European Network on Statelessness

PROTECTING STATELESS PERSONS FROM ARBITRARY DETENTION

AN AGENDA FOR CHANGE

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#LOCKEDINLIMBO

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FOREWORD

Statelessness and arbitrary (immigration) detention have been important areas of focus of my work since I took up the position of Council of Europe Commissioner for Human Rights in 2012. Across Europe, including in many of the countries discussed in the report, I have urged authorities to take action to prevent statelessness and ensure that people are not faced with further violations of their rights simply because they lack an effective nationality.

I have repeatedly stressed that detention should not be used as a tool to implement states' overall migration policies. Immigration detention has severe and long-lasting effects on the mental health of persons detained. This is even more likely to be the case for stateless persons, for whom the prospects of being expelled are usually minimal, meaning they are faced with prolonged detention and uncertainty.

Reducing and eventually abolishing immigration detention requires states to invest systematically and proactively in alternatives to detention. The individual stories presented in this report fittingly highlight the enormous difference access to such alternatives would have on stateless men, women and children.

The hardship faced by adults in detention is experienced even more acutely by children. States should urgently end the immigration detention of children, including stateless children. Under the UN Convention of the Rights of the Child, states are required to take the best interest of the child as a primary consideration in their actions affecting children. As the Committee on the Rights of the Child rightly noted, the detention of a child because of their or their parents' migration status is never in the best interest of the child, and should be expeditiously and completely ceased.

Of particular note in the report is the lack of social assistance that unreturnable persons – which stateless persons frequently are – face in different European countries. They are often left in a legal limbo and excluded from access to basic services, including health care services, leaving them destitute and often in poor health. States may see this as a way to incentivize them to leave, but it is an ineffective and harmful policy. The European Committee of Social Rights has made it very clear that states violate their obligations under the European Social Charter if they use deprivation from basic services as a weapon to enforce returns. The report rightly focuses on this issue as one of the particular problems faced by stateless persons.

Of course, key to protecting stateless persons against arbitrary detention, destitution and other rights violations is ending statelessness. It is important that states make sure they can effectively identify statelessness and ensure that appropriate procedures to acquire nationality are in place. In particular, states should focus on protecting the right of children to a nationality, to ensure that the problem does not persist.

One of the main factors feeding the perpetuation of statelessness, and the vulnerability of stateless persons to arbitrary detention, is the lack of visibility of the problem and a lack of awareness of its underlying causes. The European Network on Statelessness has worked tirelessly to overcome this, and the current report is another example of the invaluable work of the Network. Furthermore, it has shown to states that statelessness is not a problem that is 'too complex' to tackle effectively. With political will, many steps can be taken to avoid arbitrary detention, and to prevent statelessness more generally. I therefore emphatically support the report's recommendations and urge states to take them to heart and to act upon them swiftly.

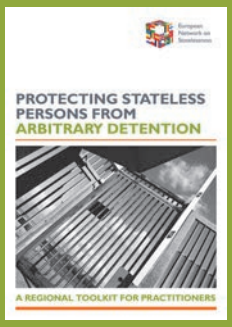
Nils Muižnieks
Council of Europe Commissioner for Human Rights

PROJECT OVERVIEW

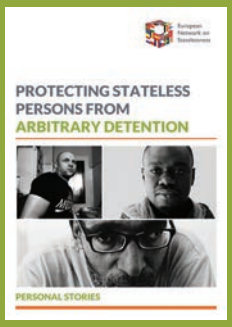
The European Network on Statelessness (ENS) is a civil society alliance with over 100 members, committed to addressing statelessness in Europe. This report is the final publication of a three-year project aimed at better understanding the extent and consequences of the detention of stateless persons in Europe, and creating tools and advocating for the protection of stateless persons from arbitrary detention through the application of regional and international standards.

In this project, ENS has published a series of six country reports highlighting the gaps and raising awareness about the extent of the issue and impact on stateless people, as well as a toolkit for practitioners across Europe, and a collection of some of the personal stories from stateless people interviewed for the project.

Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners



Protecting Stateless Persons from Arbitrary Detention: Personal Stories



Country reports:

- Bulgaria
- Malta
- The Netherlands
- Poland
- Ukraine
- The United Kingdom

All project outputs are available at: www.statelessness.eu/protecting-stateless-persons-from-detention

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Special thanks and acknowledgement are also owed to Greg Constantine for use of the images contained in this report. Finally, we must thank the stateless people who shared their stories, and whose everyday experiences illustrate just how much work remains to be done.

