



**NO CHILD
SHOULD BE
STATELESS
IN AUSTRIA**



European
Network on
Statelessness



Diakonie 
Flüchtlingsdienst



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I. INTRODUCTION

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“Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality.”¹

”

This right, enshrined in the Universal Declaration of Human Rights 1948, may be true in theory but the reality in practice is less clear. Since 1948, the United Nations and other international bodies have adopted resolutions and conventions highlighting the importance of preventing and eliminating statelessness.² Despite recognising that every person should have a nationality, there are currently an estimated 10 million stateless people globally, around 600,000 of whom are in Europe.³ According to the United Nations High Commissioner for Refugees (UNHCR), every 10 minutes a baby is born stateless around the world.⁴

In recent years, political instability and the global refugee crisis have made the topic of statelessness ever more relevant. Especially where children on the move are concerned, states are under the obligation to ensure that they are protected in law. As a signatory to the UN Convention relating to the Status of Stateless Persons 1954 (1954 Convention) and one of the first five states to ratify the UN Convention on the Reduction of Statelessness 1961 (1961 Convention), Austria has recognised the importance of safeguarding nationality rights to prevent statelessness. Nonetheless, gaps in Austrian nationality law remain with growing concern about children at risk of being born stateless in Austria.

¹ Article 15 Universal Declaration of Human Rights 1948

² Batchelor, “Statelessness and the Problem of Resolving Nationality Status” (International Journal of Refugee Law, Vol 10, No 1/2) (Oxford University Press, 1998), p.156

³ UNHCR, Statelessness around the world, <http://www.unhcr.org/statelessness-around-the-world.html> (accessed 6 January 2017)

⁴ UNHCR, “I belong” Campaign, <http://www.unhcr.org/ibelong/> (accessed 6 January 2017)



UNHCR's recent mapping study provides for the first time, invaluable in-depth analysis of statelessness in Austria.⁵ This report aims to build on this with a specific focus on childhood statelessness in Austria, highlighting where gaps in law and policy remain, and making recommendations for reform to bring Austrian legislation in line with international standards under the 1954 and 1961 Conventions.

The first section of the report provides a brief overview of the national and international context regarding statelessness in Austria, including how statelessness is defined in Austrian law and relevant international instruments. The right to nationality is an important aspect of international law and being stateless can have a detrimental impact on the realisation of basic human rights, such as the right to equal treatment before the law, and to work, education and health.⁶ The second section, therefore, outlines how nationality is regulated in Austria, identifying shortcomings in Austrian nationality law.

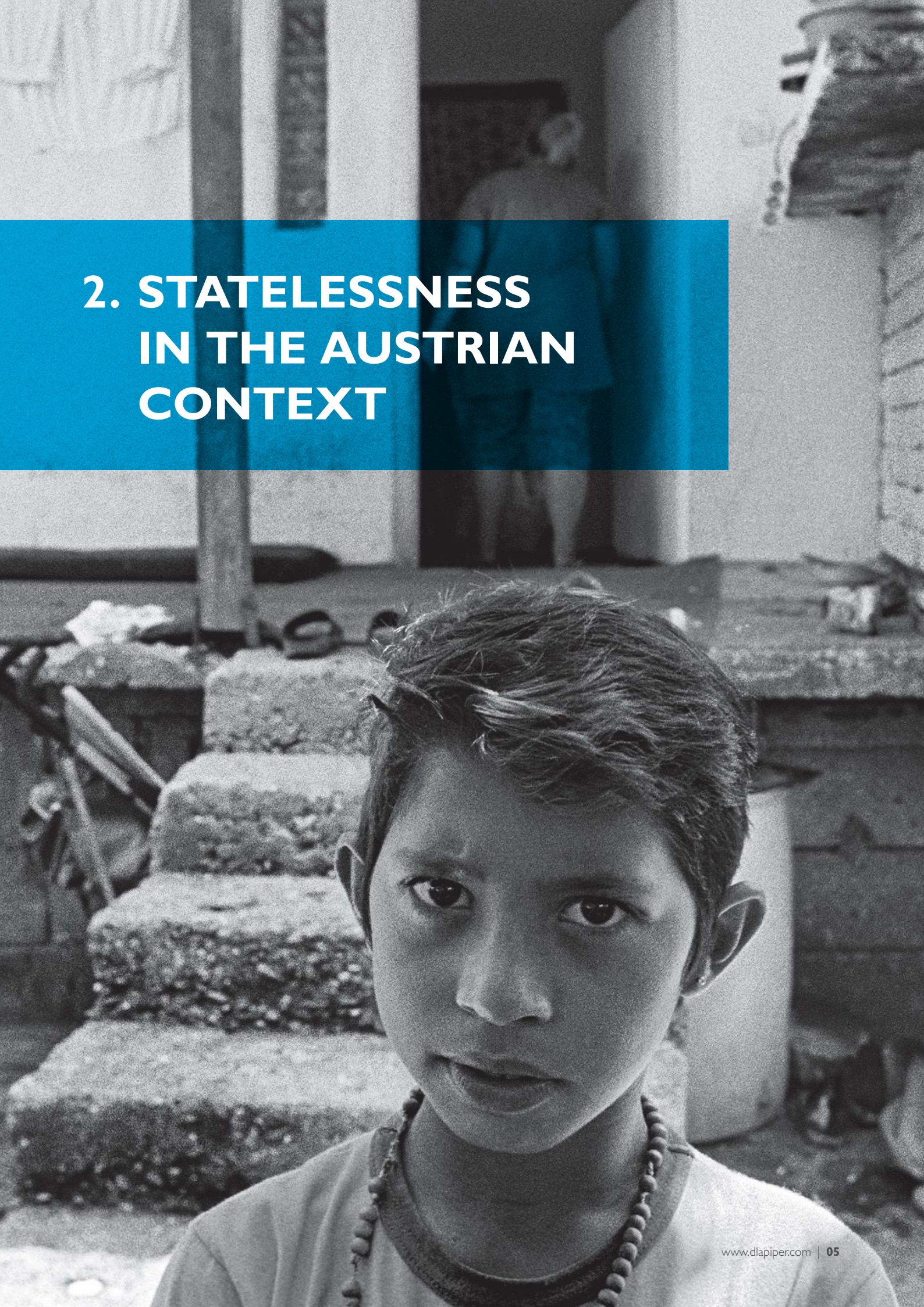
Statelessness at birth continues to be a persistent problem in Austria.⁷ To address this, it is vital to guarantee the protection of all children from statelessness in both law and practice. In the third section, the report evaluates the current position of children in Austria who may fall into specific categories for the acquisition of nationality such as adoption, surrogacy or foundlings; and makes recommendations for reform to bring Austrian law in line with international legal standards.

The fourth section discusses the link between birth registration and nationality, addressing barriers to birth registration and documentation in the Austrian context, analysing nationality and civil law, and making recommendations for access to birth registration as an essential tool for combating statelessness. The final section summarises the report's conclusions and makes key recommendations towards ending childhood statelessness in Austria.

⁵ UNHCR, "Mapping Statelessness in Austria" (January 2017), <http://www.refworld.org/docid/58b6e5b14.html> (accessed 1 February 2017)

⁶ UNHCR, "Handbook on Protection of Stateless Persons" (30 June 2014), <http://www.refworld.org/docid/53b676aa4.html> (accessed 14 January 2017), p. 1

⁷ UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 83



2. STATELESSNESS IN THE AUSTRIAN CONTEXT



2.1 International obligations

Article I of the 1954 Convention defines a 'stateless person' as a 'person who is not considered a national by any state under the operation of its law'.⁸ As well as establishing the universal definition of a 'stateless person', the 1954 Convention provides a core set of principles for the protection of stateless people.⁹ Austria ratified the 1954 Convention in 2008 and was one of the first five states to ratify the 1961 Convention in 1972. In 2011, on the 50th anniversary of the 1961 Convention, Austria promised to review and reassess the implementation of its international obligations on the protection of stateless people and prevention of statelessness.¹⁰

Nevertheless, Austria maintains significant reservations to both the 1954 and 1961 Conventions. Reservations to two articles in the 1954 Convention have the effect of limiting access to travel documents and 'alien passports' (*Fremdenpässe*) only to those stateless persons who are residing lawfully in the country.¹¹ Austria is also one of only seven states to hold a regressive reservation to the 1961 Convention that allows it to retain 'disloyalty' and 'conduct seriously prejudicial to the interests of the state' as grounds for deprivation of nationality, even if it means that an individual will be left stateless.¹² Such reservations undoubtedly provide less protection and rights to stateless people in Austria than envisioned in the convention, and reconsideration of these would be opportune, as there is little justification for limiting the rights and protection of stateless people in Austria today.

