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Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

Decision adopted by the Committee under article 4 (1) of the Optional Protocol, concerning communication No. 141/2019*,**

Communication submitted by:	M.A.M.N. (represented by counsel, Richard Timmis)
Alleged victim:	The author
State party:	United Kingdom of Great Britain and Northern Ireland
Date of communication:	8 November 2017 (initial submission)
References:	Transmitted to the State party on 14 March 2019 (not issued in document form)
Date of adoption of decision:	6 July 2020
Subject matter:	Discrimination against women; denial of citizenship on the ground of sex
Procedural issues:	Exhaustion of domestic remedies; communication manifestly ill-founded; communication incompatible with the provisions of the Convention
Articles of the Convention:	1, 2 (f) and 9
Article of the Optional Protocol:	4 (1) and (2) (b) and (c)

* Adopted by the Committee at its seventy-sixth session (29 June–9 July 2020).

** The following members of the Committee participated in the examination of the present communication: Gladys Acosta Vargas, Hiroko Akizuki, Tamader Al-Rammah, Nicole Ameline, Gunnar Bergby, Marion Bethel, Louiza Chalal, Esther Eghobamien-Mshelia, Naéla Mohamed Gabr, Hilary Gbedemah, Nahla Haidar, Dalia Leinarte, Rosario G. Manalo, Lia Nadaraia, Aruna Devi Narain, Ana Peláez Narváez, Bandana Rana, Rhoda Reddock, Elgun Safarov, Wenyan Song, Genoveva Tisheva and Franceline Toé-Bouda.

Background

1.1 The author of the communication is M.A.M.N, an Egyptian national born in 1976. She claims that the State party has violated her rights under articles 1, 2 (f) and 9 of the Convention. The Convention and the Optional Protocol thereto entered into force for the United Kingdom of Great Britain and Northern Ireland on 7 May 1986 and 17 March 2005, respectively. The author is represented by counsel, Richard Timmis.

1.2 Upon ratification of the Convention, the State party made the following reservation concerning article 9: "The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of their children. The United Kingdom's acceptance of Article 9 shall not, however, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date."

1.3 On 23 July 2019, the Committee, acting through its Working Group on Communications under the Optional Protocol, pursuant to rule 66 of the Committee's rules of procedure, granted the State party's request to examine the admissibility of the communication separately from its merits.

Facts as submitted by the author

2.1 The author is an Egyptian national born in Kuwait in 1976. She is the grandchild of S.W., a woman who was born a British subject in the United Kingdom in 1905. The author's father was born to S.W. outside the United Kingdom and colonies in 1944. At that time, citizenship could not be passed down through the female line, so he was not a British subject at birth. In spite of significant changes that were introduced in the British Nationality Act 1948, effective 1 January 1949, the author's father did not become a citizen of the United Kingdom and colonies because the relevant part of the law conferred nationality by descent only on persons whose father was a British subject at the time of that person's birth.[1]

2.2 At the time of the author's birth, in Kuwait on 29 November 1976, the British Nationality Act 1948 continued to be the relevant nationality legislation for the United Kingdom. She therefore did not become a British subject at birth.

2.3 On 1 January 1983, the British Nationality Act 1981 came into force, allowing citizenship to be transmitted through the maternal line. Under section 4C of the Act, persons are entitled to registration of citizenship if: (a) they were born before 1 January 1983; and (b) they would have become citizen of the United Kingdom and colonies by descent before 1 January 1983 if, before that date, women had been able to transmit British nationality in the same way as men; and (c) had they been a citizen of the United Kingdom and colonies, they would have had the right of abode in the United Kingdom and would have become a British citizen on 1 January 1983; and (d) they were of good character.

