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THE CONSTITUTIONAL COMMISSION OF THE
COMMONWEALTH OF THE BAHAMAS

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1. Introduction

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to contribute to the current public consultation on the reform of the Constitution of The Commonwealth of the Bahamas (“the Bahamas”).
2. The United Nations General Assembly has entrusted UNHCR with a global mandate to provide protection to stateless¹ persons worldwide and for preventing and reducing statelessness.² It has specifically requested UNHCR “to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States.”³ UNHCR’s Executive Committee has requested UNHCR to provide technical advice to States with regard to the adoption and implementation of safeguards, consistent with international legal principles, to prevent the occurrence of statelessness from arbitrary deprivation or denial of nationality. It has also stated that statelessness may arise as a result of restrictions applied to parents in passing on nationality to their children; denial of a woman’s ability to pass on nationality; renunciation without having secured another nationality.⁴ As such, UNHCR has a direct interest in the development of national legislation to prevent and reduce statelessness.
3. The Commonwealth of the Bahamas is party to several international treaties that contain standards to prevent statelessness, in particular the Convention on the Rights of the Child (CRC),⁵ the Convention on the Elimination of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁶

¹ Pursuant to Article 1 of the 1954 Convention relating to the Status of Stateless Persons: “... the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.”

² See UN General Assembly Resolution A/RES/50/152, 9 February 1996, available at <http://www.unhcr.org/refworld/docid/3b00f31d24.html>. Reiterated in subsequent resolutions, inter alia, A/RES/61/137 of 25 January 2007, available at <http://www.unhcr.org/refworld/docid/45fa902d2.html>, A/RES/62/124 of 24 January 2008, available at <http://www.unhcr.org/refworld/docid/47b2fa642.html>, and A/RES/63/148 of 27 January 2009, available at <http://www.unhcr.org/refworld/docid/4989619e2.html>.

³ *Id.* para.16.

⁴ ExCom Conclusion 106, paras. (i) and (j).

⁵ UNHCR notes in this regard that the Bahamas made the following reservation upon signature and confirmed it upon ratification: “The Government of the Commonwealth of The Bahamas upon signing the Convention reserves the right not to apply the provisions of article 2 of the said Convention insofar as those provisions relate to the conferment of citizenship upon a child having regard to the Provisions of the Constitution of the Commonwealth of The Bahamas.”

⁶ UNHCR notes that the Bahamas made the following reservation to this Convention: “Firstly the Government of the Commonwealth of the Bahamas wishes to state its understanding of article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. It interprets article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by subparagraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the

4. UNHCR notes that the Bahamas made several reservations to CEDAW, notably to Article 2, which requires States to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation and Article 9-2 which provides that women are to enjoy equal rights with men with respect to the nationality of their children. However, the Bahamas has not entered similar reservations to Article 26 of the ICCPR, to which it is also a party. Article 26 of ICCPR provides for equality before the law without any discrimination, and further stipulates that the law shall prohibit any discrimination. It guarantees to all persons equal and effective protection against discrimination on various ground such as sex. In its general comments, the Human Rights Committee emphasised that:

“While Article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, Article 26 does not specify such limitations. That is to say, Article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, Article 26 does not merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on State parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content should not be discriminatory.”⁷

5. On this basis, it can be argued that, the Bahamas should comply with its international obligations and uphold the principle of non-discrimination, including in relation to nationality matters.
6. The Bahamas is not yet party to the 1954 Convention relating to the Status of Stateless Persons (hereinafter “1954 Convention”) nor to the 1961 Convention on the Reduction of Statelessness (hereinafter “1961 Convention”). The United

principles embodied in the Universal Declaration set out in article 5 of the Convention (in particular to freedom of opinion and expression and the right of freedom of peaceful assembly and association) that some legislative addition to, or variation of existing law and practice in these fields is necessary for the attainment of the ends specified in Article 4. Lastly, the Constitution of The Commonwealth of The Bahamas entrenches and guarantees to every person in the Commonwealth of the Bahamas the fundamental rights and freedoms of the individual irrespective of his race or place of origin. The Constitution prescribes judicial process to be observed in the event of the violation of any of these rights whether by the State or by a private individual. Acceptance of this Convention by the Commonwealth of the Bahamas does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligations to introduce judicial process beyond these prescribed under the Constitution.”

