



Mapping  
**Statelessness**  
in The United Kingdom





**United Nations High Commissioner for Refugees/Asylum Aid,**  
London, November 2011

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# EXECUTIVE SUMMARY

The research maps the number and profile of stateless persons in the UK and puts a human face on their situation. It also examines the UK's legal obligations to stateless persons under international law and analyses the impact of current policy and practice. Based on these findings the report makes recommendations for improvement. While the work owes a debt to previous studies, this is the first time that this hidden issue has been subject to such comprehensive quantitative and qualitative research.

The 1954 Convention on the Status of Stateless Persons defines a stateless person as “a person who is not considered as a national by any State under the operation of its law”. In practice many stateless persons are left without legal residence, consular protection, or the right to return to their country of origin. No Government takes responsibility for their protection. For those who have fallen through the cracks in this way, the consequences are serious.

The UK is one of a select group of 37 States that have ratified both the 1954 Convention and the 1961 Convention on the Reduction of Statelessness. The 1954 Convention aims to regulate the status of stateless persons and to ensure the widest possible enjoyment of their human rights, and is complemented by the relevant provisions of international human rights treaties.

The 1961 Convention's purpose is to prevent statelessness, thereby reducing it over time. Although the Universal Declaration of Human Rights confirms that everyone has a right to a nationality, it does not set out a specific nationality to which a person is entitled. Responsibility for conferring nationality lies with individual States, and the UK has criteria in domestic law for the conferral and withdrawal of nationality. Against this background, the 1961 Convention sets out additional standards that States have agreed to ensure further international cooperation and agreement to prevent and reduce statelessness.

The UK was one of the first States to ratify and implement the 1961 Convention. This research finds that the UK generally complies with its obligations in this area, although there are specific areas where improvements in British nationality law could be made.

Despite the UK's obligations under the 1954 Convention and international human rights law, UNHCR and Asylum Aid found that stateless persons without leave to remain in the UK often go unidentified and those without leave to remain often live at risk of human rights infringements. The researchers interviewed stateless persons who had been destitute for months, had been detained by immigration authorities in spite of evidence that showed there was no prospect of return, or had been separated for years from their families abroad. Some had been forced to sleep on the streets. Some had seen their accommodation and support repeatedly cancelled and reinstated. Almost all of this group were prohibited from working.

Few were in a position to break this cycle. In the absence of a dedicated and accessible procedure to identify people who are stateless, they are left in legal limbo for years.

The available data indicates that the number of stateless persons stuck in such limbo in the UK is relatively small, but appears to increase at between 50-100 persons annually. In the absence of an accessible procedure that identifies stateless persons, however, as well as problems with the reliability of published statistics on statelessness and other data, it is possible that this estimate is at the bottom end of the scale.

Nonetheless, the research found that difficulties faced by stateless persons are deeply entrenched and need to be addressed.

## Key findings

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The UK currently lacks specific law, policy and procedures to address many of the challenges confronting stateless persons. This gap impacts on many stateless persons on the territory, from their first contact with immigration control to the prospects of finding a permanent solution to their predicament either in the UK or in another State. The key findings of the research are:

1

**There are flaws in the way data on stateless persons is recorded and presented. This means it is currently impossible to provide an accurate estimate of the total number of stateless persons in the UK.**

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The categories used by the UK Border Agency to record its contact with stateless persons are numerous, overlapping and confusing. As well as preventing an accurate count of stateless persons, this increases the risk that some stateless persons are not identified and that, as a result, their protection needs are not met.

2

**A relatively small stateless population stuck in limbo in the UK can be identified by cross-referencing published figures with more detailed data provided by the Home Office and UK Border Agency for this research.**

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Despite recent improvements, the last published immigration statistics of August 2011, give an inconsistent and incomplete picture of the numbers of stateless persons who come into contact with immigration control.

Disaggregation of the published data shows that stateless persons with travel documents and visas are able to arrive in and depart from the UK without posing any particular challenge to immigration control. The research identifies around 150 to 200 people each year who claim asylum and are recorded as being stateless by the UK Border Agency. This group is granted asylum or complementary protection at a far higher rate than the average, reflecting the fact that stateless persons often face discrimination and the denial of their human rights in their countries of origin. The disaggregated statistics, however, show that removal only occurs in around 10 per cent of cases of stateless persons whose asylum claims are unsuccessful. The remaining group are small in number but are left in limbo, with no right to stay in the UK and no State to which they can return.

3

**The absence of a statelessness determination procedure prevents the proper identification of stateless persons.**

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There is currently no dedicated and accessible procedure in the UK to which individuals can apply for recognition of their statelessness. A number of other European States have such a procedure. This gap is a major obstacle that prevents the UK Border Agency from being able to identify those who are stateless and cannot leave the UK, and to distinguish such persons from individuals who

do have a nationality or the right of residence elsewhere and who can depart. Furthermore, the lack of such a procedure prevents a more accurate estimate of the number and profile of stateless persons in the UK. While there is the opportunity for stateless persons to apply for a 1954 Convention Travel Document, in practice this is accessible to only a small number of stateless persons, as any applicant is required to have six months leave to remain before being eligible to apply.

4

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**Stateless persons for whom the UK is the most appropriate country to provide a long-term solution are no longer granted leave to remain in the UK.**

Between 1998 and 2002, stateless persons were granted indefinite leave to remain in the UK as a matter of policy, in cases where the UK was the most appropriate country of residence. By 2002, however, the policy had changed and applications for leave to remain on the basis of statelessness are now refused. This contrasts with the practice of a number of other European States and leaves many stateless persons with no option but to seek asylum. If their asylum claim is refused, they are expected to leave the UK in common with all other unsuccessful asylum-seekers. Any further support and accommodation is conditional on their cooperation with voluntary return, regardless of whether there is any country of nationality to which they can return.

5

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**Stateless persons in the UK who have not been granted leave to remain are at risk of human rights infringements.**

Stateless persons without leave to remain in the UK interviewed for this research described the consequences of their legal limbo. Some told of long periods without food and nights spent on the streets. Several were separated from their immediate family, including one father who has not seen his four children in 10 years. Many were subject to lengthy periods in immigration detention, with no prospect of removal. As one person told our researchers: “I have no ID, no work, no education, no freedom”. Another interviewee likened his plight to that of “a bird with nowhere to rest on the ground, but which can’t spend his whole life in the sky”.

# Key recommendations

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1

## **The UK should implement an accessible procedure to identify stateless persons on its territory.**

The most effective way to ensure the UK meets its international obligations to stateless persons under the 1954 Convention and in human rights law is through the adoption of an accessible and efficient statelessness determination procedure that identifies stateless persons on UK territory as quickly as possible. Where such a procedure establishes that an individual does in fact possess a nationality permitting return, this could help facilitate the operation of immigration control. Likewise, such a procedure could identify a nationality to which a stateless person may be entitled, or a state where a stateless person may be entitled to return and reside, and where their human rights will be respected.

2

## **The UK should review its approach to the identification of stateless persons, and adopt a position in accordance with forthcoming UNHCR Guidelines on the definition of “stateless person” in international law.**

Currently, in both immigration and nationality law, the burden of proof is placed on the individual to substantiate any claim that he or she is stateless, rather than being shared between the State and the individual. This research found that many applicants were frustrated in their efforts to obtain proof from foreign authorities or consular authorities in the UK, which regularly refused to respond to enquiries or to formally provide notification that an individual was not considered one of their nationals. The qualitative research found that, even when such confirmation was provided, the UK Border Agency would sometimes continue to attribute that nationality to the individual.

UK Border Agency guidelines and the decisions of the courts alike provide some guidance on whether a foreign State considers an individual to be a national under the operation of its law. Neither, however, fully corresponds to the conclusions of expert meetings convened in 2010 and 2011 to help develop UNHCR Guidelines. The UK’s approach to this issue should be reviewed in the light of the forthcoming Guidelines.

3

## **The UK should grant leave to remain to stateless persons in appropriate circumstances.**

In the past, stateless persons without leave to remain were, in defined circumstances, granted indefinite leave to remain in the UK. This was the first step by which they could acquire a nationality and end their statelessness. The research has shown that a return to a policy granting leave to remain to stateless persons in appropriate circumstances would also ensure respect for stateless persons’ rights under the 1954 Convention and international human rights law. Such an approach is reflected in current practice among those States that have

statelessness determination procedures, as it enables stateless individuals to live with dignity and security. In a small number of cases, however, it may not be appropriate to grant leave to enter or remain. For example, where a stateless person enjoys the right of residence in another State and is able to return and live there with full respect for their human rights. As discussed above, an effective statelessness determination procedure could help identify such cases.

**The UK should ensure that its law, policy and practice relating to stateless persons and those who cannot as a matter of fact return to their country of nationality complies with its international human rights law obligations, particularly in relation to access to employment, social assistance and healthcare.**

4

The absence of an efficient procedure to effectively identify stateless persons, or the possibility for stateless persons without leave to remain to regularise their immigration status, results in many individuals facing a number of human rights challenges. These are particularly pressing where individuals are at risk of destitution. At present there is no clear and immediate route out of destitution for these stateless persons, as nearly all are subject to immigration legislation and policy that prohibits both access to mainstream benefits and employment. To counter this, provisions relating to social assistance (including section 4 support) and access to employment should take into account the particular circumstances of stateless persons, and be applied in accordance with the UK government's obligations under international human rights law.

**The UK Border Agency should amend its guidance on immigration detention to expressly identify an individual's statelessness as a factor that will weigh against detention, on the basis that it is likely to indicate that there are no reasonable prospects of removal.**

5

A third of participants interviewed for the research had been detained under immigration powers. As well as amending existing guidelines in order to better protect stateless persons who are at risk of arbitrary and prolonged detention, there is a need for improved training of UK Border Agency personnel on how statelessness affects the presumption against detention, and how statelessness can sometimes become apparent only through the process of documentation for removal.

**The UK should build on the protections in British nationality law that already prevent and reduce statelessness, specifically with reference to obligations under the 1954 and 1961 Conventions and the Convention on the Rights of the Child.**

6

The statistical evidence showed that British nationality law, which includes specific provisions designed to meet obligations under the 1961 Convention, is generally effective at preventing statelessness at birth. There is, however, evidence of a small number of stateless children who were born on the territory and remained stateless for five years before being able to register as British citizens as of right. Furthermore, there is no accelerated or prioritised route through which stateless persons on UK territory can naturalise as British citizens. These are both areas that should be reviewed in the light of the UK's international obligations.

# Abbreviations

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<b>ACID</b>	Asylum Casework Information Database	<b>ILR</b>	Indefinite Leave to Remain
<b>ASU</b>	Asylum Screening Unit	<b>IOM</b>	International Organisation for Migration
<b>BNA</b>	British Nationality Act 1981	<b>IPS</b>	International Passenger Survey
<b>BOC</b>	British overseas citizen	<b>LFS</b>	Labour Force Survey
<b>CEDAW</b>	Committee on the Elimination of All Forms of Discrimination Against Women	<b>MI</b>	Management Information
<b>COIS</b>	Country of Origin Information Service	<b>MP</b>	Member of Parliament
<b>CID</b>	Case Information Database	<b>NAM</b>	New Asylum Model
<b>CRC</b>	Convention on the Rights of the Child	<b>NCID</b>	Nationality Casework Information Database
<b>CRD</b>	Case Resolution Directorate	<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>DL</b>	Discretionary Leave	<b>ONS</b>	Office of National Statistics
<b>EEA</b>	European Economic Area	<b>SAR</b>	Subject Access Request
<b>ECHR</b>	European Convention on Human Rights and Fundamental Freedoms	<b>SIAC</b>	Special Immigration Appeals Commission
<b>ELR</b>	Exceptional Leave to Remain	<b>SSHD</b>	Secretary of State for the Home Department
<b>EU</b>	European Union	<b>UKBA</b>	United Kingdom Border Agency
<b>FOI</b>	Freedom of Information	<b>UKSC</b>	United Kingdom Supreme Court
<b>GCID</b>	General Casework Information Database	<b>UKUT</b>	United Kingdom Upper Tribunal
<b>HP</b>	Humanitarian Protection	<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>ICID</b>	Immigration Casework Information Database	<b>UNRWA</b>	United Nations Relief and Works Agency
<b>ICCPR</b>	International Covenant on Civil and Political Rights	<b>UNTS</b>	United Nations Treaty Series
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights	<b>USSR</b>	Union of Socialist Soviet Republics
		<b>WIP</b>	Work in Progress

# CHAPTER 1: INTRODUCTION

“The issue of statelessness has been left to fester in the shadows for far too long. It is time to take the necessary steps to rid the world of a bureaucratic malaise that is, in reality, not so difficult to resolve. It is simply a question of political will and legislative energy.”

**António Guterres, UN High Commissioner for Refugees**

**Louise Arbour, former UN High Commissioner for Human Rights<sup>1</sup>**

In 2011, to mark the 50th anniversary of the 1961 UN Convention on the Reduction of Statelessness, UNHCR launched a worldwide campaign on statelessness. The plight of people around the world not recognised as a national of any State under the operation of its law and the urgent work needed to address the deprivations they experience as a result remain a central concern in the work of the Office of the High Commissioner for Refugees (UNHCR).<sup>2</sup>

Most of these individuals are not refugees. Indeed most have not left their country of birth or a successor State. Some have crossed an international border, however, and live in refugee camps or urban areas. Statelessness is a global problem, with the largest concentration of stateless persons to be found in Asia, but it is also a largely unacknowledged issue on our doorsteps in the United Kingdom.<sup>3</sup>

In an attempt to gain a greater understanding of the situation facing stateless persons in the UK, and as part of global efforts to tackle statelessness, UNHCR and Asylum Aid have conducted a joint research project seeking to map the size and profile of the stateless population in the UK. The project also aimed to assess the UK’s compliance with its international law obligations to stateless persons.

The UK is one of a select group of 37 States to have ratified both the 1954 Convention on the Status of Stateless Persons<sup>4</sup> and the 1961 Convention on the Reduction of Statelessness<sup>5</sup>, although a number of further State ratifications are expected by the end of 2011. Indeed, British nationality law contains specific provisions that aim to meet the UK’s obligations under the 1961 Convention. However, anecdotal evidence derived from Asylum Aid’s legal team, which provides legal advice and representation to asylum-seekers, and UNHCR’s engagement with the government on this issue suggest that statelessness could be considered a hidden issue. Both government and non-governmental organisations appear to have a variable understanding of statelessness and the issues that it raises. Statelessness seems to be bound-up in the challenges that confront some asylum-seekers and other undocumented

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<sup>1</sup> Guterres, A. and Arbour, L., *The Hidden World of Stateless People*, UN Office of the High Commissioner for Human Rights, 28 November 2007, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=4964&LangID=E>. This and all following hyper-links were accessed on 8 and 9 Oct. 2011.

<sup>2</sup> See for example, BBC, “UN warning over 12 million stateless people”, 24 Aug. 2011, available at: <http://www.bbc.co.uk/news/world-14654066>.

<sup>3</sup> Hereafter “the UK”.

<sup>4</sup> UNTS 5158, Vol.3 60, 117, in force 6 June 1960, UK ratification on 16 April 1959, (hereafter “the 1954 Convention”).

<sup>5</sup> UNTS 14458, Vol. 989, p175, in force 13 December 1975, UK ratification on 29 March 1966, (hereafter “the 1961 Convention”).

migrants trying to regularise their immigration status and in the efforts of some to gain release from long periods in immigration detention. Although statelessness is clearly recognised as a concept in British nationality law, there appeared to be no dedicated procedure in immigration law that would allow for a stateless person to be identified and to access a route leading to a permanent solution.

## 1.1 Structure of the report

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Chapter 1 will continue to set out the definitions used in the study and its scope. It will also describe the methodology employed in the research.

Chapter 2 provides a brief overview of the global causes and consequences of statelessness, as well as UNHCR's mandate to protect stateless persons.

Chapter 3 provides an exhaustive analysis of relevant statistics published by the Home Office and internal management data of the UK Border Agency, the executive agency of the Secretary of State for the Home Department operationally responsible for immigration control and British nationality matters. It considers the accuracy and usefulness of the records held by the agencies with which stateless persons come into contact. Based on its empirical findings, it cautiously identifies a stateless population in the UK.

Chapters 4 and 5 examine the identification of stateless persons when they come into contact with UK immigration control, and the degree to which the UK government safeguards the human rights of stateless persons in accordance with its obligations under international law.

Chapter 6 analyses the operation of British nationality law and the provisions that prevent and reduce statelessness as required by the 1961 and 1954 Conventions and wider international human rights law.

Each chapter starts with a brief summary of content and ends with conclusions and recommendations which are compiled in a final chapter setting out key conclusions arising from the research as a whole.

## 1.2 Definitions and scope

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The definition of a stateless person in international law is found in the 1954 Convention, Article 1(1). It provides that a stateless person is a “person who is not considered as a national by any State under the operation of its law”. The International Law Commission considers that this definition constitutes customary international law.<sup>6</sup> It is also the definition given to the term in British nationality law.<sup>7</sup> The use of “stateless person” in this report assumes this meaning.

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<sup>6</sup> See International Law Commission, *Commentary on the Draft Articles on Diplomatic Protection 2006*, available at: [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_8\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf), p. 49.

<sup>7</sup> *Hamza v. Secretary of State for the Home Department (SSHD)*, [2010] UKSIAC 23/2005, Special Immigration Appeals Commission (SIAC), available at: <http://www.unhcr.org/refworld/docid/4ce2a8022.htm>, para. 5.

The definition, however, presents difficulties in interpretation and, consequently, application. UNHCR will issue guidelines in 2011 on the interpretation of Article 1(1). The development of these guidelines has been informed by an expert meeting that drew up a set of conclusions.<sup>8</sup> These conclusions found that, considering the object and the purpose of the 1954 Convention is “to secur[e] for stateless people the widest possible enjoyment of their human rights and to regulat[e] their status”, the definition in Article 1(1) should be given an inclusive interpretation and that “some categories of persons hitherto regarded as *de facto* stateless are actually *de jure* stateless”.<sup>9</sup> Furthermore, as there is no international treaty regime to regulate the treatment of *de facto* stateless persons and the interpretation of the term is subject to debate, although the UNHCR Prato Summary Conclusions found that the lack of ability to return to the country of nationality was the defining characteristic. In these circumstances, the researchers decided, as far as possible, to avoid the use of the terms *de jure* and *de facto* stateless.

Instead, it was decided to include within the scope of the study persons who were, for the purposes of the research, termed to be “unreturnable”, that is to say they were people who were subject to UK immigration law, but could not return or be returned to any country including, if known, their country of nationality. This working definition was chosen to reflect the common characteristics that the group shared, in that they did not have the right to remain in the UK and that they were unable to gain admittance to their country of nationality or former habitual residence. In this way their situation was similar to the situation of many of the participants in the research who were stateless, although the two groups were treated as being distinct. This group falls within UNHCR’s mandate relating to stateless persons because if the situation of “unreturnable” persons is left unaddressed it may become impossible to document nationality in the future, thereby leading to statelessness.<sup>10</sup> Further, as the analysis in Chapter 5 reveals, “unreturnable” persons are like many of the stateless participants interviewed left in limbo in the UK. This has significant consequences for the protection of their human rights. Indeed, the UK courts have held that this “unreturnable” characteristic is a relevant consideration in a series of cases concerning, for example, whether immigration detention was arbitrary or unlawful and whether destitution and homelessness or limitations on access to healthcare for non-nationals contravened human rights standards.<sup>11</sup>

The researchers were able to identify persons as stateless if the UK Border Agency, a Court or Tribunal had determined them to have such status. Additionally, individuals were considered stateless if they met the interpretation of Article 1(1) of the 1954 Convention set out in the conclusions of two expert meetings on statelessness organised by UNHCR in 2010–11.<sup>12</sup> Finally, some persons who were identified as “unreturnable” were potentially stateless, although that conclusion could not yet be drawn. This was because enquiries of the States where they had a “relevant link” by birth, previous habitual residence or nationality of parents had either not yet taken place or had not been concluded. If those enquiries, in the future, revealed that none of the States in question was treating the individual as a national under the operation of its law, then he or she would be “stateless”. Conversely, if those enquiries revealed that the individual has a nationality, he or she would be able to return.

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<sup>8</sup> UN High Commissioner for Refugees (UNHCR), *Expert Meeting – The Concept of Stateless Persons under International Law (Summary Conclusions)*, May 2010, available at: <http://www.unhcr.org/refworld/docid/4ca1ae002.html> (hereafter “UNHCR Prato Summary Conclusions”).

<sup>9</sup> *Ibid.*, Section II *De facto* Stateless Persons.

<sup>10</sup> *Ibid.*, para. 12.

<sup>11</sup> For further discussion, see Chapters 4 and 5.

<sup>12</sup> See UNHCR Prato Summary Conclusions and UNHCR, *Expert Meeting - Statelessness Determination Procedures and the Status of Stateless Persons (Summary Conclusions)*, Dec. 2010, available at: <http://www.unhcr.org/refworld/docid/4d9022762.html> (hereafter “UNHCR Geneva Summary Conclusions”).

The scope of the mapping element of the study was limited to the UK mainland territory. It was therefore impossible to examine the operation of British nationality law as either a cause of statelessness abroad or a mechanism for reducing statelessness abroad. The UNHCR office in London is engaging in the protection of stateless populations and the reduction and prevention of statelessness on British overseas territories. An examination of these issues, however, was beyond the scope of the research.

