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Urgent Reforms Needed to Improve UK's Approach to Statelessness

This briefing recommends three urgent reforms to improve the UK's approach to statelessness:

1) Extend legal aid to statelessness applications under Part 14 of the Immigration Rules in England and Wales.
2) Introduce a statutory right of appeal against refusal of an application for leave to remain as a stateless person under Part 14 of the Immigration Rules.
3) Waive or reduce the fees for British citizenship applications for all stateless persons.

A stateless person is someone 'who is not considered as a national by any State under the operation of its law' according to the 1954 Convention relating to the Status of Stateless Persons (1954 Convention). People become stateless in a number of ways. The dissolution of states (such as the break-up of the Soviet Union) and the formation of new states (with large populations left out of the nation-building process) have been major causes of statelessness. Laws, regulations and administrative requirements and/or discrimination leave certain individuals or groups deprived of citizenship in some jurisdictions, for example where laws do not permit women to confer their nationality to their children. In some cases, lack of birth registration or records makes it extremely difficult for an individual to prove whether they are or are not considered a national of any state.

The United Nations Office of the High Commissioner for Refugees (UNHCR) is convening a global event, the High-Level Segment on Statelessness, in Geneva on 7 October 2019. This will be an intergovernmental meeting of United Nations Member States to mark the mid-point of UNHCR's IBELONG Campaign to End Statelessness by 2024. This event provides the UK government with an important opportunity to highlight its achievements to date towards eradicating statelessness, and to pledge to address critical shortcomings in the remaining 5 years of the IBELONG Campaign.

We recommend that the UK commits at the 2019 High-Level event to undertake the following reforms by the end of 2020:

1) **Extend legal aid** to statelessness applications under Part 14 of the Immigration Rules and to any related administrative review procedures in England and Wales. This change would further the Government's aim to direct legal aid funding to areas where it is most needed, achieve parity in access to legal aid for stateless persons in all regions of the UK, and comply with international standards and UNHCR guidance.

2) **Introduce a statutory right of appeal** against refusal of an application for leave to remain as a stateless person under Part 14 of the Immigration Rules. This appeal should be to an independent tribunal, in line with the appeals process for asylum claims. This would provide stateless applicants with an effective right of appeal and bring the UK in line with international standards and UNHCR guidance.

3) **Reduce the fees for British citizenship applications** for all stateless persons to the administrative cost level; waive citizenship fees for stateless persons who cannot afford to pay them; and refund any fees in excess of the administrative cost to applicants whose citizenship applications are refused. This would fulfil the UK's obligations under two international treaties on statelessness to which the UK is a party, the 1954 Convention and the 1961 Convention on the Reduction of Statelessness (1961 Convention).

Further information about the harm caused by statelessness, and what the UK can do to resolve it, follows.

Case study (based on casework experience of authors)

A stateless person from a former Soviet country, Mr A, is not at risk of persecution, but he is not considered a citizen of his country of birth, or any other, and has no right to live anywhere. He has no documents proving his place of birth or former residence. He suffers from depression. He previously claimed asylum in the UK but was refused. He was homeless for several years after that. Eventually he applied to stay in the UK as a stateless person, under Part 14 of the Immigration Rules. He couldn't find a legal adviser to assist him free of charge, so he made the application on his own. Two years later, the Home Office refused his application on the basis that he had not made enquiries with the authorities of his country of birth, but the Home Office caseworker made no enquiries with the authorities of his country of birth either. Mr A had no right of appeal against this refusal and did not apply for administrative review within the 14-day deadline because he did not understand the process and was extremely depressed. Weeks after the deadline, he consulted a solicitor who advised him that his case was not likely to succeed on judicial review, because he had not made a very strong application, and it was unlikely the High Court would find that there was a material error of law. The solicitor applied for Exceptional Case Funding and assisted Mr A to obtain evidence that he was stateless and to make a new application to stay in the UK as a stateless person. A year and a half after his second application, and 14 years after he first came to the UK, the Home Office granted him leave to remain in the UK as a stateless person. After 5 years, he will be eligible to apply for indefinite leave to remain, and a year later, naturalisation as a British citizen. Mr A has married Ms A, a refugee from a country whose nationality laws ban women from conferring their nationality to their children. She has recently been granted refugee status. They have 4 young children, all born stateless in the UK before Mr or Ms A had leave to remain. The children have a statutory entitlement to British citizenship at age 5 (because they were born stateless in the UK), or when one of their parents naturalises or becomes 'settled'. If the children register while minors, citizenship applications for the family will cost a total of £6,708. The family is struggling financially but living very frugally and saving £25 per month towards citizenship application fees. At this rate, it will take them 22 years and 5 months to save up £6,725.

