8. Statelessness: the proof of a negative

Adolfo Sommarribas

Platform on Statelessness. It also provides an overview of the state of play of statelessness in the European Union based on the EMN Informentitled 'Statelessness in the EU' putting emphasis on the burden and standard of proof. in order to tackle statelessness in the European Union through the European Migration Network This article provides an overview of what the Member States of the European Union are doing

both stateless individuals and persons of undetermined nationality.¹ According to UNHCR and UNICEF, in 2017 there were 2.100 children registered as stateless in the European Union.² of stateless persons in the European Union plus Norway at 399 283 individuals. This includes also present in the European Union. At the end of 2018, UNHCR estimated the total number Statelessness is a global phenomenon which is

- 224,670 of the persons fall under Latvia's 25 April 1995 Law on the Status of those Former USSR Citizens who a set of rights tizens"). In the specific context of Latvia, the "Non-cifigure includes persons of concern covered by two separate Latvian laws. 174 persons fall under the Republic of Latvia's Law on Stateless Persons of 17 February 2004. Data extracted from UNHCR 'Global Trends - Forced Displacement 2018' Annex - Table 7. With respect to persons under UNHCR's statelessness mandate, this apply in accordance with Article 1.2(ii)? al, and as such the "Non-citizens" may currently of Stateless Persons, including protection from idered persons to whom the Convention does enjoy the right to reside in Latvia ex lege and rights and obligations generally beyond the ibed by the 1954 Convention relating to the ens of Latvia or Any Other State ("Non-ci-
- 'UNHCR and UNICEF urge action in Europe to end childhood statelessness', 14 February 2019. Avail-

30

ngenrecht – juni 2020, nr. 2

and can result when people face difficulties accessing civil registration documents, including birth certificates, necessary to acquire or succession, ill-defined or discriminatory nationality laws, and arbitrary deprivation of nationality. Statelessness can also be a consequence employment, marry or open a bank account.³ Even though statelessness can occur in various contexts, its most common causes include state confirm nationality.4 of forced displacement and forced migration often live in conditions of protracted marginalisation and discrimination, facing numerous difficulties, such as the inability to receive medical assistance, enrol in educational programmes, Statelessness is a legal anomaly, which can prevent those concerned from accessing fundamental human, civil, political, economic, social and cultural rights. As a result, such persons acquire property, obtain

most irregular they sailed, ...). These myths are unfounded for several reasons: a) the possibility to apply for statelessness is limited in some Member States that the applicants can be granted a residence permit, stateless children born on a ship will acquire the nationality of the flag under which Member State (i.e. Luxembourg), so it excludes to individuals who are legally residents in the and technical issue from a legal point of view, so a large majority of lawyers do not like to address it. Also, there have been many myths around statelessness regarding that recognising statelessness can be a 'pull factor' (i.e. the idea stateless persons coming to the European Union were very low and it is a very complex In the context of migration, statelessness has been an abandoned issue, as the numbers of migrants; <u>b</u>

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applicant does not benefit from the material reception conditions established in Directive 2013/33/EU; d) only a few Member States⁵ grant a residence permit to an individual recognized as stateless person. In the large majority of Member States, recognized stateless persons must apply for a residence permit on other Member States which allow irregular migrants to apply for a recognition of their statelessness they remain in an irregular situation (i.e. France) and they do not benefit from any aid from the authorities; c) different from asylum, the application does not grant a right to remain in the territory in most Member States and the recognised stateless persons may not fulfil the criteria (i.e. they do not have the financial means or cannot meet the evidence requirements). grounds if they wish to regularize their status. In some cases, this can be complicated because

Legal framework

The legal framework of statelessness is very thin and mainly based on the Convention relating to the Status of Stateless Persons⁷ of 1954 and the Convention on the Reduction of Statelessness⁸ of 1961.

person as 'a person who is not considered as a national by any State under the operation of its law. This definition 'assigns particular importance to the domestic rules on acquiring nationality and shows why statelessness is often described as a "man-made problem". Art. 1 of the 1954 Convention defines a stateless