The research was conducted between September 2010 and October 2011. The researchers received input and guidance from an expert consultative panel. The panel met twice, in December 2010 and June 2011, and provided input at other points during the research. The research team is very grateful for the generous contribution of expertise given by the experts on the panel.

## 1.3 Methodology

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The methodology devised for the research is divided into three distinct parts: quantitative, qualitative and legal. It was devised following a literature review which examined methodologies best suited for research into hidden populations<sup>13</sup> and recent studies focusing on research subjects who were likely to share similar characteristics to stateless persons, including refugees, asylum-seekers, and other undocumented migrants.<sup>14</sup> Subsequently, a scoping exercise involving a number of meetings with community representatives and extensive networking was undertaken in order to compile a comprehensive database of all organisations that work with or for the populations under study. This work secured involvement of several key individuals and organisations to assist with referring participants and the design of research materials.

### 1.3.1 Quantitative methodology

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#### **The challenges in mapping stateless populations**

Estimating the number of stateless persons is extremely difficult. Stateless persons, whether born in the UK or migrants, risk being hidden, for a number of reasons.

First, many individuals, for example, among stateless, destitute, refused asylum-seekers or other undocumented migrants, will intentionally make themselves unobservable thereby eluding registration and statistical coverage.<sup>15</sup>

Secondly, statelessness appears to be a misunderstood and unfamiliar concept amongst many government agencies and NGOs. The consequence is that “stateless” is not a common

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<sup>13</sup> Bloch, A., *Carrying out a Survey of Refugees: Some methodological considerations and guidelines*, Journal of Refugee Studies, Volume 12. No. 4, 1999.

<sup>14</sup> Crawley, H., *Chance or choice? Understanding why Asylum Seekers Come to the UK*, Refugee Council and Swansea University, 2010; Bloch, A., Zetter, R., and Sigona, N., *No right to dream: the social and economic lives of young undocumented migrants in Britain*, City University London in association with the Refugee Studies Centre, 2009.

<sup>15</sup> Tapinos, G., “Clandestine Immigration: Economic and Political Issues”, in Organisation for Economic Cooperation and Development (OECD) (ed.), *Trends in International Migration 1999*, OECD publications: Paris, 1999, pp. 229-251.

nationality category in data sets, and relevant data is not captured. Even where data sets include a “nationality” category termed “stateless”, the definition of the category is often questionable and inconsistent with the definition used in other data sets. This contributes to an absence of accurate data on the numbers and profile of stateless persons on UK territory.

Thirdly, compounding this problem, stateless persons are subject to contested definitions and are consequently hard to classify or categorise. Rather than being a group for whom established legal procedures and protections exist, such as asylum-seekers and refugees, stateless persons share only the common characteristic of a lack of nationality, whatever their other circumstances. Stateless individuals can therefore span multiple incomplete data sets.

## **Data sources and methods of analysis**

Stateless and “unreturnable” persons can be found amongst both documented and undocumented migrants, as well as amongst those born in the UK. Previous equivalent mapping studies have principally focused on estimating undocumented migrant populations and have predominantly taken place in Europe and North America.<sup>16</sup> A diverse set of methodologies have focused on different approaches. Most notably, a distinction is made between “direct” and “indirect” methods. A combination of both methods was chosen for the quantitative methodology of this study.

### **Direct methods**

A number of direct data sources that record numbers of persons as “stateless” or of “unknown nationality” were examined. Close attention was paid to the classification of “stateless” or “unknown nationality” used in each data source to try to ensure consistency both with the definition of “stateless person” used in this study, as well as across the different datasets. It was recognised that examining direct data could provide certain totals, but risked resulting in a significant undercount of the total population.

There are no direct data sources that relate to “unreturnable” persons and this group does not exist as a separate category within any of the datasets examined.

Direct data sources examined include: the Labour Force Survey; the International Passenger Survey; European Union (EU) statistics published by Eurostat; UK government published statistics; management information provided by the UK Border Agency; and data sets collected by refugee-assisting NGOs that provide services to vulnerable migrants.

### **Indirect methods**

Indirect methods can be used to infer a population size by investigating data derived from the circumstances and characteristics of the population under study and, in the case of hidden populations, how their position in society becomes visible. This could include examining data sets relating to situations where stateless and “unreturnable” persons are likely to be more highly represented. Whilst this method, in contrast to the direct methods, would have the advantage of attempting to encompass hidden populations, it also has larger margins of error.

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<sup>16</sup> Pinkerton C., McLaughlan G., and Salt, J., *Sizing the Illegally Resident Population in the UK*, Home Office Online Report 58/04 London: Home Office, 2004.

The data examined included identifiable groups such as Kuwaiti Bidouns and Palestinians, individuals for whom voluntary return has proved impossible and refused asylum-seekers who have not departed from the UK territory. It was considered likely that such groups would include a proportionately much higher number of stateless persons than contained in other classifications.

It was hoped that combining the analysis of direct and indirect data with evidence obtained from the qualitative and legal research would allow conclusions to be drawn about the number and profile of the population under study.

### 1.3.2 Qualitative methodology

The second element of the methodology was to encourage the participation of stateless and “unreturnable” persons in the research in order to provide a better understanding of their situation and profile. At the outset, the researchers aimed to interview 40 stateless and “unreturnable” persons, to hear their stories and, with their permission, obtain and review their immigration case file.

A number of challenges were identified. The fact that stateless and “unreturnable” persons are part of a hidden population poses a methodological challenge<sup>17</sup> in that no source of information detailing the geographical distribution and social-demographic characteristics of stateless people in the UK currently exists. Therefore, due to the absence of a reliable sampling frame from which to draw a probability sample, it was necessary to adopt more unorthodox alternative strategies for locating participants. Purposive sampling was therefore used, a method not based on random chance but on pre-determined judgments. Participants are identified because they have particular features or characteristics that will enable detailed exploration of the research objectives. Two forms of sampling were combined.

#### **Snowball sampling**

Snowball sampling is used when respondents from the sample population are particularly hard to locate and is the classic method for finding hidden populations.<sup>18</sup> The snowball technique relies on referrals from initial contacts to supply additional contacts with good knowledge of the target population. The technique produces a wide range of contacts and information by a system of “chain referral” and serves to provide access to those persons who would otherwise be difficult to contact.<sup>19</sup> This technique relies on trust being built up between the researcher, intermediary (or “gatekeeper”) and the interviewee, with the gatekeeper acting as an advocate for the project. As a result, gatekeepers help to facilitate the research through their organisations, encouraging the participation of potential respondents who might not have been willing to be interviewed without the recommendation of a gatekeeper. This approach assumes that the selection of subjects stops once it has reached its saturation point, which can be identified when the same points are brought up repeatedly during interviews or alternatively when quotas have been met.

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<sup>17</sup> Beata, D., *Estimating the size of the homeless population in Budapest*, Hungary, Research Support Scheme: Virtus, 2000.

<sup>18</sup> Sawyer, C., and Blitz, B., K. (eds.), *Statelessness in the European Union: Displaced, undocumented, unwanted*, Cambridge University Press, 2011.

<sup>19</sup> Atkinson, R., and Flint, J., *Accessing Hidden and Hard to Reach Populations: Snowball Research Strategies*, Social Research Update, 33, 2001.

The snowball method is inherently biased due to several factors. Participants volunteering for the sample can create a self-selection error whereby, for example, confident, English-speaking individuals may be most keen to participate, risking the exclusion of isolated groups. Those who have received numerous requests in the past may choose to ignore calls for information and a skew in the data may occur because only participants who are currently on the books of gatekeeper organisations may be referred, creating the risk that individuals who have been in the country for longer time periods may be forgotten. Efforts were therefore made to reduce over-reliance on one network, by developing a “multiple access strategy”.<sup>20</sup> This helps prevent reliance on particular groups and networks, ensuring instead a range of different potential gatekeepers including statutory organisations, educational establishments, community spaces and religious establishments.

## Quota sampling

It is not possible to draw statistically valid inferences about the whole stateless population through the use of snowball sampling. Rather, this method serves as an indication of potential patterns and relationships. Efforts were therefore made to ensure that participants with certain characteristics were interviewed in order to make the sample as representative as possible of the overall stateless population. Quota sampling was used to implement the non-random selection of respondents according to fixed quotas. The key idea in quota sampling is to produce a sample matching the target population on certain characteristics (for example, by age) by filling quotas for each of these characteristics. It was intended that this method would ensure that the sample reflected key variables and encompassed all relevant groups.<sup>21</sup> Quotas were not intended to be too rigid.

## Sample size and content

The agreed aim was for a minimum of 60 per cent of participants to be stateless persons and the remaining 40 per cent or less of participants to be “unreturnable” persons.<sup>22</sup>

Age and gender were also significant for this study because of the differing international legal obligations owed by the State to children, as well as the potential impact of gender discriminatory nationality laws. The existing data on undocumented migrants (including refused asylum-seekers, overstayers and “unauthorized entrants”) were considered,<sup>23</sup> but lacked disaggregation. Consequently, the UK asylum seeking population was put forward as the best basis from which to draw quotas for age and gender.

According to statistics published in 2009, women make up around 33 per cent of all asylum applicants. Adults aged 18 to 29 year olds make up over 50 per cent of all applicants, while children under 18 years old comprise just over 10 per cent of all applications. It was hoped to reflect these proportions in the sample. It was also proposed that no single group would make up more than 25 per cent of participants to try to ensure that no profile dominated the sample. There were, however, several key countries of origin and groups that the researchers aimed to cover, namely Kuwaiti Bidouns, Palestinians and British Overseas citizens who had renounced their Malaysian citizenship. It was also hoped to ensure geographic representation

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<sup>20</sup> Snijders, T., *Estimation on the basis of snowball samples: how to weight?*, in *Bulletin de Methodologie Sociologique*, 1992.

<sup>21</sup> Bloch, A., Zetter, R., and Sigona, N., *op. cit.*

<sup>22</sup> See Chapter 4 for the profile of participants referred and interviewed.

<sup>23</sup> Bloch, A., Zetter, R., and Sigona, N., *op. cit.*

by aiming that 25 per cent of all interviews should be undertaken with participants living in Wales, Scotland or Northern Ireland.

These methods adopted for sampling aim to increase the robustness of the research by enhancing the reliability and the validity of the data and in turn provide a greater understanding of stateless persons. The diversity of gatekeepers, multiple starting points for snowballing and the setting of flexible sampling quotas were all used to try to increase the diversity of participants.

### 1.3.3 Data collection

#### **Semi-structured interviews with stateless persons**

The researchers conducted extensive research in order to compile a database of over 400 gatekeepers to approach for the referral of participants. This database encompassed a variety of both voluntary and public sector bodies enabling a wide range of “starting points” for snowballing. The database included: refugee community organisations; crisis groups; detainee support groups; NGOs/refugee-assisting organisations; small local community groups and centres; university and student groups; online social networking websites; service providers such as housing associations and local councils; citizens advice bureaux and law centres; public bodies such as strategic migration partnerships.

A referral form was designed which described the research and requested the referral of stateless or “unreturnable” individuals. It included a short questionnaire intended to help gatekeepers to identify the target population well as to enable researchers to “filter” the most appropriate participants referred. The referral form was distributed to the project contact database by email and post, and placed as a link on the Asylum Aid and UNHCR UK website. It was also featured in other organisations’ newsletters and mailing lists, as well as being distributed on relevant email lists, such as the Refugee Legal Group.<sup>24</sup> Meetings and other follow-up work took place with organisations on the database about how best to encourage and facilitate participation in the research. These included Detention Action, Coventry Peace House, the Immigration Law Practitioners’ Association, Refugee Action, the British Refugee Council and the British Red Cross. Several of these organisations agreed for a researcher to present the project at frontline staff or management team meetings in order to increase awareness of the research, as well as to help ensure endorsement by senior members of staff and their engagement to encourage participation. This approach meant it was possible to secure large numbers of referrals despite the challenges inherent in trying to engage the participation of this type of hidden population.

If the status or circumstance of the potential interviewee was unclear following receipt of completed questionnaires from individuals or organisations, a short call would be made to ensure that the potential participant’s circumstances were within the scope of the research. Participants for interview were selected to try to obtain a broad as possible sample. A semi-structured interview questionnaire was designed to capture comparable information identified as relevant for the research. The interview questions were a combination of legal and sociological questioning and were grouped around four key themes including reasons for statelessness or unreturnability, immigration history since entering the UK (if relevant), living conditions while in the UK and finally about statelessness and the individual. All interviews were digitally recorded. Detailed notes were taken, including the interview context, access

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<sup>24</sup> The Refugee Legal Group is an email group consisting mainly of legal representatives who provide advice to asylum-seekers.

route, the setting for the interview, and key information and quotes from the interview. The duration of interviews was typically one and a half to two hours. Interpretation was provided where necessary. Three or four pilot interviews were initially carried out and a debriefing meeting among the project team was held afterwards to discuss emerging themes and any changes needed to the semi-structured interview format.

Anonymity and confidentiality was guaranteed to enable participants to talk freely and candidly about their experiences. Therefore throughout this report pseudonyms have been used to portray participants' stories.

### **Case file access and reviews**

The interviews were complemented by an examination of the participants' immigration case files to ensure the accuracy of the data recorded as well as gain additional insights into the UK Border Agency's engagement with participants. The detailed review of case files was considered important given the inherent limitations on the extent of information it is feasible to obtain from a one and a half hour interview. Moreover, wherever possible efforts were made to obtain copies of the participant's papers in advance of the interview in order to best target questioning. Paper files were obtained through subject access requests (SARs) under the Data Protection Act 1998 as well as in some cases directly from the UK Border Agency. In addition, relevant information on each participant was reviewed on the UK Border Agency's Case Information Database.<sup>25</sup> For various reasons, including delay or lack of consent, it was not possible to obtain the paper files of all the participants interviewed. Those case studies are referenced accordingly in footnotes.

#### **1.3.4 UK Border Agency co-operation**

In parallel with this, the UK Border Agency kindly agreed that the researchers could access electronic databases and files. The researchers received security clearance for this purpose. In addition, a series of semi-structured interviews were held with relevant UK Border Agency officials in order to better understand the issues raised, as well as the application of relevant law and policy concerning stateless persons. These interviews were not transcribed but were held "on record" with the understanding that information obtained should be treated as anecdotal and not attributed directly to individuals. Information obtained from these interviews, though not constituting empirical evidence, nonetheless proved very valuable in filling information gaps and enabling the researchers to test themes emerging from initial data analysis.

#### **1.3.5 Legal research**

The final part of the methodology was to undertake extensive legal research, focused initially on identifying the UK's obligations in international law towards stateless persons. The research also examined UK law and policy relating to stateless persons and evaluated the extent to which the UK's international legal obligations were being met. This analysis was informed by the evidence obtained in the quantitative and qualitative work.

It was hoped that, taken together, these different strands of the research would form a strong foundation for the evaluation and for any resulting recommendations.

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<sup>25</sup> Hereafter referred to as "CID".



# CHAPTER 2: STATELESSNESS ACROSS THE GLOBE AND UNHCR'S ENGAGEMENT WITH STATELESSNESS

## 2.1 Introduction

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Statelessness was recognised as a global problem during the first half of the twentieth century when an increased incidence of the phenomenon became apparent. Statelessness, instead of disappearing, has developed over time to produce new situations.

Today there are an estimated 12 million stateless persons worldwide. The scale of the problem has fluctuated over the years, with improvements in some regions offset by new problems in others. The large numbers at the beginning of the 1990s were gradually reduced as the States of the former Soviet Union granted citizenship to several hundreds of thousands of people. The numbers increased again, however, with developments in other parts of the world. Putting precise figures on the number of stateless people is inherently difficult because few countries have procedures to identify the stateless and collect comprehensive and reliable data in this field. Nevertheless the population data that UNHCR produces every June include available official statistics or estimates.<sup>26</sup>

While some regions have larger stateless populations than others, every State and continent is, or is potentially, affected by statelessness. With the full scope of statelessness across the globe only just becoming known, the problem is particularly acute in South East Asia, Central Asia, Eastern Europe, the Middle East and various countries in Africa. Because most of the countries of Latin America grant citizenship to all born on their territory, that region has the lowest incidence of people with no nationality.

Countries with the greatest numbers of stateless people, for which estimates are known, are Iraq, Kenya, Myanmar, Nepal, Syria, Thailand, Estonia and Latvia. However, situations and rights of stateless persons in each country vary significantly and are not always easily compared.

Before elaborating on the consequences of statelessness, it is useful to understand how people become stateless.

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<sup>26</sup> UNHCR data are based on census counts, surveys and other government data and estimates.

## 2.2 Causes of statelessness

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Statelessness occurs for a variety of reasons which can be grouped into three categories: a) causes linked to dissolution and separation of States and transfer of territory between States; b) causes linked to the complex, technical operation of citizenship laws or administrative practices; and c) causes linked to discrimination or arbitrary deprivation of nationality.<sup>27</sup>

### **Causes linked to dissolution and separation of States and transfer of territory between States**

Firstly, statelessness often arises in the context of State dissolution: the turbulent dissolution of the Soviet Union and the Yugoslav Federation caused internal and external migration that left millions stateless throughout Eastern Europe and Central Asia. Twenty years later, hundreds of thousands of people in the region remain stateless or at risk of statelessness.

The post-colonial formation of States has been another major cause of statelessness. Large populations have remained without citizenship as a result of decades of such state-building processes in Africa and Asia, which involved defining who are citizens of the independent State.

### **Technical causes**

Secondly, people may become stateless as a result of the complex, technical operation of citizenship laws or administrative practices. States have the right to determine whom they consider to be a citizen and have adopted a wide range of approaches in this field. Within this complex international maze of citizenship laws, many people find that they fall through the cracks between them. An individual can, for example, become the victim of a conflict of laws, in which two States each claim that the other is responsible for the bestowal of nationality. This is especially likely to happen when a person's State of birth grants nationality by descent (*jus sanguinis*), while his or her parents were born in a State that attributes nationality by birth on its territory (*jus soli*). In addition, some States employ a mechanism whereby automatic loss of nationality occurs, for instance after a prolonged absence from the country (in some States as few as three or five years is considered a "prolonged absence").<sup>28</sup>

Failure or inability to undertake what might be considered a simple administrative endeavour can also lead to statelessness. Lack of registration of children at birth – a pervasive problem in many developing countries – leaves many children without proof of where they were born, who their parents were or where their parents were from. Not having a birth certificate does not automatically indicate the lack of citizenship, but in many countries, and in today's increasingly mobile world of migrants, not having proof of birth, origins or legal identity increases the risk of statelessness.

### **Discrimination and arbitrary deprivation of nationality**

Thirdly, underlying causes in most situations of statelessness are discrimination and arbitrary deprivation of nationality. Ethnic and racial discrimination as well as discrimination affecting women and children are particularly topical.

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<sup>27</sup> UNHCR, *Nationality and Statelessness: A Handbook for parliamentarians*, 2005, pp. 27-39.

<sup>28</sup> *Ibid.* p. 33.

Via decree, Iraq's former President Saddam Hussein stripped the Faili Kurds of their Iraqi citizenship in one day (in 1980). While most Roma and other minority groups are citizens of the countries where they live, thousands continue to be stateless in Europe. As a consequence of States' independence or the establishment of new borders, certain ethnic groups have been excluded from citizenship even though they have resided in the same place for generations. This is the situation facing the Muslim residents (Rohingya) of the Northern Rakhine state in Myanmar, some hill tribes in Thailand, the Bidoun in the Gulf States and various nomadic groups.

Often such groups have become so marginalized that even when legislation changes to grant access to citizenship and they become theoretically eligible for citizenship, they encounter almost insuperable obstacles such as the high cost of actually obtaining citizenship and documentation or of travelling to the place where they can obtain it.

Nepal provides a case in point. In 2007 it amended its nationality laws to extend citizenship to anyone born in the country before April 1990, including various – previously stateless – minorities. While the authorities undertook a massive citizenship campaign in which they distributed almost 2.6 million certificates in the first four months of 2007, the poorest stateless people were nevertheless unable to acquire citizenship due to prohibitive fees and/or long distances that needed to be travelled to lodge an application. UNHCR monitoring missions also found that, in some communities, it was believed that some women and girls did not need certificates as their interests were represented by their husbands or fathers and because men did not want to share rights to property. In addition, contrary to the law, some authorities required the cooperation of the husband or father when processing applications submitted by married women, women and girls.<sup>29</sup>

Statelessness arises also as a result of discrimination against women and/or children. In some countries, marriage or the dissolution of marriage may also constitute a ground for the automatic loss of citizenship. Additionally, while a number of countries in sub-Saharan and North Africa, the Middle East and Asia have started to reform legislation to address this, in at least 30 countries only men can pass on their citizenship on to their children. The children who are born of women from these countries married to foreigners, or who are born out of wedlock, may end up stateless if their father is stateless, if he cannot confer nationality under the nationality law of his State or is unable or refuses to take the necessary administrative steps with the authorities of his country on behalf of his children.

In Kuwait, for instance, nationality can by law only be passed on through the male line, although Kuwaiti nationality can be acquired by a foundling born in Kuwait and may also be granted by decree to any person born in or outside Kuwait to a Kuwaiti mother whose father is unknown or whose kinship to his father has not been legally established.<sup>30</sup> Similarly, in Senegal, children born to male nationals always acquire nationality of the state, while women can only confer nationality in exceptional circumstances. Children born in wedlock to Senegalese mothers and foreign fathers do not have the right to acquire Senegalese citizenship. Children born out of wedlock can acquire Senegalese nationality if the person who establishes parentage to a child is Senegalese.<sup>31</sup> Although these practices may be presented as legal technicalities, they in fact constitute a clear form of gender discrimination.<sup>32</sup>

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<sup>29</sup> UNHCR, *UNHCR Handbook for the Protection of Women and Girls*, January 2008, p.190. It should be noted in addition that draft constitutional provisions on citizenship and fundamental rights issued in November 2009 further restrict access to citizenship, raising the prospect of a significant increase in the size of the stateless population in Nepal.

