

## 8. Statelessness: the proof of a negative

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

### Introduction

Statelessness is a global phenomenon which is also present in the European Union. At the end of 2018, UNHCR estimated the total number of stateless persons in the European Union plus Norway at 399 283 individuals. This includes both stateless individuals and persons of undetermined nationality.<sup>1</sup> According to UNHCR and UNICEF, in 2017 there were 2,100 children registered as stateless in the European Union.<sup>2</sup>

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

In the context of migration, statelessness has been an abandoned issue, as the numbers of stateless persons coming to the European Union were very low and it is a very complex 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 that the applicants can be granted a residence permit, stateless children born on a ship will acquire the nationality of the flag under which they sailed, ...). These myths are unfounded for several reasons: a) the possibility to apply for statelessness is limited in some Member States to individuals who are legally residents in the Member State (i.e. Luxembourg), so it excludes most irregular migrants; b) in some of the

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 applicant does not benefit from the material reception conditions established in Directive 2013/33/EU; d) only a few Member States<sup>5</sup> 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 grounds if they wish to regularize their status. In some cases, this can be complicated because recognised stateless persons may not fulfil the criteria (i.e. they do not have the financial means or cannot meet the evidence requirements).<sup>6</sup>

### Legal framework

The legal framework of statelessness is very thin and mainly based on the Convention relating to the Status of Stateless Persons<sup>7</sup> of 1954 and the Convention on the Reduction of Statelessness<sup>8</sup> of 1961.

Art. 1 of the 1954 Convention defines a stateless 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"'.<sup>9</sup>

<sup>5</sup> FR, HU, IT, LV and ES. See *Ibid.*, p. 2.

<sup>6</sup> *Ibidem.*

<sup>7</sup> <https://www.unhcr.org/en-us/protection/statelessness/3bb25729/convention-relating-status-stateless-persons.html>.

<sup>8</sup> <https://www.unhcr.org/en-us/protection/statelessness/s/3bb286d8/convention-reduction-statelessness.html>.

<sup>9</sup> Eromolaeva, Uliana et al., *The Concept of Stateless Persons' in European Union Law*, Amsterdam International Law Clinic, Final Report, August 2017, p. 10. See <http://>

[eurmedmonitor.org/uploads/reports/SI\\_eurmedmonitor.pdf](http://eurmedmonitor.org/uploads/reports/SI_eurmedmonitor.pdf).

<sup>10</sup> The Common European migration policy by art.79 of the Treaty on the Functioning of the European Union, signed in Lisbon on 13 December 2007.

<sup>11</sup> Treaty on the Functioning of the European Union, signed in Lisbon on 13 December 2007.

<sup>12</sup> Judgment of the Court 2 March 2010, case (Rothmann), par. 42 and 45.

<sup>13</sup> Judgment of the Court 12 March 2019, case (Tjebbes), par. 37.

able at: <https://www.unhcr.org/en-ie/news/press/2019/2/5c654e634/unhcr-unicef-urge-action-euro-pe-and-childhood-statelessness.html>.

<sup>3</sup> European Migration Network, Statelessness in the European Union, EMN INFORM, 2020, p. 1.

<sup>4</sup> *Ibidem.*

<sup>1</sup> Data extracted from UNHCR 'Global Trends - Forced Displacement 2018' Annex - Table 7. With respect to persons under UNHCR's statelessness mandate, this figure 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, 224,670 of the persons fall under Latvia's 25 April 1995 Law on the Status of those Former USSR Citizens who are not Citizens of Latvia or Any Other State ("Non-citizens"). In the specific context of Latvia, the "Non-citizens" enjoy the right to reside in Latvia ex lege and a set of rights and obligations generally beyond the rights prescribed by the 1954 Convention relating to the Status of Stateless Persons, including protection from removal, and as such the "Non-citizens" may currently be considered persons to whom the Convention does not apply in accordance with Article 1.2(ii).<sup>1</sup>

<sup>2</sup> UNHCR and UNICEF urge action in Europe to end childhood statelessness', 14 February 2019. Available at: <https://www.unhcr.org/en-ie/news/press/2019/2/5c654e634/unhcr-unicef-urge-action-euro-pe-and-childhood-statelessness.html>.

this task, the European Migration Network (EMN) was entrusted by JHA Council Conclusions of 3 and 4 December 2015 with the creation of a platform to exchange information and good practices in the field of statelessness, not only limited to Member States but also to work closely with international organisations (i.e. UNHCR, UNICEF, ...), NGOs and civil society in order to raise awareness of the issue and try to find reference cases that can help to reduce statelessness in the EU.

#### State of play of statelessness in the EU

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

24 Member States are party to the 1954 Convention and 20 are party to the 1961 Convention. Regarding the Member States that did not sign the 1961 Convention, the reasons advanced are: Estonia<sup>14</sup> points out that their Citizenship Law is partly in conflict with the convention, France wishes to retain the possibility of withdrawing French nationality if considered necessary,<sup>15</sup> Poland considers that it will put stateless persons in a privileged position in comparison with other foreigners legally residing in the country, Slovenia has reservations about the application of art. 12 of the convention, but they argued that their legislation contains most of the provisions of the convention and facilitates the acquisition of nationality.<sup>16</sup>

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

<sup>15</sup> Nevertheless, the law of 16 March 1998 on nationality has a provision which prohibits any decision of deprivation of nationality if this implies that the person be-

Even though most Member States have ratified both conventions, there is no standard statelessness determination procedure. The Platform has been able to identify four different categories of determination procedure:

- Dedicated statelessness determination procedure: seven Member States have a specific determination procedure (Bulgaria, France, Hungary, Italy, Latvia, Luxembourg and Spain);
- Judicial procedures: there are only two Member States (Belgium and Italy) that use judicial determination procedures;
- General administrative procedure or a determination within another administrative procedure (Czech Republic, Germany, Finland, Slovenia, Slovakia and Sweden);
- Ad-hoc administrative procedures (Croatia, Ireland, Malta and Poland).<sup>17</sup>

#### The Netherlands

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

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

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

<sup>20</sup> Government of the Netherlands (Rijksoverheid), 'Statelessness', <https://www.rijksoverheid.nl/onderwerpen/nederlandse-nationaliteit/staatloosheid>

<sup>21</sup> Appendix to Parliamentary Papers II 2019/20, m. 3521.