⁷ UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available at: <http://www.unhcr.org/refworld/docid/453883fa8.html>.

Nations General Assembly⁸ and the Human Rights Council⁹ have encouraged non-party States to become members of the Statelessness Convention on numerous occasions. UNHCR has also actively promoted accession by the Bahamas to these treaties.

7. The Organisation of American States (OAS) has also encouraged accession to the Statelessness Conventions and the adoption of supporting domestic legislation. In 2011, the OAS General Assembly urged “those member states that have not yet done so to consider ratifying or acceding to, as the case may be, the international instruments in the area of stateless persons, and to promote the adoption of procedures and institutional mechanisms for their application, in accordance with those instruments and further without prejudice to their ratification of, or accession to the international instruments on statelessness, to consider adoption of domestic legal provisions to prevent and reduce statelessness and protect stateless persons.”¹⁰
8. The 1954 Convention requires minimum standards of treatment of stateless persons. These rights include but are not limited to the right to education, employment, housing, and public relief. Under this Convention, stateless persons are also entitled to the right to identity, travel documents and to related administrative assistance. The 1961 Convention establishes an international framework to prevent statelessness arising at birth or later in life.¹¹
9. Accession to the Statelessness Conventions and modification of particular provisions of the Bahamas Constitution (Constitution) would ensure compliance by the Bahamas with international legal standards for the prevention and reduction of statelessness and for the protection of stateless persons. In today’s age of widespread global migration, all States benefit from efforts to resolve statelessness, as reciprocal acceptance of minimum rules on citizenship contributes to better regulation of international migration flows. UNHCR notes that stresses that more States in the region are considering accession. In 2012, Paraguay, Ecuador and Honduras all acceded to one or both of the Statelessness

⁸ Please see General Assembly Resolution 64/127; Office of the United Nations High Commissioner for Refugees, 18 December 2009, available at: <http://www.un.org/ga/64/resolutions.shtml>; General Assembly Resolution 63/148; Office of the United Nations High Commissioner for Refugees, 18 December 2008, available at: <http://www.un.org/ga/63/resolutions.shtml>; General Assembly Resolution 62/124. Office of the United Nations High Commissioner for Refugees, 18 December 2007, available at: <http://www.un.org/ga/62/resolutions.shtml>.

⁹ Please see, for example, Human Rights Council Resolution 20/5, Human Rights and Arbitrary Deprivation of Nationality, 16 July 2012, available at <http://www.unhcr.org/refworld/pdfid/5016631b2.pdf>, Human Rights Council Resolution 20/4, The Right to Nationality: Women and Children, 16 July 2012, available at <http://www.unhcr.org/refworld/pdfid/503dd5422.pdf>

¹⁰ See AG/RES. 2665 (XLI-O/11), Prevention and Reduction of Statelessness and Protection of Stateless Persons in the America, (Adopted at the fourth plenary session, held on June 7, 2011).

¹¹ See UN High Commissioner for Refugees, Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report – Universal Periodic Review: Commonwealth of the Bahamas, June 2012, available at: <http://www.unhcr.org/refworld/docid/4ffd33042.html>.

Conventions and Jamaica has completed its domestic procedure to accede to the 1961 Convention.

10. UNHCR would like to reiterate its previous recommendations to the Bahamas to accede to the Statelessness Conventions and to bring the Constitution in line with standards contained in them.¹²

2. Scope of this submission

11. This submission, prepared in collaboration with the Eugene Dupuch Law School, focuses on provisions of the Constitution that affect the prevention and reduction of statelessness. Accordingly, UNHCR's comments relate only to Chapter II on Citizenship, Chapter III on the Protection of Fundamental Rights and Freedoms of the Individuals, and Chapter X on Interpretation.

12. UNHCR would like to clarify that it is for each individual State to determine under its own law who is a national within the limits set by international law.¹³ UNHCR's submission does not aim to advise the Bahamas on how it should grant nationality, but rather to provide guidance on how to respect its international obligations to prevent and reduce statelessness.