<sup>30</sup> Nationality Law [Kuwait], 1959 (and subsequently amendments), Articles 2 and 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b4ef1c.html>. In the latter scenario, the Minister may afford such children the same treatment as that afforded to Kuwaiti nationals until they reach their majority.

## 2.3 Consequences of statelessness

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Statelessness costs people dearly. Stateless persons are among the most vulnerable in the world. In principle, individuals are entitled to most human rights protections regardless of their citizenship status. In practice, however, statelessness often results in the denial of fundamental rights, provoking social and economic hardship, and acute vulnerabilities, most notably for stateless women and children.

Authorities may refuse to register the birth and issue a birth certificate to a child whose parents cannot prove that they hold the nationality of their country of residence. Without such a birth certificate, the child in question is much more likely to experience trouble proving nationality (or enjoying a host of other rights) in the future.

Stateless people may experience similar hindrances in obtaining personal identification documentation. Considering that stateless people are often at increased risk of discrimination, abuse, detention or expulsion, not being able to present an identity document may increase the incentive to shun participation in society altogether.

They may not be able to own property, open a bank account, get married legally or raise a child. While access to the labour market and housing is either difficult or barred completely, stateless people often cannot access national services such as public education, healthcare and pensions. The right to own or inherit property may be restricted or fully denied. Similarly, it can be virtually impossible to start a business due to the inability to enter into contracts, obtain licences or open a bank account.<sup>33</sup> This way, poverty becomes an integral part of stateless life. Stateless persons are sometimes forced to obtain false identification documents or assume alternate identities in order to engage in day-to-day activities.

Some face long periods of detention, because they cannot prove who they are or where they are from. Statelessness may also result in the denial of a person's right to reside in the country, which results in a heightened chance of expulsion from their own country.<sup>34</sup> However, they also face restrictions on freedom of movement, including on travelling – and returning from – abroad. Legitimate international travel may not be an option, resulting in significantly increased exposure to human smugglers and traffickers; “an industry that thrives on the desperation of individuals”.<sup>35</sup>

On a wider level, statelessness may hamper social development efforts, because “the concept of statelessness introduces a power-dynamic that is particularly challenging for the design and delivery of effective pro-poor social development programmes”.<sup>36</sup> Furthermore, the problem becomes self-perpetuating because stateless parents cannot pass a nationality to their

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<sup>31</sup> Loi No. 61-70 du 7 Mars 1961 déterminant la Nationalité Sénégalaise, and subsequent amendments, Article 5.

<sup>32</sup> For more information on specifically gender-related problems facing stateless women and girls, see UNHCR, *Handbook for the Protection of Women and Girls* *op cit*.

<sup>33</sup> UNHCR, *Action to Address Statelessness: A Strategy Note*, March 2010, p.14 available at: <http://www.unhcr.org/refworld/docid/4b9e0c3d2.html>.

<sup>34</sup> UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, CCPR/C/21/Rev.1/Add.9, 2 November 1999, available at: <http://www.unhcr.org/refworld/docid/45139c394.html>.

<sup>35</sup> M. Lynch, *Statelessness: International blind spot linked to global concerns*, *Refugees International Field Report*, 2 September 2009, p. 2.

<sup>36</sup> B.K. Blitz, *Statelessness, protection and equality*, Refugee Studies Centre, Forced Migration Policy Briefing no. 3, 2009, p. 3.

children. Apart from the misery caused to the people themselves, the effect of marginalizing whole groups of people across generations may severely affect the balanced integration in society and may represent a source of conflict.

## 2.4 UNHCR's engagement with statelessness

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UNHCR has been involved in statelessness issues and with stateless persons since it began operations in 1950. The organization is mandated by the United Nations to protect refugees and to help them find solutions to their plight, and many of the refugees assisted throughout the years have also been stateless.<sup>37</sup> Indeed, over the past several decades, the link between the loss or denial of national protection and the loss or denial of nationality has been well established. It is also now generally understood that possession of an effective nationality and the ability to exercise the rights inherent to nationality help to prevent involuntary and coerced displacements of persons.<sup>38</sup>

Over the years, UNHCR's role in helping to reduce the incidence of statelessness and in assisting stateless persons has expanded. UNHCR is neither explicitly mentioned in the 1954 Convention on the Status of Stateless Persons nor in the 1961 Convention on the Reduction of Statelessness. However, the UN General Assembly has designated UNHCR as the appropriate body to examine the cases of persons who claim the benefit of the Convention and assist them in presenting their claim to the authorities under Article 11 of the 1961 Convention of the Reduction of Statelessness<sup>39</sup> and recognized UNHCR more generally as the UN institution with an international protection mandate for stateless persons.<sup>40</sup>

The organisation's responsibilities towards statelessness issues and stateless persons were elaborated by UN General Assembly resolutions<sup>41</sup> and through the recommendations of the organisation's own advisory body, the Executive Committee of the High Commissioner's Programme (ExCom).<sup>42</sup>

The UN General Assembly resolutions which set out UNHCR's mandate on statelessness are universal in scope and do not restrict UNHCR's activities to State Parties to either the 1954 Convention or the 1961 Convention. UNHCR's statelessness mandate covers all situations of statelessness.

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<sup>37</sup> Paragraph 6(A) (II) of UNHCR's Statute and article 1(A) (2) of the 1951 Convention refers to stateless persons who meet the criteria of the refugee definition.

<sup>38</sup> See UN General Assembly resolution A/RES/50/152 (21 Dec. 1995).

<sup>39</sup> UN General Assembly resolutions 3274 (XXIX), 10 December 1974, and A/RES/31/36, 30 Nov. 1976.

<sup>40</sup> *UNHCR's Role in Supervising International Protection Standards in the Context of its Mandate*, Keynote Speech delivered by Volker Türk at York University (Toronto) Conference in May 2010, available at: [www.unhcr.org/4bf406a56.html](http://www.unhcr.org/4bf406a56.html). See Article 33 of the 1954 Convention: the Secretary-General is nominally mentioned but in practice this is to be read as UNHCR; see further UN General Assembly resolutions A/RES/49/169 (para. 20); A/RES/50/152 (para. 14, where it was clarified that UNHCR's activities on behalf of stateless persons are part of the office's statutory function of providing international protection, and para. 15); A/RES/61/137 (Para. 4).

<sup>41</sup> UN General Assembly resolutions: A/RES/51/75, (12 Dec. 1996), A/RES/53/125 (9 Dec. 1998), A/RES/54/146 (17 Dec. 1999), A/RES/55/74 (4 Dec. 2000), A/RES/55/153 (12 Dec. 2000), A/RES/56/137 (19 Dec. 2001), A/RES/57/187 (18 Dec. 2002), A/RES/58/151 (22 Dec. 2003), A/RES/59/34 (2 Dec. 2004), A/RES/59/170 (20 Dec. 2004), A/RES/60/129 (16 Dec. 2005), A/RES/61/137 (19 Dec. 2006), A/RES/62/124 (18 Dec. 2007), A/RES/63/118 (11 Dec. 2008), A/RES/63/148 (18 Dec. 2008), A/RES/64/127 (18 Dec. 2009), and A/RES/65/194 (21 Dec. 2010).

<sup>42</sup> The Executive Committee of the programme of the High Commissioner is composed of representatives from countries – 79 countries as of May 2011 – selected by ECOSOC on the basis

There is some overlap between UNHCR's statelessness mandate and its refugee mandate because stateless refugees are protected under the provisions of the 1951 Convention. When refugee status ceases, though, individuals may remain stateless and therefore of concern to UNHCR. UNHCR's statelessness mandate also applies to stateless individuals who are internally displaced.

In 2006, the General Assembly urged UNHCR to continue to work *"in regard to identifying stateless persons, preventing and reducing statelessness, and protecting stateless persons"*.<sup>43</sup> These four areas govern UNHCR's statelessness-related efforts today.

The **identification** of statelessness includes continued efforts to identify populations who are stateless or of undetermined nationality; improved sharing and collecting of statistical data on these populations; the undertaking and sharing of research on the causes, scope and consequences of statelessness "so as to promote increased understanding of the nature and scope of the problem of statelessness, to identify stateless populations and to understand reasons which led to statelessness, all of which would serve as a basis for crafting strategies to addressing the problem".<sup>44</sup>

UNHCR's mandate is not limited to addressing cases of statelessness which have already occurred. It also includes **prevention** to identify and address risks of statelessness which may affect populations, notably by means of support for needed legislative changes. In this context, UNHCR provides notably technical and advisory services pertaining to the preparation and implementation of nationality legislation, and promotes accession to the 1961 Convention.

Moreover, UNHCR encourages Member States to **reduce** statelessness, *inter alia* by pleading for the adoption of "measures to allow the integration of persons in situations of protracted statelessness", for "the right of every child to acquire a nationality, particularly where the child might otherwise be stateless", and for the dissemination of "information regarding access to citizenship".<sup>45</sup>

Lastly, UNHCR has a role regarding the **protection** of stateless persons, to help them to exercise their rights. It promotes accession to the 1954 Convention and is encouraged to "implement programmes [...] which contribute to protecting and assisting stateless persons".<sup>46</sup>

2011 marks the 50<sup>th</sup> anniversary of the 1961 Convention on the Reduction of Statelessness. With this important event and bearing the same four areas in mind, UNHCR is placing statelessness issues at the centre of its advocacy work and intensifying efforts towards States' accession to the international statelessness instruments.<sup>47</sup> The present study was initiated as part of these endeavours.

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of their demonstrated interest to find a solution to refugee problems. See especially Executive Committee Conclusions No. 78 and 106, available at: <http://www.unhcr.org/3d4ab3ff2.html>.

<sup>43</sup> UN General Assembly resolution A/RES/61/137 (19 December 2006).

<sup>44</sup> UNHCR, *Conclusion on the identification, prevention and reduction of statelessness and to further the protection of stateless persons*, 6 October 2006, N° 106 (LVII) - 2006, paragraph c, available at: <http://www.unhcr.org/3d4ab3ff2.html>.

<sup>45</sup> *Ibid.*, para. p to r.

<sup>46</sup> *Ibid.*, para. v.

<sup>47</sup> UNHCR, *Statement by Ms. Janet Lim, UNHCR Assistant High Commissioner High Level Segment of the 16th Session of the United Nations Human Rights Council*, 2 March 2011, available at: <http://www.unhcr.org/refworld/docid/4d762e352.html>. See also UNHCR, *Commemoration of the Anniversary of the 100th Session of the Human Rights Committee (Statement by UNHCR)*, 2010, available at: <http://www.unhcr.org/refworld/docid/4cd798752.html>.

# CHAPTER 3: ESTIMATING THE POPULATION OF STATELESS AND “UNRETURNABLE” PERSONS IN THE UK

An attempt to calculate the stateless population in the UK in this chapter encounters substantial flaws in the quality of the data collected and presented by the government. This chapter scrutinises much of the publicly-available data, explores the limitations to this information, and suggests better ways in which relevant information might be collected and presented in the future.

It also explores further disaggregated data in detail, made available to the researchers at special request, from which more robust statistics can be derived. A number of practical policy recommendations follow from these statistics.

## 3.1 Introduction

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One of the primary aims of the study was to map the number and the profile of stateless persons in the UK.<sup>48</sup> At the outset of the research in September 2010 there was a gap in the published statistics relating to stateless persons. In particular, stateless persons did not appear as a separate category in the immigration control statistics, published by the UK’s Home Office.<sup>49</sup> Although the situation improved during the research, and “stateless” appeared as a category in the immigration statistics published in August 2011,<sup>50</sup> further progress is still needed to ensure accuracy. In addition, there was no published research that attempted to estimate the number of stateless persons in the UK. In this context, it was recognised that a greater understanding of the number and profile of stateless persons in the UK would help in evaluating the extent to which the UK was complying with its international legal obligations towards stateless persons and would be an aid to policy makers.

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<sup>48</sup> Such research is part of the mandate that UNHCR has been given by the General Assembly in respect of the identification of stateless populations, see UN General Assembly resolutions A/RES/51/75 (12 Dec. 1996), A/RES/53/125 (9 December 1998), A/RES/54/146 (17 Dec. 1999), A/RES/55/74 (4 Dec. 2000), A/RES/55/153 (12 December 2000), A/RES/56/137 (19 Dec. 2001), A/RES/57/187 (18 Dec. 2002), A/RES/58/151 (22 Dec. 2003), A/RES/59/34 (2 Dec. 2004), A/RES/59/170 (20 Dec. 2004), A/RES/60/129 (16 Dec. 2005), A/RES/61/137 (19 Dec. 2006), A/RES/62/124 (18 Dec. 2007), A/RES/63/118 (11 Dec. 2008), A/RES/63/148 (18 Dec. 2008), A/RES/64/127 (18 Dec. 2009), and A/RES/65/194 (21 Dec. 2010). Further see UNHCR, *Conclusion on the identification, prevention and reduction of statelessness and to further the protection of stateless persons*, 6 Oct. 2006, N° 106 (LVII) - 2006, para. (c), available at <http://www.unhcr.org/3d4ab3ff2.html>.

<sup>49</sup> For example, Home Office, *The Control of Immigration: Statistics United Kingdom 2009*, available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/hosb1510/?view=Standard&pubID=864717>.

<sup>50</sup> See Home Office *Immigration Statistics: April to June 2011*, available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-q2-2011/>.

It was also recognised that this aim was ambitious. Limitations were apparent in the data sets that would have to be examined in an attempt to map the stateless population in the UK. Therefore it was necessary to examine the different definitions and categorisations of “stateless person” employed in this data, as well as relevant guidance and recording techniques. As it proved difficult to draw firm conclusions in respect of overall numbers of stateless persons on the UK territory, the analysis of the data sets also attempted to identify any patterns and trends that existed.

The main part of the chapter will set out, in detail, an analysis of a combination of published immigration statistics and the UK Border Agency’s management information in relevant areas. The analysis will identify trends and patterns that emerge, informed by findings from the qualitative data, whilst recognising the limitations that exist within the sources. This chapter will also examine a number of potentially significant data sources which, upon examination, were either discounted or given little weight. It will end with conclusions and recommendations.

At the outset it is important to recognise that the referrals of participants to the project indicated that it was likely that statelessness in the UK is primarily an issue linked to migration. Consequently, the data relating to the operation of immigration control was likely to be revealing.

## 3.2 Home Office published immigration statistics and UK Border Agency management information

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The Home Office publishes the *Control of Immigration Statistics*.<sup>51</sup> It proved to be the primary published source of data examined for the quantitative aspect of this research. The statistics provide reports on a number of relevant areas ranging from visas and grants of entry clearance issued, to the numbers of removals that occur. These datasets were chosen because they appeared likely to provide the most fruitful information for analysis about the circumstances in which stateless and “unreturnable” persons have interacted with the UK Border Agency and its predecessors.<sup>52</sup> That said, the data could not provide reliable totals in respect of the numbers, profiles and situation of stateless or “unreturnable” persons in the UK because the total population is likely to include a hidden element that has not engaged with the UK Border Agency or its predecessors.

It was also clear from the outset that there was additional management information kept by the UK Border Agency which could provide an important additional source of data. Consequently, a number of requests were made under the Freedom of Information Act 2000 in respect of data kept between the years of 2000 and 2010. However, since the cost of answering the requests was likely to be above the statutory threshold, the UK Border Agency suggested and made a data sharing agreement to facilitate the researchers’ access to relevant data.<sup>53</sup>

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<sup>51</sup> For example, *The Control of Immigration: Statistics United Kingdom 2009*, available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/hosb1510/?view=Standard&pubID=864717>.

<sup>52</sup> Immigration, asylum and nationality were part of the Immigration and Nationality Directorate of the Home Office until 1 April 2007. These areas were taken over by the Border and Immigration Agency on 1 April 2007. The UK Border Agency succeeded the Border and Immigration Agency on 1 April 2008.

<sup>53</sup> The agreement stated that: “The information provided is for Asylum Aid /UNHCR’s use only and specifically for the Mapping Statelessness in the UK Joint Research Project. The information provided should not be used for any other purpose other than the one specified above. Once information disclosed has been satisfied, the information will be securely destroyed / returned and no copies will be held by Asylum Aid /UNHCR body.”

The data provided was supplied with the explanation that “the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change”.

The source of the management information examined was the UK Border Agency’s Casework Information Database (CID). CID is an administrative tool, used by the UK Border Agency to perform all casework tasks including recording all applications with the related casework and decisions. It is regularly updated by caseworkers as they progress applications. Caseworkers record key details about particular applicants on CID, including a “nationality” section. This electronic file is kept updated by caseworkers.

CID consists of four so-called “flavours” or parts that are mainly used to segregate user profiles, which are:

- 1) ACID: asylum cases recorded at Public Enquiry Offices (PEO)
- 2) ICID: immigration cases including visitors and spouses as well as asylum cases (only where the applicant claims asylum at the border);
- 3) NCID: nationality cases;<sup>54</sup>
- 4) GCID: general settlement cases: i.e. marriage, sponsorship, and indefinite leave to remain.

Given that some individuals relevant to the research were likely to have made multiple applications across different CID “flavours”, it was agreed that management data provided by the UK Border Agency would be recorded against individuals rather than applications in order to avoid duplication or double counting. Therefore where “cases” are referred to this includes the main applicant plus dependants. Consequently, where data is disaggregated by different CID “flavours” it should be noted that this refers to the first application made by an individual, and therefore would exclude subsequent applications made in different “flavours”. There remain several problems, however, with the accuracy of CID management information, as described below.

### Relevant categories in CID

CID records four “nationality”<sup>55</sup> groupings relevant to this project. In day-to-day use, caseworkers register applications on “nationality fields” from a drop down menu. The relevant “nationality” categories are identified as:

- 1) Nationality currently unknown;
- 2) Stateless person (Article 1 of 1954 Convention);
- 3) Officially stateless; and,
- 4) Unspecified nationality

Guidance exists on aspects of CID usage within instructions for UK Border Agency caseworkers, which are publicly available. The guidance given in respect of statelessness, however, is limited. It includes, for example, directions about how information on disputed nationality in asylum claims should be entered onto CID, including disputed stateless cases. The instructions state, in respect of disputed statelessness cases, that:

“An applicant’s nationality should only be recorded as Stateless on CID where the applicant has produced a Convention document which defines them as Stateless under

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<sup>54</sup> No clear guidance was available on the case files allocated to this flavour of CID.

<sup>55</sup> The UK Border Agency uses the term “nationality” when referring to stateless relevant categories, despite the contradiction this poses.

the 1951 or 1954 Convention. In all other cases, their claim to be Stateless should only be recorded in 'Person notes'. Should the applicant be considered to be Stateless following consideration of the claim, officers should amend CID to reflect this."<sup>56</sup>

However, in examining CID records as part of the qualitative research, no consistent pattern emerged in the way that CID was used. Indeed one response to a Freedom of Information Act request detailed that caseworkers used these categories based on the client's self-identification of being stateless and confirmed that "[t]here is no guidance on when each of the different stateless categories can or should be used".<sup>57</sup>

Similar issues were identified from a series of semi-structured interviews undertaken with UK Border Agency staff. The result is that any of the statistics derived from CID management information relating to stateless persons have to be treated with caution.

### **Relevant "nationality" groupings in the published statistics**

*The Control of Immigration: Statistics United Kingdom 2009* was published by the Home Office in August 2010, immediately before the data collection for this research began. It contained no distinct "nationality" grouping of "stateless". Rather, upon investigation,<sup>59</sup> it became clear that there was an existing category for "stateless" persons recorded as a subset of the published "other and not known" category.<sup>60</sup> While the data collection for this project was coming to an end, however, the Home Office published *Immigration Statistics: April to June 2011*, which contained in their supporting tables for the first time a nationality grouping of "stateless", as well as a separate "unknown or other" nationality grouping.<sup>61</sup> The precise composition of these categories is not set out in the publication, but from further discussions with the Migration Statistics team at the Home Office it has become clear that these included a wide combination of different categories, whose use fluctuates dependent on the variable being studied. Consequently, although the publication of a "stateless" nationality grouping within the statistics is an excellent step forward, more needs to be done to ensure that the grouping reflects the numbers of stateless persons coming into contact with immigration control accurately.

The "stateless" and "unknown or other" nationality groupings identified are partly made up of data from databases that are used by the UK Border Agency. The first database is CID detailed above. The second is the Central Record System, a web-based application that contains entry clearance data from diplomatic missions from overseas. Individual records on these systems include an attribution of a nationality category from a specified drop-down list.

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<sup>56</sup> UK Border Agency, *Asylum Process Guidance: Nationality Doubtful, Disputed or Other Cases*, paragraph 7.1, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/nationality-doubtful-disputed?view=Binary>.

<sup>57</sup> Detail provided in FOI request 18427 received 18th May 2011 in response to a question from the researchers about how the various existing "stateless" relevant categories are selected for use by case owners when entering information on CID.

<sup>58</sup> For an analysis, see Chapter 4.

<sup>59</sup> During discussions with the Home Office, Migration Statistics Team.

<sup>60</sup> On some occasions, the category "other and not known" includes "British Overseas Citizens" as an additional subset. This group has been separately disaggregated by UKBA and as it is not relevant here will be excluded from this analysis.