2.4 On 8 March 2016, the author applied to register as a British citizen under section 4C of the British Nationality Act 1981. Her application was refused by the Home Office on 25 May 2016. For the purpose of examining the relevant criteria for registration, the Home Office referred to section 5 (1) of the British Nationality Act 1948, which states that persons born after the Act comes into force shall be a citizen

[1] The State party agrees that had the relevant part of the then applicable law included the word "mother" as well as "father" with respect to conferring citizenship by descent, then, on 1 January 1949, the author's father would have become a citizen of the United Kingdom and colonies.

of the United Kingdom and colonies by descent if their father (or mother for the purposes of section 4C) is a citizen of the United Kingdom and colonies at the time of birth. It therefore concluded that, whereas the author's father would have been entitled to register under that provision of the British Nationality Act 1981,[2] the author herself had no entitlement to register, as her father did not have transmittable citizen status at the time of her birth.

2.5 On 22 July 2016, the author submitted an application for reconsideration to the Home Office. She argued that section 4C of the British Nationality Act 1981 continues to discriminate against the descendants of British grandmothers as compared with descendants of British grandfathers. The Home Office maintained its decision of 25 May 2016, reasoning that when introducing section 4C, the State party's undertaking was to allow for the acquisition of British citizenship by those who would have acquired it automatically on 1 January 1983 had section 5 of the British Nationality Act 1948 not been discriminatory against women. Section 4C gave effect to that undertaking, but does not go so far as to deem a person as having been a citizen of the United Kingdom and colonies at the time of her or his birth if that person is entitled to citizenship only under section 4C.

2.6 The author did not avail herself of any further legal remedies.

Complaint

3.1 The author claims to be a victim of a violation by the State party of her rights under articles 1, 2 (f) and 9 of the Convention.

3.2 The author explains that, prior to 1983, transmission of nationality by descent through the paternal line occurred automatically to the first generation born abroad and, in certain cases, automatically or conditionally to the second and further generations born abroad. She claims that had the relevant nationality laws not been discriminatory at the time of her father's birth and provided for the acquisition of nationality by descent through the maternal line on the same basis as through the paternal line, her father would have acquired British nationality by descent, and she also could have become a citizen of the United Kingdom and colonies by having her birth registered at the consulate of the United Kingdom.

3.3 The author claims that she should have been treated by the domestic authorities as if descended from a male, United Kingdom-born British subject and thus a person who had been eligible to obtain British citizenship by descent under section 5 (1) of the British Nationality Act 1948. Consequently, she also would have had the right of abode in the United Kingdom under section 2 of the Immigration Act 1971 and would have met the third condition of section 4C. She argues that the refusal of her application entails a continuing prejudice against her arising from the pre-1983 nationality laws' discriminatory effect, which has not been remedied to this day.

3.4 The author submits that there had been no effective remedy to challenge the decision of the Home Office to refuse her application for registration under section 4C of the British Nationality Act 1981. She argues that it is not possible for a domestic court to interpret section 4C of the British Nationality Act 1981 consistently with fundamental rights so as to avoid unjustified gender discrimination. She further asserts that even if a domestic court were to conclude that there was no possible interpretation of the challenged provision consistent with the fundamental rights protected by the Human Rights Act 1998, the remedy of a declaration of incompatibility would not affect the validity or continuing enforcement of the respective provision and would not be binding on the parties to the proceedings. It

[2] The author's father never applied for British nationality.

would then be within the discretionary power of the Minister to issue a remedial order and refer the issue to the Government to amend primary legislation.[3]

State party's observations on admissibility

4.1 In a note verbale dated 9 May 2019, the State party challenged the communication, arguing that it should be declared inadmissible for being manifestly ill-founded, for non-exhaustion of domestic remedies and for being incompatible *ratione temporis* with the provisions of the Convention.

4.2 The State party explains that the general principle adopted by the United Kingdom in its nationality law is consistent with that of the nationality law of most States, namely that a person's entitlement to the acquisition of nationality by birth or descent is determined by reference to that person's circumstances and the law applicable at the time of her or his birth. Under United Kingdom nationality law, before 1 January 1983, there were circumstances in which a person's entitlement to the acquisition of British nationality would be different if her or his circumstances included having a British father and a non-British mother rather than a non-British father and a British mother at the time of her or his birth.