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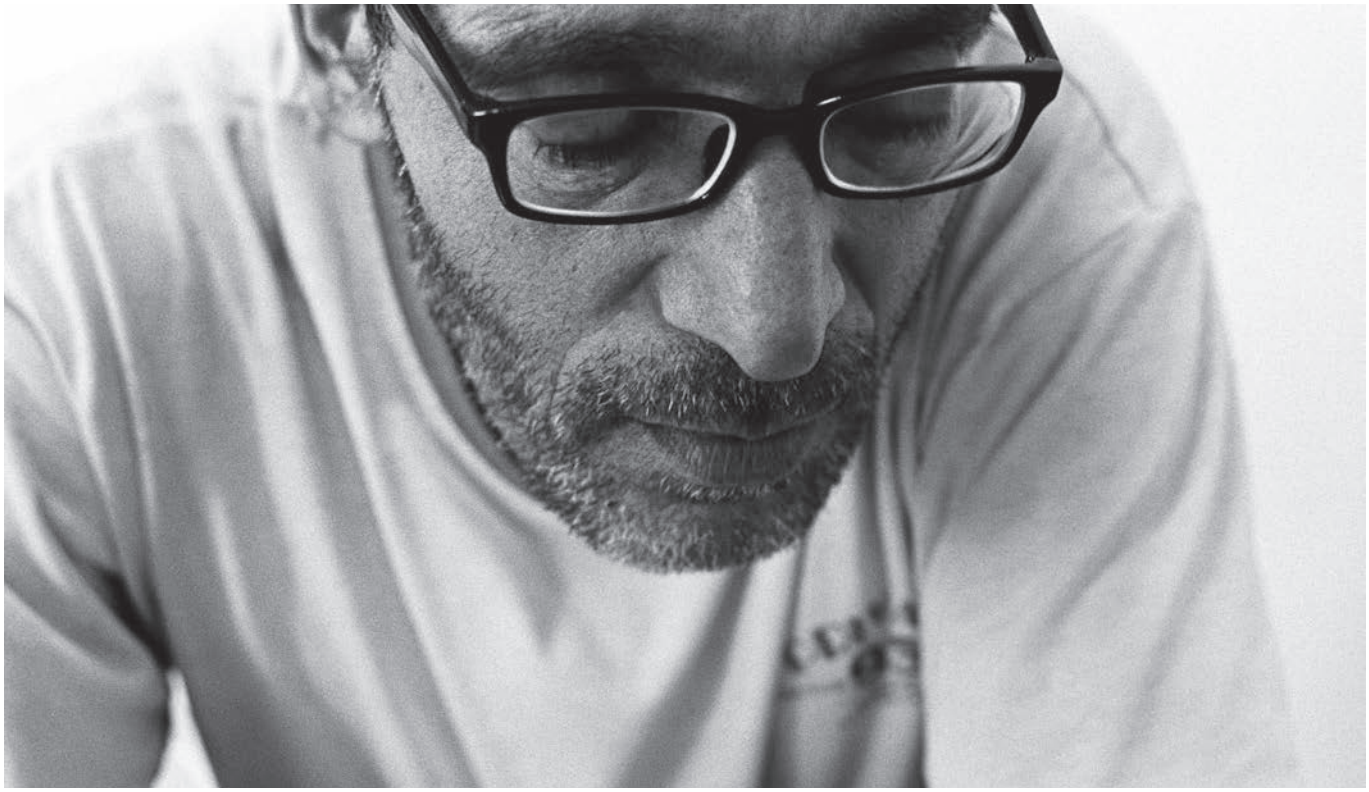
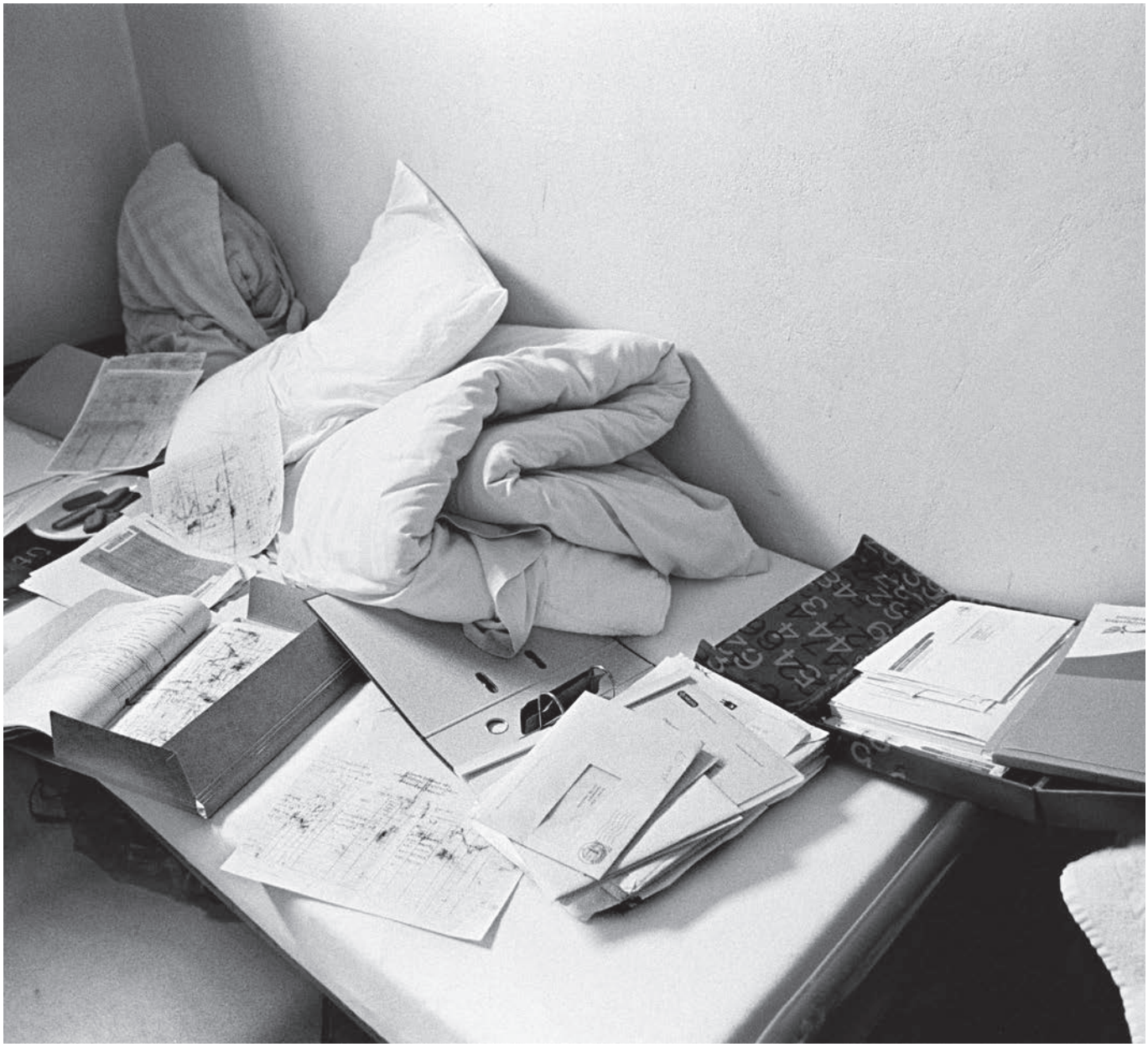


INTRODUCTION



> “The immigration detention of stateless persons is one of the silent tragedies of our globalised world that plays out behind closed doors, away from the gaze of the media, but with significant, irreparable human cost. It is a tragedy that is completely preventable, but due to a lack of will and attention, continues to harm thousands of lives all around the world every year.
>
> FRANÇOIS CRÉPEAU, UN SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS

> "I have lived here for 24 years… not 24 hours or 24 months, but years… Immigration detention has been the most humiliating punishment in my life.
>
> CHRISTOFF, ORIGINALLY FROM THE FORMER YUGOSLAVIA, INTERVIEWED IN BULGARIA

The increasing use of immigration detention and the growing criminalisation of irregular migration are concerning global and European trends, which result in more people being detained for reasons that are unlawful or arbitrary. These trends are particularly concerning for stateless people or those who may be at risk of statelessness, as they are often trapped in systems that criminalise their irregular migration status and subject them to ongoing detention without offering them any real prospects for adjusting their status or availing themselves of a nationality.

While immigration detention is a significant area of general concern to stateless people, the unique barriers to removal faced by stateless people and those at risk of statelessness, put them at particular risk of unlawful or arbitrary detention in the context of removal procedures. As the European Court of Human Rights (ECtHR) held in *Kim v Russia*, a stateless person is highly vulnerable to being "simply left to languish for months and years…without any authority taking an active interest in [their] fate and well-being".

Although there are other important circumstances in which stateless persons may be detained, which merit further attention (for example under criminal law, national security, or in asylum procedures), the research findings emerging from this project shone a light on the specific vulnerabilities faced by stateless people in removal procedures. This is therefore the focus of this agenda for change. It is hoped that reform in this area can act as a catalyst for change more widely, leading to effective mechanisms for the prevention of arbitrary immigration detention and contributing to a shift towards alternatives to detention across the region.