13. The Inter-American Court on Human Rights (Inter-American Court) has also emphasized this point:

“Despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.”¹⁴

14. In the *Case of the Yean and Bosico Children v. The Dominican Republic*¹⁵, the Inter-American Court found that States are limited in their authority to grant nationality by their obligations to provide individuals with the equal and effective

¹² See UN High Commissioner for Refugees, Submission by the United Nations High Commissioner for Refugees or the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Commonwealth of the Bahamas, June 2012, available at: <http://www.unhcr.org/refworld/docid/4ffd33042.html>.

¹³ According to Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws: “It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”

¹⁴ Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC-4/84, Inter-American Court of Human Rights (IACrTHR), 19 January 1984, available at: <http://www.unhcr.org/refworld/docid/44e492b74.html>.

¹⁵ Inter-American Court of Human Rights (IACrTHR), 8 September 2005, available at: <http://www.unhcr.org/refworld/docid/44e497d94.html>

protection of the law and by their obligations to prevent avoid and reduce statelessness.¹⁶

3. Comments on Existing Provisions of the Constitution

15. UNHCR has identified a number of provisions in the Constitution that are not in conformity with international law and standards, for which it therefore recommends modifications to these provisions.

3.1. On Gender Inequality in the Transmission of Nationality by Women

16. On various occasions, the Bahamas has acknowledged that gender discrimination exists in the Constitution relating to transmission of nationality by Bahamian women. In 2003, the previous Constitutional Review Commission explained in its report that:

“The citizenship provisions [of the Constitution] are perceived to reflect a male gender-bias by treating women differently and less favourably than men in their ability to transmit citizenship to their spouses, their children, and in respect of the conditions attached for the registration of their children born outside the Bahamas.”¹⁷

17. More recently, in its 2012 report to the United Nations Universal Periodic Review, the Bahamian Government reported the following:

“Protection of fundamental human rights enshrined in The Bahamas Constitution applies equally to men and women. However, separate Constitutional Provisions concerned with the transfer of nationality from parent to children and to the award of nationality to foreign born spouses of Bahamian citizens accord privileges to Bahamian men that are not afforded to Bahamian women.”¹⁸

18. As noted above, the Bahamas is party to CEDAW and the ICCPR, both of which prohibit gender discrimination. This includes the transmission of nationality, particularly with respect to conferral of nationality to their children. However, the Bahamas maintains reservations to Article 2-a and Article 9-2 of CEDAW. UNHCR and the Committee on the Elimination of Discrimination against Women recently reiterated their concerns in this regard, noting that:

¹⁶ See *Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACrtHR), 8 September 2005, available at: <http://www.unhcr.org/refworld/docid/44e497d94.html>.

¹⁷ See *The Bahamas Constitution: Options for change*, prepared for the Commission by the Commission's secretariat, Government of the Bahamas 2003.

¹⁸ UN Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 : [Universal Periodic Review] : Bahamas , 8 November 2012, A/HRC/WG.6/15/BHS/1, available at: <http://www.unhcr.org/refworld/docid/50cecdb32.html>.

“[the] Bahamas did not see itself bound by the provisions of Article 9, paragraphs 1 and 2, of the Convention, based on a Constitutional Referendum vote against the withdrawal of the provision preventing women from passing their nationality to their children or to their spouses of foreign nationality.”¹⁹

19. Both types of provisions, those preventing women to pass their nationality to their child or to their spouse on equal footing with men are reviewed below.

3.1.1. On Inequality for Transmission of Nationality to Children

20. UNHCR notes that pursuant to Article 8 and 14-1 of the Constitution, a child born in wedlock outside the territory of the Bahamas of a Bahamian mother (and foreign father) cannot acquire the nationality of the mother at birth. Only a child born outside of the territory of the Bahamas to a Bahamian father automatically acquires the nationality of the father at birth. Pursuant to Article 9 of the Constitution, a child born in wedlock to a Bahamian mother outside the territory of The Commonwealth of the Bahamas is only entitled to *apply* for citizenship between the ages of 18 to 21. In addition, this registration right does not provide a right to citizenship but is subject to prior renunciation of any other citizenship, and a discretionary decision of the Minister.

