and this points to an election not being once and for all. The State, however, has an interest in persons not being able to switch more frequently than it can keep track of, and also in persons not being able to take and to lose, its nationality as a matter of convenience rather than as an expression of identity. An example for as long as the UK remains in the EU, would be if a person who had always identified as a British citizen and as Irish elected to identify as Irish only when they wished to bring a spouse to the UK, to benefit from the less onerous requirements for EEA nationals, and then promptly switched back to being able to identify as both.

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<sup>24</sup> *Secretary of State for the Home Department v Jake Parker De Souza* [2019] UKUT 355, 14 October 2019.

## C. THE LAW

44. To understand the options, an understanding of the relevant laws is required. This is also helpful as an introduction to the complexities of amending British nationality law.

### C.1. BRITISH NATIONALITY AND UK IMMIGRATION LAW

45. The British Nationality Act 1981 s 1 provides that:

#### *1 Acquisition by birth or adoption.*

(1) A person born in the United Kingdom after commencement, or in a qualifying territory on or after the appointed day, shall be a British citizen if at the time of the birth his father or mother is—

- (a) a British citizen; or
- (b) settled in the United Kingdom or that territory.

(1A) A person born in the United Kingdom or a qualifying territory on or after the relevant day shall be a British citizen if at the time of the birth his father or mother is a member of the armed forces.

(2) A new-born infant who, after commencement, is found abandoned in the United Kingdom, or on or after the appointed day is found abandoned in a qualifying territory, shall, unless the contrary is shown, be deemed for the purposes of subsection (1)—

- (a) to have been born in the United Kingdom after commencement or in that territory on or after the appointed day; and
- (b) to have been born to a parent who at the time of the birth was a British citizen or settled in the United Kingdom or that territory.

(3) A person born in the United Kingdom after commencement who is not a British citizen by virtue of subsection (1), (1A) or (2) shall be entitled to be registered as a British citizen if, while he is a minor—

- (a) his father or mother becomes a British citizen or becomes settled in the United Kingdom; and
- (b) an application is made for his registration as a British citizen.

(3A) A person born in the United Kingdom on or after the relevant day who is not a British citizen by virtue of subsection (1), (1A) or (2) shall be entitled to be registered as a British citizen if, while he is a minor—

- (a) his father or mother becomes a member of the armed forces; and
- (b) an application is made for his registration as a British citizen.

(4) A person born in the United Kingdom after commencement who is not a British citizen by virtue of subsection (1) (1A) or (2) shall be entitled, on an application for his registration as a British citizen made at any time after he has attained the age of ten years, to be registered as such a citizen if, as regards each of the first ten years of that

person's life, the number of days on which he was absent from the United Kingdom in that year does not exceed 90.

(5) Where—

(a) any court in the United Kingdom or, on or after the appointed day, any court in a qualifying territory makes an order authorising the adoption of a minor who is not a British citizen; or

(b) a minor who is not a British citizen is adopted under a Convention adoption, that minor shall, if the requirements of subsection (5A) are met, be a British citizen as from the date on which the order is made or the Convention adoption is effected, as the case may be effected under the law of a country or territory outside the United Kingdom.

(5A) Those requirements are that on the date on which the order is made or the Convention adoption is effected (as the case may be)—

(a) the adopter or, in the case of a joint adoption, one of the adopters is a British citizen; and

(b) in a case within subsection (5)(b), the adopter or, in the case of a joint adoption, both of the adopters are habitually resident in the United Kingdom or in a designated territory.

(6) Where an order or a Convention adoption in consequence of which any person became a British citizen by virtue of subsection (5) ceases to have effect, whether on annulment or otherwise, the cesser shall not affect the status of that person as a British citizen.

(7) If in the special circumstances of any particular case the Secretary of State thinks fit, he may for the purposes of subsection (4) treat the person to whom the application relates as fulfilling the requirement specified in that subsection although, as regards any one or more of the first ten years of that person's life, the number of days on which he was absent from the United Kingdom in that year or each of the years in question exceeds 90.

(8) In this section and elsewhere in this Act "settled" has the meaning given by section 50.

(9) The relevant day for the purposes of subsection (1A) or (3A) is the day appointed for the commencement of section 42 of the Borders, Citizenship and Immigration Act 2009 (which inserted those subsections).

46. As to birth outside the territory, s 3 provides that:

(1) A person born outside the United Kingdom and the qualifying territories after commencement shall be a British citizen if at the time of the birth his father or mother—

(a) is a British citizen otherwise than by descent; or

(b) is a British citizen and is serving outside the United Kingdom and the qualifying territories in service to which this paragraph applies, his or her

recruitment for that service having taken place in the United Kingdom or a qualifying territory; or

(c) is a British citizen and is serving outside the United Kingdom and the qualifying territories in service under an EU institution, his or her recruitment for that service having taken place in a country which at the time of the recruitment was a member of the European Union.

### ***C.1.i “Parent”***

47. As to “parent”, section 50 of the 1981 Act now provides that:

(9) For the purposes of this Act a child’s mother is the woman who gives birth to the child.

(9A) For the purposes of this Act a child’s father is—

(a) the husband, at the time of the child’s birth, of the woman who gives birth to the child, or

(b) where a person is treated as the father of the child under section 28 of the Human Fertilisation and Embryology Act 1990 or section 35 or 36 of the Human Fertilisation and Embryology Act 2008, that person, or

(ba) where a person is treated as a parent of the child under section 42 or 43 of the Human Fertilisation and Embryology Act 2008, that person, or

(c) where none of paragraphs (a) to (ba) applies, a person who satisfies prescribed requirements as to proof of paternity. [...]

48. For babies born before 1 July 2006, the law provided that the parents had to be married for a baby to acquire British nationality by birth through the father; but amendments effected in 2006 by s 9 of the Nationality, Immigration and Asylum Act 2002 make provision for unmarried fathers to pass on their British nationality to babies born on and after that date and for the means of proving paternity (see SI 2006/1498 (C.11), and SI 2006/1496 as amended by SI 2015/1615 with effect from 10 September 2014).

49. If the parents marry after the birth, a child’s status can be related back to the immigration status of either parent at the date of birth. This is the doctrine of ‘subsequent legitimation’. Beware: as discussed above the Nationality Immigration and Asylum Act 2002 abolished the discrimination against children born ‘out of wedlock’. In so doing it repealed s 47 of the British Nationality Act 1981 which dealt with subsequent legitimation. But, see the Nationality, Immigration and Asylum Act 2002 s 162(5) read with SI 2006/1498, it only abolished it in respect of children born on or after 1 July 2006. For children born before that date, s 47 is still in force and thus the doctrine of subsequent legitimation still holds good.

### ***C.1.ii “settled”***

50. As the Act stands, a child born to parents, neither of whom is settled in the UK, is not born British. Only those born after 1 January 1983 are affected, as prior to that date a child born on the territory of the UK was born a British citizen (prior to 1 January 1983, born a Citizen of the UK and Colonies and, prior to 1 January 1949, born a “British Subject”, as defined in s 27(1) of the British Nationality and Status of Aliens Act 1914).

51. The Home Office guidance *European Economic Area (EEA) and Swiss nationals: free movement rights* Version 17.0 of 20 October 2017 states:

Citizens of Ireland, whether exercising EEA free movement rights or not, are not normally subject to any form of immigration control on arrival in the UK because of Ireland's inclusion in the Common Travel Area (section 1(3), of the Immigration Act 1971).

[...]

The 2000 and 2006 regulations do not affect the position of EEA nationals entitled to remain indefinitely on some other basis, for example because they:

- » have been granted indefinite leave to remain under the Immigration Rules
- » are entitled by virtue of diplomatic status to exemption from UK immigration control
- » benefit under the Common Travel Area provisions as Irish nationals

Persons in this category should continue to be regarded as free from any restriction under the immigration laws on the period for which they may remain<sup>25</sup>.

52. The references to the 2000 and 2006 regulations are to the Immigration (European Economic Area) Regulations of those years.
53. Compare the guidance to Article 4 of the Immigration (Control of Entry through Republic of Ireland) Order 1972, which currently provides:

4.—

(1) Subject to paragraph (2), this Article applies to any person who does not have the right of abode in the United Kingdom under section 2 of the Act and is not an EEA national, or a person who is entitled to enter or remain in the United Kingdom by virtue of an enforceable EU right or any provision made under section 2(2) of the European Communities Act 1972, and who enters the United Kingdom on a local journey from the Republic of Ireland after having entered that Republic—

- (a) on coming from a place outside the common travel area; or
- (b) after leaving the United Kingdom whilst having a limited leave to enter or remain there which has since expired.

[...]

(2A) This Article does not apply to any person who has leave or may be granted leave to enter or remain in the United Kingdom by virtue of Appendix EU to the immigration rules

*[The remaining paragraphs are not in point save for the following:]*

(8) The restriction and condition mentioned in paragraphs (4) and (6B) shall cease

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25 The predecessor guidance containing similar remarks was the Nationality Instructions, Volume 2, Part 2, *EEA and Swiss Citizens*.

to apply to a person if that person becomes entitled to enter or remain in the United Kingdom by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972.

54. Those parts of Article 4 as amended by the Immigration (European Economic Area Nationals) (EU Exit) Regulations 2019/468 will, when changed, read:

~~4.—~~

(1) Subject to paragraphs (2) and (2A), this Article applies to any person who does not have the right of abode in the United Kingdom under section 2 of the Act and is not an EEA national, or a person who is entitled to enter or remain in the United Kingdom by virtue of a retained enforceable EU right or any provision made under section 2(2) of the European Communities Act 1972 as that provision is modified from time to time and who enters the United Kingdom on a local journey from the Republic of Ireland after having entered that Republic—

- (a) on coming from a place outside the common travel area; or
- (b) after leaving the United Kingdom whilst having a limited leave to enter or remain there which has since expired.

[...]

(2A) This Article does not apply to any person who has leave or may be granted leave to enter or remain in the United Kingdom by virtue of Appendix EU to the immigration rules.

(3) A person to whom this Article applies by virtue only of paragraph (1)(a) shall, unless he is a visa national without a valid visa for entry to the United Kingdom, who is also a visa national to whom article 3A applies, be subject to the restriction and to the condition set out in paragraph (4).

[...]

(8) The restriction and condition mentioned in paragraphs (4) and (6B) shall cease to apply to a person if that person becomes entitled to enter or remain in the United Kingdom by virtue of

- (a) a retained enforceable EU right, or
- (b) any provision made under section 2(2) of the European Communities Act 1972 as that provision is modified from time to time.

55. Thus Article 4(1) in its current format exempts persons who are EEA nationals, or a person who is entitled to enter or remain in the United Kingdom by virtue of an enforceable EU right or of any provision made under **section 2(2)** of the European Communities Act 1972, who enters the United Kingdom on a local journey from the Republic of Ireland from limits on their length of stay.

56. In its proposed amended format, the article also exempts those granted leave under Appendix EU (“settled status” or “pre-settled status”) from limits on their length of stay. As to EEA nationals, it allows for restrictions of their rights and, of course, they may lack for rights under EU law after Brexit.

57. Prior to amendment on 12 October 2014<sup>26</sup>, the exemption in Article 4 was for citizens of the Republic of Ireland only. The exemption is currently intended to continue to extend to all EEA nationals during a transitional period when the UK leaves the EU<sup>27</sup> but after the transitional period ends, only to those with rights under Appendix EU, and in time only those with settled status under that Appendix. The deadline for applying for pre-settled or settled status is 31 December 2020 if the United Kingdom leaves the EU with no deal and 30 June 2021 if there is a deal.
58. Not all Irish persons arrive on a local journey. Belfast has an international airport and Irish citizens fly in to all parts of the UK from all over the world.
59. The complexities created by the mismatch between administrative practice and the legal basis for the treatment of the Irish nationals were arguably not fully or widely appreciated until the Brexit debate began<sup>28</sup>. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill, which completed only its Commons' second reading and committee stages in the 2017-2019 parliament before being stalled in March 2019, was not carried forward to the next session following the prorogation of the UK parliament on 8 October 2019, just as the government had not intended to carry it forward following the purported prorogation on 28 August 2019<sup>29</sup>. The Immigration Bill announced in the Queen's Speech of 14 October 2019, however, sounds very similar although no text has been laid before parliament at the time of writing.
60. The session 2017-2019 Bill provided for the insertion of the following into the Immigration Act 1971:

***3ZA Irish citizens***

- (1) An Irish citizen does not require leave to enter or remain in the United Kingdom, unless subsection (2), (3) or (4) applies to that citizen.*
- (2) This subsection applies to an Irish citizen if the Irish citizen is subject to a deportation order made under section 5(1).*
- (3) This subsection applies to an Irish citizen if*
  - (a) the Secretary of State has issued directions for the Irish citizen not to be given entry to the United Kingdom on the ground that the Irish citizen's exclusion is conducive to the public good,*
  - (b) the Secretary of State has given the Irish citizen notice of the directions, and*
  - (c) the directions have not been withdrawn.*
- (4) This subsection applies to an Irish citizen if the Irish citizen is an excluded person for the purposes of section 8B (persons excluded under international obligations etc).*

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26 By the Immigration (Control of Entry through Republic of Ireland) (Amendment) Order 2014/2475 [article 3\(6\)](#).

27 Immigration (European Economic Area Nationals) (EU Exit) Regulations 2019/468 [part 2 regulation 2\(4\)\(a\)](#).

28 See Professor Bernard Ryan's 30 September 2016 evidence BU10008 to the House of Lords' Committee on the European Union which, with his other writings, is arguably the inspiration for what was proposed as s 3ZA of the 1971 Act in the Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19 (accessed 25 December 2019) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/brexit-ukirish-relations/written/39488.html>

29 Declared null and of no effect in *R(Miller) v The Prime Minister, Cherry et ors v Advocate General for Scotland* ([2019] UKSC 41, see paragraph 62.