Stateless people will only be protected from arbitrary detention if authorities recognise and act upon the specific rights of the stateless in international law on the one hand, and the fundamental right to liberty and security of the person, on the other. The research found that states are largely failing to acknowledge the vulnerabilities associated with statelessness, to put in place effective procedures to identify statelessness and to protect stateless people, leading to a failure to prevent their arbitrary detention. Recognising these rights and vulnerabilities, and taking steps to identify statelessness, will help to guard against arbitrary deprivation of liberty.

Europe urgently needs to foster change on the issue of immigration detention. Regional advocacy is shifting towards recognising the harm inflicted by immigration detention and a consensus is emerging among civil society actors as well as UNHCR, the Council of Europe, and national governments, that there is a need to expand and improve alternatives to detention. The output from this project serves as a further indictment of the failings of Europe's detention regimes. Drawing on evidence from two years of research into statelessness and immigration detention in the region, and the law, policy, and practice in six diverse countries (Bulgaria, Malta, the Netherlands, Poland, the UK and Ukraine), this report now presents an agenda for change at national and regional levels.

Promoting both the protection of individuals' human rights and the development of fairer and more efficient systems, this report is intended as a tool for civil society to advocate for change and for policy makers to effect sustainable reform. *Part I* reflects on the current reality in Europe, highlighting the most fundamental challenges that emerged from the research and which need to be addressed. *Part II* looks ahead and further explores the change that needs to happen in key areas to achieve the goal of ending the arbitrary detention of stateless persons or those at risk of statelessness in Europe. *Part III* summarises the key recommendations and sets out an advocacy agenda. At the end of the report there is a short glossary of *key terms* and a list of *key resources* including links to each of the country reports and the Regional Toolkit for Practitioners, where more detailed analysis of the relevant legal and policy frameworks can be found, as well as other useful external resources on detention and statelessness.

If achieved, the reforms set out here will not only bring law, policy, and practice in Europe more in line with international human rights standards, but it will also bring the wider benefits of fairer and more efficient systems to governments and communities across the region.

PART I
CURRENT REALITY

> “The waiting is the worst part of detention. It’s like you don’t have any control any more, you just sit and wait. You wait for someone else to tell who you are and what is your country.
>
> FARID, ORIGINALLY FROM PAKISTAN, INTERVIEWED IN POLAND

The situation described by Farid will be familiar to stateless people across Europe. The experiences of men and women interviewed for the research point to broken systems characterised by mistrust, lack of awareness, and a failure to apply established legal standards. Evidence emerged of authorities failing to act with due diligence, to be proportionate and reasonable, and to protect people's rights. The result is stateless people (or those at risk of statelessness) being exposed to arbitrariness, discrimination, and systemic exclusion, punished for their lack of documentation or country that would accept them for removal.

As clearly set out in the Regional Toolkit for Practitioners, universal and regional legal norms and standards provide for protection against arbitrary detention. Furthermore, the country reports outline existing safeguards against discrimination and arbitrariness in national legal frameworks. Whilst some good practice can be identified, the failure in Europe is largely one of implementation. Key to this is the failure to identify statelessness and therefore to provide suitable protection and effectively implement alternatives to detention.

STATELESSNESS AND DETENTION IN EUROPE

UNHCR estimates there to be around 600,000 stateless persons in Europe today. Over 80% of the total reported population live in four countries – Estonia, Latvia, the Russian Federation and Ukraine – and their statelessness can be traced back to the dissolution of the Soviet Union. While these numbers give an indication of the scale of statelessness in the region, data is sparse and often incomplete. Statelessness remains, therefore, a largely hidden phenomenon. The lack of accurate data and information about stateless persons is even more acute where immigration detention is concerned, which effectively renders people and their suffering invisible. This in turn makes it difficult to plan or respond at a policy level and means that authorities have little awareness of the issues and, in some cases, deny the existence of any problem.

- **In the Netherlands**, the government estimates the stateless population to be around 5,000, but there are also over 80,000 people in the country whose nationality is 'unknown'. While most of these people are likely to have a nationality, statelessness may be hidden within this figure. There is no data on how many stateless people are in detention.
- **In Ukraine**, there is no reliable data on the size of the stateless population. Estimates range from 6,500 to close to 50,000. The Ukrainian detention framework does not consider or count statelessness.
- **In the UK**, the number of stateless persons is unknown, and data on stateless persons in detention is flawed and incomplete. The stateless are often wrongly attributed a nationality or categorised as 'persons with unknown nationality', so the real numbers are likely to be higher than the published figures.
- **In Bulgaria**, there are significant issues with the recording of statelessness in the context of detention. On being detained, people are often simply assigned a nationality by the authorities according to where they are deemed to have come from or have cultural or historical links.
- **In Malta**, data on statelessness is very limited as official statistics group stateless people with third country nationals.

Stories of suffering, of indifference to suffering, and of great human cost, pepper the research findings across this project. They point to small numbers of stateless people and those at risk of statelessness facing deeply damaging, life changing and unnecessary detention because their statelessness is invisible to the authorities, or their stories are not believed. Stateless men, women, and children affected by immigration detention in the six research countries came from a range of different backgrounds with different identities, rights, and vulnerabilities. They included migrants, refused asylum seekers, disabled people, ethnic minorities, foundlings, and survivors of abuse, torture, and trafficking. Here are some of their stories:

> “ The documents I do have tell me I'm of 'unknown nationality'. Officially I still don't exist.

Angela is an ethnic Armenian from Azerbaijan. She fled to the Netherlands seeking asylum with her family in her early teens, but they were refused protection. Countless efforts to obtain new travel documents failed and both Armenia and Azerbaijan refused to facilitate their return. Angela was detained in 2012 during an attempt to forcibly remove her family, which had a huge emotional impact on her. A court ruled her detention unlawful and suspended forced return, but this did not end her limbo.

> “ Why did they hold me for seven years and gave me nothing?

Anton is a stateless person from the former Soviet Union who was held in immigration detention in Bulgaria from 2005 to 2012. During this time, he was told he would be forcibly removed, but was never given any details about how and when. Anton remained in detention for seven years because the only alternative to detention in Bulgarian law could not be applied as he had no registered address. He was finally released after an intervention by the UN and now lives as an undocumented migrant.

> “ Detention made my mental health worse. It started when I got into detention. There they do not care if you cry.

Muhammed is a Sahrawi in his late thirties who came to the UK as a minor. He was refused asylum and has been detained several times for a total of nearly four of the last eighteen years. His statelessness application was refused because he has a past criminal offence. Muhammed suffers from mental health issues. In 2015-2016, he spent fifteen months in detention despite the authorities accepting that he was Sahrawi and therefore had no prospects of removal.

> “ Immigration detention is far far worse than prison because there is no time limit.