21. As a result of such provisions, a child born outside the Bahamas to a Bahamian mother and a foreign father is at risk of statelessness. There are many instances in which a non-Bahamian father may be unable to confer a nationality to his child. For instance if the father is stateless, or where the laws of the father’s country do not permit him to confer nationality, or when the father has been unable to fulfill administrative steps to confer his nationality or acquire proof of nationality for his children (because, for example, he has died, has been forcibly separated from his family, or cannot fulfill onerous documentation or other requirements).²⁰ In such cases, children born overseas to Bahamian mothers and non-Bahamian fathers will remain stateless, at least until they reach the age of majority. At this point, if they apply for Bahamian nationality, there is no guarantee that they will acquire a nationality as this decision is subject to the discretion of the Minister.²¹

22. Not only are these provisions of the Constitution contrary to the ICCPR and CEDAW, but they are also problematic in light of the Bahamas obligations pursuant to the CRC.

¹⁹ UN Human Rights Council, Compilation : [Universal Periodic Review] : Bahamas / prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 9 November 2012, A/HRC/WG.6/15/BHS/2, available at: <http://www.unhcr.org/refworld/docid/50cece652.html>

²⁰ See UN High Commissioner for Refugees, Background Note on Gender Equality, Nationality Laws and Statelessness , 8 March 2012, available at: <http://www.unhcr.org/refworld/docid/4f59bdd92.html> [accessed 25 January 2013]

²¹ The question of the discretionary power of the ministry to grant or refuse citizenship is discussed in further details below.

23. Furthermore, the Secretary General of the United Nations specifically outlined in a report on arbitrary deprivation of nationality that the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of the Child have stressed that “there must be no discrimination between men and women in their capacity to transmit their nationality to children.”²²
24. The Committee on the Rights of the Child has reiterated this stance in a number of concluding observations, in which it stated, inter alia, that “Articles 2 and 7 of the Convention [CRC] require that all children within the State party’s jurisdiction have the right to be registered and acquire a nationality, irrespective of the child’s or his or her parents’ or legal guardians’ sex, race, religion or ethnic origin.”²³

3.1.2. On Inequality for Transmission of Nationality to Foreign Spouses

25. UNHCR notes that pursuant to Article 5 and 10 of the Constitution only Bahamian men have the right to confer their citizenship to their foreign spouses. Under this constitutional provision, a woman married to a Bahamian citizen can apply for the citizenship by registration without satisfying all requirements otherwise required by other aliens, particularly with respect to residency requirements. However, a Bahamian woman does not have a similar right to confer her nationality to her non-Bahamian spouse under the Constitution.
26. These constitutional provisions, in addition to discriminating against women, impede the reduction of statelessness, where, for example, the spouse in question is a stateless man.

UNHCR recommends that the Bahamas:

Amend the Constitution to grant Bahamian women equal rights as Bahamian men regarding the transmission of their nationality:

- to their children, particularly with respect to children born outside the Bahamas to Bahamian women; and
- to their spouses of foreign nationality.

²² UN Human Rights Council, Human rights and arbitrary deprivation of nationality: report of the Secretary-General, 14 December 2009, A/HRC/13/34, available at: <http://www.unhcr.org/refworld/docid/4b83a9cb2.html>.

²³ *Id.*

3.2. On the requirement to renounce other citizenship prior to the acquisition of nationality of the Bahamas

27. UNHCR notes that voluntary acquisition of the nationality of another country under the Constitution, leads to loss of Bahamas nationality.²⁴ Registration as a citizen of the Bahamas under Article 5, 7 and 9 of the Constitution is conditioned upon prior renunciation to any other citizenship.²⁵
28. Requiring an individual to renounce his nationality prior to acquiring another one essentially requires that individuals become stateless in order to ever be considered for naturalisation. This is inconsistent to the standard set out in Article 7 of the 1961 Convention, and can lead to statelessness for a protracted period where a person renounces his or her nationality in a bid to acquire Bahamian nationality but subsequently is not granted Bahamian nationality and is also unable to reacquire his or her previous nationality.
29. For the reasons mentioned above, UNHCR recommends amendment of these provisions to ensure that renunciation will be required only after acquisition of the citizenship of the Bahamas. For instance, it could be stipulated that once a positive decision to grant nationality has been taken, an assurance is given to the individual that permits them to renounce their previous nationality or nationalities. Registration as a citizen of the Bahamas only becomes effective after the person provides proof of renunciation of the other nationality or nationalities he or she may hold.
30. Regarding the prohibition of dual nationality, while UNHCR has no recommendation on this question, it notes that there is a general tendency to allow dual nationality and that States have found permitting dual nationality can serve to prevent situations of statelessness resulting from conflicts of laws in relation to change of nationality following residence abroad, marriage or other changes in personal status. As an example, the Republic of Haiti amended in June 2012 its constitution to allow dual nationality. This legislation inevitably reinforces the prevention of statelessness in cases where the second nationality is withdrawn.