In addition to the core statelessness conventions, Austria is also party to the International Covenant on Civil and Political Rights 1976 (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination 1965, the Convention on the Elimination of All Form of Discrimination against Women 1979 (CEDAW), the Convention Relating to the Status of Refugees 1951 (Refugee Convention), the Convention on the Rights of Persons with Disabilities 2008 (CRPD), and, most significantly for the focus of this report, the Convention on the Rights of the Child 1989 (CRC).

In 2011, the key CRC principles were adopted in national law by the Austrian Constitutional Act (*Bundes-Verfassungsgesetz* [B-VG]) and the Austrian Constitutional Act on the Rights of the Child (*Bundesverfassungsgesetz über die Rechte der Kinder* [BVG Child Rights]). Of particular significance, the 'child welfare priority principle', underlined in Article I of the BVG Child Rights, is an important benchmark in Austrian legislation, policy and practice.

At a regional level, Austria is signatory to a range of legal instruments, which provide protections to stateless people, including the European Convention on Nationality 1997 (ECN), the Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession 2009, the European Convention on Human Rights and Fundamental Freedoms 1953 (ECHR) and the European Social Charter 1961.

2.2 National legislative framework

On a domestic level, the Austrian Nationality Act 1985 (*Staatsbürgerschaftsgesetz* [StbG]) regulates the acquisition and loss of Austrian nationality. Other key sources regulating Austrian nationality are the Asylum Act 2005 (*Asylgesetz* [AsylG]), the Aliens Police Act 2005 (*Fremdenpolizeigesetz* [FPG]), the Austrian Settlement and Residence Act 2005 (*Niederlassungs – und Aufenthaltsgesetz* [NAG]) as well as case law from the Higher Administrative Court (*Verwaltungsgerichtshof* [VwGH]) and the Constitutional Court (*Verfassungsgerichtshof* [VfGH]).

Several regulations must also be considered by the authorities during any legal procedure. These include the Administrative Procedure Act (*Allgemeine Verwaltungsverfahrensgesetz* [AVG]), Administrative Penalty Act (*Verwaltungsstrafgesetz* [VStG]), and Administrative Enforcement Act (*Verwaltungsvollstreckungsgesetz* [VVG]). An applicant may bring forward an appeal to the Regional Administrative Court (*Landesverwaltungsgericht* [VwG]), and a regular or extraordinary second appeal (*ordentliche/außerordentliche*

⁸ Article I (1) UN Convention relating to the Status of Stateless Persons 1954

⁹ UNHCR, "Handbook on Protection of Stateless Persons" (30 June 2014), p. 1

¹⁰ UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 11

¹¹ Articles 27 and 28 of the 1954 Convention

¹² UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 77



Revision) against the VwG's decision to the VfGH.¹³ Furthermore, if the VwG has applied an unconstitutional law, an unlawful regulation (*Verordnung*), or a fundamental right has been violated, the applicant may bring forward a complaint to the VfGH.¹⁴ If the authorities do not act within reasonable time, the applicant has the right to put forward a complaint of omission (*Säumnisbeschwerde*) before the VwG.¹⁵

Although Austrian national legislation has very precise procedures on nationality and its regulation, there is no definition of statelessness in national law, and there is no Statelessness Determination Procedure (SDP). Article 3 StbG states that a person whose nationality cannot be determined will be treated as a stateless person but it lacks a legal definition or a procedure. In Austria, the provincial government (*Landesregierung*) is responsible for implementing the StbG, so administrative procedures in relation to statelessness can vary across the country. A centralised determination procedure with an attached residence status established in law and implemented by federal authorities with appropriate expertise, would facilitate more consistent decision-making and ensure the application of uniform standards.¹⁶

The status and rights of a stateless person in Austria, for example to social security or healthcare, depends on their residence permit, which in turn depends on a range of other factors.¹⁷ In some cases, residence status is granted subject to the person not being a burden on public services. Stateless people who do not qualify for a residence permit (for example, if they have applied for asylum and been refused protection) are often threatened with removal, and are prohibited from accessing the labour market or receiving any form of social support.¹⁸ If it is established that a stateless person cannot be removed, they may be granted a so-called

'tolerated stay' with very limited rights, valid for one year and renewable annually, under the Aliens Law Amendment Act 2009 (*Fremdenrechtsänderungsgesetz*).¹⁹

In a seemingly progressive ruling in 2014, the VfGH ruled that the expulsion from Austria of a stateless person who had no link to any other state would violate their human dignity and contravene the European Convention on Human Rights (ECHR) as they would be deprived of any legal existence, ordering removal proceedings to be temporarily suspended.²⁰ This ruling can be seen as a positive step towards raising awareness of statelessness and the importance of safeguarding the human rights of stateless people in Austria, and should be used as an example in similar cases to recognise and uphold the rights of stateless persons.

Another area where Austrian legislation is in line with international standards set out in the 1961 Convention and the ECN, is the prevention of statelessness as a result of loss of nationality.²¹ Austrian legislation permits loss of nationality only in the case of acquisition of another nationality or renunciation by dual nationals, neither of which can result in statelessness.²² However, there have been cases in Austria where individuals have renounced their former nationality to meet the requirements of Austrian law (which seeks to prevent dual nationality by requiring renunciation of any other nationality to naturalise as Austrian), but have then not met the requirements for naturalisation and been refused citizenship.²³ This practice is not in line with international standards, which clearly requires that loss of nationality should not result in statelessness. Austria should therefore consider amending its legislation and practice to ensure that a person cannot be left stateless in the process of naturalisation.

¹³ Regional Administrative Court (*Landesverwaltungsgericht*) (Article 130(I)(1), Article 131(I), Article 132 B-VG) or a regular or extraordinary second appeal to the Higher Administrative Court (*Verwaltungsgerichtshof*) (Article 133 B-VG) or a complaint to the Constitutional Court (*Verfassungsgerichtshof*) (Article 144 B-VG)

¹⁴ Article 144 B-VG

¹⁵ (Article 130(I)(3), Article 131(I) B-VG); Öhlinger & Eberhard, Constitutional Law (*Verfassungsrecht*), 10th Edition, para. 655

¹⁶ UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 14

¹⁷ Articles 41 – 45 NAG

¹⁸ UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 12

¹⁹ Article 46a, Aliens Law Amendment Act 2009 (*Fremdenrechtsänderungsgesetz*)

²⁰ Constitutional Court (VfGH) U2131/2012, 6 March 2014

²¹ Articles 5 – 7 1961 Convention; Articles 7,8 ECN

²² Article 29 StbG

²³ UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 92



In summary, Austria is falling short of international standards on the protection of stateless people on its territory. It retains significant reservations to the statelessness conventions, and Austrian domestic legislation contains neither specific laws relating to statelessness, nor a formal SDP or status to provide stateless people with adequate protection. Although there is no explicit obligation under the 1961 or 1954 Conventions to have an SDP, UNHCR has recognised the importance of a legal procedure in enabling state parties to fulfil their international obligations to tackle statelessness and protect stateless people.²⁴ Whilst it maintains regressive reservations to international instruments, and without an SDP and protection status established in national law, Austria will continue to see inconsistencies in its treatment of stateless people and struggle to fulfil its international obligations.