Okeke is in his thirties and has always lived in the UK. He was probably born there although he has no birth certificate. He believes that his parents are British but he lost contact with them as a teenager after fleeing years of domestic abuse. Okeke has faced a life of destitution and isolation due to his lack of documents and the abuse he suffered as a child. After a criminal conviction for theft, he was sent to immigration detention subject to a deportation order. Despite being classified as a person of 'unknown nationality', the UK attempted to deport him to Nigeria on the basis that he has a Nigerian name.

As these stories demonstrate, many people interviewed for the research had complex needs and additional vulnerabilities to those arising from their statelessness. What they all had in common was a right to protection under international law, but they had fallen through cracks in the system. In many countries, through poor design or misapplication, the systems themselves render the stateless even more vulnerable to long-term detention.

For example:

- **In Poland**, people without documentation who cannot confirm their identity can be granted residence. However, the law actually requires the undocumented to provide documentation, in order to benefit from this provision. The authorities can waive this requirement, but they rarely do. If refused, people are subject to detention and return proceedings even if they can't be removed.
- **In Bulgaria**, the only alternative to immigration detention is weekly reporting to the police, but this can only be implemented on production of a registered permanent address or a 'guarantor' to provide accommodation, which effectively excludes most of those the law is designed to protect.
- **In the Netherlands**, stateless people can apply for a one-year residence permit if they cannot be removed, in what is known as the 'no fault procedure'. However, the burden of proof is very high, decisions are discretionary, there is a low approval rate, and no formal recognition of statelessness.

In none of the six countries researched did authorities systematically identify statelessness as an integral consideration in decisions to detain or remove. The lack of procedures to identify statelessness – and the failure to make them accessible or effective where they do exist – is therefore contributing to the failure to protect.

A further issue is that some states adopt and apply a definition of 'stateless person' that falls short of the international legal definition. In some cases, they also require additional conditions to be fulfilled for stateless people to receive protection. This can result in stateless people not being identified and being denied protection even when they have gone through a statelessness determination procedure.

For example:

- **In Ukraine**, the legal definition of a stateless person is someone not considered a national by any country '*in accordance with its laws*'. This is narrower than the 1954 Convention – '*under the operation of its laws*' – which results in a protection gap for those who should be considered a national in law, but who in practice are not.
- **In the UK**, the statelessness determination procedure contains exclusion criteria that might result in people identified as stateless not being granted leave to remain, including where removal to a third country is deemed possible, or on other grounds (e.g. previous criminal convictions). In practice this can also result in their statelessness not being formally identified. This leads to a protection gap where human rights are concerned, for example, in the case of protection from arbitrary detention.
- **In Bulgaria**, under the new statelessness determination procedure, irregular entrants, unlawful residents, and those who have less than five years' legal residence, may be excluded from stateless status.

The development and practice of immigration detention throughout Europe has largely occurred without regard to the specific circumstances of stateless persons and the implications of international and regional human rights law on their detention. In many countries, stateless people are increasingly being detained for lengthy periods, simply because there is no country – or no safe country – to return them to. Because of the significant barriers to removal in such cases, their detention is likely to be arbitrary.

The result of systemic failures such as these is stateless people living without legal status, unable to work and excluded from support systems, on the margins of Europe's communities. Men, women, and children are facing destitution, isolation, heightened risk of exploitation and abuse, and petty 'survival' criminality, which in turn often leads to apprehension and detention. Breaking this vicious and discriminatory cycle of destitution and detention requires urgent law and policy reform. Changes that align policy and practice with international and regional law, leading to better identification, recognition, and protection, will go a long way to reducing human suffering and building more integrated, equal, and prosperous communities.

PART II
LOOKING AHEAD

A consensus is building not only among civil society, but also international agencies and regional institutions, that the current system of immigration detention in Europe is unsustainable, harmful, and, in many cases, unlawful. It is time for national governments to respond to these calls for change. As actions are developed, it is essential that reforms take account of the specific rights and circumstances of stateless people and those at risk of statelessness. Fair and effective procedures must be put in place to identify statelessness, guarantee protection, and assess and respond to vulnerability at all stages of immigration procedures, including during removal procedures.

The shift towards community based alternatives to detention must be harnessed by national governments and more widely implemented, with their appropriateness for stateless people considered and acted upon. Rights relating not only to nationality status, but also other characteristics, such as ethnicity, gender or gender identity, sexual orientation, disability, or age, must be proactively protected before the law. Stateless people must be given the tools to rebuild their lives and foster integration in Europe's communities, including through naturalisation. Finally, to effectively implement reform, state authorities must improve how they record, monitor and report on statelessness and detention.

Ultimately, fairer systems, which have human rights principles at their core, will be more efficient, more effective, and more humane.

In *Part II* of this report, we take a closer look at what needs to change to address these key challenges.

ENDING ARBITRARY DETENTION OF STATELESS PERSONS

The right to liberty of person is a fundamental right of international law that applies to all people, at all times – including stateless persons. This right to personal liberty enshrines a number of important safeguards that states must ensure whenever they are considering the use of detention, which are that detention is, *inter alia* (i) provided for by national law; (ii) carried out in pursuit of a legitimate purpose; (iii) non-arbitrary; (vi) non-discriminatory; and (v) carried out in accordance with procedural and substantive due process safeguards.

The prohibition of arbitrary detention, in particular, is one of the few non-derogable norms of customary international law (*jus cogens*) and therefore a principle of universal application and authority in international human rights law. The international and regional legal frameworks are discussed in detail in the Toolkit for Practitioners, but one example of a key legal source under each of the three relevant frameworks is set out below as an illustration.

In several countries researched, policy and practice fell short of these standards, exposing stateless people to the risk of arbitrary detention. Where someone is stateless or at risk of statelessness, their removal is likely to be subject to extensive delays and is often impossible, and may render detention unlawful from the outset. Stateless persons detained for removal purposes are therefore vulnerable to prolonged, repeated and even indefinite detention.

There must be a legitimate purpose to detain, which must *also* be achievable within a reasonable period, *and* pursued with due diligence. So, in removal proceedings, if there is no evident country to remove the person to, or if no appropriate safe country will accept a stateless person, their detention will be arbitrary. Even if an initial decision to detain was justifiable, it can become arbitrary over time. Ongoing review is therefore essential.

Where a legitimate purpose is being pursued, detention must never be arbitrary, which means it must be an exceptional measure of last resort. For example, the EU Returns Directive provides for two circumstances where detention for removal may be justified: where there is a risk of absconding, or where the person avoids or hampers the process. Notably, even in these situations, less coercive measures should be applied if available. For detention to be necessary therefore, alternatives must have been considered and the availability of a range of appropriate alternatives demonstrated alongside why they would not be suitable.