- FR, HU, IT, LV and ES. See Ibid, p. 2.
- https://www.unhcr.org/en-us/protection/stateless/3bbb25729/convention-relating-status
- s/3bbb286d8/convention-reduction-statelessness ://www.unhcr.org/en-us/protecti n/statelessnes
- sons'in European Union Law, Amsterdam International Law Clinic, Final Report, August 2017, p. 10. See http:// Eromolaeva, Uliana et al., The Concept of Stateless Per
- less-persons.html.

obtain nationality (i.e. children mothers who were not accompanion husbands) or were not registered in they were born. A secondary issue try of origin. papers in order not to be returned to t teless and the ones that destroy the tinguish between the individuals w of stateless persons coming to the Union was increasing substantially because some children born en ro The migration crisis in 2015 con European Union with a new reality: EMN Platform on Statelessness third-country nationals. However, the issue remains entirely petence of Member States when the

.unhcr.org/en-ie/news/pres

pe-end-childhood-statelessness.html. European Migration Network, 'Statelessness in the European Union, EMN INFORM; 2020, p. 1.

regard to EU law. 12 Nevertheless, Justice of the European Union, l'citizenship of the Union' definition addressing issues related to the los lessness, as citizenship remains a p the Member States as it is clearly of art. 20 (1) of the Treaty of Lisbor the 1961 Convention in so far as the does not become statelessness. 13 lity in accordance with art. 6 and 7 Member States must, when exe powers in the sphere of national The EU acquis¹⁰ does not dea

The position of the European Com to eradicate statelessness from the t the European Union. In order to a

- euromedmonitor.org/uploads/reports/S
- 10 pean Union, signed in Lisbon on 13 Decer by art.79 of the Treaty mon European on the Functioning ation policy
- 11 Treaty on the Functioning of the European ned in Lisbon on 13 December 2007.12 Judgment of the Court 2 March 2010, cas

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- (Rottmann), par. 42 and 45.
 Judgment of the Court 12 March 2019, cas
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Journaal Vree juni 2020, nr.

ARTIKELEN

State of play of statelessness in the EU

EU is not uniformed. The state of play regarding statelessness in the

and facilitates the acquisition of nationality.16 tains most of the provisions of the convention tion, but they argued that their legislation conding in the country, Slovenia has reservations stateless persons in a privileged position in of withdrawing French nationality if consideabout the application of art. 12 of the convencomparison with other foreigners legally resired necessary,15 Poland considers that it will put vention, France wishes to retain the possibility zenship Law is partly in conflict with the consign the 1961 Convention, the reasons advanon. Regarding the Member States that did not ced are: Estonia¹⁴ points out that their Citivention and 20 are party to the 1961 Conventi-24 Member States are party to the 1954 Con-

14 EE considers that EE citizenship law is based on the prescribe which mode of acquisition States parties granting citizenship to a person born in its territory ius sanguinis principle and the convention foresees according to UNHCR the 1961 Convention does not who would otherwise be stateless (ius solis). However,

has a provision which prohibits any decision of depri-Nevertheless, the law of 16 March 1998 on nationality vation of nationality if this implies that the person beco-

> form has been able to identify four different both conventions, there is no standard statecategories of determination procedure: lessness determination procedure. The Plat-Even though most Member States have ratified

- Dedicated statelessness determination proce-Hungary, Italy, Latvia, Luxembourg and determination procedure (Bulgaria, France, dure: seven Member States have a specific
- al determination procedures; Judicial procedures: there are only two Member States (Belgium and Italy) that use judici-
- Slovenia, Slovakia and Sweden); cedure (Czech Republic, Germany, Finland mination within another administrative pro-General administrative procedure or a deter
- Ireland, Malta and Poland). 17 Ad-hoc administrative procedures (Croatia

The Netherlands

applicant stateless.19 In the Netherlands there in principle not sufficient to consider the to the applicant, are for the Dutch authorities which they denied any responsibility in regard diplomatic missions of the country of origin in nation if it is not evident that the person is sta-BRP is not meant for complex status determi no such documents, the individual will be prove that s/he is stateless. If the applicant has ant has to produce foreign documents that Personal Records Database (BRP). The appliccentral authorities. Individuals can be registedetermination procedure conducted by the teless. The burden of proof lays on the indivi registered under 'unknown nationality'. The red by the municipalities as stateless in the In the Netherlands, 18 there is no statelessness Repeated statements by foreign