UNHCR consequently recommends that the Bahamas:

Amend the relevant provisions of the Constitution to include a safeguard that ensures that renunciation of a previous nationality will only be required once citizenship of the Bahamas is acquired.

²⁴ UNHCR notes that dual citizenship is permitted when it is automatically granted through birth in the territory, marriage or descent.

²⁵ “Provided that if he is a citizen of some country other than The Bahamas he shall not be entitled to be registered as a citizen of The Bahamas under this Article unless he renounces his citizenship of that other country.”

4. Comments on Gaps in the Constitution

31. UNHCR notes that the Constitution currently contains a number of gaps that may lead to situations of statelessness or may impair efforts to reduce statelessness.

4.1. On the Absence of Safeguards to Prevent Statelessness Amongst Children

32. UNHCR notes that pursuant to Article 6 of the Constitution persons born in The Commonwealth of the Bahamas of either a Bahamian father or mother become Bahamian citizens automatically at birth.

33. However, UNHCR notes that the Constitution lacks safeguards to prevent statelessness in certain circumstances where:

- (i) A child is born in the territory of The Bahamas and does not acquire any other nationality;
- (ii) A child is born abroad to Bahamian nationals and does not acquire their nationality;
- (iii) A child is a foundling.

4.1.1. On safeguards to prevent statelessness of a child born in the territory of the Bahamas

34. UNHCR notes that pursuant to Article 7 of the Constitution, individuals born in the Bahamas to non-Bahamians parents are entitled to apply for Bahamian citizenship. However, the application for registration under this Article can only be submitted between the ages of 18 and 19.

35. In addition, grant of nationality is further subject to the Minister's discretion as set out in Article 7 of the Nationality Act. Under this provision, the Minister responsible for citizenship and nationality may refuse the application for registration for a number of reasons. Reasons may include if he is of the impression that the applicant is "not of good behavior" or he or she "not being the dependent of a citizen of the Bahamas has not sufficient means to maintain himself and is likely to become a public charge". Furthermore, the wide discretionary power of the Minister in granting registration as well as the lack of procedural safeguards may hinder attainment of nationality. As a result, application for citizenship under Article 7 of the Constitution does not guarantee the right to a nationality for those born in the territory that would otherwise be stateless. It also means that children born stateless in the Bahamas remain so until they reach the age of majority.

36. Under international human rights law, every person, particularly every child, has the right to a nationality. This is enshrined in a number of international

instruments, such as in Article 15 of the Universal Declaration of Human Rights and other human rights treaties to which the Bahamas is a party such as the ICCPR and the CRC.

37. Under Article 1 of the 1961 Convention on the Reduction of Statelessness, the State “shall grant its nationality to a person born in the territory who would otherwise be stateless.” This Article does not oblige the State to grant their nationality to all children born on the territory, but simply requires States to do so if the child would otherwise be stateless.
38. This 1961 Convention gives a choice to the State on how to fulfill this obligation. The State can grant its nationality automatically at birth by operation of law or upon application; States may, pursuant to Article 1-2 of the Convention make the granting of nationality upon application conditional with respect to one or more of four conditions set out in Article 1 - 2.²⁶
39. The rules for preventing statelessness contained in Articles 1(1) and 1(2) of the 1961 Convention must be read in light of later human rights treaties, which recognize every child’s right to acquire a nationality. Specifically, when read with Article 1 of the 1961 Convention, the right of every child to acquire a nationality (Article 7 of the CRC) and the principle of the best interests of the child (Article 3 of the CRC) require that States grant nationality to children born in their territory who would otherwise be stateless either (i) automatically at birth or (ii) upon application shortly after birth. Thus, if the State imposes conditions for an application as allowed for under Article 1(2) of the 1961 Convention, this must not have the effect of leaving the child stateless for a considerable period of time.²⁷
40. UNHCR notes that, at the regional level, the American Convention on Human Rights requires States to grant their nationality at birth to children born in its territory who are not entitled to any other nationality. According to Article 20, “Every person has the right to a nationality. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.” Further, the Article XIX of the American Declaration of Human Rights and Duties of Man provides that “[e]very person has the right to