2.3 Existing research and data on statelessness in Austria

To address statelessness effectively in the Austrian context, it is important to understand the issue and to know how many people are affected. The recent UNHCR mapping study of statelessness in Austria has filled an important gap in this regard, providing invaluable analysis and information with which to address statelessness at a national level.²⁵

In terms of population data, the Central Register of Residents (*Zentrales Melderegister* [ZMR]) and Statistics Austria²⁶ are the main national sources. The ZMR is compiled of registration data, including age, gender, country of birth, residence and nationality gathered by the registry offices in each municipality. In cases

of renunciation, loss or deprivation of nationality the municipal office must be informed.²⁷ There are three categories in the ZMR within which stateless people are likely to be recorded: 'stateless', 'unknown nationality' and 'undetermined nationality'.²⁸ On 1 January 2016, 11,628 people were recorded in these three categories, of which 4,142 were classified as 'stateless'. It is of note that the number of young people aged 0-14 years in these categories is alarmingly high, amounting to 6,910, of which 1,019 were classified as 'stateless'.²⁹ Nearly half of Austria's stateless population resides in the capital, Vienna, followed by the neighbouring provinces, Lower and Upper Austria.³⁰ Between 2002 and 2012, 171 births of stateless children, 20 children with unknown nationality and 1,257 children of undetermined nationality were documented in Austria.³¹

It is important to note that these official figures are unlikely to reflect the actual numbers, as the nature of statelessness makes it very difficult to obtain exact data. The ZMR only records those legally residing in Austria and those who have applied for international protection. Hence, individuals residing irregularly in Austria remain hidden and a much higher number of stateless people can be expected in real terms.³² UNHCR has noted that between 2005 and 2015, 2,467 stateless people were recognised as refugees or granted subsidiary protection in Austria, and around a further 300 of those granted international protection in 2015 were recorded as having unknown or unidentified nationality.³³

The collection of data nationally must be improved by identifying and recording statelessness consistently. A standardised SDP, protection and residence status for those identified as stateless would facilitate this process.

²⁴ UNHCR, "Handbook on Protection of Stateless Persons" (30 June 2014)

²⁵ UNHCR, "Mapping Statelessness in Austria" (January 2017)

²⁶ STATISTIK AUSTRIA, https://www.statistik.at/web_en/statistics/index.html (accessed 26 April 2017)

²⁷ Article 11(I) Registration Act (*Meldegesetz*) 1991

²⁸ UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 23

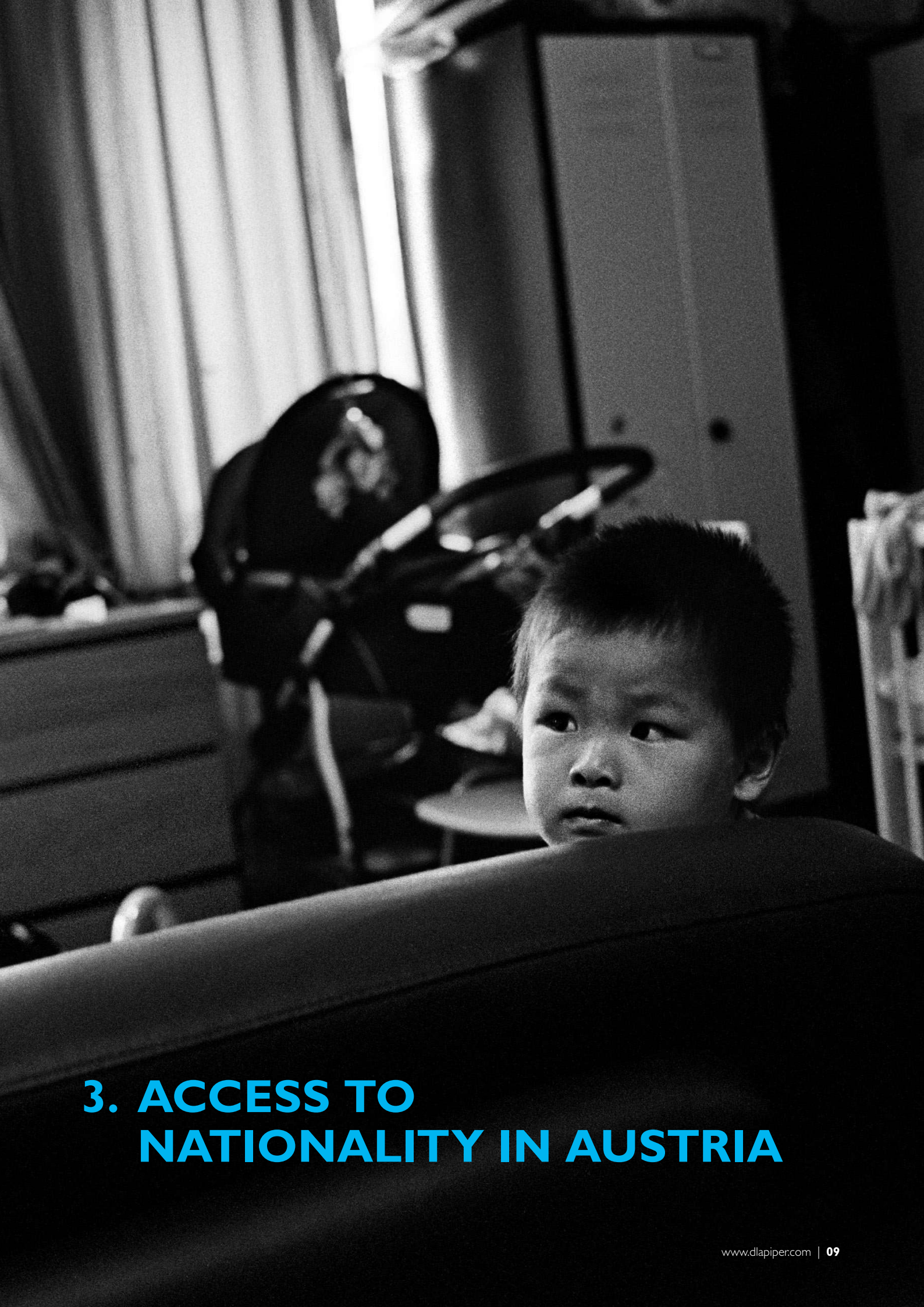
²⁹ STATISTIK AUSTRIA, Population according to nationality and place of birth (*Bevölkerung nach Staatsangehörigkeit und Geburtsland*), http://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/bevoelkerungsstruktur/bevoelkerung_nach_staatsangehoerigkeit_geburtsland/index.html (accessed 29 September 2016)

³⁰ UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 36

³¹ UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 30

³² Profil, "Die kein Staat will" (The ones no state wants) (2010), <http://www.profil.at/home/die-staat-256966> (accessed 28 September 2016)

³³ UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 12



3. ACCESS TO NATIONALITY IN AUSTRIA



3.1 General regulations on acquisition of nationality

According to Article 11(1)(1) B-VG, the regulation of nationality sits with the federal government (*Bundesregierung*), but the execution of nationality law lies with the provincial government (*Landesregierung*). The StbG was introduced by the Federal Ministry of the Interior to regulate decision-making by administrative authorities on matters relating to citizenship.³⁴

Article I of the 1961 Convention requires state parties to grant a person nationality by birth or by application if they would otherwise be stateless. However, current Austrian naturalisation laws are only generally accessible for those who have resided in Austria for a continuous 10 years and meet a series of other requirements.³⁵ Article 32 of the 1954 Convention requires effective assimilation and naturalisation of stateless people residing in the territory of a state through accelerated naturalisation procedures. A similar principle has been laid out in Article 6(4) of the ECN. Austria, however, has made reservations to the ECN declaring that statelessness will explicitly not be recognized as a ground for facilitated naturalisation, reserving its right “*not to facilitate the acquisition of its nationality for stateless persons and recognised refugees lawfully and habitually resident on its territory (i.e. main domicile) for this reason alone.*”³⁶

The Austrian courts have argued this point in several cases, stating clearly that statelessness is not a factor in itself contributing towards “advanced assimilation” and therefore does not justify a reduction of the general requirements for naturalisation.³⁷ This stance and the reservations maintained by Austria to the ECN constitute an obstacle to the protection of stateless

people on its territory and the promotion of durable solutions to statelessness, which should be addressed through law and policy reform.