Where a legitimate purpose is being pursued and detention is considered necessary, it must also be proportionate and reasonable. The longer a person is in detention, the more difficult it is to maintain that detention is a proportionate response. It is extremely difficult to justify the detention of certain groups of people, such as minors, pregnant women, survivors of torture, trafficking, or abuse, or those with mental health issues, under the proportionality and reasonableness test. Importantly, the experience of detention itself can cause vulnerability or exacerbate existing vulnerabilities, highlighting again the importance of ongoing vulnerability assessment. The

United Nations ICCPR Article 9.1	Council of Europe ECHR Article 5.1 (f)	European Union Returns Directive Article 15.1
Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.	Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: … (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.	Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

country research identified people with each and a combination of these characteristics who were additionally either stateless or at risk of statelessness, and had been detained.

> The overarching call to action emerging from this research is for urgent reform to law, policy, and practice so that it better reflects, and applies without discrimination, international human rights standards, bringing an end to unlawful or arbitrary immigration detention in Europe.

In the following sections, five key areas of action towards achieving this goal are outlined: Alternatives to detention; Identification of statelessness; Addressing vulnerability and protecting against discrimination; Integration in the community; and, Monitoring and implementation.

ALTERNATIVES TO DETENTION

As discussed above, to safeguard against the arbitrary detention of stateless people and uphold international and regional legal standards, immigration authorities need to consider and implement less coercive measures throughout the process. It is important that governments and authorities recognise that people are more likely to cooperate if they can live in their communities, realise their fundamental rights, and enjoy a basic and dignified standard of life. To achieve this, requires a fundamental shift away from the enforcement and restriction approach prevalent in Europe, towards one more focused first and foremost on alternatives, which do not necessitate the deprivation of liberty.

> '*Alternatives to detention*' is not a term that has been legally defined, but the International Detention Coalition defines it as, '*Any law, policy or practice by which persons are not detained for reasons relating to their migration status*'.

A wide range of effective and human rights compliant community-based alternatives have been identified, such as: temporary identification and documentation schemes; residential housing, open reception or other accommodation in the community; temporary shelter arrangements for individuals in situations of particular vulnerability; regular reporting or supervision arrangements; and the provision of case management, safe spaces to access information, free legal assistance, and other community-based supports so that individuals are better able to comply with migration procedures without the threat of unnecessary detention.

For stateless people and those at risk of statelessness, who face unique and often insurmountable barriers to removal, a proactive approach by decision makers to considering and implementing a range of community based alternatives to detention would not only significantly reduce harm, but also reduce the cost and inefficiency of futile periods of detention, and provide opportunities for more effective case resolution.

The country research identified a notable lack of effective and suitable alternatives to detention currently being considered or implemented in practice:

- **In Bulgaria**, detention orders usually accompany removal orders without any consideration of alternatives. There is no requirement for the authorities to ascertain the destination country before initiating removal procedures, so, in practice, this is determined after someone has been detained.
- **In Ukraine**, the only available alternatives to detention are forms of bail and there are restrictions on eligibility. By comparison, in criminal proceedings there are four alternatives to imprisonment.
- **In the UK**, although many people are detained for long periods without access to bail, many others are released on bail, raising questions as to why they were detained in the first place. The UK is the only EU country to use electronic tagging on immigration detainees, which is a traumatising and stigmatising way of restricting liberty, and considered an alternative form of detention, not a suitable alternative to detention.
- **In Poland**, detention can be extended even if there is no realistic prospect of return and alternatives to detention are only considered as a last resort.
- **In Malta**, there are no alternatives to detention aside from the possibility to request bail. People issued with a removal order are automatically detained. There is no formal administrative decision to detain to provide them with clear reasons in writing for their detention.

> Alternatives to detention that are tailored to individuals, provide case management, ensure basic needs can be met, and only apply restrictive conditions where absolutely necessary, are less costly, more humane and have been proven to be highly effective.
>
> - Immigration authorities should proactively consider and implement a range of **appropriate community based alternatives to detention** in line with international best practice.
> - Immigration authorities must **improve their guidance for those making decisions to detain** to ensure that all decisions are proportionate, reasonable, necessary, and in particular, that alternatives have been fully considered and implemented as a priority.
> - States must guarantee **the right to appeal to an independent authority** and provide a clear role for the judiciary in scrutinising the lawfulness of decisions to detain.
> - Decision makers must consider the **specific circumstances facing stateless persons and those at risk of statelessness** when determining removal procedures and making decisions to detain.

> When they placed me in the Guarded Centre they gave me a decision… I was supposed to leave Poland… they asked me to fill out some forms for the Embassy. I did everything they asked for. I thought that maybe my situation will finally be resolved. After one year, they released me; they just told me that I am free and I can go now. I thought that since I was in the Centre for a full year and they didn't send me anywhere, they will give me a paper allowing me to stay in Poland, but it didn't happen. After all this time, I was in the same place as before, with no place to stay and no place to go to.

BEN, ORIGINALLY FROM RWANDA, INTERVIEWED IN POLAND

> “I saw my case-owner only once. The authorities would send me monthly progress reports but they always said the same thing; it looked like they were copied and pasted. I did not believe my case-owner was progressing my case.
>
> ANTHONY, ORIGINALLY FROM ZIMBABWE, INTERVIEWED IN THE UK

IDENTIFICATION OF STATELESSNESS

The obligation on states to identify stateless persons within their territory or jurisdiction is implicit in international human rights law. Where states are party to the 1954 Convention, this obligation is well established. But, even where states are not party to the Convention (or individuals are excluded from its protection), the identification of stateless persons may be necessary to protect their human rights. For example, in the context of removal and detention, being stateless is likely to present significant barriers to removal, which could render their detention arbitrary. So, without a procedure in place to identify and determine statelessness, authorities risk making unlawful decisions to detain.

While a handful of European countries do have statelessness determination procedures in place, **none routinely consider statelessness as part of the decision-making process to remove or detain**. Furthermore, very few countries make their statelessness determination procedures easily accessible to people being held in immigration detention. As such there is a significant protection gap in practice for stateless persons even where countries do have a procedure.

- **In Ukraine**, statelessness is not considered in decisions to detain, and many stateless persons are incorrectly categorised as citizens of other countries.
- **In the UK**, statelessness is not considered in the decision to detain. The burden of proof in the statelessness determination procedure is on the applicant, which presents barriers for detainees as no provisions are in place to facilitate access to the procedure or assist with case preparation, and they do not automatically have access to an interview.
- **In Poland**, authorities do not consider statelessness in decisions to detain and courts have even extended detention on the basis that authorities failed to establish a detainee's identity or the country of destination refused to cooperate with removal.

The identification and determination of statelessness is essential to preventing arbitrary immigration detention. To ensure that people have access to justice, and improve accountability and the quality of decision making, there should be investment in establishing and implementing robust procedures and training decision makers.