²⁶ The applicable conditions are as follows: “(a) that the application is lodged during a period, fixed by the Contracting State, beginning not later than at the age of eighteen years and ending not earlier than at the age of twenty-one years, so, however, that the person concerned shall be allowed at least one year during which he may himself make the application without having to obtain legal authorization to do so; (b) that the person concerned has habitually resided in the territory of the Contracting State for such period as may be fixed by that State, not exceeding five years immediately preceding the lodging of the application nor ten years in all; (c) that the person concerned has neither been convicted of an offence against national security nor has been sentenced to imprisonment for a term of five years or more on a criminal charge; (d) that the person concerned has always been stateless.”

²⁷ Please see paragraph 34 of the UNHCR, Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, 21 December 2012, HCR/GS/12/04, available at: <http://www.unhcr.org/refworld/docid/50d460c72.html>

the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.”

4.1.2. On safeguards to prevent statelessness of a child born abroad to Bahamians nationals

41. UNHCR notes that, pursuant to Article 8²⁸ of the Constitution, a person born outside the Bahamas to a Bahamian father may acquire the Bahamian citizenship by birth unless the father himself acquired the citizenship pursuant to Article 3-2²⁹ or 8 of the Constitution. In cases where the father was himself born outside the Bahamas, a child born outside the Bahamas would not be able to acquire Bahamian citizenship, and would therefore be stateless unless they acquire another nationality.
42. It is legitimate for the Bahamas to seek to ensure that all citizens have a strong degree of attachment to the State and therefore to limit the conferral of nationality when several generations are born abroad. However, in doing so, it is important to ensure that children born abroad to nationals themselves born abroad do not become stateless.
43. Pursuant to Article 4 of the 1961 Convention: “A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State. Similarly to provisions contained in Article 1-1 States are in this case given the option to either grant the nationality in that case automatically at birth or upon application.”³⁰

4.1.3. On safeguards to prevent statelessness for foundlings

44. UNHCR notes that the Constitution lacks a provision for the acquisition of nationality for foundlings found on the Bahamian territory. UNHCR has therefore expressed its opinion and recommended that the Government of the Bahamas

²⁸ According to Article 8 of the Constitution: “A person born outside The Bahamas after 9th July 1973 shall become a citizen of The Bahamas at the date of his birth if at that date his father is a citizen of The Bahamas otherwise than by virtue of this Article or Article 3(2) of this Constitution.”

²⁹ Pursuant to Article 3-2 of the Constitution: “Every person who, having been born outside the former Colony of the Bahamas Islands, is on 9th July 1973 a citizen of the United Kingdom and Colonies shall, if his father becomes or would but for his death have become a citizen of The Bahamas in accordance with the provisions of the preceding paragraph, become a citizen of The Bahamas on 10th July 1973”.

³⁰ Subject to the provisions of paragraph 2 of this article, no such application may be rejected. Similarly as to Article 1-1 (though the conditions differs) if the State choose to grant the nationality upon application, subject to one or more of the following conditions, no such application may be rejected: (a) That the application is lodged before the applicant reaches an age, being not less than twenty-three years, fixed by the Contracting State; (b) That the person concerned has habitually resided in the territory of the Contracting State for such period immediately preceding the lodging of the application, not exceeding three years, as may be fixed by that State; (c) That the person concerned has not been convicted of an offence against national security; (d) That the person concerned has always been stateless.

insert a safeguard in the Constitution to ensure that foundlings found on the territory of the Bahamas are granted the nationality of the Bahamas.³¹