*(5) Where subsection (2), (3) or (4) applies to an Irish citizen, section 1(3) does not permit the Irish citizen to enter the United Kingdom without leave on arriving in the United Kingdom on a local journey from any place in the common travel area.*

61. The latest bill, like its predecessor, also provides for the amendment of s 9 of the Immigration Act 1971 which, again, deals with “local journeys” from elsewhere in the Common Travel Area so that Irish citizens will be treated in the same way as British citizens for the purposes of the Common Travel Area.
62. Subsequent to the stalling of the Bill in March 2019, the UK and Ireland concluded the Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, which is not yet in force but which could come into force, at the earliest, on or immediately after 31 January.<sup>30</sup> They have also concluded a memorandum of understanding on the Common Travel Area.<sup>31</sup> It provides for free movement of British and Irish citizens (paragraph 14) and for rights to reside (paragraph 7) and for laws to be enacted (paragraph 17) to give effect to these, non-binding (paragraph 5) commitments.
63. Section 3ZA, if enacted, would apply to all Irish nationals. It thus performs a function separate from that performed by the right of abode in my recommendation that the “people of Northern Ireland” would be given a right of abode. Section 3ZA would, for example, be relevant to the question of whether an Irish parent of a child were in the UK without restriction of time on their stay, despite the parent not being a “person of Northern Ireland”. It would be relevant to whether the parent were settled at the time of the birth and thus to the British nationality of the child and whether the child born in Northern Ireland was a “person of Northern Ireland” for the purposes of the Belfast Agreement. See further below.
64. Protocol 20 to the Treaty of the European Union *On the application of certain aspects of article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland* provides at Article 2:

The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (“the Common Travel Area”), while fully respecting the rights of persons referred to in Article 1, first paragraph, point (a) of this Protocol. Accordingly, as long as they maintain such arrangements, the provisions of Article 1 of this Protocol shall apply to Ireland under the same terms and conditions as for the United Kingdom. Nothing in Articles 26 and 77 of the Treaty on the Functioning of the European Union, in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them, shall affect any such arrangements.

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<sup>30</sup> CS Ireland No.1/2019, see <https://www.gov.uk/government/publications/cs-ireland-no12019-ukireland-convention-on-social-security>; (accessed 29 December 2019). Article 65 of the Convention provides for commencement when each government has notified the other that the necessary internal procedures for entry into force have been completed. The Social Security (Ireland) Order 2019 (SI 2019/622) modifies UK legislation to give effect to the provisions in the Convention. It comes into force either on ‘exit day’ (currently 31 January 2020, s 20(1) of the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019 (SI 2019/1243), see the Social Security (Amendment) (EU Exit) Regulations 2019 (SI 2019/128)) or when each Government has notified the other that necessary internal procedures for commencement have been completed, whichever is later.

<sup>31</sup> Memorandum of Understanding between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland concerning the Common Travel Area and associated reciprocal rights and privileges, 8 May 2019, accessed 29 December 2019, available at <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-ireland-on-the-cta> See also the joint statement issued with the memorandum (accessed 29 December 2019): <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-ireland-on-the-cta/joint-statement-of-8-may-2019-between-the-uk-government-and-government-of-ireland-on-the-common-travel-area>

65. The reference to Article 1(a) is to persons with rights, including under EU free movement law, to enter the UK. I do not consider that there is any legal reason why Ireland could not retain the benefit of Protocol 20 in the event of the UK leaving the EU, absent objection by another member State of the EU.
66. It remains only for me to address mention in the research brief<sup>32</sup> of the case of *Capparrelli (EEA Nationals – British Nationality)* [2017] UKUT 00162 (IAC) (27 April 2017). This is a controversial decision of the Upper Tribunal. It is unclear that the difficult and technical points raised by the determination were given the consideration they merit by the Tribunal. There are manifest errors in this determination which, it is to be hoped, will be grappled with in the *De Souza* case. To date, wisely in my view given those errors, it has been studiously ignored by the Home Office and by the Tribunals.
67. The question before the Upper Tribunal was whether a parent exercising Treaty rights but without permanent residence on 18 March 1986 was settled in the UK for the purposes of s 1(1)(b) of the British Nationality Act 1981.
68. The Tribunal held, following the long-forgotten case of *Gal* [TH/25885/92 10620] that the qualified person was not settled within the meaning of s 1(1) of the British Nationality Act 1981 because the period for which the person may remain is contingent upon their continuing to be a qualified person. It disagreed, however with the Tribunal in *Gal* in that it held that the phrase ‘immigration laws’ does not encompass EU laws on free movement.
69. Something has gone wrong here. If the Tribunal is right that the phrase ‘immigration laws’ does not encompass EU laws on free movement, and, as indicated above, I consider that it is right, then the decision is wrong because a person is settled if that person is not ‘subject under the immigration laws to any restriction on the period for which he may remain’. Thus, it is not, as the Tribunal suggests, that EU citizens ‘can never satisfy the second part of the definition’ but that they always do.
70. If the Tribunal is right that ‘immigration laws’ does not encompass free movement, then arguably the *vires* of the post 2 October 2000 position adopted by the Secretary of State in secondary legislation, that EEA nationals are not settled, is open to question.
71. The more interesting questions are whether the Tribunal is correct in its understanding of:
  - » Whether a qualified person without permanent residence is settled;
  - » Whether the phrase ‘immigration laws’ encompasses EU laws on free movement.
72. These questions may admit of different answers for different time periods.<sup>33</sup> They are, happily, not material for the purposes of this paper, although they may be material for the parallel research project.

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32 Available at [https://www.nihrc.org/uploads/general/Birthright\\_research-spec-June2019.pdf](https://www.nihrc.org/uploads/general/Birthright_research-spec-June2019.pdf) (accessed 10 January 2020). See footnote 9, relying on a secondary source.

33 See my 28 April 2017 case note on *Capparrelli* for ILPA members, available at (to ILPA members only) (accessed 6 September 2019) <http://www.ilpa.org.uk/resource/33203/capparelli-eea-nationals-british-nationality-2017-ukut-00162-iac-27-april-2017-updated-28-april-with>

### **C.1.iii Loss**

73. British citizenship may be lost in various ways. It will never be lost automatically by the acquisition of another citizenship.
74. It is possible to renounce British citizenship on making a declaration of renunciation (British Nationality Act 1981 s 12), on a specified form and with the payment of a fee (currently £372<sup>34</sup>). Renunciation can only be registered and take effect if the person would obtain or retain another citizenship, so that it is not possible for someone to make him/herself stateless in this way.
75. The British Nationality (General) Regulations 2005 (SI 2005/38) make provision in Part III and Schedule 5 for the procedures for renunciation.
76. The 1981 Act makes provision for resumption of citizenship at s 13. A person can resume once as of right, but only in circumstances where a person gave up British citizenship to be eligible for another nationality or citizenship e.g. of a State that does not permit dual nationality. This is not the case for persons who are nationals of both Britain and Ireland, who are entitled to hold dual nationality. Anyone who renounces citizenship can ask the Secretary of State to exercise discretion to allow them to resume it.

### **C.1.iv Fees**

77. The power to set fees for nationality applications derives from the Immigration Act 2014 s 68. This provides at s 68(9):
  - (9) In setting the amount of any fee, or rate or other factor, in fees regulations, the Secretary of State may have regard only to—
    - (a) the costs of exercising the function;
    - (b) benefits that the Secretary of State thinks are likely to accrue to any person in connection with the exercise of the function;
    - (c) the costs of exercising any other function in connection with immigration or nationality;
    - (d) the promotion of economic growth;
    - (e) fees charged by or on behalf of governments of other countries in respect of comparable functions;
    - (f) any international agreement.

This is subject to section 69(5).

- (10) In respect of any fee provided for under this section, fees regulations may—
  - (a) provide for exceptions;
  - (b) provide for the reduction, waiver or refund of part or all of a fee (whether by conferring a discretion or otherwise);
  - (c) make provision about—

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34 (accessed 25 August 2019) <https://www.gov.uk/government/publications/visa-regulations-revised-table/home-office-immigration-and-nationality-fees-29-march-2019>

- (i) the consequences of failure to pay a fee;
  - (ii) enforcement;
  - (iii) when a fee may or must be paid.
78. Provision has not been made for waiver in the case of fees for nationality applications (see the Immigration and Nationality (Fees) Order 2016 and the Immigration and Nationality (Fees) Regulations 2018 (SI 2018/330). The statutory scheme for the setting of nationality fees was recently considered in *R (The Project for the Registration of Children as British Citizens et ors) v Secretary of State for the Home Department* [2019] EWHC 3536 (Admin) (19 December 2019). The court rejected the argument that there was no power for the Secretary of State to set the fee at above the cost to the Secretary of State of registering a child's British citizenship or at a level that was unaffordable to many children entitled to that citizenship. The court ruled that it was bound to reject this argument by reason of the decision of the Court of Appeal in *R (Williams) v Secretary of State for the Home Department* [2017] EWCA Civ 98) but granted a certificate under s 12 of the Administration of Justice Act 1969 for the claimants to apply for permission to appeal to the Supreme Court on this point. The Claimant succeeded on the grounds that the Secretary of State had failed to assess and give primary consideration to the best interests of children when setting the fee for children to register as British citizens, but the Defendant was granted permission to appeal.
79. In *Williams* the Court of appeal held at paragraph 55:
- There is no “fundamental” or “constitutional” right to citizenship registration for persons in the position of the appellant at all. The right is one which Parliament has chosen by statute to create and bestow, in certain specified circumstances.
80. It is arguable that this ratio cannot be applied to registration or to renunciation under the Belfast Agreement.
81. It was argued on behalf of the Claimants in the *Project for the Registration of Children as British Citizens* case that the decision in *Williams* could not survive the judgment of the Supreme Court in *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409. Mr Justice Jay was unpersuaded that the express language of the statutory scheme did not survive *UNISON*, but held, contrasting the *Project for the Registration of children as British Citizens* case with *UNISON*, that where a fundamental right, that of access to justice, was in issue:
- My only observation about *UNISON* is that I do not think that it necessarily follows that in a case such as the present which does not involve fundamental rights, the Secretary of State would be acting unlawfully unless each and every child applicant could afford the registration fee.<sup>35</sup>
82. Thus there is an argument, which may be strengthened or weakened by future judgement in the *Project for the Registration of Children as British Citizens*' case that there are statutory constraints on the fees that the Secretary of State charge to give effect to the Belfast Agreement. For the purposes of this paper, however, it has been assumed that no such constraints exist and that fees will be set as a matter of policy.

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<sup>35</sup> *R (The Project for the Registration of Children as British Citizens et ors) v Secretary of State for the Home Department* [2019] EWHC 3536 (Admin) (19 December 2019), paragraph 72.

## C.2. BRITISH AND IRISH NATIONALITY LAW

83. Section 31 of the British Nationality Act 1981 *Continuance as British subjects of certain former citizens of Eire* is worthy of particular consideration<sup>36</sup>:

(1) A person is within this subsection if immediately before 1st January 1949 he was both a citizen of Eire and a British subject.

(2) A person within subsection (1) who immediately before commencement was a British subject by virtue of section 2 of the 1948 Act (continuance of certain citizens of Eire as British subjects) shall as from commencement be a British subject by virtue of this subsection.

(3) If at any time after commencement a citizen of the Republic of Ireland who is within subsection (1) but is not a British subject by virtue of subsection (2) gives notice in writing to the Secretary of State claiming to remain a British subject on either or both of the following grounds, namely—

(a) that he is or has been in Crown Service under the government of the United Kingdom; and

(b) that he has associations by way of descent, residence or otherwise with the United Kingdom or with any British overseas territory,

he shall as from that time be a British subject by virtue of this subsection.

(4) A person who is a British subject by virtue of subsection (2) or (3) shall be deemed to have remained a British subject from 1st January 1949 to the time when (whether already a British subject by virtue of the said section 2 or not) he became a British subject by virtue of that subsection.

84. To understand the provision, it is necessary to understand the terms used.

85. The term British subject was, before 1 January 1949, the term used for the equivalent of today's British citizens: albeit scattered across the globe.

86. In the British Nationality Act 1948 the term "Citizen of the UK and Colonies" replaced the old term "British Subject". The term "British Subject" was put to a different use, as a synonym for Commonwealth citizen. All Citizens of the UK and Colonies were British subjects/ Commonwealth citizens, but not all British subjects were Citizens of the UK and Colonies. Many were citizens of other Commonwealth countries.

87. Until 1922 Ireland was treated as part of the King's dominions and as such the persons born there were British subjects under the British Nationality and Status of Aliens Act 1914. On 31 March 1922, the Irish Free State (Agreement) Act 1922 came into force in the UK. The Schedule to the Act was the *Articles of Agreement for a Treaty between Great Britain and Ireland, dated the sixth day of December, nineteen hundred and twenty-one*. The schedule provided:

Article 1 Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of

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<sup>36</sup> I acknowledge my debt to Professor Bernard Ryan's *The Ian Paisley Question: Irish Citizenship and Northern Ireland* 25 Dublin U. L.J. 145 (2003). Mine is a simplified account. Anyone with an interest in this area will want to consider his. It does not necessarily reflect his current views.

Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.

2. Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.

88. Persons born in the Dominions were British subjects under the British Nationality and Status of Aliens Act 1914. Thus, citizens of the Irish Free State, like citizens of the Dominions, were treated as British Subjects.

89. On 6 December 1922 the Irish Free State Constitution<sup>37</sup> came into force. Article 3 of the constitution made provision for citizenship of the Irish Free State:

Every person, without distinction of sex, domiciled in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) at the time of the coming into operation of this Constitution, who was born in Ireland or either of whose parents was born in Ireland or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) for not less than seven years, is a citizen of the Irish Free State (Saorstát Eireann) and shall within the limits of the jurisdiction of the Irish Free State (Saorstát Eireann) enjoy the privileges and be subject to the obligations of such citizenship: Provided that any such person being a citizen of another State may elect not to accept the citizenship hereby conferred; and the conditions governing the future acquisition and termination of citizenship in the Irish Free State (Saorstát Eireann) shall be determined by law.

90. Section 21 of the Constitution of the Irish Free State (Saorstát Eireann) Act 1922, as originally enacted, provided that:

21.— (1) Save as is otherwise provided by this Act, every citizen of Saorstát Eireann who, after he has attained the age of twenty-one years, becomes a citizen of another country shall thereupon cease to be a citizen of Saorstát Eireann.

91. The jurisdiction of the Free State was the island of Ireland<sup>38</sup>. The Northern Ireland Parliament gave notice, as it was entitled to do, that it did not wish to come under the jurisdiction of the Free State.<sup>39</sup> In *Re Logue* [1933] 67 ILTR 253 it was held that, because the notice took effect after the Constitution of the Irish Free State (Saorstát Eireann) had come into operation, most of those domiciled in Northern Ireland had become Irish citizens under Article 3 of the Constitution of the Irish Free State (Saorstát Eireann).<sup>40</sup>

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37 Constitution of the Irish Free State (Saorstát Eireann) Act, 1922.

38 Article 12 of the Schedule to the Irish Free State (Agreement) Act 1922, s 5 of the Free State Constitution Act 1922, Article 3 of the Constitution of the Irish Free State.

39 Parliamentary papers of Northern Ireland pp191-192, see *Bordering Two Unions: Northern Ireland and Brexit*, de Mars, S & C. Murray, A. O'Donoghue and B. Warwick, Bristol 2018.