States should put in place statelessness determination procedures and ensure that:

- **Statelessness determination procedures are developed in line with established guidance** including the UNHCR Handbook on Protection of Stateless Persons.
- Anyone on the territory or subject to its jurisdiction has **access to a statelessness determination procedure** at any time, including those who are undocumented, without lawful residence, or in detention.
- **Decisions to detain or remove an individual consider statelessness:** if someone claims to be stateless or is suspected of being stateless (or is unable to establish their nationality), they should be provided with information and legal aid, and referred to a statelessness determination procedure that can formally recognise their status and grant them the appropriate protection.
- People going through a statelessness determination procedure have a right of appeal and review, access to **legal aid and advice, and information about their rights** in a language they understand.

ADDRESSING VULNERABILITY AND PROTECTING AGAINST DISCRIMINATION

The obligation to not discriminate is a fundamental principle of international human rights law. Stateless persons and those at risk of statelessness must be protected from discrimination, including in the exercise of immigration powers; and any vulnerabilities arising either from their statelessness or other characteristics, must be addressed. For detention not to be arbitrary, it must also not be discriminatory. This requires states to carry out an assessment of circumstances and vulnerabilities. A one-size-fits-all approach will fail to guarantee equal treatment before the law. In addition to being disproportionate and unnecessary, the routine detention of all those subject to removal procedures risks indirectly discriminating against people who cannot be removed within a reasonable time period, including the stateless. The obligation to identify and act on statelessness and other vulnerabilities, and to protect individual rights, is therefore directly linked to the obligation to not discriminate.

- **In Poland**, there is no routine vulnerability assessment. The law does contain some safeguards, but in practice, the lack of a vulnerability assessment mechanism means that these do not guarantee effective protection against the discriminatory detention of vulnerable people.

People with certain profiles may be more at risk of discrimination. One example is the routine detention of people subject to removal procedures following a criminal conviction. Detention in these instances escapes the scrutiny and safeguards of criminal law, and where there is no time limit, can be inhumane and degrading treatment, with deep psychological impact.

- **In the UK**, discriminatory attitudes towards ex-offenders are evident in both law and practice. For example, those detained following a criminal conviction are denied equal rights to an automatic review of their detention. There is also provision for other vulnerable groups, including minors, pregnant women, the elderly, those with serious medical conditions, the disabled, and victims of torture or trafficking, to be detained in certain circumstances. Failure to fully apply protections against the detention of these groups have been recorded by civil society and in case law.
- **In Ukraine**, the law does not identify any groups as vulnerable and provides no leniency, for example, in the case of the detention of families with children. In 2015, 41 children were detained and authorities frequently detain disabled people in centres lacking the facilities to provide adequate medical attention and care.

> "When Peter (originally from Nigeria, interviewed in the UK) finished serving a criminal sentence, he was surprised to discover that he would not be released but rather detained under immigration powers without any time limit. Peter said he didn't really understand at the time, but he soon learned from experience. The authorities first told him that he would be detained to facilitate his removal but for how long was unclear. Peter eventually spent more time in immigration detention than in prison. He says that prison is less traumatic than immigration detention because at least you know when it will be over. The profound uncertainty about the future is what affected him the most.

States are clearly falling short of their duties to not discriminate, and to identify and protect those with vulnerabilities, including those who may also be stateless or at risk of statelessness, or who may be in vulnerable circumstances due to aspects of their identity, such as gender or gender identity, sexual orientation, age or disability. States should also acknowledge that the experience of detention in itself can cause vulnerability. Immigration authorities should take responsibility for ensuring ongoing vulnerability assessments are carried out and people's health and wellbeing protected.

Authorities must put in place robust mechanisms to identify and protect individuals' rights, respond to vulnerabilities, and exercise their duty to not discriminate:

- Immigration authorities must put in place robust mechanisms to **identify and protect individuals' rights**, respond to vulnerabilities (including those that may arise from the experience of detention), and exercise their duty to not discriminate.
- Immigration authorities **should not routinely detain or otherwise discriminate against those who have previously served criminal sentences**.
- States should build specific protections for women and children into their immigration systems.
- The immigration **detention of children is never in their best interests: alternatives to detention should be provided for families** and alternative care arrangements made for unaccompanied children.

INTEGRATION IN THE COMMUNITY

The country research demonstrates that a failure to grant legal status and protection to those released from detention or who cannot be removed, succeeds only in driving them into destitution, isolation, and long-term suffering. People must be granted the right to a basic and dignified standard of life. Essential to this, is providing a facilitated route to naturalisation for those people recognised as stateless. Many examples emerged from the research of men, women and children living in limbo, denied their rights and an opportunity to rebuild their lives.

- **In the Netherlands**, if removal has not proven possible and there is no prospect of achieving it imminently, people may be released from detention, but the duty to return remains and no legal status is granted. To be granted a residence permit through the 'no fault procedure' people must prove they are cooperating with return, which can be very difficult to do in practice.
- **In Poland**, people released from detention are not granted any legal status. They remain excluded from Polish society without rights to state support and if they were released before the end of the maximum detention period, they are subject to re-detention.
- **In the UK**, release with 'temporary admission' status can be requested subject to various restrictions and conditions, but requests are almost always refused. The requirement to have accommodation is difficult to meet for those who are destitute and have no ties in the UK. Sometimes people qualify for basic support, but only if they are refused asylum seekers and can show they have attempted to leave the UK. If released, temporary admission does not give the right to work, study, nor many other rights attached to lawful status, nor does it protect someone from re-detention.

- **In Ukraine**, people released from detention after the maximum term are entitled to apply for a temporary residence permit, but one of the conditions is registration of a place of residence, which can be difficult in practice. If released before the maximum term, people are not eligible for residence, considered unlawful, and may be re-detained. Even those with a residence permit face often insurmountable barriers to accessing employment due to the requirement to apply for a work permit.

Governments and European institutions are clearly not giving adequate attention to the residence rights of people who cannot be removed. States should recognise that some people cannot lawfully be removed. This is not a failure, but a reality. These people will remain in the country, and their attitude towards it will be shaped by their experiences with immigration authorities. Identifying barriers to removal and making the decision not to detain someone is a successful resolution of a difficult case. It requires a commitment to ensuring that those who are released, are released with a legal status that guarantees their access to fundamental rights and freedoms.

Governments have a duty to act to ensure that the rights and protections of stateless people or those at risk of statelessness are recognised, and that they are provided with opportunities to rebuild their lives, integrate into their communities, and access a facilitated route to naturalisation.

All those at risk of statelessness should have their rights fully protected pending a proper and diligent determination of their status. Stateless persons should be granted legal status and related rights, including the right to work, study, social security, and healthcare:

- Authorities should **grant compensation** to individuals whose detention has been deemed unlawful.
- Authorities should **protect those released from detention from re-detention** and grant them legal status in accordance with their rights.
- Stateless people and those at risk of statelessness should be provided with the **basic rights and freedoms to facilitate their integration in the community**.
- Nationality laws should provide a **facilitated route to naturalisation** for people recognised as stateless.