4.3 The State party submits that it appears from the facts set out in the communication that the author's paternal grandmother had British subject status by virtue of the common law at the time of her birth in 1905. At the time of the birth of the author's father in Egypt in 1944, the relevant United Kingdom nationality legislation was section 1 (1) of the British Nationality and Status of Aliens Act 1914. The author's father did not become a British subject at birth because citizenship could not be passed down through the female line. The State party agrees, however, that if section 1 (1) (b) had included the word "mother" as well as "father", then the author's father would have been a British subject at birth by virtue of section 1 (1) (b) (i).[4]

4.4 On 1 January 1949, the British Nationality Act 1948 came into force, but the author's father did not become a citizen of the United Kingdom and colonies, since neither section 1 (1) (b) of the British Nationality and Status of Aliens Act 1914 nor section 12 (2) of the British Nationality Act 1948[5] included the word "mother" as well as "father". The State party adds that even if the author's father had become a citizen by descent, the author would not have been a citizen at the time of her birth because the Act of 1948 generally limited transmission of nationality by descent to one generation born outside the United Kingdom.[6] The State party underlines that the operation of this principle is independent of the limitations in earlier legislation based on gender. The State party notes that there may be exceptions to this rule: if the author's father had hypothetically been a citizen by descent, then he would have been able to have the author's birth registered at a United Kingdom consulate. Such an action had allowed persons of a second generation born outside the United Kingdom to acquire citizenship provided that all other conditions were met. The State party nonetheless argues that, as a matter of fact, the author's birth was not registered at a United Kingdom consulate, and the author failed to substantiate that her birth would have been so registered if it could have been.

[3] The author is relying on the decision of the European Court of Human Rights in *Hirst v. United Kingdom (No. 2)* (application No. 74025/01, judgment of 6 October 2005), which, according to her, has not yet been properly implemented.

[4] See http://www.legislation.gov.uk/ukpga/Geo5/4-5/17/enacted.

[5] See http://www.legislation.gov.uk/ukpga/Geo6/11-12/56/enacted.

[6] Ibid., section 5 (1).

4.5 Accordingly, the alleged continuing effects of the impugned nationality laws have clearly not been caused by gender discrimination, which occurred one generation earlier.

4.6 In addition, the State party asserts that it is completely immaterial to the author's complaint that she is female. If, hypothetically, she had a twin brother, both siblings would be in an identical situation. Any discrimination that occurred on the ground of gender was discrimination against the author's grandmother. Although that indeed had an effect on the author's father, the State party had provided a remedy for that effect through the current version of section 4C of the British Nationality Act 1981. The State party submits that it is common ground that the author's father is entitled to apply under section 4C for registration of citizenship, although it appears that he has not taken up his entitlement to do so. Accordingly, the author is not a victim of discrimination and her communication should therefore be declared manifestly ill-founded.

4.7 With regard to the exhaustion of domestic remedies, the State party submits that the author received a decision refusing her application for registration of citizenship under section 4C of the British Nationality Act 1981. She requested an administrative reconsideration of that decision by the Secretary of State. The original decision of the Home Office was upheld. It is common ground that the author has taken no steps, by way of an application to the High Court for judicial review, towards bringing a complaint about this allegedly erroneous decision before any domestic court. Relying on the jurisprudence of the Committee, the State party is of the position that the communication should be declared inadmissible for non-exhaustion of domestic remedies.[7]

4.8 The State party submits that the requirement of exhaustion of domestic remedies may be displaced only if a high test of ineffectiveness is satisfied. However, contrary to the author's assertion, under the Human Rights Act 1998, domestic courts are required to read and give effect to primary legislation and secondary legislation in a way that is compatible with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms. The author's assertion that domestic courts cannot interpret the challenged provision of the British Nationality Act 1981 consistently with fundamental rights is to be tested before the courts.