<sup>61</sup> See *Home Office Immigration Statistics: April to June 2011*, available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-q2-2011/>.

In addition, in respect of the details of passengers entering the UK, the information is derived from landing cards that the passenger completes and submits.

The “unknown or other” nationality grouping is described as “admissions with no identifiable nationality”. It includes six “nationality” categories derived from the databases:<sup>62</sup>

- 1) Those mis-recorded as British citizens;
- 2) Nationality currently unknown;
- 3) Unspecified nationality;
- 4) Nationality not recorded;
- 5) United Nations agency or United Nations organisation, and;
- 6) United Nations other

The “stateless” category is not given a description or a definition.<sup>63</sup> It includes seven categories:

- 1) Officially stateless;
- 2) Kuwaiti Bidoun;
- 3) Refugee – Other;
- 4) Refugee (Article 1 of the 1951 Convention);
- 5) Stateless person (Article 1 of the 1954 Convention);
- 6) Stateless,<sup>64</sup> and;
- 7) Northern Cyprus.<sup>65</sup>

These categories raise a number of issues. First, it appears that a number of them are clearly similar and would benefit from consolidation.

Secondly, the inclusion of some categories of people who are not stateless risks significant over-counting in respect of a number of datasets. In particular those identified as “Refugee – Article 1 of the 1951 Convention” within the grouping of “stateless” is highly problematic. Although some refugees may be stateless, many will not be.<sup>66</sup> The inclusion of this category therefore causes a conflation of the stateless and refugee populations which should be kept distinct.

Amongst certain data sets examined below this can result in an inaccurate inflation of those who are identified as stateless. It is important to note that these categories are still the ones used under “stateless” in the 2011 statistics (which contain supporting tables that go back as far as, in some cases, 2001). Consequently, this problem remains unresolved. Following discussions between the research team and officials in Migration Statistics Team at the Home Office, a way forward was identified to try to address this issue of categorisation within the published statistics as soon as possible, with UNHCR’s involvement.

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<sup>62</sup> Detailed in an email from Migration Statistics Team to the researchers dated 10 June 2011.

<sup>63</sup> When the researchers investigated this, no member of UKBA staff including case owners, statistics teams or policy staff could provide a definition or description being used.

<sup>64</sup> This is a historic category from the early 2000s that is no longer used but is present in data from earlier years.

<sup>65</sup> This category was removed for the 2011 published data.

<sup>66</sup> See for example the definition that UNHCR uses in its statistical publications, UNHCR, *UNHCR Global Trends 2010*, June 2011, p. 37, available at: <http://www.unhcr.org/refworld/docid/4e01b00e2.html>.

Finally, issues arise in respect of how a nationality category is allocated to an individual case file on CID. After investigation it appears that case owners and data analysts do not have a consistent approach to this issue.<sup>67</sup> This means that these categorisations may be used arbitrarily or inconsistently. This could result in a stateless person's application being assigned, in error, to a nationality associated with their country of former habitual residence. Such errors in categorisation could contribute to a significant undercount of the numbers of stateless persons in the published statistics.

The problems with the identification and categorisation of stateless persons indicate that caution has to be displayed in analysing the relevant data from the Home Office's published immigration control statistics. Despite these challenges, an analysis of the relevant published datasets was attempted to identify trends in the numbers and profiles of stateless persons identified.

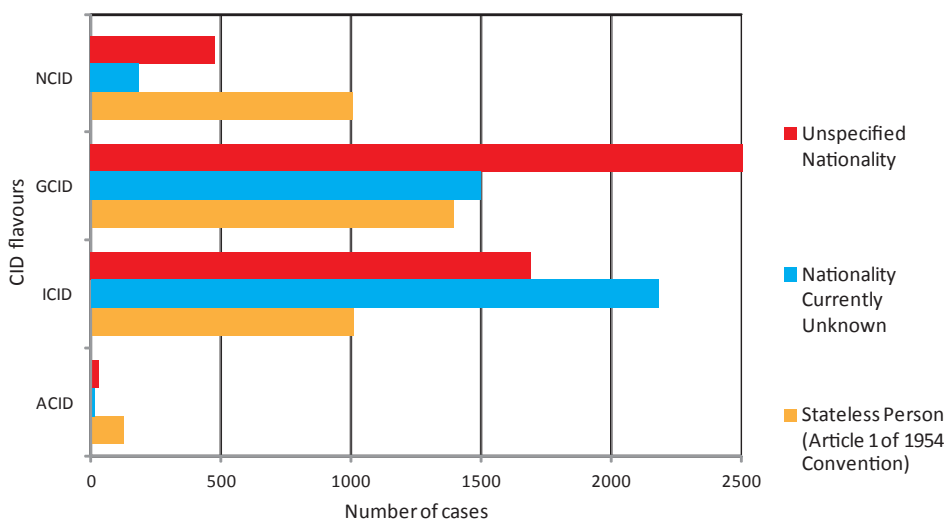
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<sup>67</sup> See section 4.6 in Chapter 4.

### 3.3 Total numbers of stateless persons coming into contact with immigration control

Given the weaknesses of the published datasets discussed above, the UK Border Agency’s management information was a source that was investigated in order to provide more indicative totals. However, as with the published datasets, problems with the identification and categorisation of stateless persons who come into contact with the UK Border Agency limits the reliability of this data. Similarly, the risk persists that not all stateless persons would have come into contact with the UK Border Agency or its predecessors. However, analysis of this data, combined with the published datasets, provides a more comprehensive basis upon which to try to estimate the total numbers of stateless persons coming into contact with immigration control. These are examined in turn below.

**Figure 1:** Case records on CID in relevant categories by flavour of CID (2001-2010)

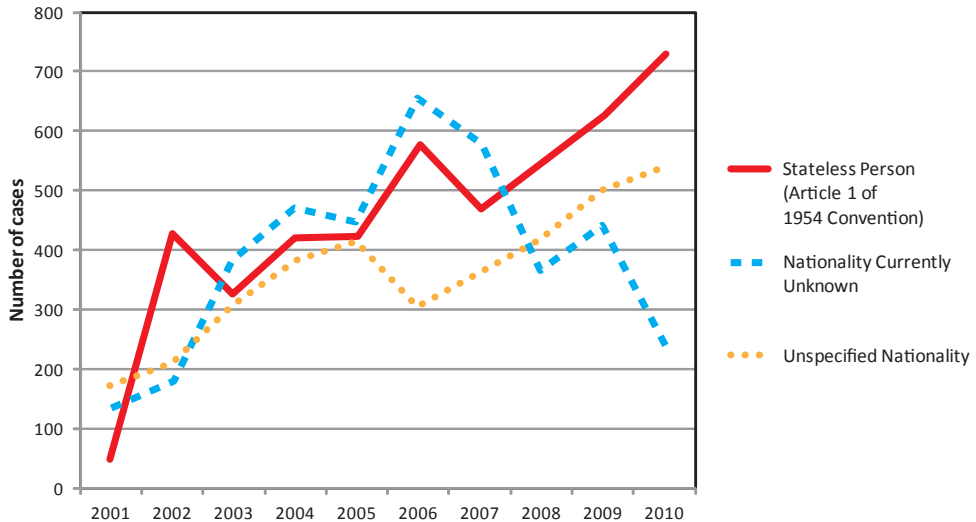


	ACID	ICID	GCID	NCID	TOTAL
Stateless Person (Article 1 of 1954 Convention)	123	1012	1393	1002	3,530
Nationality Currently Unknown	17	2181	1498	188	3,884
Officially stateless	0	48	17	1	66
Unspecified Nationality	31	1691	2505	477	4,704
Stateless	0	0	0	27	27
<b>TOTAL</b>	<b>171</b>	<b>4932</b>	<b>5413</b>	<b>1695</b>	<b>12,211</b>

Source: Management information request CPO11-1085 received 29 July 2011 from UKBA performance services. Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.

The data in Figure 1 relates to all cases captured on CID from 2001-2010 by “flavour”.<sup>68</sup> This demonstrates there were 3,694 case records on CID in the categories of “Stateless Article 1, 1954 Convention”, “Officially stateless” and “Stateless” categories. There were 8,518 case records falling into the “Nationality unknown” and “Unspecified nationality” groupings. The categories of “Stateless” and “Officially stateless” appear to be rarely used, and are therefore omitted from the graph. Figure 1 demonstrates that GCID is the most common CID “flavour” for where the population under study is represented, with ACID the least common.

**Figure 2:** Case records on CID by relevant nationality categories and by year (2001-2010)



Source: Management information request CPO11-1085 received 29 July 2011 from UKBA performance services team. Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.

**Figure 3:** Age distribution in relevant categories recorded on CID (2001-2010)

Age	Percentage of caseload
0-9	15%
10-18	11%
19-35	52%
Over 35	22%

Figure 2 indicates an increase over time in case files relating to the category “Stateless Person (Article 1 of the 1954 Convention)”. The male to female ratio in all categories of case files is 2:1, with 4,188 case files relating to females and to 7,695 relating to males. The age range within the total relevant caseload is found in Figure 3. However, the data on the overall numbers of stateless persons on the CID reveals that the numbers of persons being identified as stateless within the last 10 years is very low.

<sup>68</sup> See section 3.2 for an explanation of the CID “flavours”.

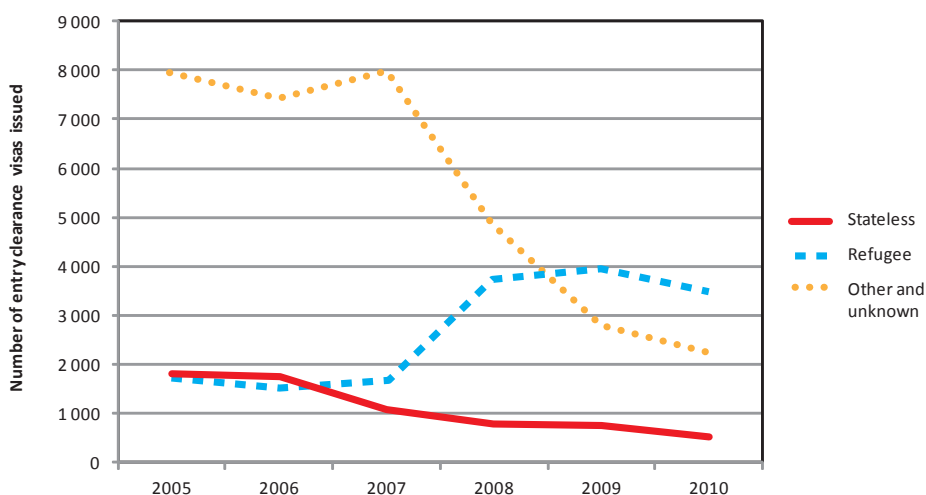
### 3.3.1 Visas and entry clearance

Visas or grants of entry clearance are issued outside the UK to those who are seeking to come to the UK, almost always within one of the categories specified within the Immigration Rules.<sup>69</sup> Applicants have to fulfil specified criteria depending on the category under which they seek entry. The groups that populate the published statistics referring to the “stateless” and “unspecified nationality” groupings make it impossible to draw any reliable conclusions. This is because “Refugees (Article 1, 1951 Convention)” and “Stateless - Defined Article 1 1954 Convention” are conflated to form one “stateless” category.

Upon request and for the purposes of this research, however, the Home Office’s Migration Statistics Team has provided disaggregated data on visas and grants of entry clearance issued outside the UK to stateless persons. The disaggregated data is separated into two groups, thereby identifying those who are “Stateless - Defined Article 1 1954 Convention” as a distinct group. This disaggregation is shown in Figure 4 below. It demonstrates that the number of “stateless persons” granted visas or entry clearance abroad to come to the UK is low, at no more than 2,000 per year. The number is also decreasing year on year. This data, however, must be viewed with the caveat that it includes duplications when one individual is granted more than one visa in the same year, so the numbers of stateless individuals granted visas or entry clearance is likely to be lower.

**Figure 4:** Entry Clearance and visas issued to persons to show disaggregation by “Stateless Person - 1954 Convention” and “Refugee - 1951 Convention” as well as “other and unknown” nationality, 2005 – 2010

UK Border Agency “nationality” category	2005	2006	2007	2008	2009	2010
Stateless Person (1954 Convention)	1,798	1,699	1,128	837	708	575
Refugee (1951 Convention)	1,759	1,548	1,702	3,697	3,998	3,521
Other and unknown	8,304	7,846	8,292	5,246	3,196	2,655



Source: Data obtained from the Home Office Migration Statistics (via email on 4 October 2011) as an unpublished subset of published immigration statistics derived from Before entry data tables, Immigration Statistics April - June 2011, 2005-2010.

<sup>69</sup> HC 395.

### 3.3.2 Passengers granted leave to enter on arrival in the UK

Statistics on passengers granted leave to enter the UK are determined by the immigration officer at border control where the information is derived from landing cards and is dependent on the passenger entering their nationality correctly and this being checked by the immigration officer. The classification of unknown nationality and stateless available for these immigration officers is: “Persons officially designated as stateless or of unknown nationality in a passport or other travel document”.<sup>70</sup>

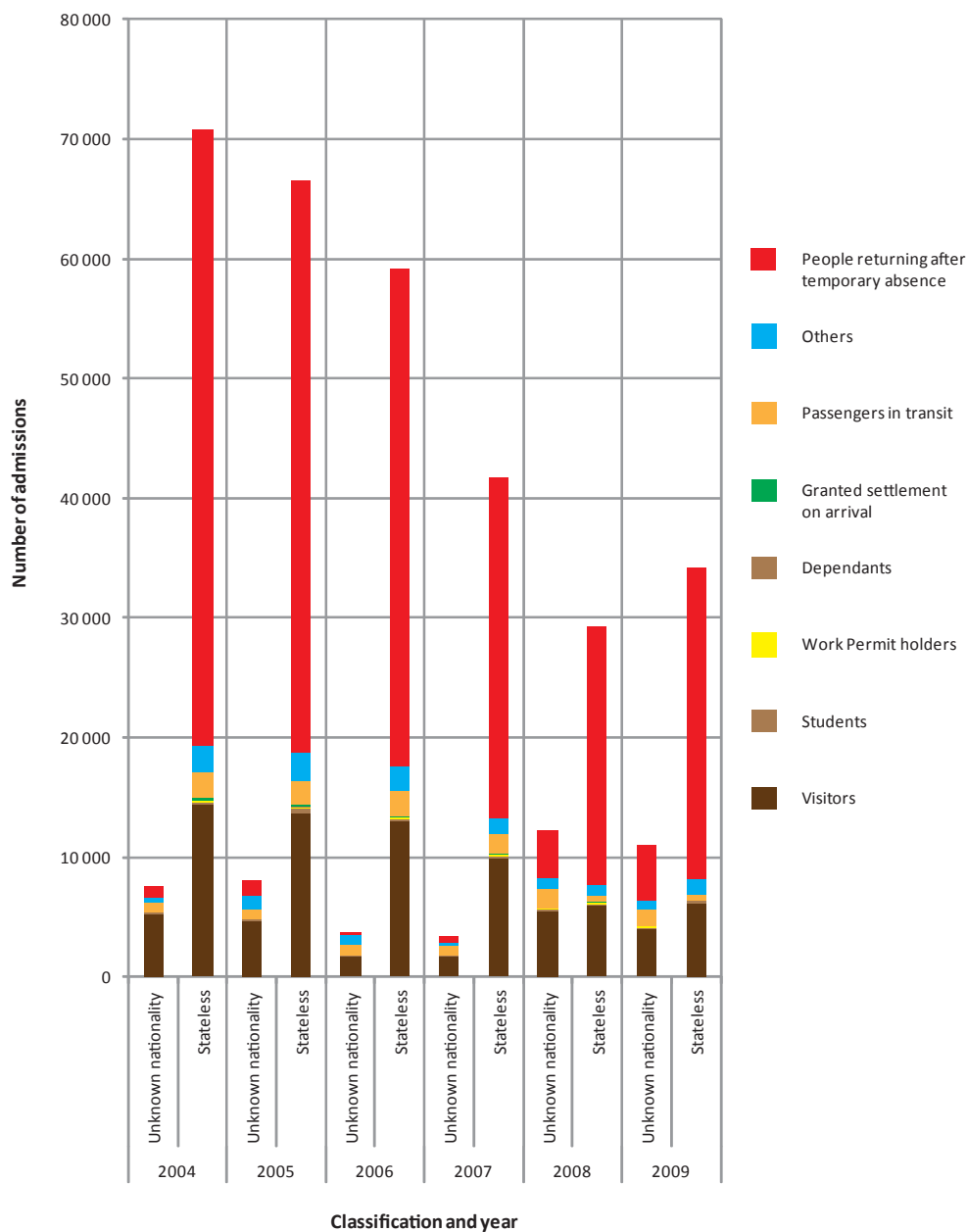
These leave to enter statistics for individuals of “unknown or other” nationality or who are “stateless” are available through the UK Border Agency’s published statistics (Figure 5). A consistent pattern emerges which shows the majority of journeys are made by passengers either returning after a temporary absence (72 per cent) or visiting the UK (25 per cent). These numbers appear high, particularly when compared to the other data sets investigated. This is for two main reasons. First of all, the data relates only to arrivals, and therefore an individual travelling into the UK more than once in a year will be counted more than once. At present the UK does not operate embarkation controls, and therefore the number of these people leaving the UK and/or never returning is not recorded and cannot be compared.

Secondly, the stateless category in this instance includes those individuals grouped as: “Stateless – Defined Article 1 1954 Convention”, “Stateless Refugee – Defined 1951 Convention”, “Stateless Refugee – Other”, and “Nationality Unknown Officially Designated as Stateless”. The published immigration statistics again includes recognised refugees in the “stateless” category, which has inflated the overall numbers significantly.

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<sup>70</sup> Detailed in an email received on 3 May 2007 from the Home Office Migration Statistics in response to a request for this information made by UNHCR. On file with the authors.

**Figure 5:** Passengers categorised as “stateless” and of “unknown or other” nationality granted leave to enter by purpose of journey



Source: *Published Immigration Statistics: April - June 2011, admissions data tables (2004-2010)*.

Upon request and for the purposes of this research, however, the Home Office’s Migration Statistics Team has provided disaggregated data on leave to enter granted to passengers presented within the “stateless” nationality grouping, which excludes the refugee categories and delineates those individuals recorded as “Stateless – Defined Article 1 1954 Convention” and “Nationality Unknown Officially Designated as Stateless”. As with the disaggregated data on grants of visas and entry clearance to persons in the “stateless” nationality grouping, this

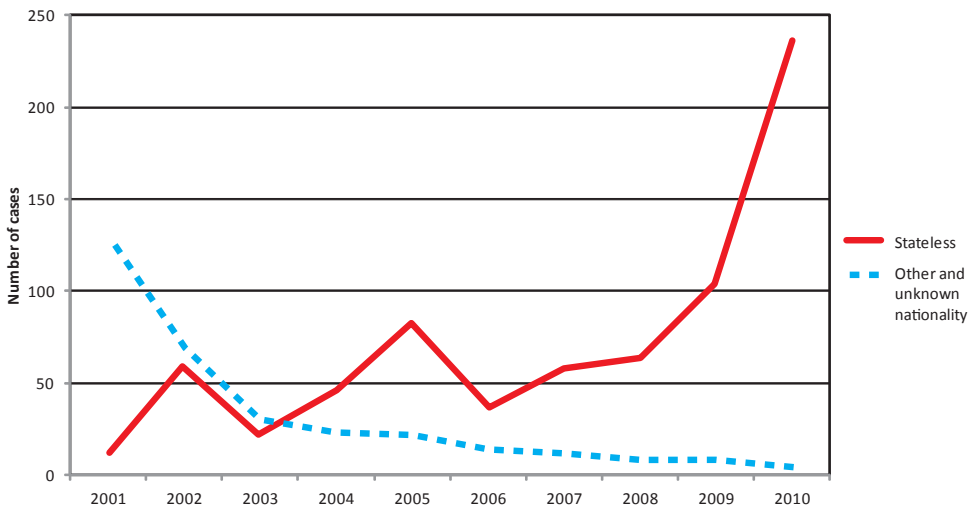
provides more detailed and reliable data by to estimate the number of stateless persons entering UK territory, although all numbers must still be treated with some caution. This disaggregation confirms that only 16 per cent of all admissions identified in Figure 5 within the current “stateless” nationality grouping in Home Office published statistics relate to stateless persons, and in fact 84 per cent of this grouping are therefore refugees.<sup>71</sup>

### 3.3.3 Asylum

#### Overall numbers

The number of applications for asylum received by the UK Border Agency and its predecessors between 2001 and 2010, and recorded in the published statistics for those who are categorised as either “stateless” or of “other or unknown” nationality is set out in Figure 6 below.

**Figure 6:** Applications for asylum (excluding dependants) 2001 - 2010



*Source: Published Immigration Statistics: April - June 2011, from asylum applications and initial decisions for main applicants, by country of nationality (2001-2010).*

This data merits particular scrutiny for a number of reasons. First of all, as is explained elsewhere in the report, almost all of those stateless or potentially stateless persons who expressed an interest in participating in the project had claimed asylum. Secondly, all potential participants who were referred to the research team were migrants. Thirdly, their experience and the analysis in Chapter 4 indicates that stateless persons who are currently without leave to remain on the UK territory no longer have a formal route to regularise their immigration status on the basis of their statelessness. Consequently, if a stateless person is undocumented on the UK territory and wishes to attempt to regularise his or her immigration status, then one of the only options that exists will be for him or her to claim asylum.<sup>72</sup>

<sup>71</sup> Data obtained from the UK Border Agency publications team (via email on 4 Oct 2011) as an unpublished subset of published immigration statistics derived from Admissions data tables Immigration Statistics April - June 2011 (2005-2010).