In Austria, there is no unconditional right for children to obtain Austrian citizenship. Under Articles 6 and 7 StbG, the principle of descent applies and children inherit the citizenship of their parents (*ius sanguinis*). In practice, this means that children born to married parents receive Austrian citizenship automatically, provided that their parents are Austrian nationals. Children born out of wedlock receive Austrian citizenship if the mother is a citizen or the father acknowledges his paternity or if paternity is determined by a court within eight weeks of birth in accordance with Article 144 (1) of the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch* [ABGB]). Where a child is born on board of an Austrian ship or aircraft, they are considered to have been born on Austrian territory.³⁸

3.2 Otherwise stateless children born in Austria

As noted above, there is no general right to Austrian nationality for stateless children born in Austria. According to Article 14 StbG, a foreigner shall be granted nationality if they were born in Austria and have been stateless since birth or have had their domicile in Austria for at least ten years (at least five of which must be continuous). They must not have been sentenced either by a domestic court for certain crimes under the Austrian Criminal Code (*Strafgesetzbuch* [StGB]) nor by a domestic or foreign court to imprisonment of five years or more. Additionally, the application for citizenship must be made no later than two years after reaching the age of majority³⁹ and must be submitted to a relevant citizenship section at the respective federal government office.⁴⁰

³⁴ Articles 39 and 41 StbG

³⁵ Article 10(1)(1) StbG

³⁶ Council of Europe, ECN: List of declarations made with respect to treaty No. 166, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166/declarations?p_auth=wNfFXivZ (accessed on 20 January 2017)

³⁷ UNHCR, “Mapping Statelessness in Austria” (January 2017), p. 94

³⁸ Article 14 (2) StbG

³⁹ Article 14 StbG

⁴⁰ Article 1(2) StbG



Although these provisions comply with international legal standards for the protection of stateless persons to an extent, there are shortcomings. For example, the timeframe of two years within which to apply for citizenship between the ages of 18-20 in Article 14 StbG is considered too short. The 1961 Convention requires the minimum age limit for an application to be 21 years. The short timeframe in Austrian law was criticised in a 2013 UNHCR opinion, which recommended that Austria should revise the age limit to 21 years, providing a period of three years for the application of citizenship.⁴¹

There is limited domestic jurisprudence concerning access to nationality for children born in Austria who would otherwise be stateless, but two notable cases should be highlighted. In an early case, 97/01/0223 of April 1998, the Administrative Court found that the provisions in Article 14 StbG described above to enable stateless young people to access citizenship, only applied to those born in Austria and who have been stateless since birth. The judgment further noted that statelessness should not be a special consideration when granting nationality under the general rule for foreign nationals seeking discretionary naturalisation under Article 10 StbG.⁴²

In a more recent case of the VfGH, G 66/12 (29 November 2012), it was found that the exclusion from Austrian citizenship of children born out of wedlock with an Austrian father and a non-national mother violated the right to family life under Article 8 ECHR.⁴³ As a result of this case, and jurisprudence from the European Court of Human Rights⁴⁴, an amendment was introduced to the StbG in 2013, whereby children born out of wedlock acquire citizenship at birth as long

as at the time of birth, the mother or the father has Austrian citizenship, the father acknowledges paternity or it is determined by a court within eight weeks of birth.⁴⁵ However, it has been noted that the time limit of eight weeks after birth, may present a risk of statelessness in some cases where there is a delay in establishing paternity.⁴⁶ There is no equivalent access to citizenship for those whose paternity is discovered at a later stage. Hence, the present legislation cannot be considered to be fully in line with international standards.⁴⁷

3.3 Otherwise stateless children born outside Austria

As noted above, a child will automatically acquire Austrian citizenship as long as the parents are Austrian nationals. Whether the child was born on Austrian territory has no bearing on the acquisition of nationality in this case. Since the 2013 Amendment to the StbG, children born abroad out of wedlock, who would otherwise be stateless, acquire citizenship at birth if at the time of birth, the mother or the father has Austrian citizenship, the father acknowledges paternity or it is determined by court. Documentation and proof of citizenship for children born abroad can be requested at the relevant Austrian representative authority, who must implement the regulations in accordance with the AVG.⁴⁸

Jurisprudence⁴⁹ and the 2013 amendment to the StbG have provided some further protection for children born abroad where the parents are Austrian citizens and they would otherwise be stateless, including in cases of surrogacy, but some gaps in safeguards remain and should be addressed (see Section 4.3 below).

⁴¹ UNHCR, UNHCR opinion on the revised Austrian Nationality Act 1985 (UNHCR-Stellungnahme zum Bundesgesetz, mit dem das Staatsbürgerschaftsgesetz 1985 geändert wird) (27 March 2013), p.7, http://www.unhcr.de/fileadmin/rechtsinfos/staatenlosigkeit/staatenl_AUS_Positionen-Staatsbuergerschaftsgesetz2013.pdf (accessed 29 September 2016)

⁴² Administrative Court (Verwaltungsgerichtshof) 97/01/0223 (22 April 1998)

⁴³ Constitutional Court (Verfassungsgerichtshof) G 66/12 (29 November 2012)

⁴⁴ *Genovese v. Malta*, Application no. 53124/09, Council of Europe: European Court of Human Rights, 11 October 2011, <http://www.refworld.org/cases/ECHR/509ea0852.html> (accessed 20 April 2017)