<sup>22</sup> Government of the Netherlands (Rijksoverheid), 'Statelessness', <https://www.rijksoverheid.nl/onderwerpen/nederlandse-nationaliteit/staatloosheid>

<sup>23</sup> Appendix to Parliamentary Papers II, 2017/18, m. 1066.

<sup>24</sup> *Dagblad Trouw*, 'Gemeenten willen niet langer wachten

**The burden and standard**  
The main concern in all that how to prove that a person legal system it is known that action or an exemption in the The problem with stateless applicant of a statelessness prove that s/he does not have something positive can be it is straight forward, while F is very complex and difficult. tion of the burden of proof a proof in statelessness cases from Member State to Member and 1961 Convention are silent The 2014 UNHCR Handbook stateless persons under the 1 relating to the Status of Stateless in paragraph 89 with regard proof that:

'(...) In the case of statelessness the burden of proof is in principle both the applicant and examine to obtain evidence and to establish procedure is a collaborative or trying whether an individual scope of the 1954 Convention. ant has a duty to be truthful, to account of his or her position to submit all evidence reasonably likely, the determination authority obtain and present all relevant ably available to it, enabling amination of the applicant's status of a number of States that are lessness determination procedure.

Regarding the standard of proof in paragraph 91 states:

that required in refugee status determination, namely, a finding of statelessness would be warranted where it is established to a "reasonable degree" that an individual is not considered as a national by any State under the operation of its law.<sup>26</sup>

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

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

As the issue of statelessness is the proof of a negative, there has to be a shared burden in this case in which both parties have to bring proof to the file and one of the parties (the state) may determine whether or not the other party (the applicant) is to be recognised as stateless.

Even though all Member States accept all types of evidence in the determination procedure, the burden of proof and the standard of proof applied by the Member States are not in line with the recommendations of the UNHCR manual.

In the Member States with a specific determination procedure it is evident that there are significant variations regarding these two issues. In **Bulgaria** the burden of proof lies with the applicant and the standard of proof is higher than the one in asylum applications.<sup>25</sup> **France** on the other hand has a shared burden of proof, but the standard of proof is higher than applied to asylum applications.<sup>27</sup> In **Hungary** the burden of proof lies principally with the applicant, but under procedural rules the authorities should also actively contribute.<sup>28</sup> In **Italy** the standard of proof is the same as for asylum seekers, however, the burden of proof varies: in the administrative procedure it lies with the applicant and in the judicial procedure it is shared.<sup>29</sup> In **Latvia** the burden of proof according to the law lies with the applicant, but in practice it is shared between the applicant and the Office of Citizenship and Migration Affairs.<sup>30</sup> The same happens in **Spain**.<sup>31</sup> In **Luxembourg**, the burden of proof lies with the applicant, but it is limited to determining that s/he does not have the nationality of any relevant country (e.g. the country in which he/she was born, in which his/her family members reside, where he/she lived

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

In **Belgium**, which has a judicial determination procedure, the burden of proof lies with the applicant, who has to prove that s/he never had the nationality of the countries with which s/he has ties. The countries with which the applicant-stateless person has ties could be among others: 1) country of residence; 2) country of birth; or 3) country where family members have nationality. If not, the applicant has to prove that s/he has lost it and is unable to access it again.<sup>33</sup>

In those Member States that use a general administrative procedure or the determination is done within another administrative procedure, the burden and standard of proof applied when assessing an individual's potential statelessness will depend on the procedural standards and guidelines governing such assessments in the procedure in question (**Sweden**<sup>34</sup>), the burden of proof is shared between the applicant and the administration (**Finland**<sup>35</sup>) or the burden of proof lies exclusively with the applicant (**Slovak Republic**<sup>36</sup>).

<sup>32</sup> Ibidem.

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

It is clear that there is no uniform regard to the burden of proof in Member States, not even between those that have a specific determination procedure. It also clear that the standard of proof is higher than in the case of international protection. Nevertheless, it is clear that the collaboration of the applicant is not, however, have to prove that he has nationality of any country in the world that he cannot claim the nationality relevant to him, namely mainly the country in which he was born, where the family reside, where he has stayed where he has had his residence.<sup>39</sup>

The second part of the equation is of proof. Normally the standard of proof required in other international procedures. In most Member States of proof required in statelessness cases is higher than in other international protection procedures. While in the latter it must prove that s/he has been subjected to prosecution (in case of a refugee serious harm (in case of subsidiary protection)<sup>40</sup> in a reasonable manner (even if the identity of the applicant is not fully established), in statelessness cases there has to be a high probability that the applicant does not have nationality of a) his/her country of birth, or b) his/her country of birth, or c) where family members have nationality.

<sup>37</sup> Ibidem.

<sup>38</sup> Ibidem.

<sup>39</sup> Judgement no. 36744C of 27 October 2019.

<sup>26</sup> European Migration Network, op.cit., p. 5.

<sup>27</sup> Ibidem.

<sup>28</sup> Ibidem.

<sup>25</sup> Mourad Derbak is head of Division Europe-Maria

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