40 See *The Celtic Cubs: the controversy over birthright citizenship in Ireland*, Ryan, B. [2004] *European Journal of Migration and Law*, 6 (3) pp 173 - 193

92. Section 21 of the Constitution of the Irish Free State (Saorstát Eireann) Act 1922 was modified by s 24 of the Irish Nationality and Citizenship Act 1956 to provide that:

24.—No person shall be deemed ever to have lost Irish citizenship under section 21 of the Act of 1935 merely by operation of the law of another country whereby citizenship of that country is conferred on that person without any voluntary act on his part.

93. The Act did not change the status of citizens of the Irish Free State under British nationality law. The UK treated such persons as British subjects and outside the limits of the jurisdiction of the Irish Free State,

94. In 1935, following the judgment in *Re Logue*, the government of the Irish Free State passed the 1935 Nationality and Citizenship Act which purported to repeal the British Nationality and Status of Aliens Act 1914. It provided:

34.—*Every person who is a citizen of Saorstát Eireann by virtue of Article 3 of the Constitution and every person who is or becomes a citizen of Saorstát Eireann by or under this Act shall be such citizen for all purposes, municipal and international.*

95. The UK, for its part, continued to treat the Irish Free State as part of the Crown's dominions. But in the Dominions too, objections to being allowed only a little local nationality were brewing. In *Murray v Parkes* [1942] 2 K.B. 123<sup>41</sup> a man convicted under the National Service (Armed Forces) Act 1939 prayed in aid the 1931 Statute of Westminster, which governed the status of the laws of the Dominions, although the Irish Free State was not a Dominion, in seeking to assert that the repeal of the British Nationality and Status of Aliens Act 1914 by the 1935 Nationality and Citizenship Act meant that he was not a British subject.

96. In 1946 when the Dominion of Canada passed a citizenship law that made provision for people who were not also British subjects to naturalise as Canadians, the other Dominions wanted one too. The British Nationality Act 1948 essentially recognised a *fait accompli* in this regard. The Act came into force on 1 January 1949. Citizens of the Dominions were henceforth British subjects/Commonwealth citizens (s 1). Citizens of Eire were not. But section 2 contained the predecessor to s 31:

(1) Any citizen of Eire who immediately before the commencement of this Act was also a British subject shall not by reason of anything contained in section one of this Act be deemed to have ceased to be a British subject if at any time he gives notice in writing to the Secretary of State claiming to remain a British subject on all or any of the following grounds, that is to say—

(a) that he is or has been in Crown service under His Majesty's government- in the United Kingdom;

(b) that he is the holder of a British passport issued by His Majesty's government in the United Kingdom or the government of any colony, protectorate, United Kingdom mandated territory or United Kingdom trust territory;

(c) that he has associations by way of descent, residence or otherwise with the United Kingdom or with any colony or protectorate or any such territory as aforesaid.

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41 See *Murray v Parkes* (1942) 2 KB 123 The Cambridge Law Journal [1943] Vol 8, Issue 2, page 26.

(2) A claim under the foregoing subsection may be made on behalf of a child who has not attained the age of sixteen years by any person who satisfies the Secretary of State that he is a parent or guardian of the child.

(3) If by any enactment for the time being in force in any country mentioned in subsection (3) of section one of this Act provision corresponding to the foregoing provisions of this section is made for enabling citizens of Eire to claim to remain British subjects, any person who by virtue of that enactment is a British subject shall be deemed also to be a British subject by virtue of this section.

97. Section 31 of the 1981 Act is thus a reminder that forcing British nationality upon Irish citizens against their will, was controversial long before the question of the exercise of EU law rights of free movement was contested in cases such as *McCarthy* and *De Souza*. But section 31, and the acts of both States that fed into it, also provide a source of precedents.<sup>42</sup>

### C.3. IRISH NATIONALITY LAW

98. It is helpful to look at the way Ireland has amended its law to give effect to the Belfast Agreement, both to understand how Irish law would interact with any changes made to British Nationality Law and as a potential source of inspiration.

99. The Irish Nationality and Citizenship Act 2001 amended the Irish Nationality and Citizenship Act 1956 in 2001 to give effect to the Belfast Agreement. Heretofore, s 6(1) of the Act had provided that every person born in Ireland was an Irish citizen from birth.

100. Section 7(1) of the Act had provided:

7(1) Pending the re-integration of the national territory, subsection (1) of section 6 shall not apply to a person, not otherwise an Irish citizen, born in Northern Ireland on or after the 6th December, 1922, unless, in the prescribed manner, that person, if of full age, declares himself to be an Irish citizen or, if he is not of full age, his parent or guardian declares him to be an Irish citizen. In any such case, the subsection shall be deemed to apply to him from birth

(2) Neither subsection (2) nor (4) of section 6 shall confer Irish citizenship on a person born outside Ireland if the father or mother through whom he derives citizenship was also born outside Ireland, unless—

(a) that person's birth is registered under section 27, or

(b) his father or mother, as the case may be, was at the time of his birth resident abroad in the public service

101. The Act, unlike UK law, does not separate out registration or naturalisation. It makes provision in s 15 for the naturalisation of adults. In s 17(1)(b) it makes provision for the naturalisation of children on application where the applicant is a parent or guardian acting on behalf of a minor of Irish descent or Irish associations, and specific provision in s 17(1)(c) for the children of persons who naturalise as Irish citizens subsequent to the birth.

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42 For a detailed exposition of this history, and of the significance of *Re Logue* see Bernard Ryan's "The Ian Paisley Question: Irish Citizenship and Northern Ireland" *Dublin Law Review*, Vol. 25, pages 145 to 176.

102. The version of s 6 inserted in 2001 provided:

6.—(1) Every person born in the island of Ireland is entitled to be an Irish citizen.

(2) (a) Subject to subsections (4) and (5), a person born in the island of Ireland is an Irish citizen from birth if he or she does, or if not of full age has done on his or her behalf, any act which only an Irish citizen is entitled to do.

(b) The fact that a person so born has not done, or has not had done on his or her behalf, such an act shall not of itself give rise to a presumption that the person is not an Irish citizen or is a citizen of another country.

(3) A person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country.

(4) A person born in the island of Ireland—

(a) to a non-national who at the time of that person's birth was entitled to diplomatic immunity within the State, or

(b) to a non-national on a foreign ship or in a foreign aircraft,

shall not be an Irish citizen unless, in the prescribed manner, that person declares, or if not of full age has declared on his or her behalf, that he or she is an Irish citizen; and such person shall be deemed to be an Irish citizen from the date of birth or the date of coming into operation of this section, whichever is the later.

(5) A person born in the island of Ireland who has made a declaration of alienage under section 21 shall remain entitled to be an Irish citizen, but shall not be an Irish citizen unless, in the prescribed manner, that person declares that he or she is an Irish citizen; and such person shall be an Irish citizen from the date of the declaration.

103. Thus we have a new notion of “entitlement” and a process of declaration, and of deemed declaration<sup>43</sup>. Pause over s 6(3). If a person born in Ireland is not entitled to the citizenship of any other country, then that person is an Irish citizen from birth.

104. The old section 7 vanished and the new s 7 provided:

7.—(1) A person is an Irish citizen from birth if at the time of his or her birth either parent was an Irish citizen or would if alive have been an Irish citizen.

(2) The fact that the parent from whom a person derives citizenship had not at the time of the person's birth done an act referred to in section 6(2)(a) shall not of itself exclude a person from the operation of subsection (1).

(3) Subsection (1) shall not confer Irish citizenship on a person born outside the island of Ireland if the parent through whom he or she derives citizenship was also born outside the island of Ireland unless—

(a) that person's birth is registered under section 27, or

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<sup>43</sup> For an interesting historical precedent, consider the way in which the German Federal Republic allowed those on whom German nationality had been imposed by the National Socialist government of Germany before and during the second world war, through decrees imposing German nationality on persons living in territories occupied by Germany, to disclaim nationality by declaration. See the discussion in Myres, S McDougal, Harold D Lasswell and Lung-chu Chen, 'Nationality and Human Rights: The Protection of the Individual in External Arenas' (1974) 83 Yale Law Journal 900, at 920-921.

(b) the parent through whom that person derives citizenship was at the time of that person's birth abroad in the public service:

Provided that the Irish citizenship of a person who, after 1 July, 1986, is registered under section 27 shall commence only as on and from the date of such registration.

(4) Nothing in this section shall confer Irish citizenship on a person not an Irish citizen immediately before its coming into operation, nor deprive of Irish citizenship a person who immediately before its coming into operation was an Irish citizen.

105. Subsequent changes have altered this law. As described above, following the twenty-seventh amendment to the Constitution of Ireland<sup>44</sup> and with effect from 1 January 2005, it is no longer enough to be born on the island of Ireland to be Irish by birth. Now section 6 provides:

(6) In this section 'person' does not include a person born in the island of Ireland on or after the commencement of the *Irish Nationality and Citizenship Act 2004*

(a) neither of whose parents was at the time of the person's birth—

(i) an Irish citizen or entitled to be an Irish citizen,

(ii) a British citizen,

(iii) a person entitled to reside in the State without any restriction on his or her period of residence (including in accordance with a permission granted under section 4 of the Act of 2004), or

(iv) a person entitled to reside in Northern Ireland without any restriction on his or her period of residence,

And

(b) at least one of whose parents was at that time entitled to diplomatic immunity in the State.

106. It is further modified by sections 6A and 6B:

6A (1) A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years

(2) This section does not apply to—

(a) person born before the commencement of the *Irish Nationality and Citizenship Act 2004*

(b) a person born in the island of Ireland

(i) to parents at least one of whom was at the time of the person's birth an Irish citizen or entitled to be an Irish citizen

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<sup>44</sup> Article 9 was amended to include: <sup>1°</sup> Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law.

- (ii) if the person was born to parents one of whom was deceased at the time of the person's birth and
    - (I) the other parent was at that time, or
    - (II) the deceased parent was, immediately before he or she died, an Irish citizen or entitled to be an Irish citizen, or
  - (iii) if the person was born to parents both of whom were deceased at the time of the person's birth, and at least one of whom was, immediately before his or her death, an Irish citizen or entitled to be an Irish citizen
- (c) a person born in the island of Ireland
- (i) to parents at least one of whom was at the time of the person's birth a British citizen or a person entitled to reside in Northern Ireland without any restriction on his or her period of residence
  - (ii) if the person was born to parents one of whom was deceased at the time of the person's birth and
    - (I) the other parent was at that time, or
    - (II) the deceased parent was, immediately before he or she died, a British citizen or a person entitled to reside in Northern Ireland without any restriction on his or her period of residence
  - (iii) if the person was born to parents both of whom were deceased at the time of the person's birth and at least one of whom was, immediately before his or her death, a British citizen or a person entitled to reside in Northern Ireland without any restriction on his or her period of residence,
- (d) a person born in the island of Ireland—
- (i) to parents at least one of whom was at the time of the person's birth a person entitled to reside in the State without any restriction on his or her period of residence (including in accordance with a permission granted under section 4 of the Act of 2004),
  - (ii) if the person was born to parents one of whom was deceased at the time of the person's birth and—
    - (I) the other parent was at that time, or
    - (II) the deceased parent was, immediately before he or she died, a person entitled to reside in the State without any restriction on his or her period of residence (including in accordance with a permission granted under section 4 of the Act of 2004), or
  - (iii) if the person was born to parents both of whom were deceased at the time of the person's birth and one of whom was, immediately before his or her death, a person entitled to reside in the State without any restriction on his or her period of residence (including in accordance with a permission granted under section 4 of the Act of 2004),

or

(e) a person born in the island of Ireland—

(i) neither of whose parents was at the time of the person's birth—

(I) an Irish citizen or entitled to be an Irish citizen,

(II) a British citizen,

(III) a person entitled to reside in the State without any restriction on his or her period of residence (including in accordance with a permission granted under section 4 of the Act of 2004), or

(IV) a person entitled to reside in Northern Ireland without any restriction on his or her period of residence,

and

(ii) at least one of whose parents was at that time a person referred to in section 2(1) or section 2(1A) of the Immigration Act 2004 in the State.

(3) In this section 'British citizen' means a citizen of the United Kingdom of Great Britain and Northern Ireland.

6B(1) Where a parent of a person to whom section 6A (inserted by section 4 of the *Irish Nationality and Citizenship Act 2004*) applies dies before the person's birth, the period commencing on the date of the parent's death and expiring on the date of the person's birth shall be reckonable for the purposes of calculating a period of residence in the island of Ireland under that section where

(a) the parent was, immediately before his or her death, residing in the island of Ireland, and

(b) the period in respect of which he or she was, immediately before his or her death, resident in the island of Ireland is reckonable for the purposes of that section.

(2) Where a national of—

(a) a Member State (other than the United Kingdom of Great Britain and Northern Ireland),

(b) a state (other than a Member State) that is a contracting party to the EEA Agreement, or

(c) the Swiss Confederation,

makes a declaration in such manner as may be prescribed that he or she has resided in the island of Ireland for such period as is stated in that declaration, he or she shall, for the purposes of section 6A, be regarded as having been resident in the island of Ireland—

(i) for that period, if during the entire of that period he or she was a national of a Member State, an EEA state or the Swiss Confederation, or

(ii) if he or she was such a national for part only of that period, for that part of the period, unless the contrary is proved.

(3) (a) If a person who is the guardian of, or *in loco parentis* to, a person (in this paragraph referred to as the ‘second-mentioned person’) who—

- (i) has not attained the age of 18 years, and
- (ii) is the child of a person (in this paragraph referred to as the ‘parent’) who was, at the time of the second-mentioned person’s birth, a national of a state referred to in subsection (2),

makes a declaration in such manner as may be prescribed that the parent resided in the island of Ireland for such period as is specified in that declaration, the parent shall, for the purposes of section 6A, be regarded as having been resident in the island of Ireland—

- (I) for that period, if during the entire of that period he or she was a national of a Member State, an EEA state or the Swiss Confederation, or
- (II) if he or she was such a national for part only of that period, for that part of the period,

unless the contrary is proved.

(b) If a person who is duly authorised to act on behalf of a person (in this paragraph referred to as the ‘second-mentioned person’) who—

- (i) is suffering from a mental incapacity, and
- (ii) is the child of a person (in this paragraph referred to as the ‘parent’) who was, at the time of the second-mentioned person’s birth, a national of a state referred to in subsection (2),

makes a declaration in such manner as may be prescribed that the parent resided in the island of Ireland for such period as is specified in that declaration, the parent shall, for the purposes of section 6A, be regarded as having been resident in the island of Ireland—

- (I) for that period, if during the entire of that period he or she was a national of a Member State, an EEA state or the Swiss Confederation, or
- (II) if he or she was such a national for part only of that period, for that part of the period,

unless the contrary is proved.