4.9 Then, if a domestic court is satisfied that the primary legislation is incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms, under section 4 (2) of the Human Rights Act 1998, it may make a declaration of that incompatibility.[8] The State party contests that a declaration of incompatibility should be considered to be an effective remedy. In order to refute the author's arguments with respect to the judgment of the European Court of Human Rights in *Hirst v. United Kingdom (No. 2)*, the State party notes that, on 4 December 2018, the Committee of Ministers of the Council of Europe recorded its satisfaction that the State party had adopted all the measures to satisfy the requirements stemming from article 46 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and decided to close its supervision concerning the enforcement of the judgment. In addition, the State party explains that, while a declaration of incompatibility transfers immediate responsibility for remedial action to the Government, this is because the Government is best placed to decide whether to

[7] See *J.S. v. United Kingdom of Great Britain and Northern Ireland* (CEDAW/C/53/D/38/2012), para. 6.3.

[8] See United Kingdom Supreme Court, *R. (on the application of Johnson) (Appellant) v. Secretary of State for the Home Department (Respondent)*, No. 56, judgment of 19 October 2016; and United Kingdom High Court of Justice, *K (A child) v. Secretary of State for the Home Department*, No. 1834 (Admin), judgment of 18 July 2018.

propose new primary legislation to Parliament to replace the legislation found to have been defective. As an alternative, if there are compelling reasons for the Government to amend the defective primary legislation without fully involving Parliament, section 10 (2) of the Human Rights Act 1998 allows the Government to make a remedial order that amends the primary legislation in order to remedy the defect. Choosing between these alternative routes requires consideration of their respective merits, including in particular whether parliamentary time might be available for consideration of new primary legislation and whether a suitable vehicle exists.

4.10 In addition, the State party makes reference to *The Advocate General for Scotland (Appellant) v. Romein (Respondent) (Scotland)*, in which the United Kingdom Supreme Court considered the case of a claimant who had been born outside the United Kingdom to a mother who was a British national at that time. The situation in that case, however, was not the same as that of the author, because in contrast to the author's father, the claimant's mother was in fact a British citizen at the time of the claimant's birth. The question as to whether the reasoning in that decision could be extended to the situation in the author's case is one that should first be considered by a domestic court. As the domestic courts have not been afforded any opportunity to do so, the State party claims that the author failed to exhaust domestic remedies.

4.11 The State party further argues that the communication should be declared inadmissible for being incompatible *ratione temporis* with the provisions of the Convention because the complaint concerns discrimination that predates the entry into force for the United Kingdom of both the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto (see para. 1.1). The State party submits that it does not wish to suggest that there was no gender discrimination present in earlier versions of its nationality legislation. However, the relevant dates on which the statutory provisions in question affected the facts of the author's case were 1944 and 1 January 1949 and continuity cannot be established. In this respect, the State party relies on the Committee's decision of inadmissibility in *Ragan Salgado v. United Kingdom of Great Britain and Northern Ireland* (CEDAW/C/37/D/11/2006), in which the Committee considered a complaint about a woman's inability to transmit her British citizenship to her eldest son. The Committee established that the discrimination described in that complaint had originated at the time of the author's son's birth and that article 9 (2) of the Convention imposes an obligation not to discriminate against a woman that continues for the entire period that the woman's child remains a minor. In the author's case, the author's grandmother was the person discriminated against. The relevant period ended in 1965 when her child, that is, the author's father, became an adult. In fact, the author herself became an adult in 1994, before the Optional Protocol entered into force for the United Kingdom. As all these dates long predate the adoption of the Optional Protocol, and its entry into force for the State party, the communication should be declared inadmissible in accordance with article 4 (2) (e) of the Optional Protocol.