> stateless in the BRP.20 are approximately 12.000 persons registered as

cipalities have expressed the wish to do the determination under their own competences. reported about such initiatives.²⁴ Some muni developing local initiatives. The media have has inspired certain municipalities to start lack of a statelessness determination procedure conditions after five years of residence.23 The will also be able to acquire Dutch citizenship in the Netherlands, without a residence permit, draft bill proposes that children born stateless through the option procedure under certain zenship after three years of legal residence. The apply for Dutch nationality after three years of less in the Netherlands can obtain Dutch citiresidence instead of five.²² Children born statecitizenship applies, allowing the beneficiary to will facilitate the registration in the BRP. In the once the individual is recognized as stateless it less, a simplified procedure to obtain the Dutch Netherlands, if someone is registered as statedealt with by a civil judge. If the bill is approved judicial determination procedure which will be mitted to Parliament.²¹ The bill will establish a statelessness, but the bill has not yet been suba draft bill establishing a statelessness determination procedure facilitating the recognition of In October 2016, the Dutch government issued

ant has a duty to be truthful,

scope of the 1954 Convention.

rifying whether an individual

procedure is a collaborative o to obtain evidence and to estab both the applicant and examin

the burden of proof is in princi

(...) In the case of statelessne

in paragraph 89 with regard

stateless persons under the

and 1961 Convention are sile from Member State to Memb proof in statelessness cases tion of the burden of proof a is very complex and difficult, it is straight forward, while p

The 2014 UNHCR Handbool

prove that s/he does not have applicant of a statelessness

action or an exemption in t The problem with stateles

legal system it is known tha how to prove that a person The main concern in all th The burden and standard

ving something positive can b

relating to the Status of Statel

obtain and present all relevant larly, the determination autho: submit all evidence reasonably account of his or her position a

lessness determination procedu of a number of States that alrea versarial approach can be four mination of the applicant's sta ably available to it, enabling a

24 Dagblad Trouw, 'Gemeenten willen niet langer wachten Appendix to Parliamentary Papers II, 2017/18, nr. 1066

17 Ibid, p. 2.

18 Input on the current policy in the Netherlands provided

²⁰ Government of the Netherlands (Rijksoverheid), 'Statelessness, https://www.rijksoverheid.nl/onderwer pen/nederlandse-nationaliteit/staatloosheid.

pen/nederlandse-nationaliteit/staatloosheid https://www.rijksoverheid.nl/onderwer

in paragraph 91 states: Regarding the standard of proo

²² Government of the Netherlands (Rijksoverheid), 'Sta-21 Appendix to Parliamentary Papers II 2019/20, nr. 3521

national by any State under the operation of its degree" that an individual is not considered as a ranted where it is established to a "reasonable namely, a finding of statelessness would be warthat required in refugee status determination,

of those countries. It is evident that trying to means for obtaining this kind of proof from all and do not have the economic and material individuals that are legally invisible in society prove this is almost impossible, especially for applicant does not have the nationality of any have a nationality will be proving that the only way of proving that an applicant does not Niue and other dependencies. In principle, the of Palestine). In addition, there are other terriber observer states (the Holy See and the State tories such as Taiwan, the Cook Islands and Nations and two countries that are non-mem-Nevertheless, the task is not easy as there are 193 countries, which are members of United

manual.

onality and the other party (state) has to grant contentious situation in the application: one clear cut from a legal perspective as there is a only if this cannot be proven then the stateless is to try to prove in a collaborative manner that 2019,²⁵ the objective from the state perspective Statelessness in Europe' in Madrid on 25 April the International Conference on 'Addressing rad Derbak stated during his intervention in applicant does not have a nationality. As Mouthis status based on evidence that effectively the the basis that the applicant does not have a natiparty is requiring the other to grant a status on The proposed non-adversarial approach is not the third-country national has a nationality and