(c) If a person (in this paragraph referred to as the ‘declarant’) who—

- (i) has attained the age of 18 years, and
- (ii) is the child of a person (in this paragraph referred to as the ‘parent’) who was, at the time of the declarant’s birth, a national of a state referred to in subsection (2),

makes a declaration in such manner as may be prescribed that the parent resided in the island of Ireland for such period as is stated in that declaration, the parent shall, for the purposes of section 6A, be regarded as having been resident in the island of Ireland—

- (I) for that period, if during the entire of that period he or she was a national of a Member State, an EEA state or the Swiss Confederation, or

(II) if he or she was such a national for part only of that period, for that part of the period,

unless the contrary is proved.

(4) A period of residence in the State shall not be reckonable for the purposes of calculating a period of residence under section 6A if—

- (a) it is in contravention of section 5(1) of the Act of 2004,
- (b) it is in accordance with a permission given to a person under section 4 of the Act of 2004 for the purpose of enabling him or her to engage in a course of education or study in the State, or
- (c) it consists of a period during which a person (other than a person who was, during that period, a national of a Member State, an EEA state or the Swiss Confederation) referred to in subsection (2) of section 9 (amended by section 7(c)(i) of the Act of 2003) of the Act of 1996 is entitled to remain in the State in accordance only with the said subsection.

(5) A period of residence in Northern Ireland shall not be reckonable for the purposes of calculating a period of residence under section 6A—

- (a) if—
  - (i) the person concerned is not during the entire of that period a national of a Member State, an EEA state or the Swiss Confederation, and
  - (ii) the residence of the person concerned in Northern Ireland during that period is not lawful under the law of Northern Ireland,

or

(b) if the entitlement of the person concerned to reside in Northern Ireland during that period is subject to a condition that is the same as or similar to a condition which, if applicable in respect of an entitlement to reside in the State, would, by virtue of subsection (4), render a period of residence in the State pursuant to such an entitlement not reckonable for the purposes of calculating a period of residence under the said section 6A.

(6) A declaration referred to in subsection (2) or (3) shall be accompanied by such verifying documents (if any) as may be prescribed.”

107. The provisions are tortuous and complex and not easy to understand but the cumulative effect, as set out in the research brief, is to restrict entitlement to Irish citizenship by birth for persons born after 1 January 2005, “to those born to a parent who: is Irish, or entitled to be Irish, or British, or living on the island with no legal restriction on residency, or can show a ‘genuine link’ to Ireland (based on residency) or is recognised as a refugee”.<sup>45</sup>

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45 Proposal for legal analysis on incorporating into UK law the birthright commitment under the Belfast (Good Friday) Agreement 1998 (NIHRC and IHREC, 2019) available at: [https://www.nihrc.org/uploads/general/Birthright\\_research-spec-June2019.pdf](https://www.nihrc.org/uploads/general/Birthright_research-spec-June2019.pdf) (accessed 25 December 2019).

108. It is necessary to pause over s 7. British nationality law confers citizenship by descent to those born outside the territory of the UK by operation of s 2 of the British Nationality Act 1981. Having a parent who is a British citizen is a sufficient, although not a necessary, condition for being born British if born on the territory of the UK under s 1 of the British Nationality Act 1981. Irish law works differently. Citizenship by descent is conferred on those born to an Irish parent, wheresoever born. There is a registration requirement, but this does not apply to a person born on the island of Ireland. Thus while you are “entitled to Irish citizenship” under s 6 of the Irish Citizenship and Nationality Act 1956 if born in, for example, Dublin or Lisburn, if you have an Irish parent then your birth in Dublin or Lisburn means that you are born Irish under s 7 of that Act and s 7 makes no mention of ‘entitlement’.
109. Provision was made in s 6(2)(a)(ii) for persons under a mental incapacity. Meanwhile a definition of being of “Irish associations” was added in s 16(2):
- (2) For the purposes of this section a person is of Irish associations if—
- a*) he or she is related by blood, affinity or adoption to a person who is an Irish citizen or entitled to be an Irish citizen, or
- b*) he or she was related by blood, affinity or adoption to a person who is deceased and who, at the time of his or her death, was an Irish citizen or entitled to be an Irish citizen.
110. I draw attention to the reference to adoption. “[A]ffinity” is undefined.

### *C.3.i “Parent”*

111. The Status of Children Act 1987 provides:
- 5.—It is hereby declared that, in relation to a child, any reference to “father”, “mother” or “parent” in the Irish Nationality and Citizenship Acts, 1956 and 1986, includes and shall be deemed always to have included the father, mother or parent, as the case may require, who was not married to the child’s other parent at the time of the child’s birth or at any time during the period of ten months preceding the birth.
112. There have been many changes to procedure over the years, many of which lie outside the scope of this paper but many of which offer instructive precedents<sup>46</sup>.

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46 (accessed 17 August 2019) [http://www.irishstatutebook.ie/eli/isbc/1956.html#a26\\_1956](http://www.irishstatutebook.ie/eli/isbc/1956.html#a26_1956)

## D. STATELESSNESS

113. It can be seen from the above that the provision targeting avoidance of statelessness in Irish law is s 6(3) of the Irish Nationality and Citizenship Act 1956:

(3): “A person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country”

114. At the moment, absent any amendments to British nationality law, an intended beneficiary of the Belfast Agreement will always have British citizenship. A British citizen cannot renounce his or her citizenship if to do so would make him or her stateless.

115. The UK and Ireland are parties, *inter alia*, to:

the UN Convention Relating to the Status of Stateless Persons 1954, and

the UN Convention on the Reduction of Statelessness 1961.

116. Article 1(1) of the 1954 Convention provides the definition of “stateless person” in these terms:

### Article 1. - Definition of the term “stateless person”

1. For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.

117. Both the UK and Ireland have entered declarations under Article 8(3) of the Convention. Article 8 reads:

### Article 8

(1) A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.

[...]

(3) Notwithstanding the provisions of paragraph 1 of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:

[...]

3. has conducted himself in a manner seriously prejudicial to the vital interests of the State;

118. The UK reservation is in the following terms:

### United Kingdom of Great Britain and Northern Ireland

“The Government of the United Kingdom declares that, in accordance with paragraph 3 (a) of Article 8 of the Convention, notwithstanding the provisions of paragraph 1 of Article 8, the United Kingdom retains the right to deprive a naturalised person of his nationality on the following grounds, being grounds existing in United Kingdom law at the present time: that, inconsistently with his duty of loyalty to Her Britannic Majesty, the person

- (i) Has, in disregard of an express prohibition of Her Britannic Majesty, rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
- (ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty.”

119. The Irish reservation reads:

“In accordance with paragraph 3 of article 8 of the Convention Ireland retains the right to deprive a naturalised Irish citizen of his citizenship pursuant to section 19 (1) (b) of the Irish Nationality and Citizenship Act, 1956, on grounds specified in the aforesaid paragraph.”

120. In *AlJedda v Secretary of State for the Home Department* [2013] UKSC 12, the Supreme Court determined that the Secretary of State could not exercise her powers of deprivation under s 40 of the British Nationality Act 1981 where the person would be left stateless. This, it held, was an objective standard and what mattered, as a matter of construction of s 40(4) of the British Nationality Act 1981, which then contained the prohibition on deprivation’s leaving a person stateless, was the status following deprivation; it was irrelevant that the person could acquire another nationality, even if this were acquisition by entitlement. It cited with approval paragraph 43 of the UNHCR Guidelines No. 1<sup>47</sup>:

“...if an individual is partway through a process for acquiring nationality but those procedures have not been completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention. Similarly, where requirements or procedures for loss, deprivation or renunciation of nationality have not been completed, the individual is still a national for the purposes of the stateless person definition, not recognised by any State as a national by operation of its law.

121. This deals with the construction of s 40(4) of the Act, not of the Act as a whole. The Secretary of State may not make an order under subsection 40(2) if she is satisfied that the order would make a person stateless. Section 40(4A) inserted into the Act after the *AlJedda* case, and, in part, in response to it:

(4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—

- (a) the citizenship status results from the person’s naturalisation,
- (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
- (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

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47 *op.cit.* Now recast as paragraph 50 of the UNHCR *Handbook on the protection of stateless persons under the 1954 Convention relating to the Status of Stateless Persons*, Geneva 2014.

122. Statelessness is not defined in the Act. But there is nothing about s 40(4) that suggests that the same definition would not apply elsewhere. And s 40(4A) makes plain that the UK considers that insofar as its declaration to Article 8(3) of the 1961 Convention is concerned, a person who does not at the moment of deprivation have another citizenship or nationality, is stateless.
123. Section 40(4A) is the government's response to *Al Jeddah*. The government had argued in *Al Jeddah* that a right to another nationality was enough to lift a person out of statelessness. The Supreme Court disagreed. A person may have a right to another nationality but still the person is stateless. This remains the law. The government has not changed that law. Rather, it has taken power to deprive certain persons, those who pose a particular threat to national security, of their nationality even though this leaves them stateless.
124. This is in line with the summary conclusions of the expert meeting convened by the Office of the United Nations High Commissioner for Refugees, Tunis, Tunisia, 31 October-1 November 2013<sup>48</sup>: Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality:

#### When is a Person “Stateless”?

##### Definition of “stateless” for the 1961 Convention.

Articles 5-8 of the 1961 Convention establish a basic rule that loss or deprivation shall not cause statelessness. The Convention, however, does not define the term “stateless”. Rather, Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (1954 Convention) establishes the customary international law definition of a “stateless person” as a person “who is not considered as a national by any State under the operation of its law.”<sup>2</sup> Where the 1961 Convention requires that a person shall not lose or be deprived of nationality if this would render him or her stateless, States are required to examine whether the person possesses another nationality at the time of loss or deprivation, not whether they could acquire a nationality at some future date.

<sup>2</sup> UNHCR Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons.

125. While the view expressed in *Al Jeddah* is that an entitlement to another nationality is not enough to lift a person out of statelessness, there is a line of authority beginning with the case of *R(Bradshaw) v Secretary of State for the Home Department* [1994] Imm AR 359 that, before being accepted as stateless, and to discharge the burden of proof upon them, a person must apply to those States which might consider them to be and might accept them as a national. The relevant law was reviewed in *AS (Guinea) v Secretary of State for the Home Department, United Nations High Commissioner for Refugees intervening* [2018] EWCA Civ 2234. Lord Kitchen, giving the judgment of the Court, held:

58 [...] I accept that the 1954 Convention contemplates that a person is either stateless or a national of a state and that it is undesirable that persons should be left in limbo but I am not persuaded that the conventional balance of probabilities test has created a material problem in this regard. [...]

59. [...] The applicant was required to establish that he was stateless on the balance of probabilities and that he failed to do. [...] the appellant had been remarkably

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<sup>48</sup> (accessed 20 August 2019) <https://www.refworld.org/pdfid/533a754b4.pdf>

inactive about establishing his nationality and had failed to take many of the quite straightforward steps that he could have taken.

126. What is the nationality status of a person who has not done any act that only an Irish citizen is entitled to do and has not made a declaration of alienage? The person's status under s 6 of the 1956 Act is very hard to discern from the face of that section. Clarity is not provided by the debates on the provision; rather it is confirmed that the ambiguity is intentional.<sup>49</sup>

If I was born in Belfast I am entitled to be an Irish citizen. The new provision says so, but does not say definitively whether I am an Irish citizen or not. If I obtain a UK passport, I am still entitled to be an Irish citizen, and the provision is still silent as to whether I am an Irish citizen or not; I may or may not be, and it is my entitlement to perceive myself as British, Irish or both. I can still apply for an Irish passport; and as soon as I do, the law will recognise that I am exercising my entitlement to be an Irish citizen. Furthermore, if I am applying for an Irish passport, all I must do is produce the birth certificate which shows that I was born in the island of Ireland – in this example, in Belfast. This contrasts with the procedural requirement for those born in Northern Ireland under the present section 7(1) of the 1956 Act, a requirement which does not apply to those born in the State. That requirement is that a person born in the North, wishing to assert Irish citizenship, must either make a declaration of Irish citizenship or else show – usually by producing the birth certificates of parents and grandparents – that that person is anyway an Irish citizen. This somewhat anomalous provision – expressed to be “pending the reunification of the national territory”, in the words of the former Article 3 of the Constitution – has been regarded by those in the North who see themselves as Irish citizens as being discriminatory as against Irish citizens born in the State. Section 3 of this Bill gets rid of that procedure as well as the now outdated quotation from the old Article 3.

As I have said, the new provision is in general silent as to whether the entitlement to Irish citizenship is being exercised in the case of any particular person born in the island of Ireland. That silence could be regarded as giving rise to uncertainty as to the citizenship status of any particular person. A feature of citizenship provisions in many countries throughout the world, and one reflected in a number of international instruments on the subject of nationality and citizenship, is the importance of avoiding situations where a person might be deemed to be stateless.

In order to deal with that concern and reduce the scope for potential uncertainty, subsection (3) of the new section 6 provides that any person born in the island of Ireland who is not entitled to citizenship of another country is an Irish citizen from birth. That is not to say that a person born in the island of Ireland who has an entitlement to citizenship of another country is not entitled to Irish citizenship; this subsection simply puts the matter out of the realm of uncertainty for those who have no such entitlement. As with subsection (2), this is primarily an evidential provision.

[...] The new provisions regarding citizenship by birth in the island of Ireland, at the proposed section 6 of the 1956 Act, will not operate to deprive anyone who by operation of the 1956 Act as it stands, is already an Irish citizen. Article 2 of the Constitution declares

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49 (accessed 14 August 2019) <https://www.oireachtas.ie/en/debates/debate/seanad/1999-12-08/5/>

the entitlement of everyone, without exception, born in the island of Ireland to be part of the Irish nation. [...]

There is one circumstance where there will be certainty that a person born in the island of Ireland is not an Irish citizen and that is where the person has made a declaration of alienage under section 21 of the 1956 Act, renouncing Irish citizenship. Even then, however, there remains the constitutional entitlement and birthright to be part of the Irish nation, an entitlement which cannot be renounced. Accordingly, subsection (5) of the new section 6 provides that a person who had made a declaration of alienage can resume Irish citizenship by making a declaration to that effect. Citizenship in that case dates from the date of the declaration.

[...] One feature of interest in the new section 7 is the clarifying provision at subsection (2) which ensures that the fact that a person born in Ireland may not have done an act demonstrating that the entitlement to Irish citizenship was being asserted does not of itself cut off the next generation from Irish citizenship.