Author's comments on the State party's observations on admissibility

5.1 In her submission dated 17 June 2019, the author contests the State party's arguments. She contends that the State party, by arguing that she could not have acquired United Kingdom nationality in any event because of the applicable restriction concerning the transmission of nationality by descent, seeks to include other dimensions of the United Kingdom nationality law. In response, she submits that her father was not a British national at the time of her birth only because he was born to a United Kingdom-born woman rather than a United Kingdom-born man. The inability of her father to have her birth registered at a British consulate, which could have exempted her from this restriction, stems directly from the discrimination

against her grandmother. That has had a continuous effect on her own rights because the relevant nationality laws continue to exclude her from acquiring British nationality. She argues that the protection provided by the Convention would be ineffective and illusionary if it could not afford protection against the violation of her rights rooted in discrimination against her grandmother but continuing to have an impact on the author by descent.

5.2 As concerns the State party's point of view regarding the requirement of exhaustion of domestic remedies, the author reiterates her arguments presented in her initial communication. With regard to the decision of the European Court of Human Rights in *Hirst v. United Kingdom (No. 2)*, she adds that it took 13 years for the State party to adopt effective measures. Taking into account her weak financial situation, she cannot be obliged to pursue a remedy that is likely to be ineffective.

Issues and proceedings before the Committee

6.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 66, the Committee may examine the admissibility of the communication separately from the merits.

6.2 In accordance with article 4 (2) (a) of the Optional Protocol, the Committee is satisfied that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.3 In accordance with article 4 (1) of the Optional Protocol, the Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted, unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

6.4 The Committee takes note of the State party's observation that even though the author made an application for registration of citizenship with the Home Office in 2010, she failed to challenge the refusal of her application before the High Court despite the possibility to apply for judicial review under the Human Rights Act 1998. In response, the author submitted that even if a domestic court were to interpret section 4C of the British Nationality Act 1981 consistently with fundamental rights, which in itself was highly unlikely, the remedy of a declaration of incompatibility should not be deemed to be effective. The author also referred to her weak financial situation as justification for not having pursued a judicial remedy.

6.5 The Committee observes that it is common ground that a judicial review of the administrative refusal of the author's application for registration of citizenship was indeed available to the author before the High Court. In its assessment as to whether such a remedy may be deemed to be effective, the Committee takes note of the domestic cases cited by the State party, which included a decision that concerned, in particular, provisions of the British Nationality Act 1981. It appears that in those cases, a declaration of incompatibility was made by domestic courts and remedial steps were eventually taken.

6.6 In addition, the Committee concurs with the State party's claim that, as in the cited case of *The Advocate General for Scotland (Appellant) v. Romein (Respondent) (Scotland)*, in which the United Kingdom Supreme Court addressed similar but not identical issues, it is imperative that domestic courts be given the opportunity to consider a matter of domestic law before bringing the issue before an international forum. The Committee recalls that it is generally for the authorities of States parties to the Convention to evaluate the facts and evidence and the application of national law in a particular case, unless it can be established that the evaluation was biased or

based on gender stereotypes that constitute discrimination against women, and thus was clearly arbitrary or amounted to a denial of justice.[9]

6.7 In the present circumstances, the Committee is of the opinion that the author has not established that the application of remedies before the courts in the State party is unreasonably prolonged or unlikely to bring effective relief. The author's weak financial situation in itself cannot have a bearing on this assessment and does not absolve her from the requirement stipulated in article 4 (1) of the Optional Protocol.[10] Accordingly, the Committee considers that the author has failed to exhaust all available domestic remedies and declares the communication inadmissible under article 4 (1) of the Optional Protocol.

6.8 Having found the communication inadmissible under article 4 (1) of the Optional Protocol, the Committee decides not to examine any other grounds for inadmissibility.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 4 (1) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[9] See, for example, *R.P.B. v. Philippines* (CEDAW/C/57/D/34/2011), para. 7.5.

[10] See, for example, *J.S. v. United Kingdom of Great Britain and Northern Ireland and Ragan Salgado v. United Kingdom of Great Britain and Northern Ireland* (CEDAW/C/37/D/11/2006).