<sup>72</sup> See Chapter 4.

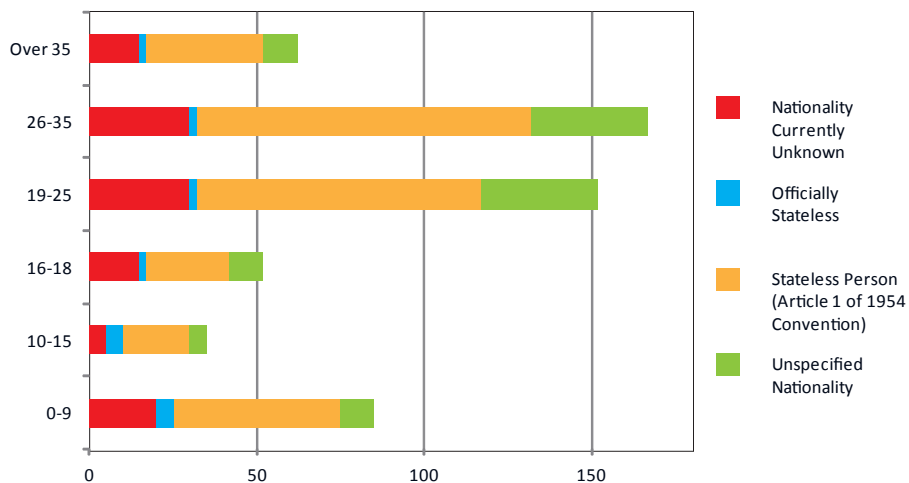
Therefore, the statistics in respect of asylum-seekers who are identified as “stateless” or “other or unknown” nationality may be particularly revealing in respect of the number of stateless persons on the UK territory. That said, the same issues about the reliability of the data arise as a result of problems in classification and categorisation. As a result, these figures should be treated with a degree of caution, although it is less likely that these statistics will contain a significant number of non-stateless persons recognised as refugees, compared to other data sets examined.

The published data for asylum applications made by stateless persons suggest numbers remain consistently low, rarely exceeding 200 per year. The data shows that the nationality “unknown or other” was more frequent from 2001-2003, whilst numbers in the “stateless” category tend to increase gradually from 2001, potentially largely replacing the use of nationality “unknown or other”. One explanation for this increase may be that “Kuwaiti Bidoun” was only established as a CID category in 2006. Consequently, Kuwaiti Bidouns who could previously have been categorised in the “other or unknown” category on CID may, from 2006, be categorised differently (see further discussion below). Separate investigation of CID data which excludes Kuwaiti Bidouns confirms this finding because it shows the numbers of asylum cases of stateless persons decreasing in the relevant period.<sup>73</sup>

### Profiles

The CID data also provides a disaggregation by age<sup>74</sup> and gender.<sup>75</sup> Any additional data relating to specific details of an asylum claim are only recorded in the “person notes” sections within the database or held solely on the case file. Consequently, the UK Border Agency was unable to provide details on country of origin.

**Figure 7:** Relevant asylum cases recorded by CID by age at date of application (2001-2010)



Source: FOI request 18427 received 18 May 2011 from UKBA performance services team. Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.

<sup>73</sup> Received by researchers as FOI 18427.

<sup>74</sup> Age relates to the applicant’s age at date of application.

<sup>75</sup> This is because these variables are captured in certain mandatory fields on CID.

The gender disaggregation showed that females comprised 29 per cent of the group and males 71 per cent. This is consistent with the national pattern of asylum applications, which are one third female. Age data from the same source demonstrated that 30 per cent of individuals in this group are under 18 years old, 59 per cent are between 18 and 35 years old and 11 per cent are over 35.<sup>76</sup> This broadly reflects national trends in the age of asylum-seekers. However, given that child asylum-seekers constituted only 8.5 per cent of the overall asylum seeking population in 2010,<sup>77</sup> it does indicate that a higher proportion of potentially stateless asylum-seekers are children. This suggests that there may be a proportionately higher number of stateless children on the UK territory, when compared to the overall asylum seeking population.

## Outcome of the asylum application

The grant and refusal rates for the asylum caseload within the published statistics are set out in Figures 8 and 9 below. The figures are based on initial decisions, so exclude withdrawn applications, appeals, and post-decision reviews. The grant rate for stateless persons was 47 per cent of which 97 per cent were grants of asylum.<sup>78</sup> For those of “unknown or other” nationality the grant rate was 22 per cent, of which 43 per cent of those applicants were granted asylum.

National trends for all asylum-seekers in 2010 indicated a refusal rate on all asylum applications of 75 per cent alongside a 25 per cent grant rate.<sup>79</sup> These national averages include post-decision reviews and are not, like the data presented in this section, based solely on initial decisions. It is nonetheless safe to conclude that that published statistics show that since 2001 the grant rates in asylum claims made by persons identified as “stateless” are higher than average. This trend is even stronger amongst those who are identified as being stateless (i.e. those categorised as “Officially stateless” or “Stateless Person - Article 1 1954 Convention”).

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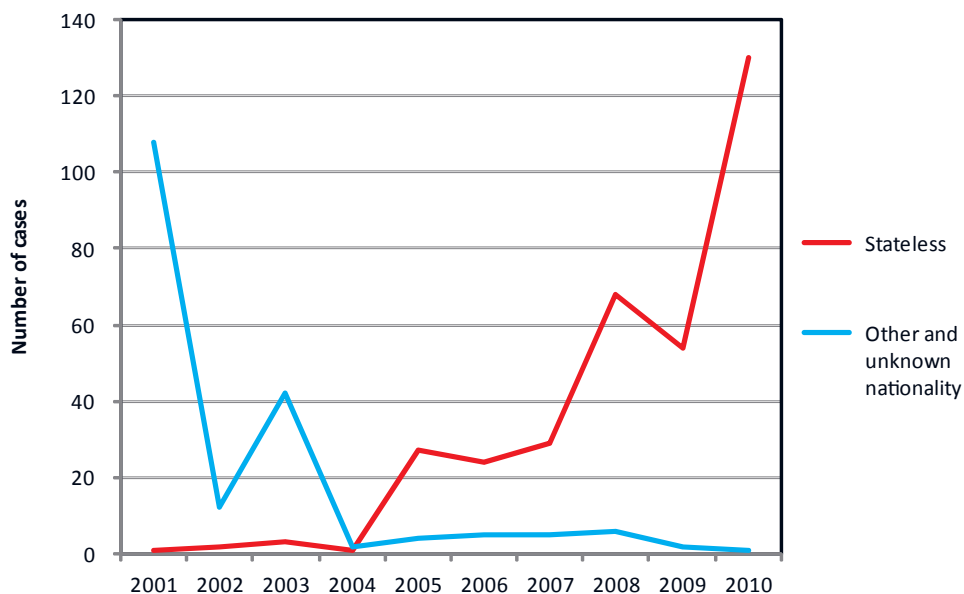
<sup>76</sup> It is interesting to note that an analysis of the British Refugee Council’s database which was also investigated by the researchers, which stores records kept on the Council’s clients entered by frontline caseworkers presents a similar picture on both age and gender. Here, between 2003 and 2010, 122 individual cases were recorded as ‘stateless’. These comprised 30% Women, 70% men, whilst the age categories appeared as follows: 0-19 (24%), 20-34 (57%), over 35 (19%).

<sup>77</sup> Asylum data tables Immigration Statistics April - June 2011, asylum applications by age shows 1,530 of 17,916 applications are from individuals under 18. Available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-tabs-q2-2011v2/asylum1-q2-11-tabs>.

<sup>78</sup> That is to say that they were recognised refugees within the meaning of Article 1A (2) of the 1951 Convention. Although the domestic legal provisions that provide for the grant of asylum have changed in the period under study, the current provision is found in paragraph 334 of the Immigration Rules HC 395.

<sup>79</sup> Home Office, *Control of Immigration: Statistics United Kingdom 2010*, Home Office Statistical Bulletin. Of initial decisions in 2010, 17 % were to grant asylum; 8 % were to grant Humanitarian Protection (HP) or Discretionary Leave (DL) and 75 % were refusals.

**Figure 8:** Grants of asylum and complementary protection (excluding dependants) 2001-2010



Source: *Published Immigration Statistics: April - June 2011, from Asylum applications and initial decisions for main applicants, by country of nationality (2001-2010).*

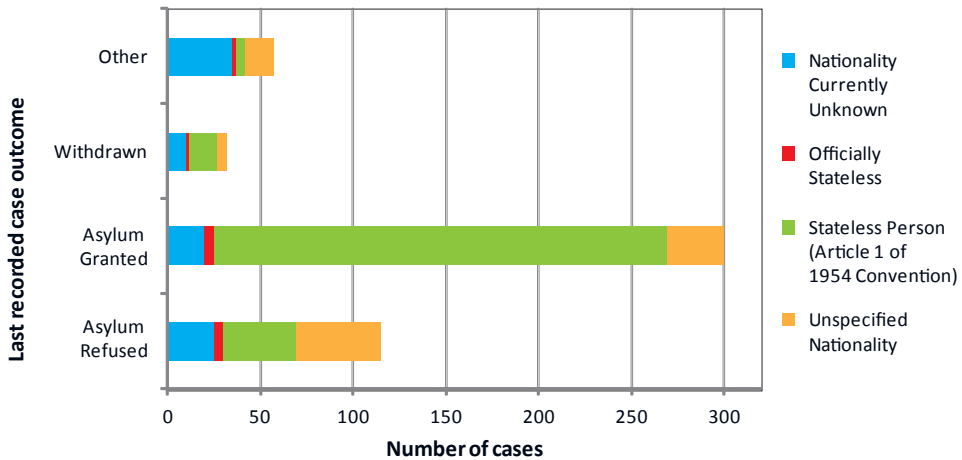
**Figure 9:** Grants and Refusal rates of asylum applicants 2001-2010

Nationality category (2001 – 2010)	Total initial decisions	Cases granted	Grant rate	Cases refused	Refusal rate
Stateless	725	339	47%	386	53%
Other or unknown	836	187	22%	649	78%

Source: *Published Immigration Statistics: April - June 2011, from Asylum applications and initial decisions for main applicants, by country of nationality (2001-2010).*

Figure 10 illustrates the last recorded case outcomes in respect of asylum applications by relevant “nationality” categories, noted on CID. It shows that 23 per cent of cases were refused, 56 per cent were granted refugee status or another form of leave to remain, 6 per cent of applications were withdrawn and 11 per cent fall into an “other” category (where either the applicant is deceased or has left the UK). This broadly confirms that the grant rate derived from the published statistics is around double the present average for all asylum-seekers, whilst the refusal rate is over three times lower. Those cases classified as “Stateless person Article 1 of 1954 Convention” account for 78 per cent of grants made within this group, whilst this particular category made up only 58 per cent of all cases detailed here, meaning those individuals in this category experienced the highest rate of grants.

**Figure 10:** Relevant asylum cases last known case outcome as recorded on CID (2001-2010)



Source: FOI request 18427 received 18 May 2011 from UKBA performance services team. *Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.*

When considering complementary forms of protection granted, it is important to note that on 1 April 2003 the basis upon which complementary protection was granted changed.<sup>80</sup> Until that date, 45 per cent of applicants identified as having an “unknown nationality” were granted Exceptional Leave to Remain (ELR). Subsequently, grants of Humanitarian Protection and Discretionary Leave only comprised 3 per cent and 12 per cent of the overall caseloads.

In conclusion, the data examined in this section indicates that the numbers of stateless persons who are currently recorded as claiming asylum in the UK are relatively small in number, but are recognised as being in need of international protection at a much higher rate than the national averages across all nationality groupings. This is likely to reflect the fact that stateless persons are often subject to discrimination and human rights violations in their country of origin. These two trends arise from both an analysis of the published data and from the UK Border Agency’s management information.<sup>81</sup>

### Kuwaiti Bidouns and Palestinians

Two additional CID “nationality” categories of relevance available to UK Border Agency caseowners and screening officers are “Kuwaiti Bidoun” and “Palestinian Authority”. These categories are likely to contain a proportion of persons that the UK Border Agency treats as stateless although many may be entitled to asylum or complementary protection. In the case

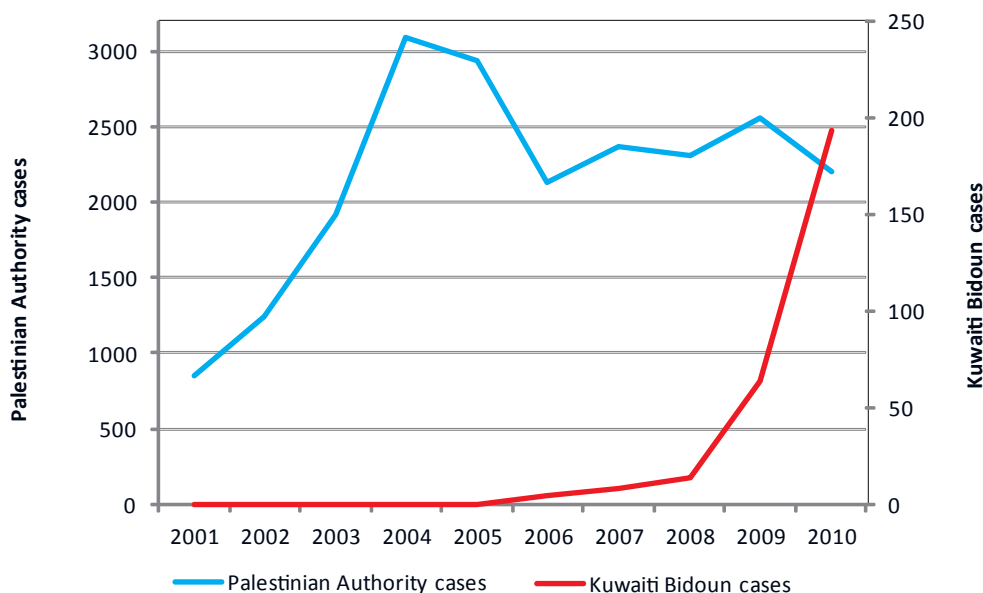
<sup>80</sup> See *APU Notice: Exceptional Leave, Humanitarian Protection and Discretionary Leave*, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apunotices/elhpanddl.pdf?view=Binary>.

<sup>81</sup> It is interesting to note that an analysis of the Refugee Council’s database, which stores records kept on the Council’s clients entered by frontline caseworkers, presents a similar picture. Between 2003 and 2010, 122 individual cases were recorded as ‘stateless’ (30% women, 70% men). This appears consistent with the pattern identified.

of the “Kuwaiti Bidoun”, those cases that are categorised in this way are presented as being stateless within the Home Office’s published statistics.

A request by the researchers was therefore submitted to the UK Border Agency to obtain the number of cases recorded under these categories over the last ten years. “Kuwaiti Bidoun” was only introduced as a new “nationality” category in 2006. Prior to this year, therefore, zero cases were recorded. This new category could explain the sudden increase in “stateless” asylum applicants identified in Figure 6 because such cases risk having been categorised as “Kuwaiti” previously, rather than as stateless. From 2006, however, the number of cases in this category have been steadily increasing, yet the number of cases in this category from 2006 onwards nonetheless seems lower than might be expected (see Figure 11), with only 284 cases over ten years across all flavours of CID. Moreover, qualitative data from interviews with participants and review of their immigration files indicate that there appears to be an issue of Bidouns being classified by the UK Border Agency as “Kuwaiti”,<sup>82</sup> which is a separate category available on CID. Cases classified in the “Palestinian Authority” category are much higher with a total of just over 21,000 cases identified across all flavours of CID. These cases increase substantially from just below 900 in 2001 to a peak of just over 3,000 in 2004. Case numbers then level out thereafter at an average of just above 2,300 per year (see Figure 11).

**Figure 11:** Cases recorded as “Kuwaiti Bidoun” and “Palestinian Authority” on CID by year (2001-2010)



Source: Management information request CPO-11-1350 received 13 September 2011 from UKBA performance services team.

In addition to these figures, the researchers also requested data that indicated the numbers of certain “nationality” categories amongst asylum claims that had been made since March 2007 but where the applicant has neither been granted leave to enter or remain in the UK, nor has left the UK. This figure is referred to as “Asylum Work in Progress” (WIP) (see Figure 12).

<sup>82</sup> For this reason, the numbers of WIP cases recorded under “Kuwait” were also requested. This figure was 208.

**Figure 12:** Relevant “nationality” categories within Asylum Work in Progress (August 2011)

Of the 37,827 cases in the August 2011 WIP <sup>83</sup> (Asylum Work In Progress cases) there were:
145 cases classified as “Kuwaiti Bidoun”
667 cases classified as “Palestinian Authority”
5 cases classified as “Stateless Person (Article 1 of 1954 Convention)”

*The figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.*

The figures relating to Work in Progress reveals that there are a significant number of potentially stateless persons who claim asylum. Given that these cases are still in the UK, and sometimes for extended periods of time after their appeal rights are exhausted, it may indicate that there is a proportion of this group who are unable to leave to the UK, even if their claims for asylum fail. The most likely reason they are unable to leave the UK is that no other State will admit them. They therefore appear to lack a solution that meets their protection needs.

### 3.3.4 Immigration cases

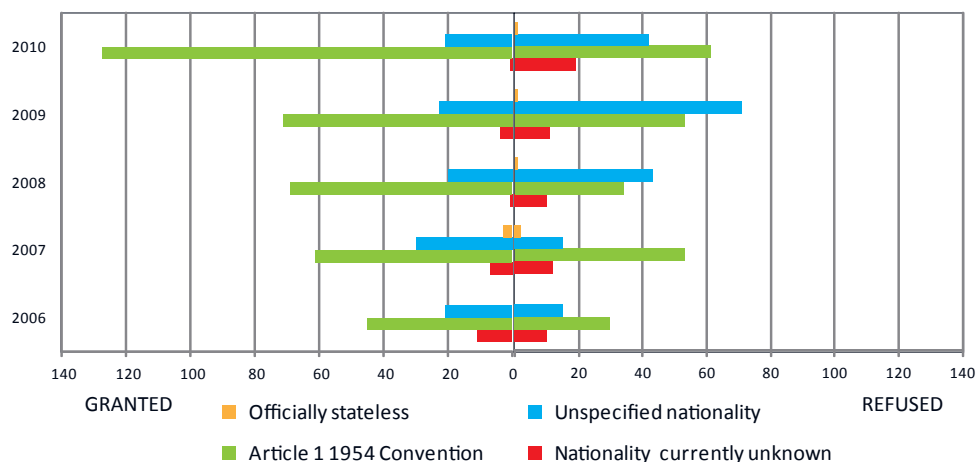
The UK Border Agency provided management data from CID on the numbers of case records in relevant nationality categories granted limited leave to remain.<sup>84</sup> The results are displayed in Figure 13.<sup>85</sup> They indicate that “Stateless – Article 1 1954 Convention” has the largest number of applicants in this category, with a peak of 127 grants of limited leave to enter on non-asylum grounds in 2010. Previous years demonstrate a grant rate for this category remaining below 70 grants of leave to remain per year. Over the period of five years examined, “Article 1 Stateless – 1954 Convention” and “Unspecified Nationality” contribute in most part to the number of refused applications at 231 and 186 cases in total respectively. The numbers of applications in these categories remain low at below 70 cases per year. The “Officially stateless” category remains an almost redundant category.

<sup>83</sup> Detailed in an email from the UK Border Agency asylum policy team on 19 September 2011.

<sup>84</sup> Limited leave to remain is the grant of immigration status in the UK for a fixed period.

<sup>85</sup> Researchers requested “the total number of ‘stateless’ persons or persons of ‘unknown or unspecified’ nationality for each year from 2006-2010 who were granted limited leave to remain by purpose of grant (e.g. visit, studies, employment, points based system, other – these categories were picked from the immigration rules as examples to include).” It was clearly highlighted that these figures should not include cases where the purpose of the journey is to claim asylum.

**Figure 13:** CID case records of decisions to grant or refuse limited leave to remain in relevant nationality categories (2006-2010).



Source: Management information request CPO-11-1088 received 16 August 2011 from UKBA performance services team. Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.

Figure 14 sets out the data in respect of grants or refusals of indefinite leave to remain.<sup>86</sup> The numbers are significantly lower than those granted limited leave to remain. Indeed they are over three times lower than the numbers of decisions on applications for limited leave to remain. The majority of these cases arise from the nationality categories “Stateless – Article 1 1954 Convention” (113 cases) and “Unspecified Nationality” (115 cases) over the five-year period. Almost double the number of cases in the “Stateless – Article 1 1954 Convention” and “Unspecified nationality” categories are granted than refused, with a particularly significant increase of this pattern in 2010 with a grant to refusal ratio of 4:1. The “Officially stateless” category again remains almost redundant.