127. As the final paragraph cited acknowledges, however, very many such persons are likely to be Irish in any event under s 7 of the 1956 Act, as set out above, because they were born to an Irish parent. The exceptions are those born to a settled parent who is not an Irish citizen. Many of these persons will be entitled to the nationality of their settled parent, although acquisition of nationality by children born abroad is not automatic in the case of every country<sup>50</sup>. Where the child has no entitlement to any other nationality, s 6(3) of the 1956 Act operates to make them Irish. Thus the only children in Northern Ireland born with an entitlement to Irish citizenship, rather than born Irish citizens, are those born to settled or British parents who do not have Irish citizenship, including those who have rejected Irish citizenship for themselves, but who have transmitted another nationality or citizenship, including British citizenship, to their children.
128. As a matter of UK law, a person entitled to Irish citizenship who has not done any act that only an Irish citizen is entitled to do and has not made a declaration of alienage, is stateless, unless they are entitled to another nationality or citizenship, including Irish citizenship by descent.
129. UK law would not be content with the equivalent of s 6(3) of the Irish Act 1956 which prescribes that there is only a need to lift a person out of statelessness by assigning them Irish nationality from birth if they have no “entitlement” to another nationality, albeit that in the course of proving their statelessness they may be required to try to claim that other nationality. UK law requires that a person must possess another nationality, not just be entitled to one. I consider that this accurately reflects the UK’s obligations under the 1961 UN Convention on the Prevention and Reduction of Statelessness.
130. If the UK were to create mirror provisions to those in Irish law they would work differently because in the UK a person is only a British citizen “by descent” if born outside of the UK and the qualifying territories. If the UK interprets Irish law as meaning that a person is entitled to Irish citizenship rather than being an Irish citizen until they have done an unequivocal act then, absent their being, as very many will be, Irish “by descent” or holding the nationality of a third State, the UK, because of its concerns about statelessness would refuse to accept such a person as not being a British citizen until that person had claimed their entitlement to Irish citizenship. And that leads us to the conclusion that the default setting, that a such person, prior to election, is a British citizen, is a creation of the combination of Irish law and the UK’s international obligations.

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<sup>50</sup> See, for example, the children born to Colombian parents in *Ruiz Zambrano* (C34/09, EU:C:2011:124).

131. This was a matter which troubled the Upper Tribunal in *Jake Parker De Souza*'s case, although it was not addressed on the laws of Ireland and thus, unsurprisingly, does not appear to have appreciated the effect of s 7 of Ireland's 1956 Act. It held at paragraph 40:

[...] if Article 1(iv)/(vi) needs to be construed as preventing the United Kingdom from conferring British citizenship on a person born in Northern Ireland, at the point of birth, the inescapable logic is that Ireland cannot confer Irish citizenship on such a person at that point either. The result is that a person born in Northern Ireland is born stateless. That would be a breach of both countries' international obligations to prevent statelessness. It is not conceivable that the two governments intended such a result.

132. What of the baby who is born in Northern Ireland to a parent who is neither Irish, nor British, nor settled and who does not acquire the nationality of any third country at birth? Under s 6(3) of the Irish 1956 Act, the child will be an Irish national. British nationality law provides that a child born stateless on its territory to parents who hold no form of British nationality can acquire British citizenship after five years' residence in UK. This right subsists until the child or young person is 21, provided that, at the date of application, they are still stateless.<sup>51</sup> Thus, a child born stateless in Northern Ireland will acquire Irish, not British nationality, for by the time they come to be considered for British citizenship, they will already be an Irish national.<sup>52</sup>

133. For the avoidance of doubt, I do not advocate as a solution that the UK relax its approach to statelessness. Statelessness, to borrow just one quotation from the House of Lords debate during the pass of what became s 65 of the Immigration Act 2016:

...deprives people of the 'right to have rights'. It brings about a bleak, hopeless status, or rather a complete lack of status, that the British Government should have no role in encouraging, first, because of the positively terminal impact that the imposition of statelessness is bound to have on the ability of the rightless to function in a way that is even remotely human in the modern world.<sup>53</sup>

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51 British Nationality Act Schedule 2, paragraph 3.

52 This point was brought to my attention by Bernard Ryan in his article "The Ian Paisley Question: Irish Citizenship and Northern Ireland" 25 *Dublin U. L.J.* 145 (2003)

53 Lord Macdonald of River Glaven HL Report 17 March 2014, column 53.

## **E. CONCLUSIONS AND RECOMMENDATIONS**

### **E.1. LEGISLATIVE OBJECTIVES**

134. From the foregoing, I derive the following legislative objectives:

- (i) **to prevent statelessness;**
- (ii) **to ensure that persons born in Northern Ireland who are beneficiaries of Article 1(iv) of the Belfast Agreement who do not identify as British citizens are not ascribed British citizenship against their will;**
- (iii) **to ensure that persons born in Northern Ireland who are beneficiaries of Article 1(iv) of the Belfast Agreement who do identify as British citizens hold a British citizenship that is the same as that held those born elsewhere in the UK;**
- (iv) **to ensure that parents whose children are beneficiaries of Article 1(iv) of the Belfast Agreement can identify their children as British or not, as they so choose;**
- (v) **to ensure that whatever choices parents make for their children do not bind the children throughout their lives;**
- (vi) **to ensure that lack of capacity is not a bar to citizenship;**
- (vii) **to prevent disadvantage arising from failure to elect, or from election not to be treated as a British citizen;**
- (viii) **to promote inclusion and to challenge discrimination;**
- (ix) **to ensure that rights are effective and accessible;**
- (x) **to promote good administration;**
- (xi) **to follow precedents in legislation wherever possible.**

### **E.2. GETTING THE COHORT RIGHT**

135. The cohort of beneficiaries under Article 1 (iv), the “people of Northern Ireland”, is:

all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

#### ***E.2.i Parents***

136. As set out above, prior to 1 January 1983 all persons born on the territory of the UK were born Citizens of the UK and Colonies (and prior to that British subjects). They became British Citizens automatically on 1 January 1983.

137. Since 1 July 2006, all children born in Northern Ireland to a British citizen parent are born British under s 1(1) of the British Nationality Act 1981. Children born to a British citizen father not married to their mother between 1 January 1983 and 1 July 2006 were not born British. This was the law in force in the UK at the time of the signing of the Belfast Agreement, in which “parent” is nowhere defined. It was not the law in Ireland where s 5 of the Status of Children Act 1987 had dealt with unmarried parents, and with retrospective effect.

138. Section 50 of the British Nationality Act 1981 defines parent for the purposes of British Nationality law. Section 5 of the Irish Status of Children Act 1987 defines parent for the purposes of Irish immigration and nationality law. Neither define it for broader purposes. For the broader definition in UK law, we must look to s 1 of the Family Law Reform Act 1987:

**1. General principle.**

(1) In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time.

139. I therefore conclude that the meaning of “parent” in the Belfast Agreement encompasses a father not married to the mother of a child.
140. British nationality law is now in line with this meaning but this was not the case between 1 January 1983 and 1 July 2006.
141. A child born to a British father not married to his/her mother, or to a settled father, whether Irish or not, not married to his/her mother is entitled to register as British under 4G of the British Nationality Act 1981. They do not pay a fee for registration (they do pay a fee for their citizenship ceremony). Thus they are able to elect to be British citizens by opting for registration.
142. What this does not provide is any retrospectivity. For the persons directly affected I consider that there is no particular benefit in giving the provision retrospective application. Birth right or no birth right, they have been kept out of their right to elect to date and giving them a retrospective right now will not allow them to go back and exercise their rights.
143. There is, however, one important respect in which retrospectivity matters. A person born in 1983 is now in their thirties and may have children of their own. Some of those children may be adults. A child born prior to the parent’s registration as a British citizen does not acquire the parent’s British citizenship. Some may have been born in Northern Ireland. Persons could continue to be born whose parents have not availed themselves of their rights under s 4G but whose children identify as British citizens.
144. We are nonetheless dealing with a limited group of people because the law changed in 2006 and because many such persons will have been ordinarily resident in the UK (whether in Northern Ireland or not does not matter) at the time of the birth of their children.
145. For those who are still minor children there is a potential fix using s 3(1) of the British Nationality Act 1981 which provides the Secretary of State with a discretion at large to register any child upon application.
146. **Recommendation 1: I recommend that the guidance on the exercise of the discretion under s 3(1) be amended to provide for registration of children born in Northern Ireland who would have become British at birth had their grandfather been married to their grandmother and thus their parent been born British.**
147. This will work for the children of British and settled (including Irish) fathers. The language can be adapted from s 4G of the British Nationality Act 1981. Such a right will only be of the slightest use if the eye-watering fee for registration, currently £1012 is waived in these cases.

**148. Recommendation 2: That there be no fee in such cases.**

149. For those who are adults,

**Recommendation 3: An amendment to s 4G of the British Nationality Act 1981 in similar terms.**

150. There is no fee (save for a citizenship ceremony) for registration under s 4G.

151. I have no doubt that there will be considerable pressure for the proposed amendment to be extended to cover persons born anywhere in the UK and I am unaware of any sensible arguments against this.

152. This does not exhaust the problems with the definition of parents. The mother of a child in British nationality law is the person who gives birth to the child<sup>54</sup>. The father is defined in s 50(9A) as:

(a) the husband, at the time of the child's birth, of the woman who gives birth to the child, or

(b) where a person is treated as the father of the child under section 28 of the Human Fertilisation and Embryology Act 1990 or section 35 or 36 of the Human Fertilisation and Embryology Act 2008, that person, or

(ba) where a person is treated as a parent of the child under section 42 or 43 of the Human Fertilisation and Embryology Act 2008, that person, or

(c) where none of paragraphs (a) to (ba) applies, a person who satisfies prescribed requirements as to proof of paternity.

[...]

153. In *R(K) v Secretary of State for the Home Department* [2018] EWHC 1834 it was held that that s 50(9A) discriminates on the grounds of birth status contrary to Article 8, read with Article 14 of the European Convention on Human Rights because it does not permit rebuttal of the presumption that the husband of the mother is the father as of right, it confers only a right to ask the Secretary of State to exercise a discretion to confer nationality. A declaration of incompatibility under the Human Rights Act 1998 was given.

154. The Irish Status of Children Act 1987 provides:

6(1) Where a woman gives birth to a child

(a) during a subsisting marriage to which she is a party, or

(b) within the period of ten months after the termination, by death or otherwise, of a marriage to which she is a party,

then the husband of the marriage shall be presumed to be the father of the child unless the contrary is proved on the balance of probabilities.

(2) Notwithstanding subsection (1) of this section, where a married woman, being a woman who is living apart from her husband under—

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54 S50(9).

- (a) a decree of divorce a mensa et thoro, or
- (b) a deed of separation,

gives birth to a child more than ten months after the decree was granted or the deed was executed, as the case may be, then her husband shall be presumed not to be the father of the child unless the contrary is proved on the balance of probabilities.

(3) Notwithstanding subsection (1) of this section, where—

- (a) the birth of a child is registered in a register maintained under the *Births and Deaths Registration Acts, 1863 to 1987*, and
- (b) the name of a person is entered as the father of the child on the register so maintained, then the person whose name is so entered shall be presumed to be the father of the child unless the contrary is proved on the balance of probabilities.

(4) For the purposes of *subsection (1)* of this section “subsisting marriage” shall be construed as including avoidable marriage and the expression “the termination, by death or otherwise, of a marriage” shall be construed as including the annulment of a voidable marriage.

155. Surrogacy arrangements are not enforceable in Ireland.

156. In these cases, I consider that in general the question of whether a man is the father of a child falls to be worked out across the broader canvas of British nationality law. If the approach taken in *R(K) v Secretary of State for the Home Department* [2018] EWHC 1834 is followed then UK law will take the same approach as Irish law to marriage of the parents. Absent provision for surrogacy in Irish law, then I consider that the UK approach to who is the father of the child should be followed for the purposes of British nationality law, including in cases of children born in Northern Ireland to Irish parents.

#### *E.2.ii The children of Irish citizens and persons entitled to reside without limit of time*

157. We can leave to one side Irish citizens (and others) subject to a deportation order, exclusion order or exclusion decision since they are subject to restrictions on residence and their children are not intended beneficiaries of Article 1(iv). If one parent is subject to deportation or exclusion and the other is not, the child is an intended beneficiary of Article 1 (iv).

158. As set out above, as a matter of administrative practice the UK has treated all other Irish citizens, as being without restriction of time on their stay in the UK. As described, the legal foundations of this are shaky, certainly for those not arriving on a local journey and, therefore:

159. **Recommendation 4: I recommend that the provisions proposed in the Immigration and Social Security Coordination Bill Session 2019-2021 as new s 3ZA of the Immigration Act 1971, should be enacted** to provide the necessary statutory underpinning. See further the discussion of the right of abode below.

160. Children of Irish nationals born in Northern Ireland to an Irish parent, or to a parent of another nationality entitled to reside there without limit of time are intended to benefit from Article 1(iv). But at the moment they do not all fall within s 1(1) of the British Nationality Act 1981 because s 50(2) of that Act defines “settled” as being in the United Kingdom or in a British Overseas Territory “without being subject under the immigration laws to any restriction on the period for which he may remain”.

161. Again, the problem only arises for persons born post 1 January 1983 when the 1981 Act came into effect. Some of these Irish citizens will have been recognised as British citizens because of the administrative practices and confusion described above. There is no reason to think that their British citizenship is in jeopardy.
162. Some of those affected will have acquired British citizenship subsequent to birth and they are discussed below. If the steps proposed below are not taken then it will be necessary to make specific, limited, provision to ensure that such persons too benefit from a right of election.
163. As to those whose Irish father, or father entitled to be in the UK without restriction of time, was not in the UK (what matters is the UK, not Northern Ireland) at the time of the birth, this does not affect the child's being born British, provided always that the father has not been outside the UK for more than two years or for another reason lost that status.
164. I turn now to those born in Northern Ireland who were not British citizens at the time of their birth but are British citizens now. They are not among the intended beneficiaries of Article 1 (iv) of the Belfast Agreement but I consider that there are strong policy reasons for giving them a right to elect to be identified as British citizens.
165. Prior to 1 January 2005 all those born on the island of Ireland were citizens of Ireland by birth. Prior to 1 January 1983 all those born in Northern Ireland will have been (otherwise they would have been British by birth).
166. I suggest that those of concern are those who acquire or will acquire British citizenship while they were still children, as those who acquired British citizenship as adults did so by their own voluntary act, and have thus exercised a right of election.
167. I provide examples (not an exhaustive list) of persons in an anomalous position below:
  - (i) Those adopted as children by parents, at least one of whom is a British citizen, ordinarily resident in Northern Ireland in the UK or a qualifying territory (British Overseas Territory with the exception of the sovereign base areas on Cyprus) or under the law of a State in which the Hague Convention on Adoption is in force and which is certified in pursuance of Article 23(1) of the Convention (British Nationality Act s1(5)) who are also (for whatever reason) entitled to Irish citizenship.
  - (ii) Persons born to parents not married to each other between 1 January 2005 and 1 July 2006 (the date from which British Nationality Law treated children born out of wedlock in the same way as those whose parents are married) who have subsequently registered under s 4E to 4I of the British Nationality Act 1981 and who are (for whatever reason) also entitled to Irish citizenship;
  - (iii) Persons born in Northern Ireland after 13 January 2010 (the appointed day for the purposes of s 1(1A) of the British Nationality Act 1981) to serving members of the UK's armed forces (as defined in s 50 of the British Nationality Act 1981) whose parents are not settled and who are (for whatever reason) also entitled to Irish citizenship;
  - (iv) Persons born in Northern Ireland who lived in the UK continuously for 10 years from the date of their birth (British Nationality Act 1981 s 1(4)).