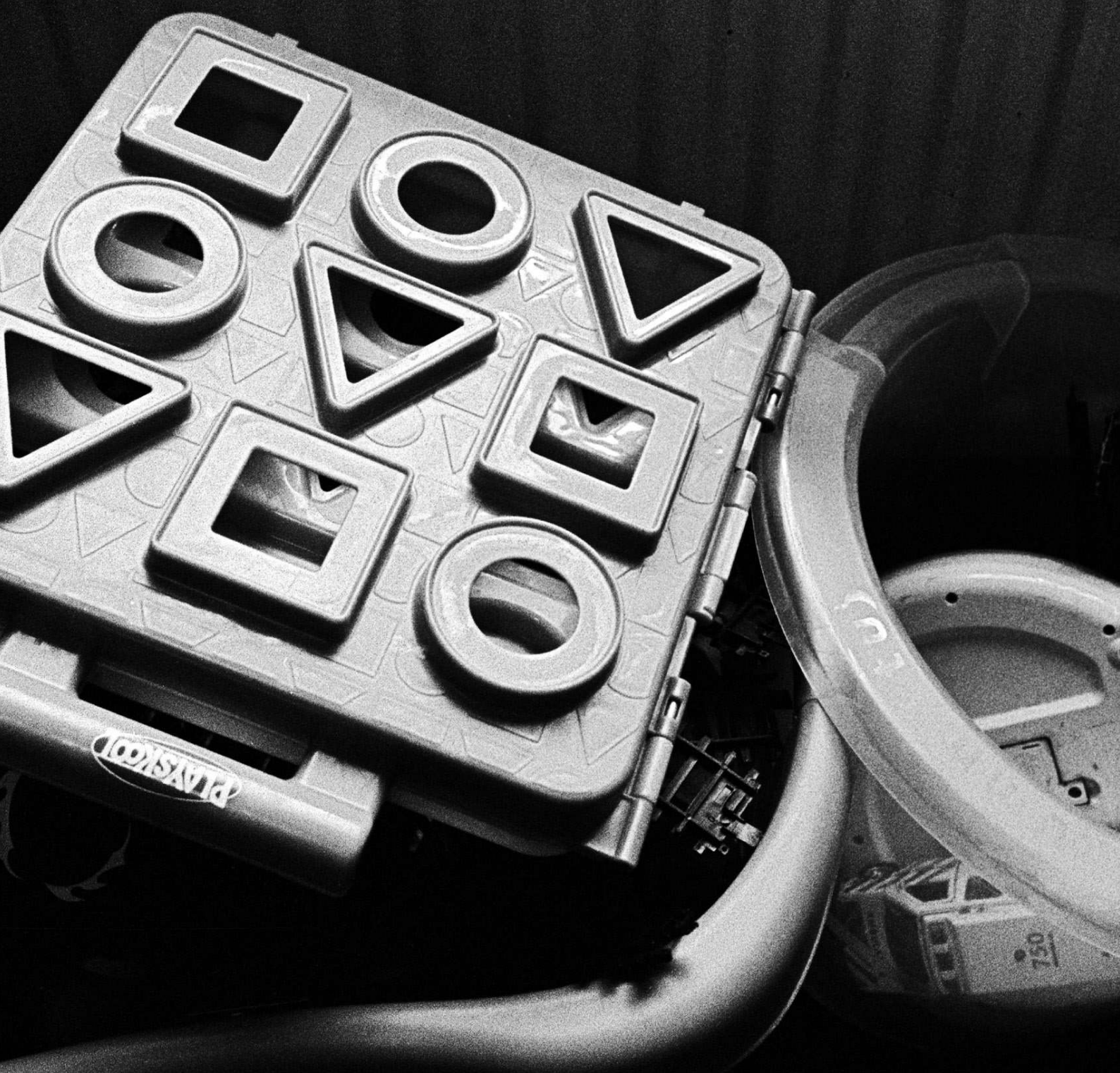
⁴⁵ Article 7 StbG

⁴⁶ UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 81

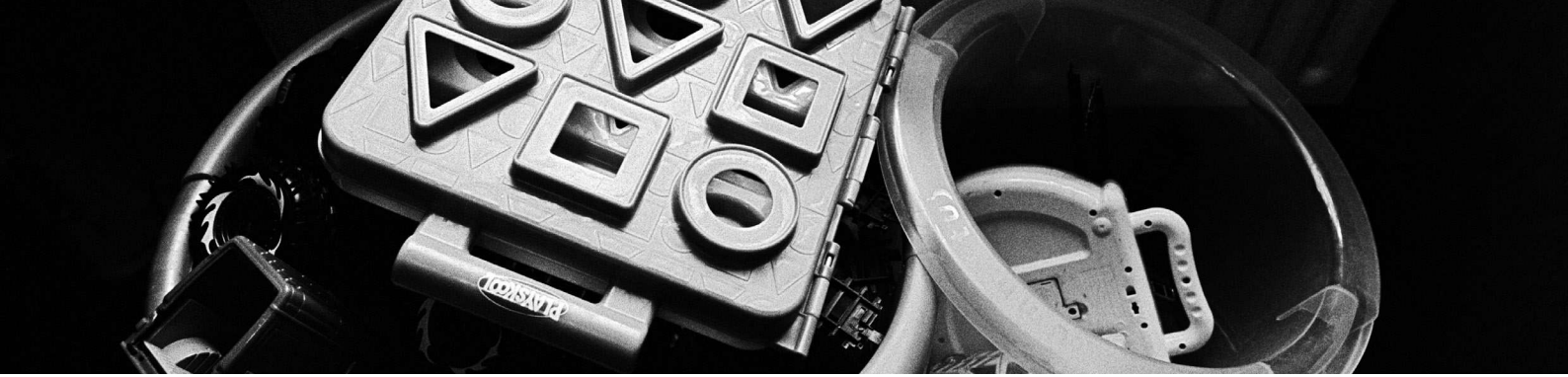
⁴⁷ UNHCR, UNHCR opinion on the revised Austrian Nationality Act 1985 (UNHCR-Stellungnahme zum Bundesgesetz, mit dem das Staatsbürgerschaftsgesetz 1985 geändert wird) (27 March 2013), p.3, http://www.unhcr.de/fileadmin/rechtsinfos/staatenlosigkeit/staatenl_AUS_Positionen-Staatsbuergerschaftsgesetz2013.pdf (accessed 29 September 2016)

⁴⁸ Article 41(2) StbG; Article 3 AVG

⁴⁹ Constitutional Court (Verfassungsgerichtshof) B 99/12 (11. October 2012)



4. GAPS IN SAFEGUARDS FOR SPECIFIC GROUPS OF CHILDREN



4.1 Foundlings

A foundling is an abandoned child that is found on the territory of a state.⁵⁰ Article 2 of the 1961 Convention requires a foundling to be granted the citizenship of the territory on which it is found. Likewise, Article 6(1)(b) of the ECN requires state parties to provide for their nationality to be acquired by foundlings on their territory who would otherwise be stateless. The 1961 Convention does not give a precise definition of 'foundling', but the Explanatory Note to the ECN states that the term refers to "...new-born infants found abandoned in the territory of a State with no known parentage or nationality who would be stateless if this principle were not applied".⁵¹

In Austria, foundlings are provided for in Article 8(1) StbG, which declares that, "*Until proof of the contrary, a person under the age of six months found on the territory of the Republic is regarded as national by descent*". This regulation may be considered problematic for two reasons: firstly, it only establishes an *assumption* of nationality by descent, meaning that if the authorities can prove that the foundling is not Austrian by descent, or the parents are later identified and are not Austrian citizens, the child's citizenship may be denied. The law is not explicit on what should happen in these circumstances, though it could be argued based on Article 7(3) ECN and Articles 27-39 StbG that the child should not be rendered stateless at any time, including through later identification of its parents.⁵²

The second and more pressing issue is the time limit of six months. International standards do not provide for a time limit, which makes the Austrian legislation problematic, as it limits the acquisition of nationality to foundlings under the age of six months and therefore poses a risk of statelessness to children found after this age limit. By comparison, in Germany, there is no age limit for foundlings to acquire citizenship.⁵³ At a

minimum, Austria should consider raising the current limit, so that all children who are unable to confirm their identity are covered by Article 8(1) StbG.

4.2 Adoption

In line with international standards set out in Article 5(1) of the 1961 Convention a child under the age of 14 adopted by Austrian citizens, is eligible to apply for Austrian citizenship. The procedure in this instance is simplified and must be completed within six weeks.⁵⁴ However, there are two key gaps in Austrian legislation: firstly, the law does not specify whether a child with a different nationality at the time of adoption, will lose this on being granted Austrian nationality; and secondly, children aged between 14 and 18 years are not covered by the legislation. Thus, a child adopted between the ages of 14 and 18 will not have the same facilitated access to citizenship as a child under 14 years. The procedure for older children is unclear and may put this group at risk of statelessness. This provision should be reviewed and amended so all adopted children have access to Austrian nationality.