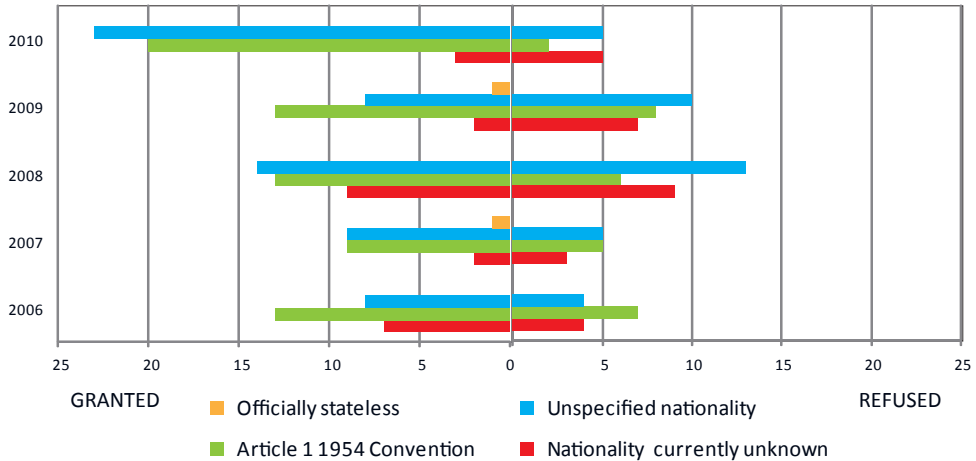
Analysing this data is difficult because of missing information. For example, neither the basis upon which the application was made or granted is provided nor whether the applicant had pre-existing leave to enter or remain at the time of the application. One possible explanation for the increase in the number of grants of leave to remain to stateless persons over the period under scrutiny could be the operation of the Case Resolution Directorate. It aimed to resolve the backlog of cases of asylum claims that had been made before March 2007 by July 2011 and is likely to have granted leave to enter or remain a significant number of stateless persons against whom it was not possible to enforce removal.<sup>87</sup> Indeed this analysis is also supported by the increase in the number of travel documents issued under the 1954 Convention during the same period.<sup>88</sup>

<sup>86</sup> *Ibid.*, except relating to “indefinite leave to remain”.

<sup>87</sup> Resolved in this context means either where leave to enter or remain has been granted or where it is established that the applicant has been removed.

<sup>88</sup> See Figure 18.

**Figure 14:** CID case records of decisions to grant or refuse indefinite leave to remain in relevant nationality categories (2006-2010).



*Source: Management information request CPO-11-1088 received 16 August 2011 from UKBA performance services team. Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.*

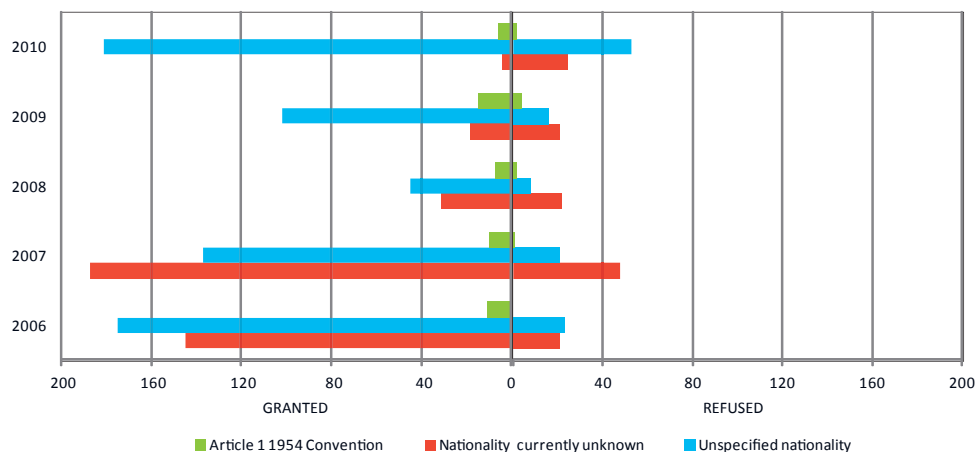
Data relating to applications by relevant nationality categories for a residence permit on the basis of their right in EU law to free movement were also examined in Figure 15. These cases would include family members, unmarried partners or spouses of nationals of the European Economic Area (EEA) and include individuals with permanent resident cards exercising rights under the EU Citizen’s Directive.<sup>89</sup>

The data demonstrates that many more EEA applications in nationality categories relevant to this research are granted than refused, with an overall grant rate average of 65 per cent across all five years. The majority of cases, however, are derived from the categories “Nationality currently unknown” and “Unspecified nationality”, with only 4 per cent of the caseload being derived from the “Stateless Article 1, 1954 Convention” category. “Nationality currently unknown” cases are much higher in 2006 and 2007 than in the later years, whereas “Unspecified nationality” cases then comprise the majority of grants from 2008 onwards.

This data appears to show that there are a small number of stateless persons who obtain the legal right to remain in the UK as a result of being a family member of an EEA national exercising treaty rights in the UK. In most cases it is likely that the nature of the family relationship will be that of a spouse, civil partner or long-term partner.

<sup>89</sup> Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, transposed by the Immigration (European Economic Area) Regulations S.I. 2006/1003.

**Figure 15:** CID case records of decisions to grant or refuse applications under European Economic Area Regulations by relevant nationality groupings (2006 – 2010)



Source: Management information request CPO-11-1083 received 16 August 2011 from UKBA performance services team. Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.

In conclusion, the UK Border Agency’s management information indicates that annually there are up to approximately 200 hundred grants of leave to remain, indefinite leave to remain or the issuing of a residence card evidencing a right to free movement in EU law to persons attributed the “Stateless – Article 1, 1954 Convention” nationality category on CID. This indicates that there are stateless persons who are undocumented on the UK territory and are able to regularise their immigration status, or that there are some stateless persons who have always had leave to enter or remain and presumably arrive with a visa or prior entry clearance or that it is a combination of both circumstances. The researchers only received the referral of one participant who was stateless and had travelled to the UK with prior entry clearance,<sup>90</sup> but that could be explained by the fact that this group’s situation is regular, they do not face the same human rights challenges as those without leave to remain and they do not present a particular challenge to immigration control.

The data in respect of entry clearance and grants of leave to enter indicate that there is a population identified as stateless who are arriving in a regular manner. Nonetheless, taking the quantitative and qualitative data together it appears likely that there is a small population of undocumented stateless persons who have been able to regularise their immigration status, usually after an asylum claim fails. The basis upon which they have regularised their immigration status, however, is not directly related to their statelessness. This appears to be consistent with the published statistics in respect of asylum applications, but is inconsistent with the analysis of the data relating to entry clearance and visa applications and the passengers travelling to the UK. The inconsistencies can, however, be explained by the fact that refugees appear in the entry clearance and leave to enter statistics as stateless persons. When the statistics were disaggregated this showed that only 16% of all passengers given leave to enter or remain were in fact “stateless”.

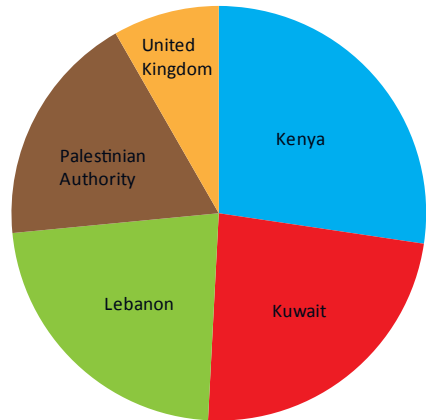
<sup>90</sup> Participant 1.

### 3.3.5 Stateless Person's Travel Documents issued under the 1954 Convention

The obligation under the 1954 Convention, Article 28 to provide travel documents to stateless persons lawfully staying in the territory is discussed in Chapter 4. Management data provided by the UK Border Agency indicates that 531 stateless persons travel documents were issued between 2002 and 2010. The five countries of birth most highly represented in this sample are detailed below in Figure 16 and together constitute 68.2% of Stateless Person Travel Documents issued within the period. The remaining countries each comprise less than 2% of the total sample and are not included within this figure.

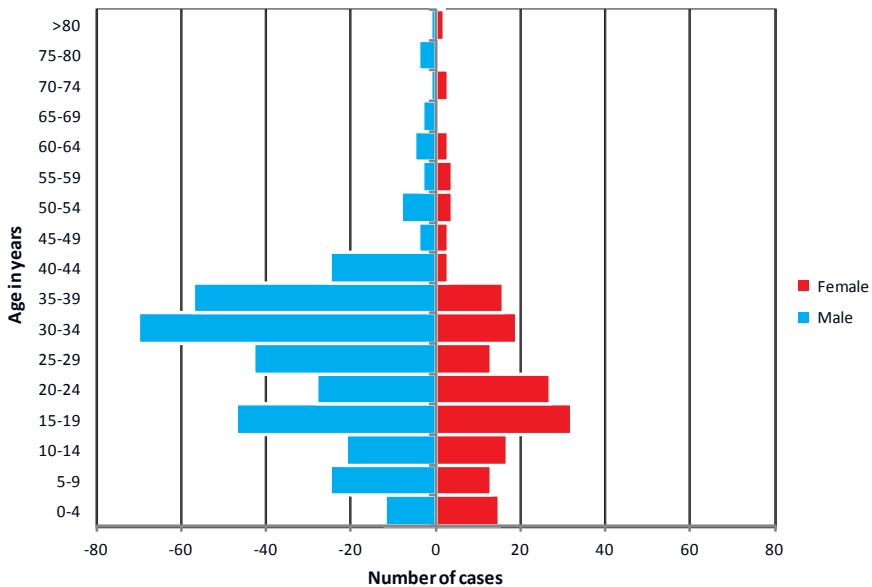
**Figure 16:** Top five countries of birth of persons issued with Stateless Persons Travel Documents (2002-2010)

*Source: UKBA Travel Documents team, received 18 April 2011. Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.*



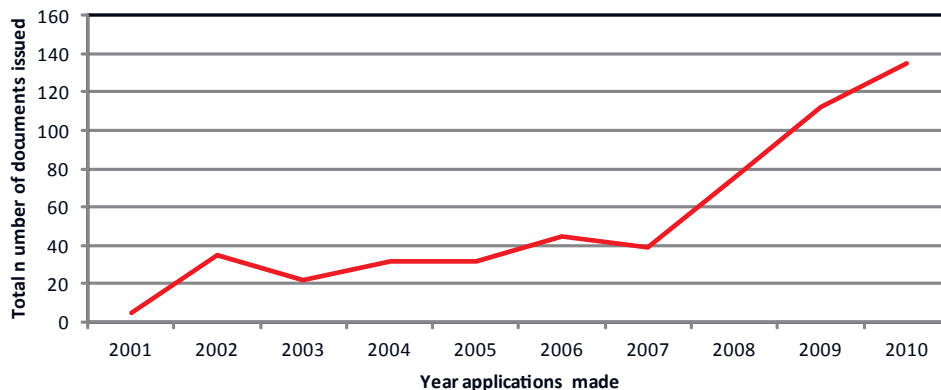
The data set out in Figure 17 below give the applicants' ages at application, and their gender. Females constitute 33% of the total granted 1954 Convention Travel Document whereas males constitute 67% of the total, reflecting a similar proportion to the national trend in respect of asylum-seekers. The age range represented is broader than previous data examined, but still indicates a young population with 91% of all cases aged under 45 years old.

**Figure 17:** Gender and age of individuals issued with 1954 Convention Travel Documents (2002-2010)



*Source: UKBA Travel Documents team, received 18 April 2011. Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.*

**Figure 18:** Total number of 1954 Convention Travel Documents issued by the UK Border Agency 2001-2010



Source: UKBA Travel Documents team, received 18 April 2011. Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.

Figure 18 above indicates that the numbers of 1954 Convention Travel Documents issued has been increasing consistently year on year and most particularly in the last few years. It has risen from five such documents issued in 2001, to 135 documents issued in 2010. It is likely that this trend reflects an increase in the number of stateless persons granted leave to enter or remain, for periods of over six months, who do not have travel documents reflecting the requirements contained in guidance.<sup>91</sup> The trend is likely to be as a result of the work of the Case Resolution Directorate, which has granted leave to enter or remain to significant numbers of asylum-seekers who claimed asylum before March 2007, but had not departed from the UK even though the vast majority had had their claims for asylum refused.

This supports the hypothesis that there are a number of asylum-seekers who claim asylum, whose claim fails, but who are unable to leave the UK because no other state will admit them. A further contributing factor to the increase in grants may be that, since 2006, children have been required to make separate applications for travel documents rather than as dependants of their parents.<sup>92</sup>

When considering all 531 cases, 27 are children under five years of age. Figure 20 below indicates that the UK is the country of birth for 74% of these children. This may indicate that a number of stateless children are able to regularise their immigration status and, subsequently, apply for a stateless travel document. They may be unable to apply for British citizenship under specific stateless provisions because they have not been resident for five years.<sup>93</sup> However, an application for discretionary registration could be open to them.<sup>94</sup> The fact that these children are not applying for British citizenship may reflect significantly higher fees

<sup>91</sup> See TD112 Guidance Notes Version 04/2011, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/traveldocuments/td112-guidance.pdf>.

<sup>92</sup> Anecdotal information from a semi-structured interview with the Travel Documents Team at UK Border Agency (9 Aug. 2011).

<sup>93</sup> In particular, British Nationality Act 1981, Schedule 2, paragraphs 3 and 6.

<sup>94</sup> *Ibid.*, section 3(1).

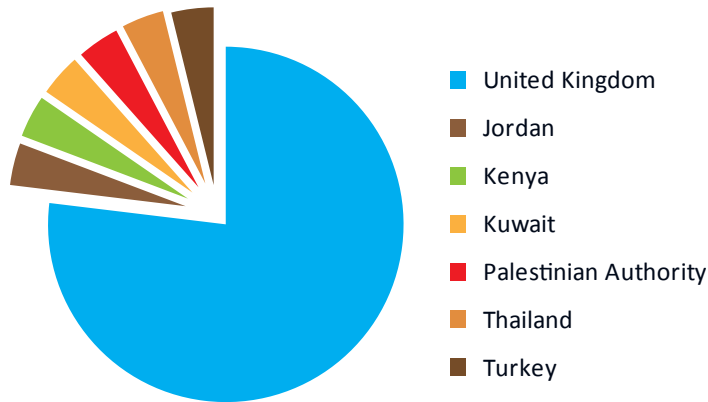
charged for citizenship application than the fees charged on applications for 1954 Convention Travel Documents.<sup>95</sup>

**Figure 19:** Top 5 countries of birth represented in all 1954 Convention Travel Documents issued, 2002-10

Country	Count	Percentage of total
Kenya	99	18.6%
Kuwait	85	16.0%
Lebanon	82	15.4%
Palestinian Authority	66	12.4%
United Kingdom	30	5.6%

Source: UKBA Travel Documents team, received 18 April 2011. Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.

**Figure 20:** Countries of birth represented in stateless persons travel documents issued to individuals under five years old (2002-2010)



Source: UKBA Travel Documents team, received 18 April 2011. Please note the figures quoted are not provided under National Statistics protocols and have been derived from local management information and are therefore provisional and subject to change.

<sup>95</sup> See Chapter 6.

## 3.4 Published statistics: enforcement and compliance

### Detention

As discussed later in this report, the research indicates that stateless persons who are undocumented, do not have the opportunity to regularise their stay on the basis of their statelessness and, consequently, are particularly vulnerable to arbitrary detention and, further, that there are gaps in the legal regime which could protect stateless persons in the UK from arbitrary detention.<sup>96</sup> Data in respect of immigration detention of stateless persons is therefore particularly important as a mechanism for monitoring this area of concern. The only relevant data available covers 2009 and 2010 and is not very detailed.

There is also here a problem in respect of categorisation. The categories included within the definition of stateless person in these figures are: “Stateless Person (Article 1 of 1954 Convention)”; “Refugee – Article 1 of the 1951 Convention”; “Refugee other”; and “Kuwaiti Bidoun”. The data provided therefore conflates stateless persons with refugees. However, the inclusion of a specific group, “Kuwaiti Bidoun”, who are often recognised as stateless<sup>97</sup> is beneficial. Nonetheless, categorisation issues limit how much the figures can be relied upon.

There are also shortcomings in the data itself which makes it difficult to draw meaningful conclusions. For example, detainees may be recorded more than once if the person has been detained on more than one separate occasion, and the figures also include dependants. Furthermore, the data omits crucial information about the length of time an individual has been detained, and whether that detention is pending removal (as is likely to be the case) or justified upon other grounds. In addition, the data does not tell us the circumstances of the release from detention.

**Figure 21:** People entering detention by country of nationality, sex, place of initial detention and age

		Total detainees	Male detainees	Female detainees	Total adult detainees	Total child detainees	Adult asylum detainees
2009	<b>Stateless</b>	58	52	6	58	0	37
	<b>Other or unknown</b>	33	27	6	30	3	2
2010	<b>Stateless</b>	53	47	6	52	1	34
	<b>Other or unknown</b>	24	17	7	24	0	3

Source: *Published Immigration Statistics: April – June 2011, Table 3 of detention statistics.*

<sup>96</sup> See Chapter 5, section 5.5.

<sup>97</sup> See Open Society Justice Initiative, *De Jure statelessness in the Real World: Applying the Prato Summary Conclusions*, Bingham, L., Harrington-Ready, J and Kohn, S., 2011, available at: [http://www.soros.org/initiatives/justice/articles\\_publications/publications/prato-20110302/prato-statelessness-20110303.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/prato-20110302/prato-statelessness-20110303.pdf) p. 21.

The limited conclusions that can be drawn from this data are, first, that stateless persons are detained under Immigration Act powers in the UK. This is supported by the participants' testimony.<sup>98</sup> Secondly, the majority of "stateless" persons detained appear to have claimed asylum. Thirdly, although the data indicating that stateless children appear to have been detained is particularly concerning, this issue may be addressed by changes in government policy in respect of the detention of children.<sup>99</sup>

## Removals and voluntary departures

The researchers examined published data on removals and departures from the UK of those categorized as either "stateless" or of "other or unknown" nationality dating back to 2004. This data included: persons subject to enforced removals (including removals of asylum-seekers to third countries under the provisions of the Dublin Regulation),<sup>100</sup> persons departing voluntarily after notifying the UK Border Agency of their intention to leave prior to their departure, persons leaving under an Assisted Voluntary Return Programme<sup>101</sup> and persons who it has been established left the UK without informing the immigration authorities. On an initial overview of the data, higher numbers of removals exist of persons categorized as either "stateless" or of "other or unknown nationality" than might be expected with a total of 3,577 removals and departures over a seven year period. One would expect the numbers of removals of stateless persons to be small because stateless persons are often unable to depart from the UK because no other state will admit them to their territory. However, there is a significant risk that the numbers in the published data may be inflated because again, the categories that comprise the "stateless" nationality category in this dataset include refugees with the categories.<sup>102</sup> The figures also include dependants.

Upon request and for the purposes of this research, however, the Home Office's Migration Statistics Team has provided disaggregated data so as to exclude the refugee categories and in doing so better identify just those individuals categorised as "Stateless - Defined Article 1 1954 Convention", "Nationality Unknown Officially Designated as Stateless", "Kuwaiti Bidoun" and "Officially stateless", referred to below as a collective "Stateless Persons" grouping. The data shows that only 17% of cases in the original "stateless" category within UK Border Agency published statistics relate to the non-refugee stateless population (i.e. 602 cases of 3,577). The vast majority of removals have involved those categorised as refugees, presumably individuals travelling on Refugee Convention Travel Documents.

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<sup>98</sup> See Chapter 5.

<sup>99</sup> For details of the Government's current policy position on the detention of children and families see UK Border Agency, "Enforcement Instructions and Guidance", Chapters 45 and 55, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectione/chapter45?view=Binary> and <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55.pdf?view=Binary>.

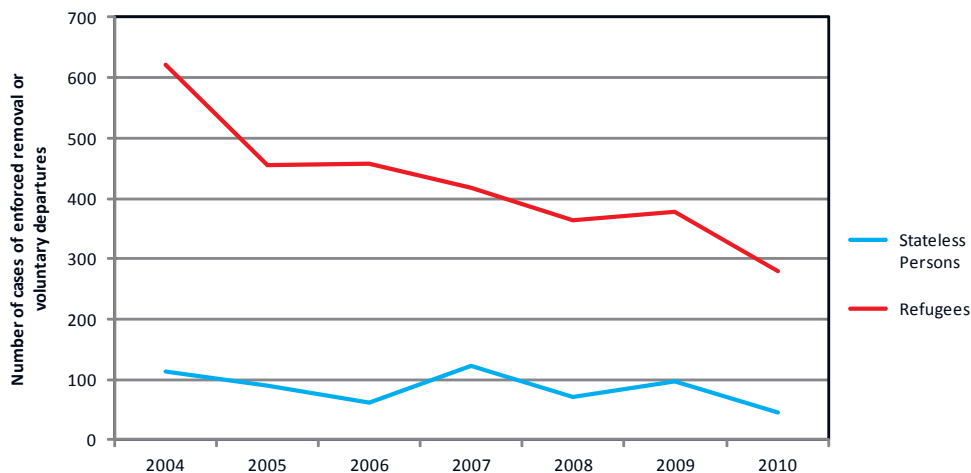
<sup>100</sup> Council Regulation (EC) No 343/2003, of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

<sup>101</sup> See UKBA: *Voluntary Returns*, available at: <http://www.ukba.homeoffice.gov.uk/asylum/outcomes/unsuccessfulapplications/voluntaryreturn/>.

<sup>102</sup> The CID "nationality categories" included are "Nationality Unknown Officially Designated as Stateless", "Stateless – Defined 1954 Convention", "Refugee – Defined 1951 Convention", "Stateless Refugee – Other", "Officially stateless" and "Kuwaiti Bidoun".