MONITORING AND IMPLEMENTATION

The lack of accurate data on statelessness and the detention of stateless people or those at risk of statelessness is hampering the ability of governments and other bodies to monitor whether they are meeting their duties and obligations under international law. It is silencing the voices of some of the most marginalised men, women and children in Europe's communities. It is undermining the fairness and effectiveness of immigration law, policy and practice in the region. The failure of immigration regimes to comprehend and accommodate the phenomenon of statelessness, identify stateless persons and ensure that they do not directly or indirectly discriminate against them is resulting in people being punished for their statelessness.

To begin to tackle the issues highlighted by this project and take action towards affecting the changes outlined here, authorities must improve how they record and report on statelessness, and build transparency and accountability into the operation of immigration removal and detention procedures.

- Statelessness must be **recorded accurately, disaggregated**, and reported on in official statistics.
- There should be **independent oversight of immigration detention in Europe** by actors such as UN agencies, prison monitoring bodies, national human rights institutions, and NGOs.
- Immigration authorities should provide detainees with **visiting rights** and ensure that detention centres are accessible to family, legal representatives, support workers and community members.

PART III
ADVOCACY AGENDA

This report aims to serve as an urgent call to action to European institutions, governments, immigration authorities, and other stakeholders, for reform to law, policy and practice towards ending the arbitrary immigration detention of stateless persons and those at risk of statelessness in Europe, and embedding international legal standards in law, policy and practice relating to immigration and statelessness. Part III summarises the key recommendations set out in the report, presenting an advocacy agenda and checklist that it is hoped will be a useful resource for civil society, policy makers, governments, institutions and other stakeholders.

SUMMARY OF RECOMMENDATIONS

1. Alternatives to detention

1.1 Immigration authorities should proactively consider and implement a range of **appropriate community based alternatives to detention** in line with international best practice.

1.2 Immigration authorities must **improve their guidance for those making decisions to detain** to ensure that all decisions are proportionate, reasonable, necessary, and in particular, that alternatives have been fully considered and implemented as a priority.

1.3 States must guarantee **the right to appeal to an independent authority** and provide a clear role for the judiciary in scrutinising the lawfulness of decisions to detain.

1.4 Decision makers must consider the **specific circumstances facing stateless persons and those at risk of statelessness** when determining removal procedures and making decisions to detain.

2. Identification of Statelessness

2.1 **Statelessness determination procedures should be developed in line with established guidance** including the UNHCR Handbook on Protection of Stateless Persons.

2.2 Anyone on the territory or subject to its jurisdiction should have **access to a statelessness determination procedure** at any time, including those who are undocumented, without lawful residence, or in detention.

2.3 **Decisions to detain or to remove an individual must consider statelessness:** if someone claims to be stateless or is suspected of being stateless (or is unable to establish their nationality), they should be provided with information and legal aid, and referred to a Statelessness Determination Procedure that can formally recognise their status and grant them the appropriate protection.

2.4 People going through a statelessness determination procedure should have **a right of appeal and review, access to legal aid and advice, and information about their rights** in a language they understand.

3. Addressing vulnerability and protecting against discrimination

3.1 Immigration authorities must put in place robust mechanisms to **identify and protect individuals' rights**, respond to vulnerabilities (including those that may arise from the experience of detention), and exercise their duty to not discriminate.

3.2 **Immigration authorities should not routinely detain or otherwise discriminate against those who have previously served criminal sentences**.

3.3 States should **build specific protections for women and children into their immigration systems**.

3.4 The immigration **detention of children is never in their best interests: alternatives to detention should be provided for families** and alternative care arrangements made for unaccompanied children.

4. Integration in the community

4.1 Authorities should **grant compensation** to individuals whose detention has been deemed unlawful.

4.2 Authorities should **protect those released from detention from re-detention** and grant them legal status in accordance with their rights.

4.3 Stateless people and those at risk of statelessness should be provided with the **basic rights and freedoms** to facilitate their **integration in the community**.

4.4 Nationality laws should provide a **facilitated route to naturalisation** for people recognised as stateless.

5. Monitoring and implementation

5.1 Statelessness must be **recorded accurately, disaggregated**, and reported on in official statistics.

5.2 There should be **independent oversight of immigration detention in Europe** by actors such as UN agencies, prison monitoring bodies, national human rights institutions, and NGOs.

5.3 Immigration authorities should provide detainees with **visiting rights** and ensure that detention centres are accessible to family, legal representatives, support workers and community members.

BUILDING A MOVEMENT FOR CHANGE

The European Network on Stateless (ENS) will work closely with its members and partners over coming months and years to disseminate this call for action and carry out advocacy towards ending the arbitrary detention of stateless persons and those at risk of statelessness in Europe. In so doing, ENS commits to disseminating the recommendations to key stakeholders including the Council of Europe Parliamentary Assembly, relevant expert groups and monitoring bodies in the Council of Europe, the Council of the European Union, the European Commission (including in conjunction with the European Migration Network and its recently launched Statelessness Platform), the European Parliament, UNHCR, UN Treaty Bodies and other UN Agencies.

At country level, ENS commits to supporting its members and partners in their efforts to monitor and push for reform, including through engaging with parliamentarians, providing technical support to members engaging with state actors, and supporting strategic litigation, training, awareness raising, submissions to human rights monitoring bodies, and further research as appropriate.

Working in collaboration with its members, partners and other stakeholders, ENS is seeking to foster a movement for change, and hopes that this report will serve as a useful resource to those working to end the arbitrary detention of stateless persons and those at risk of statelessness around the world.

THE ADVOCACY CHECKLIST

This checklist is a resource for those carrying out advocacy to identify priorities for reform related to the immigration detention of stateless persons or those at risk of statelessness.

- ✓ Is your country a state party to both the 1954 and the 1961 Conventions? Has your country acceded to the core UN Human Rights Treaties and their optional protocols?
- ✓ Does your country have a statelessness determination procedure (SDP)? If yes, does the SDP comply with UNHCR Guidelines? Do people have access to an SDP during decisions to remove and/or to detain?
- ✓ Do authorities establish a destination country before issuing a removal decision and before detaining?
- ✓ Does your country have an 'alternatives to detention' programme? Does it offer a wide range of community based options to meet the needs of different groups? Is detention only implemented as a last resort?
- ✓ Is detention used for purposes other than those allowed under Article 5(1)(f) of the ECHR?
- ✓ Is there a maximum time limit for immigration detention? What is it?
- ✓ Are those subject to immigration detention entitled to substantive and procedural due process rights? Is detention ordered by a judicial authority? Is the detention order given in writing with clear grounds for detention? Is there a right to appeal and review the decision? Is there legal aid?
- ✓ Does your country have rules governing the process of re-documentation and/or ascertaining entitlement to nationality for removal? Do these rules outline the respective roles of state and individual? Are the time limits for such processes clearly set out?
- ✓ Are all detainees provided with information on their rights and entitlements in a language they understand? Do detainees receive information about where to get assistance including to challenge their detention?
- ✓ Are individual vulnerability assessments carried out before detention and regularly during detention? Are children ever detained in your country? Are specific protections in place for women in detention?
- ✓ Do detention centre conditions meet international standards? Are conditions non-punitive? Are detention centres regularly monitored by independent authorities? Do detainees have regular contact with family, lawyers, NGOs, UNHCR, other community/faith representatives?
- ✓ Are detention review procedures adequate? Are those found not to be removable released without delay? Are those released provided with a legal status and basic rights, including the right to work, study, social security and healthcare? Is compensation provided for those whose detention has been deemed unlawful?
- ✓ Does your country re-detain former detainees? If yes, is their previous time in detention taken into consideration when calculating the maximum period of detention?
- ✓ Is statelessness accurately recorded and disaggregated in official statistics?