4.3 Surrogacy

The issue of surrogacy is a contentious one for which there is little guidance in international law. The statelessness conventions are silent on surrogacy, but it has been the subject of case law in the European Court of Human Rights⁵⁵ as well as in Austrian domestic jurisprudence. Austrian law expressly prohibits surrogacy and legally defines the mother as the person who gives birth to the child.⁵⁶ This has resulted in Austrian parents travelling abroad to enter into surrogacy agreements, and thus posed citizenship problems for children born to surrogate mothers abroad, where the genetic parents are Austrian citizens. In 2011, in a case before the Constitutional Court, the removal of Austrian

⁵⁰ Council of Europe, Explanatory Report on the Convention on Nationality, Article 6(1)(48), <https://rm.coe.int/16800ccde7> (accessed on 16 May 2017)

⁵¹ Idem, p. 9

⁵² Fessler et al, The new Austrian nationality law (*Das neue österreichische Staatsbürgerschaftsrecht*), 7th Edition (2006), p.61

⁵³ Article 4(2) German Nationality Act 1913 (*Staatsangehörigkeitsgesetz [StAG]*)

⁵⁴ Article 11(b) StbG

⁵⁵ European Parliament Legal Affairs Briefing: Regulating international surrogacy arrangements – state of play (2016), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI\(2016\)571368_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI(2016)571368_EN.pdf)

⁵⁶ Article 143 ABGB



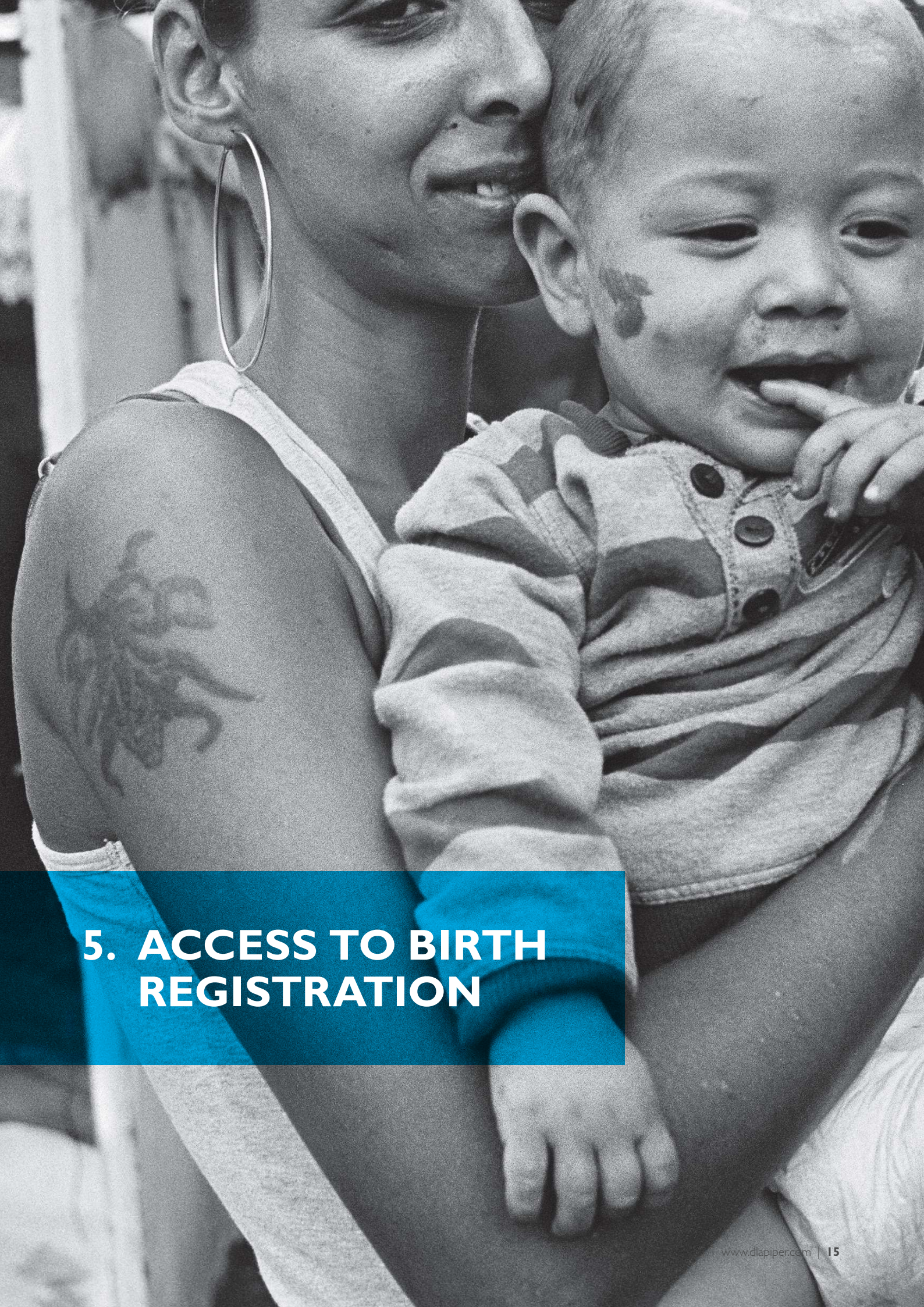
nationality by the Austrian Ministry of Interior from a child born through surrogacy to Austrian parents in the United States was deliberated, and the court finally upheld the child's right to Austrian citizenship. Key arguments included that the law in the country of birth recognized the Austrian citizens as the legal parents of the child, and that the welfare and best interests of the child were a relevant concern in determining nationality.⁵⁷

Following jurisprudence in this area, since 2013 the amended StbG now provides for the citizenship of children born abroad to a surrogate mother who is not an Austrian citizen where, according to the law of the country of the child's birth, the child's genetic mother

or father is an Austrian citizen and the child would otherwise be stateless.⁵⁸ This is an exception to the usual prevailing non-recognition of surrogate motherhood contracts in Austrian law. The legal definition of motherhood in Austrian law, the nature of the arguments put forward in the court, and the requirement that paternity is legally recognized by law in the country of the child's birth, do not fully eliminate the future potential risks of statelessness to some children born to foreign surrogate mothers where the genetic parents are Austrian. Further legal safeguards should be considered in this area to fully guard against childhood statelessness.

⁵⁷ Constitutional Court (*Verfassungsgerichtshof*), B 13/11-10 (14 December 2011)

⁵⁸ Article 7(3) StbG



5. ACCESS TO BIRTH REGISTRATION



Ensuring universal access to birth registration is key to the prevention of statelessness.⁵⁹ Article 7 CRC guarantees the right of the child to be registered at birth. The absence of birth registration can cause difficulties in establishing links to a state that entitle a person to nationality, creating a risk of statelessness. Birth registration, the place of birth, parentage, and other key pieces of information, are necessary to establish a child's nationality.⁶⁰ Under Austrian law, to acquire Austrian nationality, a birth certificate is necessary.

In Austria, birth registration is a guaranteed civil right regulated under the Austrian Civil Status Act 2013 (*Personenstandsgesetz* [PStG]) and the Austrian Civil Status Act – Implementing Regulation 2013 (*Personenstandsgesetz-Durchführungsverordnung* [PStG-DV]). The right extends to Austrian citizens abroad as well as stateless people and recognised refugees living in Austria.⁶¹ Although the UNICEF Global Database on birth registration indicates that 100 percent of all births in Austria were registered between 2010 and 2015, this figure is an estimate based on the existing infrastructure and procedures in place for birth registration and may not reflect reality on the ground for the most marginalised populations.⁶² The process can be complex and may present barriers for migrant, refugee, stateless and other marginalised groups living in Austria.

Under Article 2 PStG-DV, a birth must be registered at the local registry office within one week. The registry office will then issue the child's birth certificate and – if the child is an Austrian citizen – proof of citizenship. If the baby is born in a hospital with a 'baby-point', the mother will receive a residence registration form (*Meldezettel*) and proof of citizenship

(*Staatsbürgerschaftsnachweis*) for the baby immediately.⁶³ For registration to take place, the parents must provide their marriage certificate, citizenship/residence permits (of both parents), proof of residence if parents live abroad, education transcripts if available, and confirmation of the child's first name.⁶⁴

If a child is born during an intact marriage, the husband will be recorded on the birth certificate as the child's father. In the case of death or divorce more than 300 days prior to the birth of the child, the child will be considered to have been born out of wedlock.⁶⁵ In Austria, generally, if the parents of the child are not married, the mother has sole custody of the child. Therefore, if a child is not born during an intact marriage, the biological father can be registered in the child's birth certificate provided the father makes an acknowledgement of paternity with the consent of the 'youth welfare office' (*Jugendamt*) (for children with Austrian citizenship) or if parentage can be established by the court.