**Figure 22:** Removals and voluntary departures from the UK disaggregated to separate refugees from overall totals (2004-2010)

	2004	2005	2006	2007	2008	2009	2010	Total
<b>Stateless Persons</b>	113	90	63	122	72	96	46	602
<b>Refugees</b>	621	456	458	418	364	379	279	2,975



Source: Data obtained from the UK Border Agency publications team (via email on 4 October 2011) as an unpublished subset of published Immigration Statistics derived from ‘Removals and voluntary departures data tables Immigration Statistics April - June 2011’.

Figure 23 below shows that 95% of cases (a count of 571) identified as non-refugee “stateless” persons are in fact non-asylum cases with 93% (a count of 530) of these cases being refused entry at port and subsequently removed. The asylum cases comprise only 31 cases. This demonstrates that there are very low numbers of removals of stateless persons who claim asylum, supporting the hypothesis that there is a population of stateless persons who claim asylum but who cannot be removed, even if their claims fail. It is reasonable to infer that they are not removed because they do not have the right of entry or residence in another State.

**Figure 23:** Removals and voluntary departures of “stateless persons” by type of case (2004-2010)

Total removals and voluntary departures of “stateless” persons excluding refugees	602
Total asylum cases	31
Asylum cases: Enforced removals and notified voluntary departures	26
Asylum cases: Assisted Voluntary Returns	5
Total non-asylum cases	571
Non-asylum cases: Enforced removals and notified voluntary departures	41
Non-asylum cases: Refused entry at port and subsequently removed	530

Source: Data obtained from the UK Border Agency publications team (via email on 4 October 2011) as an unpublished subset of published Immigration Statistics derived from “Removals and voluntary departures data tables Immigration Statistics April - June 2011”.

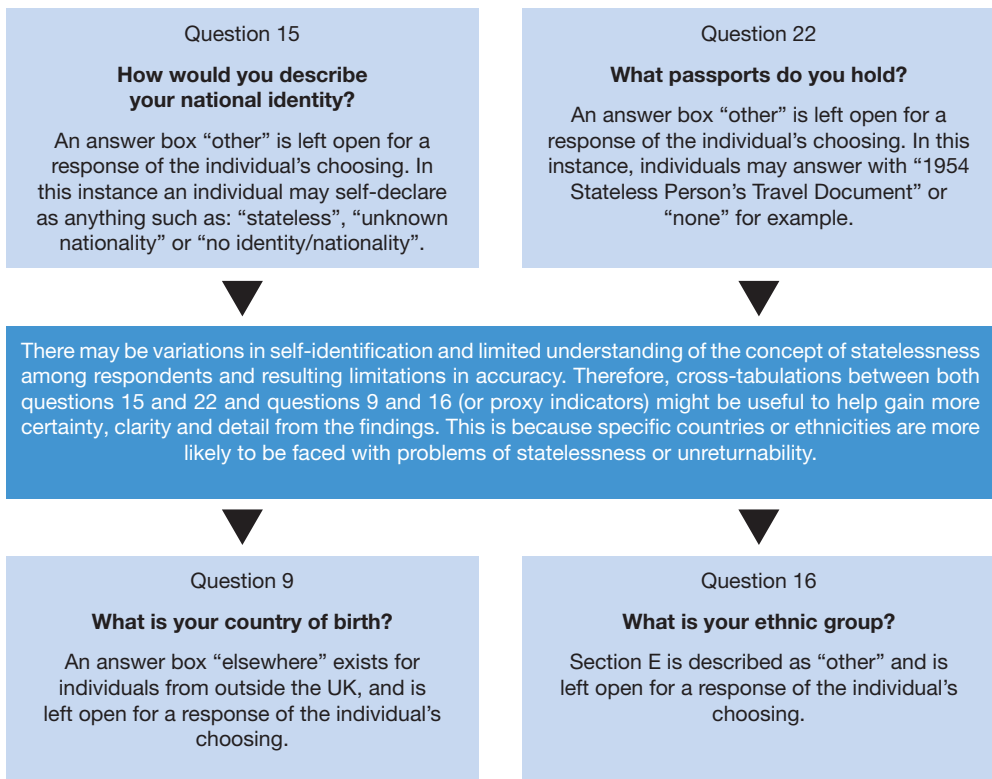
## 3.5 Data sets discounted or given minimal weight

This section will examine a number of potentially significant datasets. These were either discounted or given little or no weight because little reliance could be placed upon them.

### 3.5.1 Census data

The census, undertaken by the UK Office of National Statistics (ONS), is the most comprehensive source of data on the UK population. A census took place during the research for the project in 2011, but the data will not be available until September 2012 and so could not be analysed. The data from the previous census in 2001 would have been out of date and did not ask questions required for an analysis.<sup>103</sup> Whilst the 2011 Census does not contain a question that specifically relates to statelessness<sup>104</sup> the data resulting from the answers to four questions in the census will merit analysis.<sup>105</sup> A possible method for analysing this data to help identify the number and profile of stateless persons in the UK is set out in Figure 22.<sup>106</sup>

**Figure 24:** A Method for analysing 2011 Census Data



<sup>103</sup> The 2001 Census asked participants for their country of birth and ethnic grouping, but did not ask about what passport they hold. This would have made it hard to identify a stateless population. In addition, this census data is out of date, particularly as migration has caused a significant demographic change in the UK in the last decade.

### 3.5.2 Eurostat

Eurostat is the statistical office of the European Union. Its task is to provide the EU with statistics at EU level that enable comparisons between countries and regions. Eurostat’s sources for the UK include survey data in the form of the Labour Force Survey (LFS) and the International Passenger Survey (IPS) which are both undertaken by the ONS. Recorded numbers of stateless persons in the UK from 2001 to 2008 by Eurostat are set out in Figure 23 below.

**Figure 25:** Stateless populations in the UK by year as derived from UK survey data

Year	2001	2002	2003	2004	2005	2006	2007	2008	Source
Total population	7850	:	1174	915	:	:	:	:	LFS weighted estimates
Immigration	551	87	242	331	325	:	:	:	IPS with LFS used to weight for regional variation
Emigration	0	0	411	204	0	0	176	:	IPS with LFS used to weight for regional variation

SOURCE: Eurostat  
(:) – data not available

There are, however, problems created by the process Eurostat uses for weighting the data<sup>107</sup> from both the Labour Force Survey and the International Passenger Survey meaning data is often recorded as “unavailable”. In addition, there are also problems in the identification

<sup>104</sup> United Nations statisticians recommend, in international discussion on censuses, that “provisions should be made in order to obtain separate data for stateless persons”. See UN Economic Commission for Europe, *Conference of European Statisticians Recommendations for the 2010 Censuses of Populations and Housing: point 377*, 2006, available at: [http://www.bfs.admin.ch/bfs/portal/de/index/news/02/02\\_parsys.43257.downloadList.37177.DownloadFile.tmp/recommendationsforcensusen.pdf](http://www.bfs.admin.ch/bfs/portal/de/index/news/02/02_parsys.43257.downloadList.37177.DownloadFile.tmp/recommendationsforcensusen.pdf).

<sup>105</sup> 2011 Census Questionnaire Content: <http://www.ons.gov.uk/ons/guide-method/census/2011/the-2011-census/2011-census-questionnaire-content/question-and-content-recommendations-for-2011/index.html>. Question numbers detailed here refer to the census as carried out in England.

<sup>106</sup> This analysis will have to note that census data tends to under-enumerate particular groups, such as those in temporary accommodation, those who are not literate in English, and vulnerable groups such as undocumented migrants who may wish to remain hidden. Consequently, the analysis of the census data would therefore still have to be considered in the context of other data sources.

<sup>107</sup> In order for Eurostat to convert the information it gains from survey samples, and produce estimates which are generalised across the whole population, the data must be weighted. Each case is given a weight that can be thought of as the number of people that case represents nationally. People with a lower probability of being in the sample are given a higher weight. For example, in 2004, only six individuals were recorded in the Labour Force Survey as being stateless. This figure was weighted up by Eurostat to produce a figure of 915. However, if the numbers of cases recorded in any one year are too small, a weighting procedure is deemed inappropriate and Eurostat publishes a count of zero or “not available”. As the numbers of stateless people recorded are relatively low in general, this process of weighting produces numbers that fluctuate greatly, because one additional case alone can increase the weighted figure substantially.

and categorisation of statelessness in the Labour Force Survey<sup>108</sup> and for the International Passenger Survey.<sup>109</sup> In combination, these difficulties lead to misleading and inconsistent results which create an inaccurate impression of the numbers of stateless persons in the UK, meaning it is not possible to rely upon the published Eurostat figures for an accurate analysis.

### 3.5.3 Indirect data sets

A number of requests for data were submitted to the UK Border Agency under a data sharing agreement. The purpose of the request was to try to provide indirect data on stateless and “unreturnable” persons. These requests included the numbers of persons who were refused re-entry to their country of destination when being removed from the UK; the numbers of certain profiles of refused asylum-seekers receiving support under the Immigration Act 1999, section 4; the numbers of requests for emergency travel documents and delays in issuing such documents; the final outcome in respect of asylum applications disaggregated by relevant characteristics; and details on the numbers and profiles of unresolved asylum applications.

These questions were intended to identify groups that were more likely to include stateless or “unreturnable” persons. It was hoped that an analysis of the data would form the basis for a conclusion on the total possible numbers of stateless and “unreturnable” persons in the UK. After the analysis was complete, however, it became clear that it was not possible to draw such conclusions from this data because it was impossible to identify with any accuracy those who were stateless or “unreturnable”. That said, some of the information that came to light has informed the analysis of other areas of the research.

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<sup>108</sup> Until 2006, the Labour Force Survey used “stateless” as a variable in the nationality section of the survey. However, following an information request into how the term ‘stateless’ was applied in the Labour Force Survey, no relevant guidance could be found (Reply to information request by the research team to the LFS Production Manager, Office of National Statistics, November 2010: on file with the authors). Additionally, the Labour Force Survey stateless variable has since been removed from the survey after it was reportedly “amalgamated” into other nationality groups due to additional countries being added as new variables. This suggests that the stateless category was being used predominantly where nationality was unknown or where no correct nationality category existed.

<sup>109</sup> Three problems were identified by the researchers: 1) For the purposes of the IPS, stateless persons are identified on production of either i) a “Certificate of Identity” or ii) a Stateless Person’s Travel Document issued under 1954 Convention or iii) a Refugee Convention Travel Document issued under the 1951 Convention. The data in respect of each of these constituent groups are not disaggregated. 2) The survey takes into account individual journeys and consequently risks multiple counting. 3) Respondents are not asked to show proof of their nationality or identity and are therefore expected to self-identify as stateless. If the interviewee is uncertain of their nationality he or she may be prompted to refer to travel documentation but the respondent can choose to refuse to provide it.

## Conclusions

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A number of conclusions can be drawn from this analysis.

On the basis of the data examined, it is not possible to estimate the total number of stateless or “unreturnable” persons currently in the UK. In particular, the 2001 Census data and the Eurostat data do not provide a reliable basis upon which to make such an estimate. A methodology has been suggested for analysing the 2011 Census data when it becomes available. The indirect data examined was not sufficiently robust to help identify a potential maximum number of stateless or “unreturnable” persons on the UK territory. Indeed, as “unreturnable” persons do not form a category in direct data sets, it proved impossible to identify their number and profiles from the data sources examined.

Across almost all the data sets examined there appears to be a problem in recording and categorising stateless persons. Consequently, although information about numbers of individuals or cases the UK Border Agency or the Home Office categorised as “stateless” or of “unknown” or “unspecified” nationality is available from both published statistics and, for the purposes of this research, management information, the “nationality” categories used to identify these cases are numerous, confused and overlapping. The effect of the confused categorisation, and in particular the inclusion of 1951 Convention refugees within the category of “stateless” in the published statistics, appears to result in significant inconsistencies between a number of important data sets. Published statistics in respect of entry clearance and visa applications and of passengers coming to the UK creates a false perception that there are many more thousands of stateless persons coming to the UK than is truly the case. Once this data has been further disaggregated to exclude refugee populations (provided at special request by the Home Office’s Migration Statistics Team), it can be seen that non-refugee stateless persons account for around 16% of those categorised as “stateless” in published statistics on grants of leave to enter to passengers and, in 2010, around 9% of those categorised as stateless granted a visa. The data on asylum, immigration and EU law applications and the issuing of 1954 Convention Travel Documents supports this finding by identifying a much smaller stateless population.

Some trends in relation to age and gender can be identified within the data sets. An analysis of at least three different data sources demonstrates that trends tightly reflect the gender balance amongst UK asylum-seeking population of 30 per cent females and 70 per cent males. An analysis of at least three different data sources demonstrates that the age of those affected by statelessness or disputed nationality broadly reflects trends apparent within the UK asylum seeking population, notably a young, male population with over 90% of cases under 45 years of age. There was some evidence of a higher proportion of stateless children than is found amongst the asylum-seeking population in general. Problems with categorisation also cause inconsistencies when analysing other trends in the data. For example, the published asylum statistics appear to indicate applications made by “stateless” persons or those of “unknown or other” nationality have been increasing since 2007. In contrast, management data indicates a decline in applications and grants during the same time period. This is likely to result from the creation of a “Kuwaiti Bidoun” category by the UK Border Agency in 2006, skewing the data from this point onwards.

UK Border Agency management information indicates that there are a larger number of stateless persons or persons of “unknown” or “unspecified” nationality (close to averaging 400-500 per year) who make applications under the provisions of immigration law, including applications for settlement. However, this data has numerous issues relating to duplication making it less reliable. Indeed, an analysis of total numbers of cases of limited leave to remain, indefinite leave to remain, or a grant of a residence card or certificate over the period of study, indicates that under 200 grants of leave to enter or remain or recognition of the right

arising out of EU law per year, are made to “stateless” persons or persons of “unknown” or “unspecified” nationality.

The best sources of data examined were the published Home Office’s immigration statistics and the UK Border Agency management information, obtained on the basis of a data sharing agreement. In particular, some numbers are drawn from more detailed data provided by the Home Office’s Migration Statistics Team, on request, than that normally published. By cross-referencing the published statistics with this more detailed disaggregated data, it has been possible to identify some trends relating to stateless persons coming into contact with immigration control. This is explained below.

The data for entry clearance visas in combination with the removals data indicate that there is a population of stateless persons who are able to arrive and depart the UK in accordance with the provisions of immigration law; by obtaining entry clearance and leaving before their period of leave to enter ends. It also demonstrates that the overwhelming majority of stateless persons successfully removed from the UK are removed either at port, presumably after examination of whether they were entitled to leave to enter or remain or, in a much smaller number of cases, after breaching the conditions of their leave to enter or remain. This would suggest that those stateless persons who are granted leave to enter the UK, arriving after obtaining a visa or entry clearance, pose relatively few challenges to immigration control.

The asylum statistics show that around 150-200 asylum-seekers each year are identified as stateless by the UK Border Agency. Analysis of two data sources in relation to grant and refusal rates for asylum applications made by stateless persons or those of “unknown” nationality indicate that stateless persons are more frequently recognised as being in need of international protection than the average amongst the asylum-seeking population. Of these, a much higher proportion than the average are granted asylum, at an average of 50%. This leaves up to 100 stateless persons each year being refused asylum and according to numbers identified from the removals statistics, barely 10% of these stateless persons refused asylum are being successfully removed from the UK each year. Without a means to determine their status in the UK, it can be concluded that the remaining individuals are left in limbo, that is to say that they are unable to leave the UK, but they are not granted leave to enter or remain even though they have been identified as stateless. This analysis is supported by the findings in Chapter 4.

## Recommendations

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To obtain a more complete understanding of the number and profile of persons who may be stateless in the UK, the Home Office should undertake an analysis of the 2011 Census data. This analysis should be compared with the analysis of other data sources contained in this study to try to build the best achievable overall picture.



The statistical recording and reporting of stateless persons as defined by Article 1(1) of the 1954 Convention should be made available as a disaggregated group in published Home Office immigration statistics. Recent progress in this area should be consolidated with further changes necessary to ensure that this group is not conflated with refugees, and that both groups are distinct in published statistics.



The UK Border Agency should consolidate its numerous categories relating to stateless persons and those of unknown or unspecified nationality into distinct groupings to facilitate more accurate recording and identification. In particular, the Border Agency should have a consistent approach as to whether statelessness should be identified as a specific “nationality” category on casework databases, such as the Case Information Database (CID).



To ensure a more accurate registration and recording of stateless persons the UK Border Agency could develop its IT systems. For example:

When “stateless” or “unknown nationality” is selected on the CID drop-down menu, a country of birth or origin option should also be available for caseowners/screening officers to fill in; and,

When an individual knows their country of origin but indicates uncertainty about their nationality but does not declare themselves to be stateless, this uncertainty should be recorded in a systematic and easily accessible way to allow statistical analysis. It should not be noted in the CID notes field as this means the issue becomes hidden. This should also be the case where an individual asserts themselves to be stateless but this is not accepted by the UK Border Agency, or there is not yet sufficient information to confirm this.



New UK Border Agency guidance relating to the recording of statelessness on CID and other IT systems should be developed to ensure that officials use a consistent approach and to avoid the risk of incorrect attribution of nationality or the failure to record when an individual is stateless. This guidance should take into account UNHCR’s forthcoming Guidelines on the definition of “stateless person” in international law to ensure that the UK’s obligations under the 1954 and 1961 Conventions are met for all those who are stateless.



# CHAPTER 4: THE IDENTIFICATION OF STATELESS PERSONS IN THE OPERATION OF IMMIGRATION CONTROL

This chapter examines the profiles of the stateless and “unreturnable” persons identified and interviewed by the researchers. It sets out how protections for stateless persons in immigration law have declined and the way in which the Secretary of State for the Home Department’s policy on stateless persons who are seeking residence because they have no other State in which to live became more restrictive. It also examines the current approach of the UK Border Agency in identifying stateless persons in the operation of immigration control.

Name: **Nischal (Participant 6)**  
Country of origin: **Bhutan**  
Date of arrival in UK: **June 2010**  
Time in detention: **N/A**  
Time in limbo: **6 months**  
Current immigration status: **None**

Nischal, aged 26, arrived in the UK in June 2010. He is an ethnic Nepali and was born in Bhutan in 1993. After his father had been killed by the authorities, he was forced to flee with his mother to India when he was just six years old. He had previously been denied Bhutanese citizenship because of his ethnicity and had never possessed a passport or identity card. He lived with his mother in Darjeeling as part of a community of ethnic Nepalese refugees from Bhutan, which was broadly tolerated by the Indian authorities but given no legal status or any opportunity to regularise their immigration status or naturalise as Indian citizens.

His mother was able to make an income from a small restaurant set up with an Indian friend, in whose name the business had to be registered. Nischal was able to attend school for five years, but eventually the fact that he was undocumented meant he could not continue, so he joined his mother working at the restaurant. Meanwhile his mother had made unsuccessful efforts to register as a refugee with the municipal authorities in Darjeeling. There was no possibility of returning to Bhutan.

After his mother’s death in 2007, Nischal was pressured to become involved with protests by the Nepalese community. He was reluctant because he had no immigration status and on one occasion he was beaten up for refusing to participate in a demonstration. Eventually his mother’s friend, with whom he had been living since his mother’s death, decided to sell the restaurant business and use Nischal’s share to finance him in leaving India. A people smuggler provided false documents and arranged his travel abroad. On arrival, he discovered that his destination had been the UK.

Nischal claimed asylum. In July 2010, his application was refused. The UK Border Agency disputed that he was stateless, finding that he could be returned to India as his country of

former habitual residence and that he would be entitled to naturalise as an Indian citizen. It found that he was not at risk of persecution in India. Nischal appealed this decision.

In a determination dated 16 September 2010, the Tribunal concluded that Nischal was not at risk of persecution in India and rejected the appeal on refugee and human rights grounds.<sup>110</sup> However, the Tribunal found, after considering the evidence, that Nischal was stateless and that he had no possible entitlement to legal status or return to India. The Tribunal directed that “[t]he Appellant is stateless and the matter is remitted to the [Secretary of State for the Home Department] for her consideration”.

Nischal heard nothing from the UK Border Agency until October 2010. At that point, he received a letter informing him that his asylum application had been refused and fully determined, and that he was not entitled to asylum support or accommodation. It stated that as a failed asylum seeker he was expected to make arrangements to leave the UK without delay. The letter identified Nischal’s nationality as Bhutanese and made no reference to the Tribunal’s legally binding finding<sup>111</sup> that Nischal is stateless and could not be returned to India, his country of former habitual residence.

A review of Nischal’s immigration file shows no action in relation to the Tribunal’s finding and direction. No attempts to pursue removal have been followed up, despite the fact that Nischal has always maintained contact with the UK Border Agency, including notifying the Agency when he changed address.

At the time of the interview, Nischal remained destitute. Without any asylum support, he is totally reliant on the charity of friends from the ethnic Nepalese community living in and around London. He said:

“It can be very hard sometimes. I remember one time I was staying with some friends and they went to Germany for a long weekend without leaving any food in the house. So I could not eat for two days. Eventually I contacted another Nepalese friend but I didn’t want to tell him I’d not eaten so I just pretended I was bored and asked him to come round to pick me up so we could hang out together. When he arrived he realised I was starving so he bought me some food.”

On some occasions Nischal has found himself street homeless:

“I remember one night when a friend was meant to collect me from Farnborough but he never turned up as it turned out that he had to work a night shift at short notice. So I spent the night walking around the town centre from 10pm until 9am in the morning. I was afraid to lie down and sleep in case I was attacked or robbed. It was freezing.”