> applied by the Member States are not in line burden of proof and the standard of proof of evidence in the determination procedure, the determine whether or not the other party (the to the file and one of the parties (the state) may case in which both parties have to bring proof negative, there has to be a shared burden in this As the issue of statelessness is the proof of a with the recommendations of the UNHCR Even though all Member States accept all types applicant) is to be recognised as stateless.

her family members reside, where he/she lived administrative procedure it lies with the applicstandard of proof is the same as for asylum seeshould also actively contribute.28 In Italy the to asylum applications.²⁷ In **Hungary** the burbut the standard of proof is higher than applied on the other hand has a shared burden of proof, nation procedure it is evident that there are Citizenship and Migration Affairs.30 The same shared between the applicant and the Office of law lies with the applicant, but in practice it is In Latvia the burden of proof according to the ant and in the judicial procedure it is shared.²⁹ kers, however, the burden of proof varies: in the but under procedural rules the authorities than the one in asylum applications.²⁶ **France** significant variations regarding these two In the Member States with a specific determicountry in which he/she was born, in which his/ the nationality of any relevant country (e.g. the limited to determining that s/he does not have den of proof lies with the applicant, but it is happens in **Spain**.³¹ In **Luxembourg**, the burden of proof lies principally with the applicant, the applicant and the standard of proof is higher issues. In **Bulgaria** the burden of proof lies with

26 European Migration Network, op.cit., p. 5.

Mourad Derbak is head of Division Europe-Maria 27

Ibidem.

28 Ibidem.

Casarès of the OFPRA (French office for the protection

applicant may be linked.32 applicant, can request supplementary information from different countries to which the before). The authorities, with the consent of the

prove that s/he has lost it and is unable to access have nationality. If not, the applicant has to birth; or 3) country where family members cant-stateless person has ties could be among others: 1) country of residence; 2) country of has ties. The countries with which the applithe nationality of the countries with which s/he applicant, who has to prove that s/he never had procedure, the burden of proof lies with the In Belgium, which has a judicial determination

prooflies exclusively with the applicant (Slovak administration (Finland35) or the burden of of proof is shared between the applicant and the guidelines governing such assessments in the procedure in question (Sweden³⁴), the burden will depend on the procedural standards and assessing an individual's potential statelessness the burden and standard of proof applied when done within another administrative procedure, nistrative procedure or the determination is In those Member States that use a general admi-

33 Ibidem. In Belgium, the family courts, established in is not entitled to a temporary legal status and does not the competent authority for the recognition of statederive any rights from his or her recognition as stateless Court of Appeal. During the procedure, the applicant lessness, in accordance with the new art. 632bis of the thereof, where the applicant finds him/herself) are the applicant has his/her place of residence or, for lack fudicial Code. The decision can be appealed to at the the seat of a court of appeal (in the jurisdiction of which

(Croatia³⁷) or lie with the applica procedure, the burden of proof In those Member States which ap

he has had his residence.39 family reside, where he has stayed that he cannot claim the nationali onality of any country in the wor not, however, have to prove that h or without the collaboration of the also clear that the standard of p which he was born, where the m relevant to him, namely mainly t Nevertheless, it is clear that the c than in the case of internation have a specific determination p Member States, not even betwee regard to the burden of proof It is clear that there is no uniform

b) his/her country of birth, or c) onality of a) his/her country of ed), in statelessness cases there ha where family members have natio titude that the applicant does not h identity of the applicant is not ful on)40 in a reasonable manner (eve prosecution (in case of a refugee procedures. While in the latter t of proof required in statelessness serious harm (in case of subsidi must prove that s/he has been sub higher than in other internation cedures. In most Member States required in other international pr of proof. Normally the standard or telessness procedures is compared The second part of the equation is

Ibidem.

Ibidem.

39 Judgement no. 36744C of 27 October 20

8 - JNVR 2020 ARTIKELEN

the applicant has to prove that s/he has lost it and is unable to access it again. So, it is evident that the standard of proof is higher in statelessness cases. This situation is aggravated by the fact that in most of the Member States free legal aid is not available for the applicants for the recognition of their stateless status, different from other international protection appliants.