As a rule, the child's name, the parents' names, the child's sex, time of birth, and place of birth will be recorded on the birth certificate. If the child's first name has not yet been decided, the parents are required to contact the registry office within a month after the birth to have the name recorded. Names that are uncommon, unusual or not in the best interests of the child cannot be registered and the child's first name must comply with the child's sex.⁶⁶ However, the regulations from a foreign child's country of origin must be respected when deciding if a name is registerable.⁶⁷ Foreign language documents must be presented in their original version together with a translation certified in Austria.⁶⁸

⁵⁹ UNHCR Global Action Plan to End Statelessness: 2014–2024 <http://ibelong.indikatormedia.com/wp-content/uploads/Global-Action-Plan.pdf> (accessed 17 May 2017)

⁶⁰ UNHCR, "I Am Here, I Belong: The Urgent Need to End Childhood Statelessness" (3 November 2015), p. 8, <http://www.refworld.org/docid/563368b34.html> (accessed 9 November 2016)

⁶¹ Article 35 PStG

⁶² UNICEF Global Database on Birth Registration, https://data.unicef.org/wp-content/uploads/2015/12/Birth_registration_May-2016.xlsx (accessed 17 May 2017)

⁶³ Bundeskanzleramt Österreich (Federal Chancellery Website), Registering a Birth/Initial Issuance of a Birth Certificate, <https://www.help.gv.at/Portal.Node/hlpd/public/content/143/Seite.1430400.html> (accessed 24 October 2016)

⁶⁴ Article 2(2) PStG-DV

⁶⁵ Article 144(1) ABGB

⁶⁶ Article 13(2) and (3) PStG

⁶⁷ Federal Minister for Internal Affairs, Accomplishment Instructions for Registry Work (*Durchführungsanleitung für die standesamtliche Arbeit*) (2014) 2876/AB XXV. GP, Unit III/4/b, p.33 https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_02876/fname_380270.pdf (accessed 27 March 2017).

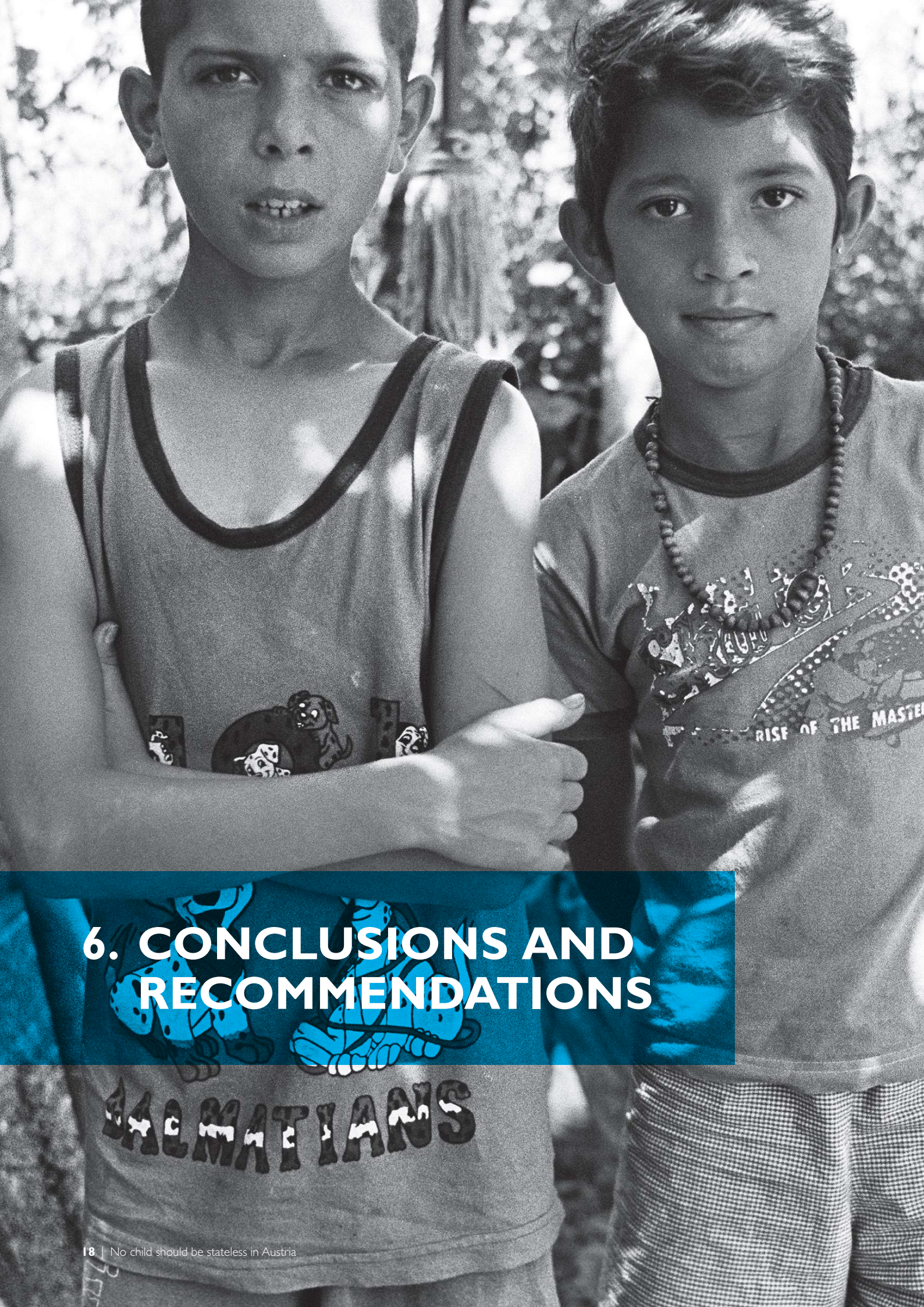
⁶⁸ Article 11(1) PStG-DV



The above detailed requirements for accessing birth registration may result in practical barriers for certain groups, including stateless people, migrants and refugees. The translation of documents by certified juridical translators is very costly, and refugees in particular may not be in possession of the required documentation if documents have been destroyed, lost or damaged during their flight. They may also face difficulties and barriers in providing proof of parentage or accessing a court to establish paternity.

Personal documents are constantly required for civil procedures and other registrations in Austria. Therefore, it is important that all stateless persons who do not have the necessary documents are able to receive them from the Austrian authorities. A standardised SDP would facilitate and support stateless persons to obtain the documents necessary for successfully gaining civil status, such as birth certificates.





6. CONCLUSIONS AND RECOMMENDATIONS



Statelessness can occur for varied reasons, whether through discrimination against ethnic or religious groups, state succession or gaps in nationality laws.⁶⁹ Stateless men, women, and children are routinely denied their human rights and dignity. Austria has ratified several international conventions, including the statelessness specific 1954 and 1961 Conventions, which set important standards for national legislation to protect stateless people and eliminate and prevent statelessness, respectively. This report demonstrates that Austria has taken some significant and necessary steps by ratifying and transposing aspects of international law into national legislation to address the issue of statelessness as well as to decrease the number of children rendered stateless.

However, the report also highlights key gaps where Austria has yet to apply and implement these international standards in practice, leaving certain children at an unacceptable risk of statelessness. Furthermore, despite ratifying important international instruments, Austria maintains many reservations in key areas, thereby retaining the right to derogate from certain international standards as it did when acceding to the ECN in 1998 with 11 reservations.⁷⁰

Austrian nationality law, enshrined in the StbG, does not define statelessness, nor provide for a specific legal procedure to recognise statelessness. This results in a lack of awareness of the inconsistencies and gaps in nationality law when it comes to addressing the issue. The lack of a statelessness determination procedure further leads to inconsistencies in the law in both theory and practice. Statelessness is dealt with by the immigration and asylum authorities who continue to apply different standards, which results in inconsistent outcomes.⁷¹ It is therefore important that a formal

determination procedure is set down in law, so that statelessness can be treated with fairness, transparency, and in accordance with international standards.⁷²

The lack of a determination procedure and statelessness status also leads to a lack of clarity about people's rights. Stateless persons may be categorised in national records as stateless, unknown nationality or undetermined nationality. Their access to a residence permit, social security or health insurance can be restricted, contrary to international standards. Although national jurisprudence has ruled that the expulsion of a stateless person would violate their rights under ECHR and that they should therefore be granted temporary stay, without a determination procedure or legal status, future decisions may vary as courts apply different standards. Thus, although Austria has recognised the importance of protecting stateless persons, the legal system lacks clarity and fails on several accounts to implement international standards.