168. While, as explained above, the cohort of those affected is small, it is largely made up of persons who have been registered as British citizens rather than been born British citizens because they were adopted, because of the marital status of the parents, or because they have benefited from registration provisions designed to correct the present day effects of historical discrimination or disadvantage in the past. Treating them differently from others born in Northern Ireland risks compounding the discrimination and disadvantage that British nationality law has sought to address by making provision for their registration.
169. There is no reason why the UK could not make more inclusive provision for persons to identify (or not) as British citizens.
170. **Recommendation 5: That consideration be given to broadening the cohort of persons who benefit from the proposed changes to the law beyond all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.**
171. **Recommendation 6: That the cohort be broadened to cover those:**
- (i) Entitled to Irish nationality/an Irish national; and
  - (ii) Born in Northern Ireland; and
  - (iii) Who were registered, during their minority, as British citizens or who became British citizens during their minority by virtue of s 1(5) (dealing with adoption) of the British Nationality Act 1981.

*E.2.iii The Right of abode*

172. **Recommendation 7: I recommend that s 2(1) of the Immigration Act 1971 be amended to provide that all persons born in Northern Ireland to a parent who is British, Irish or without any restriction on their period of residence [and see above – those born in Northern Ireland who are entitled to Irish nationality/ Irish nationals and who were either registered, during their minority, as British citizens or became British citizens during their minority by virtue of s 1(5) of the British Nationality Act 1981] benefit from a right of abode in the United Kingdom.**
173. This measure aims at affording both protection and administrative convenience and thus providing a context in which the other proposed legislative changes can be pursued:
174. The right of abode is defined in the Immigration Act 1971 at 1(1) as the right to enter, reside in, leave and return to the UK “without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person”.
175. Section 2 of the Act provides:
- 2(1) A person is under this Act to have the right of abode in the United Kingdom if -
    - (a) he is a British citizen;
    - (b) he is a Commonwealth citizen who—
      - (i) immediately before the commencement of the British Nationality Act

1981 was a Commonwealth citizen having the right of abode in the United Kingdom by virtue of section 2(1)(d) or section 2(2) of this Act as then in force; and

(ii) has not ceased to be a Commonwealth citizen in the meanwhile.

(2) In relation to Commonwealth citizens who have the right of abode in the United Kingdom by virtue of subsection (1)(b) above, this Act, except this section and section 5(2), shall apply as if they were British citizens; and in this Act (except as aforesaid) “British citizen” shall be construed accordingly.

176. Thus, since 1 January 1983, when the British Nationality Act 1981 came into force, the only way to acquire a right of abode in the UK has been to acquire British citizenship. In most countries of the world the notion that there could be a nationality without a right of abode would not make sense. The most intrinsic, and fundamental right of nationals is to enter and to remain in the country of nationality. Other rights and entitlements flow from that and make sense in that context, whether the national takes advantage of that basic right or not.

177. The origin of the right of abode origin lies in the UK the notorious Commonwealth Immigrants Acts of the 1960s which severed nationality status from what one expects to be (and most countries’ laws just assume are) the rights of any national: to enter, reside in and leave the country of nationality, i.e. the rights to be free from immigration control. These are the rights protected in Protocol 4 to the European Convention on Human Rights (which the UK has signed but not ratified):

3(1) No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

(2) No one shall be deprived of the right to enter the territory of the State of which he is a national.

178. It was the Commonwealth Immigrants Act of 1962 that brought Irish citizens under immigration control, albeit that the common travel area has ameliorated the effect of this. But it made Irish citizens, for example, subject to deportation. The proposed s 3ZA of the Immigration Act 1971 preserves this.

179. I suggest that it would be more straightforward, and administratively convenient to afford all Irish citizens born in Northern Ireland to a parent who is British, Irish, or without any restriction on their period of residence, a right of abode in the UK, but if UK government is not prepared to give up its right to deport Irish citizens (albeit that it would have the power to strip them of their right of abode on conduct grounds applying the same standard) then proposed s 3ZA of the Immigration Act 1971 covers much of the same ground.

180. There are other ways of lifting those “people of Northern Ireland” who have elected to be Irish and not British citizens clear of immigration control, for example by using similar provisions to clause 3ZA of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, discussed above, but without the provisions as to deportation and exclusion. Nonetheless, I advocate the use of the right of abode because it serves to distinguish the “people of Northern Ireland” from other Irish citizens in the UK and highlights their special status. A distinct, instantly recognisable, status for such persons would be administratively convenient and would avoid confusion as to their rights and entitlements. Using a status that already exists is simpler for administrative purposes and right and entitlements flowing from the status are more likely to be understood.

### E.3. THE RIGHT OF ELECTION

181. I conclude that a birthright to identify as British or Irish does not imply a prohibition on a person being required to take positive steps to exercise that right.

182. I identify the issues as:

- (i) Default setting: until such time as you elect, what is your status?
- (ii) Transitional provisions, what will happen to a person when the law is changed?
- (iii) Retrospectivity: if the person elects, will their citizenship date from the date of election, or some prior date?
- (iv) Frequency of election;
- (v) Manner of election;
- (vi) Consequences of election for third parties.

183. I consider that there is much to learn from the Irish approach but my recommendation, rather than the “entitlement” approach is:

**Recommendation 8: to limit the power of the UK State to make an assumption as to the British citizenship of a person born in Northern Ireland without that person having had an opportunity to assert their right not to be identified as a British citizen.**

184. I consider that this addresses the concerns of the Upper Tribunal expressed in the *Jake Parker De Souza* case that the founding principle cannot be one of consent, within the mind of the individual, so that nationality status becomes unknown and unknowable and statelessness a real possibility: “A person’s nationality cannot depend in law on an undisclosed state of mind, which could change from time to time, depending on how he or she felt” (paragraph 37), and

40 [...] if Article 1(iv)/(vi) needs to be construed as preventing the United Kingdom from conferring British citizenship on a person born in Northern Ireland, at the point of birth, the inescapable logic is that Ireland cannot confer Irish citizenship on such a person at that point either. The result is that a person born in Northern Ireland is born stateless. That would be a breach of both countries’ international obligations to prevent statelessness. It is not conceivable that the two governments intended such a result.<sup>55</sup>

185. On the proposed approach a person always has a nationality, and must express it for it to have effect in the world. But the State is limited as to the assumptions it can make, and act upon, about which that nationality is. This protects the person until such time as they exercise their birthright.

186. **Recommendation 9: An express prohibition on statelessness is required. The prohibition needs to protect not only the person exercising their birthright but any children who might be at risk of statelessness as a result.**

187. As discussed above, all those born in Northern Ireland to an Irish parent are, as a matter of Irish law, Irish, and not just “entitled to Irish citizenship”, at birth. All those who would otherwise be born stateless in Northern Ireland become Irish at birth. Irish law tolerates the ascription of Irish

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<sup>55</sup> *Secretary of State for the Home Department v Jake Parker De Souza* [2019] UKUT 355 (IAC), 14 October 2019.

nationality to the vast majority of the “people of Northern Ireland” until such time as they elect to be British alone.

188. If Irish law had been drafted differently, it would have been possible to attempt the legal creation of a Schrödinger’s citizen, who is neither British nor not British. But because of the way Irish law is drafted, the Schrodinger’s citizen would be Irish or stateless. Section 6(3) of the Irish Nationality Act of 1956 would operate to mean that for so long as they had an entitlement to British citizenship, the stateless were not automatically Irish. But neither would they be British, until they had resided for five years in the UK. The creation of a stateless person is, in my view, contrary to the UK’s obligations under international law and therefore I do not recommend that the UK mirror the Irish language of “entitlement”.

189. **Recommendation 10: I recommend using the language of the 1954 Convention “recognised by any State as a national by operation of its law”.**

190. Treating holding a passport as an election, as the Irish legislation does is in my view helpful and I recommend that it also form part of any transitional provisions. Thus at the time of the change of law coming into effect, I recommend that:

**Recommendation 11: any person holding a British passport be treated as having elected to identify, and to be identified, as a British citizen.**

**Recommendation 12: That a person who elects not to identify as a British citizen should have to return any unexpired British passport and, in their case, renunciation will take effect from the date of its return.**

191. **Recommendation 13: That with the backstop of having affirmed that all beneficiaries of the nationality provisions of the Belfast Agreement have a right of abode, it is possible to allow retrospectivity so that election will date back to birth, or to the date of majority, to date of return of a British citizen passport or to any later date that the person may specify.**

192. **Recommendation 14: Persons with parental responsibility for a child should be permitted to elect for their child, once, and their election shall determine the nationality of the child from birth.**

193. Changing status frequently is not in the best interests of a child who is in the process of forming their sense of identity<sup>56</sup>. Persons with parental responsibility should be permitted to elect on the coming into force of the provisions even if they have previously applied for a British passport for their child.

194. The question arises as to what should happen where the persons with parental responsibility disagree. It is not possible to dictate how Ireland should deal with that situation. Section 6 of the Irish Nationality Act 1956 would currently deal with it by providing that the child who is not already Irish by descent is not Irish absent, on the child’s behalf, an act being done that only an

Irish citizen can do. It is a matter of Irish law whether one parent can do such an act absent the consent of the other.

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<sup>56</sup> See, for example *Identities Under Siege: Immigration Stress and Social Mirroring among the Children of Immigrants*, C. Suárez-Orozco in *The New Immigration: An Interdisciplinary Reader*, Suárez-Orozco, C., M. Suárez-Orozco, D. Baolian Qin-Hilliard Routledge 2012.

195. In the interests of promoting the rights of the child, I consider that the default setting should be that:

**Recommendation 15: A person with parental responsibility for a child should not be allowed to reject British citizenship for that child without the consent of all other persons holding parental responsibility for the child.**

**Recommendation 16: A person with parental responsibility for a child should not be allowed to reject British citizenship where this is against the expressed wishes and feelings of the child.**

196. The UK Nationality Guidance on the registration of children states:<sup>57</sup>

*If the application is made on Form MN1, the child may well have signed consent to the application but this is not normally essential. If it becomes apparent during the consideration of the application that the child does not wish to become a British citizen, you should consider whether it would be right to refuse the application. It is a matter of judgement whether a child is of sufficient intelligence and understanding to make an informed decision on this. The older the child is, the more appropriate a refusal is likely to be.*

197. **Recommendation 17: I recommend that a similar approach be taken to the views of a child who wants a person with parental responsibility to reject British citizenship on their behalf as is taken in the UK Nationality Guidance when a person with parental responsibility wishes to register a child as a British citizen.**

198. **Recommendation 18: On reaching the age of majority or at any time thereafter, a person should be allowed to elect for themselves, again once.**

199. **Recommendation 19: A declaration of election not to be treated as a British citizen should be by simple letter,**

as is the case for Irish British subjects under s 31 of the British Nationality Act 1981<sup>58</sup>. I have no doubt whatsoever but that the Home Office will create a form; but

**Recommendation 20: The use of a form should not be mandatory.**

**Recommendation 21: There should be no fee.**

200. “Every person” includes those who lack capacity, therefore there needs to be provision for those who lack capacity to identify as British citizens or not as they so choose, or as is chosen for them. Many persons will have expressed their views on British citizenship before they lost capacity. The Home Office has power to waive its requirements to be of full capacity. The British Nationality Act 1981 provides:

*44A Waiver of requirement for full capacity*

*Where a provision of this Act requires an applicant to be of full capacity, the Secretary of State may waive the requirement in respect of a specified applicant if he thinks it in the applicant's best interests.*

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<sup>57</sup> See the Nationality Guidance Registration as a British citizen: children v 4 (accessed 21 August 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/755505/Registration-as-a-British-citizen-children-v4.oext.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755505/Registration-as-a-British-citizen-children-v4.oext.pdf)

<sup>58</sup> See the Nationality Guidance *British Subjects v 1* (accessed 12 August 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/633103/british-subject-status-v1.o.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/633103/british-subject-status-v1.o.pdf)

201. The British Nationality (General) Regulations 2005 (SI 2005/538) provide that:

***Persons not of full age or capacity***

*5. An application may be made on behalf of someone not of full age or capacity by his father or mother or any person who has assumed responsibility for his welfare.*

202. See further the Home Office guidance on the full capacity requirement<sup>59</sup> and on renunciation. The latter provides:

***Checking full capacity***

*We should normally be satisfied that the applicant is of full capacity (for example, they have some understanding of the meaning and consequences of renunciation). The person should have explained on the form RN why they wish to renounce British citizenship and the form should have been countersigned by an adult who has confirmed personal knowledge of the declarant and that they are of full capacity. Alternatively, reasons should be given as to why it would be in the declarant's best interests for the full capacity requirement to be waived in their case. In cases where the applicant is not considered to be of full capacity you must consider whether it would be in their best interests to waive the requirement.<sup>60</sup>*

203. **Recommendation 22: That existing powers under s44A of the British Nationality Act 1981 to waive the requirement to be of full capacity where this is in a person's best interests should be used for cases where a person, acting on behalf of a person who lacks capacity, does not object to that person's being treated as a British citizen.**

204. I do not consider that it be considered adequate to permit someone to disclaim/renounce citizenship on behalf of another at the discretion of the Home Office.

205. **Recommendation 23: That where a person, acting on behalf of a person who lacks capacity, wishes to declare that they do not assent to that person's being treated as a British citizen, they must produce an order from the Court of Protection authorising them to take this step.**

206. Some may consider this an excess of caution but I consider that it would only be appropriate to reject citizenship on behalf of another where it can be demonstrated to the satisfaction of a court that this is in their best interests, normally because it gives expression to views consistently held by a person who previously had capacity.