KEY TERMS

A stateless person is defined in the 1954 Convention as someone "*who is not considered as a national by any state under the operation of its law*". This definition is part of customary international law and has been authoritatively interpreted by UNHCR as requiring "*a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status. This is a mixed question of fact and law.*" It is not always a straightforward process to identify if someone is stateless or not, and there will be people who appear to have a nationality, but actually are stateless, or whose statelessness becomes apparent over a period of time.

A person at risk of statelessness is someone who either is not stateless, but may become so; or whose statelessness may become evident over time. Immigration detention for the purpose of removal is one of the contexts in which hidden statelessness can come to light. Indeed, states may be motivated to not recognise as their nationals, individuals they may have recognised as nationals in the past or in another context. In this way, immigration detention for the purpose of removal can increase the risk of statelessness for some and unearth the statelessness of others. In the immigration detention context, the protection needs of those at risk of statelessness significantly overlap with the protection needs of the stateless.

Detention is defined by UNHCR as "*the deprivation of liberty or confinement in a closed place*", which the individual "*is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.*"

KEY RESOURCES

All the resources listed below can be found at: www.statelessness.eu/detention-resources

Immigration detention and alternatives to detention:

- Association for the Prevention of Torture, International Detention Coalition and UNHCR, Monitoring Immigration Detention: A Practical Manual (2014)
- Equal Rights Trust, Guidelines to protect stateless persons from arbitrary detention (2012)
- European Network on Statelessness, Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners (2016)
- European Network on Statelessness, Protecting Stateless Persons from Arbitrary Detention: Personal Stories (2015)
- European Network on Statelessness, Protecting Stateless Persons from Arbitrary Detention in Ukraine; Bulgaria; the United Kingdom; Malta; the Netherlands; and Poland (2016)
- Global Detention Project (Mariette Grange & Izabella Majcher), When Is Immigration Detention Lawful? The Monitoring Practices of UN Human Rights Mechanisms (2017)
- International Detention Coalition, There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (2015)
- International Detention Coalition, Captured Childhood: Introducing a new model to ensure the rights and liberty of refugee, asylum seeker and Irregular migrant children affected by Immigration detention (2012)
- UNHCR, Beyond Detention. A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014-2019 (2014)
- UNHCR, Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families (2015)
- UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012)
- UNHCR and International Detention Coalition, Vulnerability Screening Tool – Identifying and addressing vulnerability: a tool for asylum and migration systems (2016)

Statelessness determination and the protection of stateless persons:

- UNHCR, Good Practice Guide on Statelessness Determination and the Protection of Stateless Persons (2013)
- UNHCR, Handbook on Protection of Stateless Persons (2014)
- UNHCR, Nationality and Statelessness: Handbook for Parliamentarians N° 22 (2014)

European legal framework including on immigration detention:

- Council of Europe, Human rights files, No. 9: Asylum and the European Convention on Human Rights (2011)
- European Asylum Support Office, An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis (2016)
- EU Fundamental Rights Agency, Handbook on European law relating to asylum, borders and immigration (2013)

ABOUT THE EUROPEAN NETWORK ON STATELESSNESS

The European Network on Statelessness (ENS) is a civil society alliance with over 100 members in 40 countries (see shaded areas of map) committed to addressing statelessness in Europe. ENS believes that all human beings have a right to a nationality and that those who lack nationality altogether are entitled to adequate protection – including the right to regularise their status and enjoy their fundamental civil, economic, social and cultural rights under international human rights law.

Advisory Committee members: ASKV Refugee Support, Netherlands * Asylum Aid, UK * The Equal Rights Trust, UK * European Roma Rights Centre, Hungary * Forum Refugiés-Cosi, France * Halina Niec Legal Aid Centre, Poland * HIAS Ukraine * Human Rights League, Slovakia * Hungarian Helsinki Committee * Immigrant Council of Ireland * The Institute on Statelessness and Inclusion, Netherlands * Latvian Centre for Human Rights * Open Society Justice Initiative * Praxis, Serbia * Hilkka Becker, Ireland * Adrian Berry, UK * Jyothi Kanics, Switzerland * Katja Swider, Netherlands

Associate member organisations: Aditus Foundation, Malta * AIRE Centre, UK * Archway Foundation, Romania * Association for Integration and Migration, Czech Republic * Association for Juridical Studies on Immigration, Italy * Asylkoordination, Austria * Bail for Immigration Detainees, UK * Belgian Refugee Council, Belgium *British Red Cross, UK * Caritas Vienna, Austria * Civic Assistance Committee for Refugees, Russia * Civil Rights Programme, Kosovo * Coram Children's Legal Centre, UK * Danish Refugee Council, Denmark * Desyate Kvitnya, Ukraine * Detention Action, UK * Diakonie Flüchtlingsdienst, Austria * EUDO Citizenship, regional * Faith Hope Love, Russia* Foundation for Access to Rights (FAR), Bulgaria * Future Worlds Centre, Cyprus * Greek Council for Refugees, Greece * Helsinki Foundation for Human Rights, Poland * Immigration Law Practitioners' Association (ILPA) * Information Legal Centre, Croatia * Innovations and Reforms Centre, Georgia * Italian Council for Refugees * Immigration Law Practitioners' Association (ILPA), UK * JRS Romania * Kerk in Actie, Netherlands * Law Centre of Advocates, Moldova * Legal Centre, Montenegro * Legal Clinic for Refugees and Immigrants, Bulgaria * Legal Information Centre on Human Rights, Estonia * Lithuanian Red Cross Society * Liverpool University Law Clinic, UK * Macedonia Young Lawyers Association * Migrant Rights Network, UK * NGO Vitality, Moldova * Norwegian Organisation for Asylum Seekers * Norwegian Refugee Council * Peace Institute, Slovenia * People for Change Foundation, Malta * Portuguese Refugee Council * Public Law Project, UK * Refugee Action, UK * Refugees International, regional * Refugee Rights, Turkey * Tirana Legal Aid Society (TLAS), Albania * Vasa Prava, Bosnia and Herzegovina

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