This report has exposed several key gaps in Austrian nationality law that are not only contrary to international law, but are perpetuating the risk of childhood statelessness. By placing an age limit and timeframe of just two years during which children who would otherwise be stateless are able to apply for Austrian nationality, the current legislative framework perpetuates the risk of statelessness continuing into adulthood. In the same way, foundlings may only access citizenship if they are discovered under the age of six months, leaving older babies and infants subject to the risk of statelessness. Shortcomings have also been identified in situations of adoption, surrogacy and loss of nationality, where inconsistencies between international standards and national law and policy leave certain groups of children at risk of statelessness.

⁶⁹ UNHCR, Ending Statelessness, <http://www.unhcr.org/en-us/stateless-people.html> (accessed 27 September 2016)

⁷⁰ Council of Europe, Reservations and Declarations for Treaty No. 166 – European Convention on Nationality (Austria), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166/declarations?p_auth=jWU2ZTz (accessed 3 February 2017)

⁷¹ UNHCR, "Mapping Statelessness in Austria" (January 2017), p. 45

⁷² UNHCR, "Handbook on Protection of Stateless Persons" (30 June 2014), p. 27, <http://www.refworld.org/docid/53b676aa4.html> (accessed 14 January 2017)



Although the principle of universal birth registration is enshrined in Austrian law, the complexity of birth registration requirements in Austria and the practical barriers to presenting the necessary documentation for stateless or marginalised migrant and refugee populations, and other minorities, is a further source of concern, given the critical importance of birth certificates to the process of acquiring or proving nationality.

UNHCR has expressed concern about a lack of awareness in Austria concerning statelessness and has urged the Government to apply international guidelines more effectively, recommending the establishment in law of a statelessness determination procedure and a designated agency to handle statelessness cases. This would not only result in more accurate data but also help to ensure transparency, develop expertise and awareness, and improve decision-making.⁷³

In this report, we reiterate our support for these two key recommendations relating to the protection of stateless people in Austria, and additionally, make a series of recommendations towards the prevention of childhood statelessness.

The Austrian Government should:

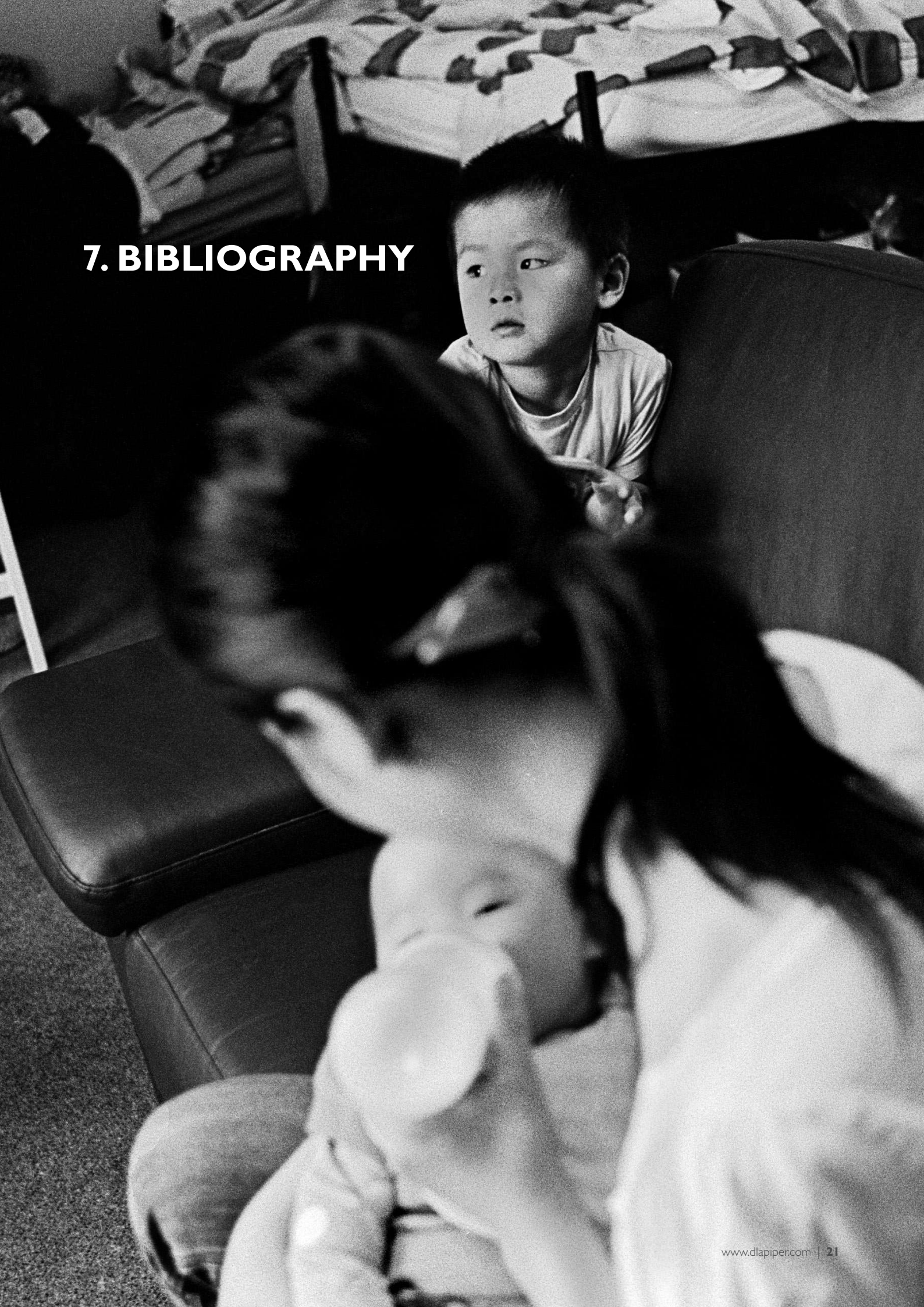
- Review and consider removing its reservations to the ECN and other international instruments relating to statelessness.

- Review and extend the age limit of six months for the acquisition of citizenship by foundlings.
- Extend the age limit for naturalisation to a minimum of 21 years instead of 20 years to comply with the minimum three-year timeframe set out in international standards.
- Review the implementation of naturalisation procedures to ensure that no adult or child is left stateless due to renunciation of their former nationality and subsequent failure to acquire Austrian citizenship.
- Provide clarity in law and policy around the procedure for the acquisition of citizenship by those young people adopted by Austrian citizens between the age of 14 and 18, ensuring their right to Austrian nationality.
- Review the procedure for determining paternity in cases where children are born abroad to Austrian parents out of wedlock to increase the timeframe and eliminate the risk of statelessness in cases of late identification of paternity.

Stateless people are often deprived of many human rights guaranteed in law and, for as long as they remain stateless, it is the responsibility of every nation to eliminate statelessness and ensure that each individual is guaranteed basic human rights, such as the right to education, health, employment, family life and – last but of course not least – human dignity.

⁷³ UNHCR, “Mapping Statelessness in Austria” (January 2017), p. 14

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⁷⁴ European Network on Statelessness, #StatelessKids – none of Europe's children should be stateless, <http://www.statelessness.eu/statelesskids-no-child-should-be-stateless> (accessed 23 May 2017)





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