***Renunciation and resumption***

207. **Recommendation 24: Subsequent election should be by way of renunciation and resumption.**

But, in recognition that this is recognised as a birthright,

**Recommendation 25: This should be as of right.**

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59 See the Nationality Guidance *Full Capacity Requirements v 1* (accessed 10 August 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/631642/nationality-policy-full-capacity-requirements-v1.oEXT.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/631642/nationality-policy-full-capacity-requirements-v1.oEXT.pdf)

60 See the Nationality Guidance *Renunciation of all types of British nationality v 3* (accessed 10 August 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/677713/renunciation-of-all-types-of-british-nationality-v3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/677713/renunciation-of-all-types-of-british-nationality-v3.pdf)

*Other matters*

208. **Recommendation 26: It should not be possible to charge a fee for renunciation and resumption in these circumstances that exceeds the cost of providing the service of processing the renunciation or resumption.**
209. I have considered whether provision needs to be made to prevent “flipping”: repeated renunciation and resumption, but I do not identify a real risk of this, particularly when a fee, albeit one limited to the cost of providing the service, is required.
210. I do not propose amending s 1(1) of the British Nationality Act 1981 mindful of the objective that those who do wish to identify as British in no way feel that their citizenship has been “downgraded” and also recognising, as set out above, that Irish law treats the majority of those born in Northern Ireland as Irish prior to exercising their entitlement any election.
211. Instead,

**Recommendation 27: Section 1(1) of the British Nationality Act 1981 should continue to express that all those born to a British citizen or settled parent in the UK are British citizens.**

but

**Recommendation 28: a new subsection in s 1 of the British Nationality Act should provide that no assumption may be made as to the British citizenship of a person born in Northern Ireland without that person having had an opportunity to assert their right not to be identified as a British citizen.**

212. A person should be able to take positive steps at any time after the birth of a child to assert that child’s right not to be identified as a British citizen. I have considered the possibility of parents making advance elections for all their future children but I do not consider that this is desirable. I reject the idea of making an election in a particular case, when a woman is pregnant, because this assumes that the child will be born safely, an assumption that few future parents would feel comfortable making, and that will create both administrative problems and a lot of heartache, when it is not the case. But to set up a means of parents electing for all future children would involve setting up provision for them to change their mind and raises the difficulty of those who make an advance declaration as to the nationality of any children they might have, change their mind, and do not change the advance declaration.
213. What constitutes “an opportunity”? A person should be able, at any time after the birth of a child, or on reaching the age of majority, to reject British citizenship for that child or for themselves. Given that, for the reasons set out above, the default setting is that a person is a British citizen, those who elect to be British need do nothing. Their “opportunity”, just like that of the person who wishes to reject British citizenship, will arise when the State needs to know what their choice is. Here there are parallels with the notion of an “act only an Irish citizen can do”, such as a passport application. I consider, however, that while there will be people who emphatically do not want to have to do any positive act to assert their British citizenship, there will be those who would like the comfort of knowing that they have made a formal declaration, without going to the expense of applying for a passport. It should be enough to write “British” on form, as British citizens do every day, but those who want the comfort of a formal declaration should not be denied it.

214. I have considered the effect of retrospectivity for the laws of other countries. Ensuring that a person can never rewrite their nationality during the period when they possessed a British passport will ensure that another State has issued a visa, and treated a person while on its territory, on the basis of the correct nationality at the time of issue and travel. It is possible that a person could seek to renounce when overseas, including while resident overseas, but the obligation to return the passport should provide an opportunity to warn them of the need to ensure that they regularise their position with the State they are in. The alternative would be to provide that a person can only renounce with retrospective effect from the UK.
215. It is possible that a person could have accepted, for example, a financial grant, that is only given to nationals of certain countries, but I assume that in such cases the grant-giver would be unlikely to be troubled as long as the person had met the terms of an historic grant while it was received and that the terms and conditions of a grant being received at the time of change of nationality would provide for notification if a person ceased to qualify.

**Recommendation 29: Provision be made that a person asserts their right, or the right of their child to be identified as a British citizen by *inter alia*:**

- (i) applying for a British Passport; or
- (ii) a simple declaration of nationality in any official context;
- (iii) declaration of assent in writing to be so identified.

216. **Recommendation 30: An adult who assents to be identified as a British citizen is a British citizen from birth.**
217. **Recommendation 31: That provision be made that a person asserts their right to not be identified as a British citizen by a declaration in writing, with which they shall provide evidence that this will not leave them stateless, in the form of evidence, which can, but need not be, in the form of a valid passport.**

218. In the case of the nationality of Ireland, in the light of the laws of Ireland,

**Recommendation 32: A declaration that that the person is an Irish national shall suffice.**

219. I envisage that it should be possible to achieve agreement between the Irish and UK governments that a declaration that a person is an Irish national is “an act which only an Irish citizen is entitled to do” for the purposes of the Irish nationality legislation.
220. I consider that a declaration that a person is an Irish national would be treated as a nullity if the person had made a declaration of alienage and had not made a declaration of citizenship reversing that<sup>61</sup>. I do not consider that express provision need be made for this.
221. I do have concerns about delay and would therefore address this.
222. **Recommendation 33: A declaration shall take effect from the date on which the relevant UK authority receives it, which should be deemed to be two days after it is sent by first class post unless the contrary is shown.**
223. Anyone who sends their letter other than by recorded delivery is, in my view, courting problems and even then, my understanding is that the Home Office signs for recorded mail in batches.

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61 See Form 1 (accessed 29 August 2019) <http://www.inis.gov.ie/en/INIS/form-CTZ1.pdf/Files/form-CTZ1.pdf>

224. **Recommendation 34:** where a person declares that they do not assent to be identified as a British citizen they shall be treated as not having been a British citizen since:

(i) birth in the case of a child or a person who, no declaration having been made during their childhood, makes such a declaration as an adult;

(ii) reaching the age of majority in the case of an adult on whose behalf a declaration of assent was made while they were a child;

save that where a person previously held a British passport they will be treated as not having held British citizenship only from the date that passport was cancelled.

225. If, as I have recommended, the cohort of persons encompasses adopted children and some children registered, this does not affect such wording, as they will not have been British citizens prior to adoption or registration in any event.

### *E.3.i Renunciation and resumption*

226. By contrast, where a person who has previously asserted their right not to be identified as a British citizen resumes and then renounces,

**Recommendation 35:** Where a person who has previously declared that they do not assent to be identified as a British citizen resumes and then renounces British citizenship, the date of ceasing to be a British citizen will be the date shown on the declaration of renunciation sent to them by the Home Office, as with any other renunciation.

**Recommendation 36:** Where a person who has previously renounced British citizenship resumes it, the date of becoming a British citizen will be the date of the citizenship ceremony at which they take the oath and pledge, as with any other renunciation.

### *E.3.ii Stateless children*

227. I consider it to be incongruous that a child born stateless in Northern Ireland should become an Irish national, but not a British national. Therefore,

**Recommendation 37:** Guidance on the exercise of the discretion under s 3(1) of the British Nationality Act 1981 be amended to provide for the registration of children born in Northern Ireland who acquire Irish nationality at birth because they would otherwise be stateless.

## **F. KEY PARTS OF THE STATUTE BOOK, LEGISLATION & GUIDANCE POTENTIALLY REQUIRING AMENDMENT**

228. I have not dealt with changes that would flow from broadening the cohort to cover those:

- (i) Born in Northern Ireland; and
- (ii) Entitled to Irish nationality/an Irish national and
- (iii) Who were registered, during their minority, as British citizens or who became British citizens during their minority by virtue of s 1(5) of the British Nationality Act 1981.

### **F.1. STATUTE**

#### ***F.1.i Immigration Act 1971***

##### ***Section 2***

229. To provide for a right of abode for all those born in Northern Ireland to a parent who at the time of the birth is a British citizen, or Irish, or without any restriction on their period of residence in the UK.

##### ***After section 3***

230. To enact s 3ZA as proposed in the Immigration and Social Security Coordination (EU Withdrawal) Bill, session 2017-2019, or equivalent provision.

#### ***F.1.ii British Nationality Act 1981***

##### ***Section 1***

231. Section 1(1) of the British Nationality Act should continue to express that all those born to a British citizen or settled parent in the UK are British citizens.

232. A new subsection in section 1 of the British Nationality Act providing that no assumption may be made as to the British citizenship of a person born in Northern Ireland without that person having had an opportunity to assert their right to be identified, or not, as a British citizen.

##### ***After section 1***

233. To make transitional provision that at the time of the change of law coming into effect, any person holding a British passport will be treated as having asserted their right to be identified as a British citizen or for that right to have been asserted on their behalf.

234. To make transitional provision that a parent may elect within one year of the coming into force of the new section for their child not to be identified as a British citizen without this affecting their right of single subsequent election on behalf of that child.

235. To make provision that:

- (i) a person of full age and capacity asserts their right, or a person acting on behalf of a person not of full age and capacity, makes a declaration of assent that the person on whose behalf they have authority to act, be identified as a British citizen by:

- (a) applying for a British Passport;
- (b) providing a declaration of assent in writing to be so identified;
- (ii) and that when they make such a declaration they shall be treated as having been a British citizen from birth;
- (iii) the need for assent to be in writing can be waived in situations of emergency;
- (iv) Such a declaration may be made once only by a person of full age and capacity and once only once (excluding exercise of the right under transitional provisions) on behalf of a child;
- (v) If a person of full age and capacity declares in writing that they do not assent to be identified as a British citizen, or a person acting on behalf of a person not of full age and capacity makes such a declaration in writing, notification of such a declaration shall mean that they must not be identified as a British citizen:
  - (a) in the case of a child, from birth, from the receipt of their British passport, or from the date, prior to the date of notification of the declaration, specified in the notification, whichever is the later;
  - (b) in the case of a person of full age and capacity, from birth or from the receipt of their British passport by the Home Office, or from the date, prior to the date of notification of the declaration specified in the notification, whichever is the later;
  - (c) in the case of a person of full age but not of full capacity, from the date of receipt of the notification, a copy of the Court Order indicating the court's assent to the notification or of their British passport by the Home Office, whichever is the later;
- (vi) Notification must be accompanied by evidence that the person holds a nationality other than their British nationality and thus is not stateless;
- (vii) A declaration that the person is an Irish national shall be treated, without more, as evidence that they hold Irish nationality unless the contrary is proven.

#### ***Section 4G***

236. To provide for registration of persons born in Northern Ireland who would have become British at birth had their grandfather been married to their grandmother and thus their parent been born British.

#### ***Section 12***

237. To provide that a person born in Northern Ireland to a British or settled parent who holds Irish nationality may renounce British nationality as of right (without limit on the number of occasions, although if this is not specified it will be without limit).

#### ***Section 13***

238. To provide that a person born in Northern Ireland may resume British nationality as of right (without limit on the number of occasions, although if this is not specified it will be without limit).

***Section 44A Waiver of requirement for full capacity***

239. To change “applicant” to person as a notification is not an application.

***Section 50 Interpretation***

240. To provide that statelessness means not recognised by any other State as a national by operation of its law.

***F.1.iii Immigration Act 2014***

***Section 68***

241. I recommend that provision be made that no fee may be charged for:

- (a) notification of a declaration;
- (b) an application under s 3(1) of the British Nationality Act 1981 for the registration of a child born in Northern Ireland who would have become British at birth had grandfather been married to their grandmother and thus their parent been born British.

and that provision that charges for renunciation and resumption of nationality by those born in Northern Ireland and for the issuing of certificates of right of abode to persons who do not wish to identify as British citizens under these provisions may not exceed the cost of providing the service, be inserted into this section to give them the force of primary legislation.

**F.2. STATUTORY INSTRUMENTS**

***F.2.i British Nationality (General) Regulations 2005***

242. To address the form in which assent to being recognised as a British citizen, or a declaration that a person does not assent to being identified as a British citizen, be given.
243. To make provision for declarations (the regulations are currently written in terms of “applications”).
244. To provide that a holder of a British passport, who declares that they do not assent to being identified as a British national, must return any unexpired British passport and, in their case, a declaration will take effect from the date of its receipt by the appropriate authority.
245. Paragraph 5 to change applicant to person because a declaration is not an application.
246. To provide that a declaration shall take effect from the date on which the relevant UK authority receives notification of it, and to deem this to be two days after it is sent by first class post unless the contrary is shown.

***F.2.ii Immigration (Certificate of Entitlement to the Right of Abode in the United Kingdom) Regulations 2006***

247. To provide that a Certificate of Entitlement to the Right of Abode should be issued to a person who has given notification that they do not wish to identify as a British citizen under these provisions.

***F.2.iii Immigration and Nationality (Fees) Order 2016***

248. Paragraph 10 and Schedule 7.

249. An alternative to setting out that no fee may be charged for notification of a declaration and that charges for renunciation and resumption of nationality by those born in Northern Ireland and for the issuing of certificates of right of abode to persons who do not wish to identify as British citizens under these provisions may not exceed the cost of providing the service, is to deal with them in this Order. Silence in the order would mean that no fee could be charged.

***F.2.iv Immigration and Nationality (Fees) Regulations 2018 (SI 2018/330) or any successor instrument***

250. To set the level of fees for renunciation, resumption, and the issue of certificates of right of abode to persons who do not wish to identify as British

**F.3. GUIDANCE**

***F.3.i Nationality Guidance: Registration as a British citizen: children***

251. Guidance on the exercise of the discretion under s 3(1) of the British Nationality Act 1981 be amended to provide for registration of children born in Northern Ireland who would have become British at birth had their grandfather been married to their grandmother and thus their parent been born British. This will not be necessary if s 4G is amended.

252. Guidance on the exercise of the discretion under s 3(1) of the British Nationality Act 1981 be amended to provide for the registration of children born in Northern Ireland who acquire Irish nationality at birth because they would otherwise be stateless.

## **G. RISKS OF INADVERTENT LOSS OF RIGHTS AND WAYS TO ADDRESS THESE**

253. As described above, Annex 2 to the Belfast Agreement defines the people of Northern Ireland for the purposes of Article 1(iv) as:

all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

254. Asylum seekers and persons within limited leave are thus not in issue because they are not persons within the scope of Article 1(iv). The persons entitled to reside without restriction are:

- » British citizens
- » Persons with a right of abode
- » Persons with indefinite leave to remain
- » Persons with permanent residence under EU law (at the moment)
- » Persons with settled status under Appendix EU to the Immigration Rules

255. I have described above the risks of statelessness and how I recommend that it be dealt with.

256. The risk of loss of rights arises more generally where persons cannot prove their British citizenship or right of abode especially given s 3(8) of the Immigration Act 1971 which provides:

When any question arises under this Act whether or not a person is a British citizen or otherwise has the right of abode ... it shall lie on the person asserting it to prove that he is.

257. I limit consideration to specific risks arising from the amendments proposed, rather than those arising in the generality of cases.

258. It is not possible for a person entering the UK through the Common Travel Area to prove that they have so entered, but the proposals above that a “parent” not be required to be present in the territory at the time of the birth address this.