45. Article 2 of the 1961 Convention on the Reduction of Statelessness provides that: “A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.”
46. There is no precise definition of the term ‘foundling’ in the 1961 Convention, particularly regarding the age of children covered by this provision. State practice in this regard varies with some restricting the age to 12 months up to 18 years. At a minimum, UNHCR recommends that safeguards are put in place to grant nationality to foundlings “who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth”.³²
47. UNHCR further observes that this safeguard should foresee that the age of the child at the date he or she was found is taken into account, rather than the date when the child was brought to the attention of the authorities.
48. Finally, UNHCR would like to emphasize that this type of safeguard is one of the most common kind of provisions of nationality laws around the world.

UNHCR recommends that the Bahamas:

Insert a provision to grant nationality to individuals born in the territory who would otherwise be stateless, either automatically at birth or upon application soon after birth.
Insert a provision to grant nationality to individuals born abroad to nationals who would otherwise be stateless, either automatically at birth or upon application soon after birth.
Insert a provision to grant nationality to foundlings found on the territory of the Commonwealth of the Bahamas.

4.2. On the absence of minimal procedural safeguards to ensure the right to a nationality, including the right not to be arbitrarily deprived of a nationality

49. UNHCR notes that while this issue is not explicitly regulated by the Constitution, under the Nationality Act 1973, the Minister responsible for Nationality and Citizenship is given considerable discretion for the granting or refusal of registration upon application, naturalization, and the issuance of an order of

³¹ “UN High Commissioner for Refugees, Submission by the United Nations High Commissioner for Refugees or the Office of the High Commissioner for Human Rights’ Compilation Report - Universal Periodic Review: Commonwealth of the Bahamas, June 2012, available at: <http://www.unhcr.org/refworld/docid/4ffd33042.html>

³² Please see paragraph 58 in UNHCR, Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, 21 December 2012, HCR/GS/12/04, available at: <http://www.unhcr.org/refworld/docid/50d460c72.html> *Id.*

- deprivation of citizenship. According to Article 16 of the Nationality Act: “The Minister shall not be required to assign any reason for the grant or refusal of any application or the making of any order under this Act the decision upon which is at his discretion; and the decision of the Minister on any such application or order shall not be subject to appeal or review in any court.”
50. Though UNHCR notes that with respect to withdrawal of nationality, the Nationality Act of the Bahamas does provide some limited procedural guarantees under Article 11. It indeed requires the Minister to give reasons for depriving a person of their nationality and also provides for the person to “appeal” the decision to a Committee of Inquiry. However, pursuant to Article 11-8 of the Nationality Act, the Minister is not obliged to act in accordance with the recommendations of the Committee. The effectiveness of such “appeal right” can therefore reasonably be questioned.
51. UNHCR notes that the right to a nationality, including the right not to be arbitrarily deprived of a nationality is recognized in numerous international instruments including the Universal Declaration of Human Rights, CERD, the ICCPR, CRC and CEDAW to which The Commonwealth of the Bahamas is party.
52. Procedural safeguards are essential to preserve the right to a nationality and the right not to be arbitrarily deprived of it. Applications concerning the acquisition, retention, loss, recovery or certification of nationality should at a minimum, be processed without undue delay, be issued in writing and be open to an effective appeal”.³³
53. UNHCR therefore recommends introducing at least minimal procedural safeguards in the Constitution to limit the power of the Minister in relation to any decision on nationality, and to allow an effective appeal on any decision affecting nationality.
54. UNHCR underlines that prohibition of arbitrary deprivation does not prevent a state from withdrawing its nationality from an individual in certain cases. As noted by the Secretary General in a report on Arbitrary Deprivation of nationality:
- “[deprivation of nationality] must be in conformity with domestic law and comply with specific procedural and substantive standards, in particular the principle of proportionality. Measures leading to the deprivation of nationality must serve a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law. Such measures must be the least intrusive instrument of those that might achieve the desired result, and they must be proportional to the interest to be protected. In this respect, the notion of arbitrariness applies to all State action, legislative, administrative and judicial.