Conclusions

standard of proof has also to be reduced to a other forms of international protection. The approach but a collaborative approach in which ble to recover it. This is not a non-adversarial that, if s/he has lost it, the individual is incapathe individual does not have a nationality or the State, in which both parties have to provide, most of the evidence. The correct approach is not equitable, as these individuals do not have on, social security, etc. Most Member States lay applicant must prove that s/he does not have a societies, as procedures differ from one Memsuffered by the stateless persons, due to stress Statelessness is a very complex and technical reasonable approach to the same extent as in teless status of the individual. The level of the the State remains suzerain to recognise the stathrough all means possible, the evidence that the shared burden between the applicant and the material and economic means to obtain the burden of proof on the applicant which is who cannot access the labour market, educatinationality is really difficult for an individual ber State to the other. The simple fact that the duals, who are legally inexistent in the host issue complicates the situation of these indivithat there is no European competence on this generated by their legal uncertainty.⁴¹ The fact physical and psychological health problems issue from a legal perspective. However, it remains a humanitarian issue because of the

to at least convince Member States to uniform their procedures in order to deal with these vulnerable individuals.

Over de auteur

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ARTIKELEN

9. Het Koninkrijk en de bescherming van vluchtelingen

Gerard Oosterholt & Thomas van Houwelingen

Dit artikel behandelt de verdeling van (juridische) verantwoordelijkheden van het Koninkrijk inzake het vluchtelingenvraagstuk, in het bijzonder de groep Venezolaanse asielzoekers op met name Curaçao en Aruba. In eerste instantie zaleen blik worden geworpen op het (international) juridisch kader. Vervolgens wordt ingegaan op de situatie zoals deze nu is op Curaçao voor wat betreft de opvang c.q. bewaring van asielzoekers en de procedure om vast te stellen of iemand bescherming nodig heeft. Tot slot bespreken wij de vraag wat de precieze verantwoordelijkheid van Nederland is in deze constellatie.

Inleidin

Te midden van de wereld die onder de (naweeen van de) coronacrisis zucht, is er binnen het
Koninkrijk der Nederlanden niet al te veel aandacht voor de groep Venezolaanse asielzoekers
op met name Curaçao en Aruba.¹ Naast de
humanitaire crisis die dit in de eerste plaats is,
betekent dit dat ook de juridische verhoudingen binnen het Koninkrijk op de proef worden
gesteld: wie is waar verantwoordelijk? En dat
nog wel in een veld dat zowel letterlijk als
figuurlijk grensoverschrijdend is, namelijk dat
van het migratie(recht).

Daarbij is van belang dat het Koninkrijk weliswaar bestaat uit vier verschillende landen (Nederland, Aruba, Curaçao en Sint-Maarten) maar dat het Koninkrijk als zodanig wel verdragspartij is bij, bijvoorbeeld, het Europees

European Union is committed to eradicate sta-

Verdrag voor de Rechten van levert de ingewikkelde situati schillende landen verantwoor hun eigen migratiebeleid, maa uitoefening van dat beleid eer ling worden geschonden, het als geheel op kan worden aang

situatie daar onder een kritisch pele reden dat over Curação de Nederland is in deze constellati bare) informatie te vinden is, r slechts dat eiland hier te bespre ming nodig heeft. Wij hebbe procedure om vast te stellen of ie opvang c.q. bewaring van asie vraag wat de precieze verantwoo lijkt te liggen. Tot slot zullen w zoals deze nu is op Curaçao voc Vervolgens zal worden ingegaa pen op het (internationaal) j In eerste instantie zal een blik Koninkrijk inzake het vluchtel dische) verantwoordelijkhed Dit artikel zal ingaan op de ver

1. Juridisch kader Koninkrijk
In het eerste deel van dit artik
aandacht aan het juridisch kad
Internationaal recht, het Uniere
de recht binnen het Koninkrijk
lokale wet- en regelgeving kort
passeren.

I.a Verdragen – algemeen
Om inzichtelijk te maken hoe de
Verdragen in het Koninkrijk
moeten we toch eerst kijken na
Daarin staat immers, in art. 3 li
meld dat alleen het Koninkrijl
heeft tot het sluiten van verdrag
afzonderlijk kunnen dus niet z