259. Provision for persons to be given the right of abode, and/or the enactment of s 3ZA of the Immigration Act 1971 will in my opinion, provide baseline protection: this will be enhanced if the right of abode is afforded by ensuring that such persons can purchase a certificate of entitlement to a right of abode at reasonable cost. The current costs of such a certificate (which must be purchased afresh each time the passport in which it is affixed is renewed) is not reasonable. I recommend the UK authorities accepting a certificate of entitlement to the right of abode in an expired passport (it is lifelong entitlement) but so far, in the generality of cases, the Home Office has refused to do this and indeed its insistence on valid passports in circumstances where the passport is used for identification and there is no reason for it to be valid, is ingrained and, I would suggest, irrational.

260. To travel outside the country a person needs a passport. There will be a record of a British passport having been issued and therefore consular protection can be extended without fuss.

261. A question could arise where a person who has travelled on an Irish (or other passport) wishes to assert their British citizenship to benefit from consular protection. Here I consider that provision for the requirement that assent be in writing to be waived in situations of emergency would offer

protection. The person would have to prove their entitlement to British citizenship but would be in no different a position to anyone else travelling in a foreign country.

262. A person wrongly identified as British could be in a position where they could not benefit from the assistance of the Irish consular authorities in the UK because a dual national cannot assert the consular protection of one of his/her countries of nationality against the other country. Thus we can envisage, for example, an Irish national wanting the assistance of the Irish consulate in the UK. The Irish consulate would need to be satisfied that the person was not also a British citizen. Exemplary record keeping of declarations will be required.
263. I do not recommend that the “mobile phone” (or, more accurately “android mobile phone”) approach adopted in cases of EU settled status be used in these cases. EU citizens with settled and pre-settled status lack evidence of their status. This is not adequate. All the more so in these cases which concern citizenship and an international treaty.
264. As described above, provisions for deprivation of the right of abode are to the same standard as British citizenship thus a person is at no more risk of losing it, than of losing British citizenship.

## **H. ANY PRACTICAL AND ADMINISTRATIVE CONSEQUENCES THAT MAY ARISE FROM ANY LEGISLATIVE AMENDMENT, AND, IF SO, HOW THESE MAY BE RESOLVED**

265. To a large extent, that has been done above. I have sought to come up with an approach that limits adverse practical and administrative consequences.

### ***Need to be able to evidence status***

266. If there is any lesson to be learned from the Windrush farrago, it is that in a country where immigration status is determinative of so many rights and entitlements, the ability to prove one's citizenship or immigration status quickly and easily, not only to the State but to third parties, is crucial. The lesson does not appear to have been learned, as evidenced by the EU settled status scheme.

267. Particular problems with the EU settled status scheme have been:

- (i) Persons cannot rapidly evidence their status
- (ii) The scheme is designed for those are IT literate and excludes those without access to technology
- (iii) Persons are being given "pre-settled status" where they should qualify for settled status, rather than being told what to do to qualify for the latter.

268. No equivalent of III) arises in this scheme. I have sought throughout to address I). As to II), there is likely to be a surge in applications when the scheme goes live and IT may have a role to play in rapid processing. But when fundamental rights such as citizenship are at stake, on-line routes cannot be the only routes of application.

269. It is critical that assent, or non-assent to being recognised as a British citizen be recorded centrally and that the person be provided with /have access to this record, while third parties may, with the assent of the person concerned, obtain a copy.

270. It is vital that a person who does not assent to being identified as British has a clear record of this, and is able rapidly to identify this. That is why I favour using the right of abode, and why I think it so important to issue certificates of entitlement to the right of abode. The right of abode is an existing status, and reference is made to it in existing policies and guidance.

### ***Fees***

271. The biggest danger I identify is that of the UK government charging excessive fees such that persons cannot afford to access their rights.

### ***Administering authority***

272. Consideration should, in my opinion, be given to whether it is considered desirable that the declarations be administered by the nationality directorate in the Home Office or by another government department. Using the Home Office imports an "immigration control" mentality, which may not be helpful, but also brings with it experience of dealing with not dissimilar applications. On entering into discussions, it should not be assumed that the scheme will be administered by the Home Office.

### ***Rights of persons with a right of abode***

273. A person with a right of abode can re-enter the UK whatever their period of absence, thus a person who does not assent to being treated as British will nonetheless retain a lifelong right to reside in the UK. Entitlements to benefits are as for citizens. A person with a right of abode has no right to vote and to stand for public office in the UK by virtue of that status alone but these are rights already enjoyed by citizens of Ireland, alongside those who have the right of abode (all of whom are Commonwealth citizens and have these rights on that basis) therefore the exceptional treatment of Irish citizens is not introduced by the proposal. The right of abode gives no new rights to stand for public office etc., but takes none away.
274. I am satisfied that giving people the right of abode will mean that the retrospectivity of declarations does not have legal consequences when it comes to the nationality of children born in Northern Ireland.
275. I have considered whether it would have implications for children born outside Northern Ireland. Take, for example, a mother born in Northern Ireland who has made no election: she has not taken any steps to assert that she does not wish to be recognised as a British citizen but neither has she ever asserted her British citizenship. She travels to Australia on her Irish passport. There she has a baby. I consider that no assumption can be made that the child is the child of a British citizen, therefore no assumption can be made that the child is a British citizen.
276. If subsequent to the birth she elects to be treated as a British citizen (for example by applying for a British passport for the child) then, if the recommendation below is accepted, her election will have retrospective effect and the child will be treated as a British citizen. If, subsequent to the birth she elects not to be treated as a British citizen then the UK should demand proof that the child will not be left stateless as a result of this. In most cases the child will have Irish citizenship, but the mother will need to demonstrate this.

### ***EU law rights***

277. The De Souza's have been fighting for Ms De Souza to be recognised as an Irish national rather than a dual national in the UK and thus to be recognised as exercising EU law rights of free movement in Northern Ireland. I consider that the effect of the changes proposed would be to take those who did not assent to being treated as British citizens outside the current prohibition on dual British/Irish nationals exercising rights of free movement under EU law and would thus have consequences for their family members.
278. The proposals work whether the UK leaves the EU with a deal, thus preserving some framework for relationships with the EU, or not.

The proposals given the proposals in Annex A to *New Decade: New Approach*, discussed above.

### ***Discrimination***

279. I have expressed my concern that to limit the cohort of beneficiaries to those directly envisaged by the Belfast Agreement will lead to differential treatment of those whom British nationality law now tries to treat equally, such as adopted children. Hence my proposals for a wider cohort of beneficiaries than those who come within the definition of the "people of Northern Ireland" in the agreement.

***Irish or British citizen, both or neither***

280. Nothing in the proposals prevents a person, who has a third nationality, from not identifying as British or Irish. That is of course the case now, where a person could use existing renunciation provisions. But under the proposals such a person would benefit from the advantageous measures put in place: a right of resumption; reduced fees, a right of abode. One way to avoid this would be to limit the advantageous provisions to persons who hold Irish nationality. I do not consider that this step is necessary, because the cohort of beneficiaries is likely to be small and it is difficult to envisage opportunities for a person to manipulate these measures to their advantage. But a limitation of advantageous provisions to persons who hold Irish nationality, although introducing extra complexity, could be done.

***Political consequences***

281. I am asked to identify practical and administrative consequences but I point out that there are likely to be political consequences that reach beyond those in Northern Ireland directly affected. British nationality law carries the shadow of its past, with historical discrimination on the grounds of gender and the marital status of parents dogging its every step. Any changes in the Northern Ireland context that grapple with such discrimination, for example the proposals to amend s 4G of the British Nationality Act 1981 will, inevitably, lead to calls for this to be extended beyond the Northern Ireland context. And, for sure, any proposals to reduce fees will attract a great deal of attention as many are kept out of their citizenship rights by current fee levels.

## **I. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS**

### **I.1. LEGISLATIVE OBJECTIVES**

- (i) to prevent statelessness;
- (ii) to ensure that persons born in Northern Ireland who are beneficiaries of Article 1(iv) of the Belfast Agreement who do not identify as British citizens are not ascribed British citizenship against their will;
- (iii) to ensure that persons born in Northern Ireland who are beneficiaries of Article 1(iv) of the Belfast Agreement who do identify as British citizens hold a British citizenship that is the same as that held by those born elsewhere in the UK;
- (iv) to ensure that parents whose children are beneficiaries of Article 1(iv) of the Belfast Agreement can identify their children as British or not, as they so choose;
- (v) to ensure that whatever choices parents make for their children do not bind the children throughout their lives;
- (vi) to ensure that lack of capacity is not a bar to citizenship;
- (vii) to prevent disadvantage arising from failure to elect, or from election not to be treated as a British citizen;
- (viii) to promote inclusion and to challenge discrimination;
- (ix) to ensure that rights are effective and accessible;
- (x) to promote good administration;
- (xi) to follow precedents in legislation wherever possible.

### **I.2. RECOMMENDATIONS**

#### **Getting the cohort right**

##### ***Parents***

1. That the guidance on the exercise of the discretion under s 3(1) of the British Nationality Act 1981 be amended to provide for registration of children born in Northern Ireland who would have become British at birth had their grandfather been married to their grandmother and thus their parent been born British.
2. That there be no fee in such cases.
3. An amendment to s 4G of the British Nationality Act 1981 in similar terms.

##### ***The children of Irish citizens and persons entitled to reside without limit of time***

4. I recommend that the proposed new s 3ZA of the Immigration Act 1971, should be enacted.
5. That consideration be given to broadening the cohort of persons who benefit from the proposed changes to the law beyond all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish

citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

6. That the cohort be broadened to cover those:
  - (I.) Entitled to Irish nationality/an Irish national; and
  - (II.) Born in Northern Ireland; and
  - (III.) Who were registered, during their minority, as British citizens or who became British citizens during their minority by virtue of s 1(5) (dealing with adoption) of the British Nationality Act 1981.

### ***The Right of abode***

7. That s 2(1) of the Immigration Act 1971 be amended to provide that all persons born in Northern Ireland to a parent who is British, Irish or without any restriction on their period of residence [*and see above – those born in Northern Ireland who are entitled to Irish nationality| Irish nationals and who were registered, during their minority, as British citizens or who became British citizens during their minority by virtue of s 1(5) of the British Nationality Act 1981*] benefit from a right of abode in the United Kingdom.

### ***The right of election***

8. Limit the power of the UK State to make an assumption as to as to the British citizenship of a person born in Northern Ireland without that person having had an opportunity to assert their right not to be identified as a British citizen.
9. An express prohibition on statelessness is required. The prohibition needs to protect not only the person exercising their birthright but any children who might be at risk of statelessness as a result.
10. Such express prohibition should use the language of the 1954 Convention “recognised by any State as a national by operation of its law”.
11. Any person holding a British passport be treated as having elected to identify, and to be identified, as a British citizen.
12. That a person who elects not to identify as a British citizen should have to return any unexpired British passport and, in their case, renunciation will take effect from the date of its return.
13. That with the backstop of having affirmed that all beneficiaries of the nationality provisions of the Belfast Agreement have a right of abode, it is possible to allow retrospectivity so that election will date back to birth, or to the date of majority, to the date of return of a British citizen passport or to any later date that the person may specify.
14. Persons with parental responsibility for a child should be permitted to elect for their child, once, and their election shall determine the nationality of the child from birth.
15. A person with parental responsibility for a child should not be allowed to reject British citizenship for that child without the consent of all other persons having parental responsibility for that child.

16. Persons with parental responsibility for a child should not be allowed to reject British citizenship where this is against the expressed wishes and feelings of the child.
17. A similar approach should be taken to the views of a child who wants a person with parental responsibility for them to reject British citizenship on their behalf as is taken in the UK Nationality Guidance when a person with parental responsibility wishes to register a child as a British citizen.
18. On reaching the age of majority or at any time thereafter, a person should be allowed to elect for themselves, again once.
19. A declaration of election not to be treated as a British citizen should be by simple letter.
20. The use of a form should not be mandatory.
21. There should be no fee.
22. Existing powers under s44A of the British Nationality Act 1981 to waive the requirement to be of full capacity where this is in a person's best interests should be used for cases where a person, acting on behalf of a person who lacks capacity, does not object to that person's being treated as a British citizen.
23. Where a person, acting on behalf of a person who lacks capacity wishes to declare that they do not assent to that person's being treated as a British citizen they must produce an order from the Court of Protection authorising them to take this step.

#### ***Renunciation and Resumption***

24. Subsequent election should be by way of renunciation and resumption.
25. This should be as of right.

#### **Other matters**

26. It should not be possible to charge a fee for renunciation and resumption in these circumstances that exceeds the cost of providing the service of processing the renunciation or resumption.
27. Section 1(1) of the British Nationality Act 1981 should continue to express that all those born to a British citizen or settled parent in the UK are British citizens.
28. A new subsection in s 1 of the British Nationality Act should provide that no assumption may be made as to the British citizenship of a person born in Northern Ireland without that person having had an opportunity to assert their right not to be identified as a British citizen.
29. Provision be made that a person asserts their right, or the right of their child to be identified as a British citizen by *inter alia*:
  - (a) applying for a British Passport; or
  - (b) a simple declaration of nationality in any official context.
30. An adult who assents to be identified as a British citizen they shall be treated as having been a British citizen from birth.

31. A person asserts their right to not be identified as a British citizen by a declaration in writing, with which they shall provide evidence that this will not leave them stateless in the form of evidence, which can, but need not be, in the form of a valid passport.
32. In the case of Irish nationality, a declaration that the person is an Irish national shall suffice.
33. A declaration shall take effect from the date on which the relevant UK authority receives it, which should be deemed to be two days after it is sent by first class post unless the contrary is shown.
34. Where a person declares that they do not assent to be identified as a British citizen they shall be treated as not having been a British citizen since:
  - (a) birth in the case of a child or a person who, no declaration having been made during their childhood, makes such a declaration as an adult;
  - (b) reaching the age of majority in the case of an adult on whose behalf a declaration of assent was made while they were a child;save that where a person previously held a British passport they will be treated as not having held British citizenship only from the date that passport was cancelled.
35. Where a person who has previously declared that they do not assent to be identified as a British citizen resumes and then renounces British citizenship, the date of ceasing to be a British citizen will be the date shown on the declaration of renunciation sent to them by the Home Office, as with any other renunciation.
36. Where a person who has previously renounced British citizenship resumes it, the date of becoming a British citizen will be the date of the citizenship ceremony at which they take the oath and pledge, as with any other renunciation.
37. Guidance on the exercise of the discretion under s 3(1) of the British Nationality Act 1981 be amended to provide for the registration of children born in Northern Ireland who acquire Irish nationality at birth because they would otherwise be stateless.