³³ See Carol A. Batchelor, Transforming International Legal Principles into National Law: the Right to a Nationality and the Avoidance of Statelessness, *Refugee Survey Quarterly*, Vol. 25, Issue 3, 2006

The notion of arbitrariness could be interpreted to include not only acts that are against the law but, more broadly, elements of inappropriateness, injustice and lack of predictability also.”³⁴

55. UNHCR emphasises that a State shall not deprive a person of his nationality if he were to be rendered stateless. However, exceptions are permissible if deprivation of nationality serves a legitimate purpose and complies with the principle of proportionality. Thus, under a limited number of circumstances foreseen in Article 8 of the 1961 Convention, deprivation of nationality resulting in statelessness is permitted.³⁵

UNHCR recommends that the Bahamas :

Introduce procedural safeguards in the Constitution to limit the power of the Minister in relation to any decision on nationality, particularly to allow an effective appeal on any decision affecting nationality

Stipulate in the Constitution that arbitrary deprivation of nationality is prohibited.

4.3. On the absence of provisions to facilitate naturalization of stateless persons

56. Pursuant to the Nationality Act, approximately ten years of residence in the country is required for naturalization of most aliens³⁶. Such a requirement is a particularly long period a stateless person to remain without any nationality. In addition, other naturalization conditions also place an unduly heavy burden on stateless individuals wishing to naturalize, such as the requirement that the alien demonstrate “sufficient knowledge of the English language.”³⁷ This is particularly the case when it is considered that stateless individuals may face difficulties in accessing the same educational opportunities as other aliens.

57. UNHCR encourages the Bahamas to insert a provision in its Constitution that aims to facilitate naturalization of stateless persons by reducing or eliminating burdensome requirements, particularly the long period of residence required for naturalization. Such a provision would be in conformity with Article 32 of the 1954 Convention which stipulates that States shall as far as possible facilitate the assimilation and naturalization of stateless persons.

³⁴ See UN Human Rights Council, Human rights and arbitrary deprivation of nationality: report of the Secretary-General, 14 December 2009, A/HRC/13/34, available at: <http://www.unhcr.org/refworld/docid/4b83a9cb2.html>.

³⁵ UNHCR notes that Article 10 of the Nationality Act does set out the limited circumstances in which a person may be deprived of their nationality such that it would render them stateless, and these conditions are in compliance with Article 8 of the 1961

³⁶ Sections 1(a) and (b) of the Second Schedule of the Nationality Act.

³⁷ Section 1(d) of the Second Schedule of the Nationality Act.

UNHCR recommends that the Government of the Bahamas:

Make provision for the facilitated naturalisation of stateless person by lowering or withdrawing requirements imposed on other aliens, for instance relating to residency.

4.4. On the absence of a definition of the term “statelessness” in the Constitution

58. UNHCR highlights that it would be helpful to include the definition of a “stateless person” in the Constitution. UNHCR recalls that pursuant to Article 1 of the 1954 Convention relating to the Status of Stateless Persons: “... the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.”

59. In this regard UNHCR notes that, according to the International Law Commission, the definition contained in Article 1 of the 1954 Convention is part of customary international law, and therefore binding on all States, regardless of whether or not they have acceded to the 1954 Convention.³⁸

UNHCR recommends that the Government of the Bahamas:

Insert the definition of a “stateless person” in accordance with Article 1 of the 1954 Convention on the Status of Stateless in Chapter X of the Constitution.

5. Conclusion

60. UNHCR is pleased to have had the opportunity to provide these comments and remains at the disposal of the members of the Commission should it need any further advice or comments on specific provisions or recommendations.

UNHCR
Nassau
Commonwealth of the Bahamas
4 February 2013

³⁸ See page 49 of the International Law Commission, Articles on Diplomatic Protection with commentaries, 2006, which states that the Article 1 definition can “no doubt be considered as having acquired a customary nature”. The Commentary is accessible at http://untreaty.un.org/ilc/guide/9_8.htm. The text of Article 1(1) of the 1954 Convention is used in the Articles on Diplomatic Protection to provide a definition of stateless person. See also UN High Commissioner for Refugees, 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, 20 February 2012, HCR/GS/12/01, available at: <http://www.unhcr.org/refworld/docid/4f4371b82.html> [accessed 19 January 2013].