Who is stateless in the UK?

A child may be born stateless in the UK if neither parent passes on a nationality, for example because they are stateless themselves or their country's laws do not allow women to confer nationality to their children. A relatively small number of stateless people immigrate to the UK or become stateless after arriving. Stateless persons living in the UK generally face a harsh reality. Most stateless people without permission to stay cannot leave the UK because no country will accept them. Without permission to stay in the UK, a stateless person is usually barred from renting accommodation, working, opening a bank account, and driving a car; and they may face difficulties accessing healthcare or getting married, amongst many other basic life activities. Some are separated from their families. They are vulnerable to destitution, depression, and exploitation. They are sometimes detained for years. Even after a stateless person is granted permission to stay in the UK, they face many barriers to full societal inclusion, such as not being eligible for some benefits or student loans and not being able to vote in any elections.

What has the UK government done to address statelessness?

As documented in the Statelessness Index, the UK fulfils some of its obligations under the 1961 Convention through the British Nationality Act 1981, which, for example, permits children born stateless in the UK to acquire British citizenship at age 5 and contains other safeguards against statelessness. The British Nationality Act also permits stateless persons to naturalise if they have had 5 years' limited leave to remain plus 1 year of indefinite leave to remain and meet other naturalisation criteria.

In 2013, the UK introduced a statelessness determination procedure in Part 14 of the Immigration Rules, through which persons may be recognised as stateless and granted leave to remain in the UK. Applicants who meet the requirements of the Immigration Rules will, since 6 April 2019, normally be granted 5 years leave to remain. This procedure partially complies with the object and purpose of the 1954 Convention.

Why are reforms needed?

Despite the progress that has been made, reforms are urgently needed because the current approach does not comply with international obligations and best practice.

1) **Legal Aid:** Access to legal aid in England and Wales is governed by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO). LASPO drastically curtailed the previous legal aid regime. Under LASPO, legal aid is limited to those seeking asylum or humanitarian protection and a few other groups. Applications for leave to remain as a stateless person or for British citizenship may be eligible for legal aid only if Exceptional Case Funding (ECF) is sought; but stateless persons often cannot obtain ECF without legal assistance. Legal advisers applying for ECF must work at risk that the application will not be granted, and remuneration under ECF is lower than for asylum claims, even though statelessness cases are typically as complex as asylum cases. Furthermore, because statelessness applications are out of scope for legal aid in England and Wales, fewer legal advisers develop the necessary expertise to adequately represent stateless applicants. Due to all these factors, it is often difficult for low-income or destitute stateless persons to find a legal adviser who has the necessary expertise and capacity.

   The position in England and Wales under LASPO contrasts sharply with the position in Scotland and Northern Ireland, where legal aid funding is provided for statelessness applications. This means that the ability of stateless people in England and Wales to access the UK's statelessness determination procedure is limited in comparison to stateless people in Scotland and Northern Ireland.

   The expansion of legal aid to applications under Part 14 of the Immigration Rules would ensure better protection of stateless individuals without imposing a significant fiscal burden. From April 2013 to March 2016, 1,592 statelessness applications were made (an average of about 500 per year). In comparison, in the same time period, the UK received an average of more than 28,000 asylum claims per year. Based on these figures, bringing statelessness applications in scope for legal aid would mean an approximate 1.8% increase in cases eligible for legal aid. Even if there were an increase in the number of applications, the increase is not likely to be large given the relatively low numbers of stateless persons in the UK.

2) **Right of Appeal:** The quality of decision making by the Home Office in immigration, asylum, statelessness, and nationality applications is variable.[1] This is especially problematic for applicants under Part 14 of the Immigration Rules as they do not normally have access to legal assistance for the preparation of applications, and the process lacks an effective appeal procedure.

   Currently, applicants who are unsuccessful in their initial applications may seek administrative review of the decision by the Home Office itself, followed by judicial review. However, neither of these routes provides an effective and impartial appeal. Administrative review is an internal Home Office process. A member of the staff unconnected with the initial decision reviews for "case working errors" and relays their findings to the statelessness team, which then issues a new decision (at times, essentially the same as the initial flawed decision). If administrative review does not result in a changed decision, applicants may be able to apply for judicial review by a UK court. However, the judicial process is usually lengthy and expensive for all involved, and the scope of the review is limited to whether there was a material error of law.

   In contrast, asylum claimants have the right to appeal to an independent tribunal, which has the jurisdiction to conduct a fresh assessment of the application, including through a review of the facts and evidence in support of the claim. Consequently, applicants for recognition as stateless persons are not afforded the same treatment as asylum claimants. There is no valid principled reason for this difference in treatment.

   Independent scrutiny of decisions by a tribunal empowered to re-determine points of fact and law would increase accountability of decision makers and hopefully improve decisions at the initial application stage. Furthermore, the right of appeal could foster the emergence of a more consistent body of case law and guidance on particular situations of statelessness.

   Legal aid and a statutory right of appeal would bring the UK's statelessness determination procedures closer to compliance with international best practices and UNHCR recommendations:

   > "An effective right to appeal against a negative first instance decision is an essential safeguard in a statelessness determination procedure. The appeal procedure is to rest with an independent body. The applicant is to have

[1] See eg J Bezzano and J Carter, Statelessness in Practice: Implementation of the UK Statelessness Application Procedure (2018).

access to legal counsel and, where free legal assistance is available, it is to be offered to applicants without financial means. … Appeals must be possible on both points of fact and law as the possibility exists that there may have been an incorrect assessment of the evidence at first instance level."[2]

3) **British citizenship fees:** Under Article 32 of the 1954 Convention, states are bound "as far as possible [to] facilitate the assimilation and naturalisation of stateless persons", and [to] 'make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings".

Many countries offer reduced fees or waive fees for citizenship applications by stateless persons, and/or have low or no fees for children. For example, citizenship applications fees in other European countries include:

- Germany: £229 (€255) per adult and £46 (€51) per child;
- Ireland: £157 (€175) per adult or child;
- Sweden: £128 (1500 SEK) per adult; free or £15 (175 SEK) per child; free for stateless refugees.

In contrast, the UK currently charges fees for acquisition of British citizenship that far exceed the fees charged by many European countries, and that are set at approximately 3 times over the administrative cost of processing individual applications. Currently, applicants for British citizenship must pay fees of **£1,330** per adult and **£1,012** per child, and these fees have risen drastically from £35 in 1983.[3] While a fee waiver is available with respect to *immigration applications*, no waiver or exemption exists for *citizenship registration or naturalisation applications,* not even for people who are destitute or children in social care.

The UK government's justification for citizenship fees is that "those who benefit directly from [the UK's] immigration system (migrants, employers and educational institutions) contribute towards its costs…; [and] that fees are set fairly, at a level that reflects the real value of a successful application to those who use the service."[4] This justification is not in line with the 1954 Convention, which refers only to *administrative* costs and reducing them as far as possible. Nor are the fees in accordance with the 1961 Convention, which makes no allowance for fees which prevent stateless children's acquisition of citizenship.

Further, the Government has failed to adequately justify the citizenship fees with reference to the "benefit" to be gained from a successful application, as pointed out in an April 2019 review by the Independent Chief Inspector of Borders and Immigration (ICIBI Report) of the Government's immigration and nationality fee policy.

The ICIBI Report recommends, among other things, that where an application fee is set above cost because it includes the "benefits that are likely to accrue", the surplus should be refunded where the application is refused (except where refused on grounds of fraud). The Government has not implemented this recommendation. The Home Office's practice is to "refuse and advise to reapply" rather than to provide an opportunity to correct mistakes or provide outstanding information. Accordingly, in addition to the barriers posed by high amount of the fee, the risk of losing the entirety of the fee remains a serious deterrent for many.

Finally, the case for waiving or reducing fees for stateless child applicants is overwhelming. Children generally have no independent income, and children born stateless in the UK have a statutory entitlement to British citizenship under the British Nationality Act, in accordance with the UK's obligations under the 1961 Convention.

This policy briefing was prepared by Cynthia Orchard, Statelessness Policy and Casework Coordinator at Consonant, in collaboration with: Nina Murray (European Network on Statelessness); Judith Carter (University of Liverpool Law Clinic); and lawyers at Latham & Watkins (Sophie Lamb QC, Samuel Pape, Maarten Overmars, Bryce Williams, Aisling Billington and Jonathan Lauras). Please direct any queries to Cynthia Orchard at statelessness@consonant.org.uk.

Further resources at: Consonant (formerly Asylum Aid) https://consonant.org.uk/policy-briefings-on-statelessness/.

[2] UNHCR, Handbook on the Protection of Stateless Persons (2014), Paras. 76-77.
[3] PRCBC & Amnesty International UK, Briefing on Fees for the Registration of Children as British Citizens (2019), pp. 2-3.
[4] Impact Assessment for the Immigration and Nationality (Fees) Order 2015.