He also worries about how his friends perceive him and the burden he is placing on them.

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<sup>110</sup> The Tribunal may have erred in assessing the protection claim in that it did not consider Bhutan as the country of former habitual residence in accordance with the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>, paras 103-105. Further, it did not consider whether, if Nischal was sent from India to Bhutan his rights under Article 3 ECHR would be infringed, see *S.H. v. United Kingdom*, App. no. 19956/06.

<sup>111</sup> *Chomanga (binding effect of unappealed decisions) Zimbabwe* [2011] UKUT 00312 (IAC).

“I’m always worried that my friends are getting sick of me staying at their homes and eating their food without contributing anything. I know that they must talk behind my back and that is why I always try to avoid staying in one place for too long.”

Underpinning everything is his frustration and despair about not being able to get on with his life.

“My biggest worry is staying like this, doing nothing. I did not think it would be such a problem to work and support myself in a developed country like the UK. I have no work, no place to stay, nothing. [Being stateless] really does affect it a lot. Since I was nine years old I have been a person without status. I had problems in Darjeeling but coming here has not solved anything. Even if it was dangerous for me in Darjeeling at least I had a place to stay and enough to eat.”

“This is really killing me. Every morning I wake up it’s the same thing, the same question about what I will do that day. If I was allowed to stay in the UK I could move forward with my life, I would try to get into the restaurant business as I have the skills to do this.”

He finds it hard to see a future. He has told the UK Border Agency that if he could be given either Bhutanese or Indian citizenship then he would be happy to return voluntarily to either country. As a stateless person he cannot. Nischal is stuck without rights or status in the UK, with no solution in sight.

## 4.1 Introduction

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Nischal’s story reflects many of the challenges that stateless persons who do not have an immigration status in the UK face on a daily basis. His situation is exceptional because the Tribunal has recognised that he is stateless. However, it is no accident that this recognition has not resulted in the regularisation of his immigration status. It is not caused by a failure in administration but, rather, by the legal and policy framework that is currently applied by the Secretary of State for the Home Department to stateless persons in the UK who do not have leave to enter or remain. For these purposes, the fact that Nischal is stateless is ignored. In contrast to Nischal, for the majority of the participants in the study, no finding of statelessness has been made. Their statelessness remains “hidden” within the current framework and, like Nischal, no solution is immediately available to them.

This is the first of two complementary chapters. It will begin by describing the profile of the individuals who were referred to the researchers to provide context. It will then describe how the way in which UK immigration law and policy has treated those who are identified as stateless under the 1954 Convention has changed over time. At the time of writing, stateless persons who are not entitled to asylum or complementary protection are unable to regularise their immigration status on the basis of their statelessness and gain access to many of the rights to which they are entitled to under the 1954 Convention and international human rights law. There is also no mechanism established in law which allows for the fact that they are stateless to be identified. The chapter will continue to examine the current problems that exist in identifying stateless persons on the territory, which could be solved by adopting a specific procedure to identify stateless persons. Chapter 5 will continue to examine the human rights challenges that result from the failure to appropriately identify stateless persons and the current domestic legal and policy framework that is applied to them, particularly in areas other than immigration control.

## 4.2 Profiles of participants in the research

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The researchers received over 80 referrals of potential participants. These referrals came from over 20 different organisations. In all, 37 interviews were conducted across the UK, including in London, Leeds, Coventry, Nottingham, Birmingham, Liverpool, Newcastle, Oxford and Cardiff. The interviewees were selected on the basis of the information contained in the interview referral form and in accordance with the criteria in the methodology designed to achieve as broad and indicative a sample as possible.<sup>112</sup>

Of those interviewed, 32 were men and five women. The low number of women interviewees reflects the low number of stateless women referred to the research generally despite the additional efforts made to attract more referrals of women. This figure of around 15 per cent is significantly less than the 33 per cent quota identified in the methodology, or indeed what would be expected from the initial quantitative data findings. There were no child participants (under 18 years old) but otherwise the age range of interviewees was broadly as anticipated and in line with the target quotas outlined in the methodology: namely 16 individuals aged 18-29 (43 per cent), 16 individuals aged 30-49 (43 per cent) and five individuals aged over 50 (14 per cent).

By far the most predominant profile of participant referred were refused asylum-seekers who remain in limbo on the UK territory. Thirty interviewees fitted this profile. A significant number came from countries of origin that are known to generate statelessness, as well as from ethnic groups which are subject to discrimination and/or arbitrary deprivation of nationality. They included Kuwaiti Bidouns (10 cases), Palestinians (six cases), a stateless Kurd from Syria, an ethnic Jew from Iraq, and an ethnic Nepali from Bhutan. Others countries of origin included Algeria, Belarus, Burundi, Chad, China, Eritrea, France, Kenya/Somalia, Liberia, Lithuania, Malaysia, Mozambique, Sierra Leone, and Zimbabwe. Only four participants interviewed (or referred) had not claimed asylum although all were nonetheless of a migrant background, two were from Malaysia and one each from France and Lithuania respectively. Of those interviewed it was concluded that 24 participants were stateless and the remainder were either “unreturnable” or outside the scope of the research or that further information was required before making a final assessment. Only three of the participants had been recognised by the UK Border Agency as stateless.

This data indicates that statelessness on the UK territory is primarily a migratory phenomenon. As a result, the application of immigration law is particularly relevant to stateless persons in the UK.

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<sup>112</sup> See Chapter 1, Section 1.3.2.

## 4.3 The UK and the 1954 Convention

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As explained in Chapter 1, the UK is a party to the 1954 Convention. The Treaty's object and purpose is "to assure stateless persons the widest possible exercise of these fundamental rights and freedoms" and "to regulate and improve the status of stateless persons by an international agreement".<sup>113</sup> The International Law Commission considers that the definition of a stateless person in Article 1(1) of the Convention constitutes customary international law.<sup>114</sup> It provides that a stateless person is a "person who is not considered as a national by any State under the operation of its law". The obligations in this treaty relate to those who fall within that definition.

The UK entered three reservations to the 1954 Convention, seeking to qualify the legal obligations that arose in specific areas. The first two reservations are not relevant to any of the issues raised in the research.<sup>115</sup> The third is relevant to limitations on stateless persons accessing National Health Service treatment, and is discussed in Chapter 5.

The UK has a dualist system of law that limits the extent to which international treaty provisions can be relied upon in proceedings in domestic courts, unless provisions of domestic law either directly incorporate international law or are interpreted to have that effect. The status of the 1954 Convention in UK domestic law has changed over time, which has particularly affected the way in which stateless persons who are in the UK are treated by immigration law. Those changes, and their consequences, will be examined.

## 4.4 The history of the status of the 1954 Convention in domestic law and the treatment of stateless persons in UK immigration law and policy

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### 4.4.1 The Immigration Rules

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The Secretary of State for the Home Department is responsible for exercising powers relating to immigration control. Those functions are carried out by an executive agency called the UK Border Agency in accordance with the Immigration Rules.

Between 25 January 1973 and March 1980, the Immigration Rules<sup>116</sup> provided that "where a person is stateless or a refugee full account is to be taken of the provisions of the relevant

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<sup>113</sup> 1954 Convention, Preamble.

<sup>114</sup> International Law Commission, *Commentary on the Draft Articles on Diplomatic Protection 2006*, available at: [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_8\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf), p. 49.

<sup>115</sup> UNHCR, *Declarations and Reservations to the 1954 Convention Relating to the Status of Stateless Persons*, 20 Nov. 2006, [www.unhcr.org/416114164.html](http://www.unhcr.org/416114164.html). These reservations were to Articles 8 and 9 (exempting stateless persons from emergency measures) and to Article 25 (relating to "administrative assistance" for stateless persons to facilitate the delivery of documents and certificates).

<sup>116</sup> Statement of Changes of Immigration Rules for Control of Persons after Entry, EEC and other non-Commonwealth Nationals (HC82), Laid before Parliament on 25 Feb. 1973, para. 56.

international instruments to which the UK is a party”.<sup>117</sup> This gave a basis upon which a stateless person could attempt to resist his or her deportation by reference to Article 31 of the 1954 Convention. The wording of the provision makes it clear that, at that time, the Secretary of State considered that refugees and stateless persons were owed international obligations, which had to be taken into account in the exercise of immigration control.<sup>118</sup>

However, the Immigration Rules were changed in March 1980. Any reference to stateless persons was omitted, whilst maintaining provisions that related to refugees. The reason for this omission was unexplained. The then leading legal textbook on immigration law<sup>119</sup> concluded that this was as a result of the decision of the Immigration Appeals Tribunal in *Kelzani*.<sup>120</sup> Mr Kelzani was a stateless Palestinian who had been lawfully resident in the UK for a considerable period. The Secretary of State for the Home Department sought to remove him to Egypt, although there was a dispute about whether he would be admitted there. Mr Kelzani appealed, seeking to rely on Article 31 of the 1954 Convention, which provides both substantive and procedural protections against expulsion of stateless persons who are lawfully on the territory.<sup>121</sup> Mr Kelzani’s case came before the Immigration Appeals Tribunal which held, in interpreting Article 31, that “the control of immigration is necessary for the maintenance of public order”. The consequence of this ruling was that the State could always justify the expulsion of a stateless person who had been granted leave to enter or remain solely by reference to the need to “control immigration” and, as a result, Article 31 would never be breached on the grounds that the State could not justify the expulsion.

This finding has been criticised<sup>122</sup> and, if interpretation of Article 31 was substantively considered by the UK courts in the future, there is a strong possibility that the courts would rule that it provides stronger protection.<sup>123</sup> It is, however, unlikely that a Court will have the opportunity to consider this matter given the omission of reference to the 1954 Convention

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<sup>117</sup> Paragraph 56 of Immigration Rules HC 82. The subsequent paragraph of the Immigration Rules also required that full account be taken of the 1951 Convention.

<sup>118</sup> Paragraph 57 of Immigration Rules HC 82.

<sup>119</sup> *Macdonald’s Immigration Law and Practice*, 1st Edition, 1983, p. 251.

<sup>120</sup> *Kelzani v. SSHD*, [1978] Imm AR 193, UK Immigration Appeal Tribunal, 7 Nov 1978, available at: <http://www.unhcr.org/refworld/docid/3ae6b62e8.html>.

<sup>121</sup> 1954 Convention, Article 31 provides:

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary”.

<sup>122</sup> See *Gashi (Asylum; Persecution) Kosovo* [1996] UKIAT 13695; “If the decision of the Tribunal concerning this Convention in *Kelzani* (1978 Imm AR 173) were to be decided today we have some doubts whether it would be decided in the same way” and *Macdonald’s Immigration Law and Practice*, 1st Edition, 1983, p. 251.

<sup>123</sup> See, for example, Neremiah Robinson, *Convention relating to the status of stateless persons – Its history and interpretation*, UNHCR, Geneva, 1955, pp. 96-97: “once a stateless person has been admitted or legalised, he is entitled to stay in the country indefinitely and can forfeit this right only by becoming a national security risk or by disturbing public order”.

in the Immigration Rules.<sup>124</sup> That said, the exclusion of reference to the 1954 Convention within the Immigration Rules in 1980 may have been made on the basis of an erroneous interpretation of the nature of the UK's international obligations.

As a result of this change, there are no specific provisions within the Immigration Rules that allow for a stateless person on the UK territory to be protected against expulsion in accordance with the 1954 Convention. Unlike refugees, there is no provision for stateless persons to be granted leave to enter or remain on the basis of their statelessness in the Immigration Rules.

#### 4.4.2 Discretion and policy

The Secretary of State has the power to grant leave to enter or remain in the UK on a discretionary basis. From time to time written policy statements are issued which set out how that discretion will be exercised. At present these policy statements are published on the UK Border Agency website. In the past, such policies were made public through letters.

In a letter dated 18 December 1998 from the Asylum Policy Unit to a solicitors firm, the terms of a policy relating to stateless persons were set out. It provided that stateless persons who were on the UK territory would, subject to fulfilling certain conditions, be granted the same period of leave to remain as refugees granted asylum which, at that time, was Indefinite Leave to Remain.<sup>125</sup> The conditions were that he or she had no residence rights in any countries and that the UK was the most appropriate country for “resettlement”.

This application of this policy helped ensure that the UK met its international obligations to stateless persons under the 1954 Convention and international human rights law.<sup>126</sup> Indeed, the granting of a residence permit to those recognised as stateless is, in general, reflected in the practice of States that have established statelessness status determination procedures.<sup>127</sup>

This policy appears still to have been in force in April 2002, when the Immigration Appeal Tribunal<sup>128</sup> considered the case of an ethnic Russian who was found to be stateless and who had previously been resident in Estonia. He was found to have lost his USSR nationality when that State dissolved, but had not acquired Estonian nationality. He had claimed asylum, and argued that he should be allowed to remain on the basis that his removal would breach his right to respect for family life because he would not be readmitted to Estonia and that this

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<sup>124</sup> See, for example, *A.K. v. SSHD* [2006] EWCA Civ 1117, paras. 51 and 52: “Mr Williams submitted that in the present case the Secretary of State ought to have considered the 1954 Convention in deciding whether or not to grant the appellant discretionary leave outside the Immigration Rules, and that the Secretary of State’s failure to consider it meant that his decision was open to appeal under section 82 of the 2002 Act on the ground that it was “otherwise not in accordance with the law” within section 84(1)(e). This argument, too, is beset with difficulties. Since the issue was not raised before the Secretary of State and was not the subject of any published policy, it is difficult to see how his decision could be challenged for failure to consider the point.”

<sup>125</sup> See *Stateless Persons (Bidoons of Kuwait)* Immigration and Nationality Directorate letter, 18 December 1998, Butterworths Immigration Law Service, Issue 29 (on file with the authors).

<sup>126</sup> See UNHCR, *Geneva Summary Conclusions*, para. 25 “When States recognize individuals as being stateless, they should provide such persons with a lawful immigration status from which the standard of treatment envisaged by the 1954 Convention flows. Having a lawful status contributes significantly to the full enjoyment of human rights.”

<sup>127</sup> *Ibid.*, para. 27.

<sup>128</sup> *AF (Return) Estonia* [2002] UKIAT 02544.

would separate him from his wife and children. The Tribunal dismissed the appeal on the facts, but recorded that:

“...if the Respondent were not admitted by the Estonian authorities, then it was the policy of the Secretary of State that the Respondent would be re-admitted to the United Kingdom so that his position could be reassessed on the basis that he was a stateless person. There would be no question of any repeated attempt to remove him to Estonia without such reconsideration.”<sup>129</sup>

It is, however, clear from the testimony of stateless participants in this study that this policy is no longer applied by the UK Border Agency. Furthermore, policy statements from the UK Border Agency make it clear that the Secretary of State’s position has changed. For example, the Asylum Policy Instruction in relation to Palestinians assisted by the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) evidences the UK’s approach to stateless persons who, at the same time as making a claim for asylum, also make a claim that they should be granted leave to enter or remain on the basis that they are stateless. It provides:

#### “7. Statelessness issues

An asylum claim from a Palestinian may be accompanied by a claim to stay in the UK on the grounds that they are stateless. The UK is a signatory to the 1954 UN Convention on the status of Statelessness Persons [sic], but that Convention does not require signatories to grant leave to stateless persons. There is no provision in primary legislation, the Immigration Rules or Home Office published policies that require leave to be granted to a person on the basis that they are stateless. Such a claim would therefore fall to be refused on the grounds that leave is being sought for a purpose not covered by the Immigration Rules.”<sup>130</sup>

An earlier version of this policy was issued in September 2002.<sup>131</sup> It therefore appears that the way the Home Office treated applications for leave to enter or remain by stateless persons changed in 2002. This change of practice contrasts with the approach by a number of other States Parties to the 1954 Convention, for example France and Spain, that operate a dedicated procedure designed to identify stateless persons. In those States, a residence permit is granted to those found to be stateless.<sup>132</sup> This change also coincides with the timing of the abolition of Exceptional Leave to Remain and its replacement with a narrower form of complementary protection regime found in the old Humanitarian Protection and Discretionary Leave Asylum Policy Instructions.<sup>133</sup>

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<sup>129</sup> *Ibid.*, para. 13.

<sup>130</sup> See Home Office, *Asylum Policy Instruction, UNRWA assisted Palestinians* available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/unrwa.pdf?view=Binary](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/unrwa.pdf?view=Binary), p. 3.

<sup>131</sup> Email from UK Border Agency to the researchers 7 October 2011 (on file with the authors).

<sup>132</sup> In contrast note Van Waas, L., *Nationality Matters: Statelessness under International Law*, Intersentia, 2008, which at p. 249 states: “These facts uncover what is arguably the core weakness of the 1954 Statelessness Convention: that with no state compelled to allow a stateless person to enter or settle on its territory, these individuals are stuck in a true legal limbo.”

<sup>133</sup> See Home Office, *Asylum Policy Instruction, Exceptional Leave, Humanitarian Protection and Discretionary Leave*, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apunotices/elhpanddl.pdf?view=Binary> and *Still Human, Still Here, At the End of the Line: Restoring the Integrity of the UK’s Asylum System*, pp. 13-15, available at: <http://stillhumanstillhere.files.wordpress.com/2009/01/at-the-end-of-the-line-2010.pdf>. Note the scope of Humanitarian Protection changed when it was incorporated into the Immigration Rules in October 2006.

The current policy position<sup>134</sup> on applications for leave to enter or remain from stateless persons is set out in the guidance on how to treat asylum claims made by Palestinians. It provides:

“No distinction is made between applications for leave to remain from stateless people and from people who have a nationality. Stateless people whose applications are successful are granted leave to enter or remain in the usual way. Those whose applications fail are expected to leave the United Kingdom, usually to return to their countries of habitual residence (see MA (Palestinian Arabs – Occupied Territories – Risk) Palestinian Territories CG [2007] UKIAT 00017...). *The fact of being stateless is not, therefore, in itself a reason for granting leave to enter or remain in the UK and would not give rise to a grant of asylum or Humanitarian Protection.*”<sup>135</sup> (Emphasis added)

Consequently, although the Secretary of State can use discretionary powers to grant leave to enter or remain to stateless persons,<sup>136</sup> there is no requirement in domestic legislation or the Immigration Rules that leave to enter or remain should be granted to stateless persons on the basis that they are stateless.<sup>137</sup> The qualitative and quantitative analysis reveals no discernable or consistent practice by the Secretary of State of using discretion in this way.<sup>138</sup> Indeed, current UK law and practice provides only a very limited possibility for leave to enter or remain to be granted to persons who are unable to leave the UK, as will be the case for many stateless persons. They must show that the Secretary of State’s refusal to grant leave to remain is irrational on the basis that there is no possibility that they can depart from the UK.<sup>139</sup>

Thus, in deciding whether a stateless person should be granted leave to enter or remain in the UK, the fact that the individual is stateless is, in most cases, not considered to be relevant. The evidence indicates that, as a result, stateless persons are not identified within the operation of immigration control. This also means that statelessness has little bearing on their ability to access rights or other entitlements, despite the obligations in international law owed to them by the UK.

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<sup>134</sup> There is a very specific policy on the possibility of granting Discretionary leave to remain to British Overseas citizens (and other UK passport holders such as British protected persons and British subjects) who are otherwise stateless and who are left in limbo, see *Immigration Directorate Instructions* Chapter 7, Section 2, available at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter7/section2/section2.pdf?view=Binary>. For a discussion of whether such people are stateless see Section 5.10 below.

<sup>135</sup> Home Office, *Operational Guidance Note, Israel, Gaza and the West Bank*, February 2009, available at: [www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/israelgazawestbank.pdf?view=Binary](http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/israelgazawestbank.pdf?view=Binary).

<sup>136</sup> For example, by exercising the wide discretion to grant leave to enter or remain provided by the Immigration Act 1971, section 3, including in line with the Discretionary Leave API, Immigration Directorate Instructions, Chapter 1, Section 14 or, in the context of administrative removal or deportation, paragraphs 395C and 364 of the Immigration Rules. The authors are grateful to Paul Luckhurst, Counsel, Blackstone Chambers, for drawing this point to our attention.

<sup>137</sup> See *A.K. v. SSHD*, [2006] EWCA Civ 1117.

<sup>138</sup> There is anecdotal evidence from a semi-structured interview with a UKBA Senior Caseworker (15 August 2011) that such discretion may occasionally be exercised. A specific example given was of an asylum applicant from Estonia being granted Discretionary leave to allow him to make enquiries as to whether he was entitled to Estonian nationality.

<sup>139</sup> See *R (on the application of MS, AR & FW) v. Secretary of State for the Home Department*, [2009] EWCA Civ 1310, United Kingdom: Court of Appeal (England and Wales), 4 December 2009, available at: <http://www.unhcr.org/refworld/docid/4b2f7eec2.html>, per Sedley LJ, citing with approval, Baroness Hale in *Khadir, R (on the application of) v. SSHD*, [2005] UKHL 39 “when the prospects of the person ever being able safely to return ... are so remote that it would be irrational to deny him the status which would enable him to make a proper contribution to the community here”.

### 4.4.3 Regularisation

Only eight of the participants in the study had had their immigration status regularised through a grant of leave to enter or remain, usually after a long period left in limbo as refused asylum-seekers.<sup>140</sup> A total of 29 participants remained undocumented and in limbo at the time of their interviews for periods ranging up to, and in some cases exceeding, five years since the rejection of their asylum claims or other applications for leave to remain in the UK.

In recent decades the Secretary of State has undertaken a number of backlog clearance exercises in respect of asylum-seekers whose claims have not been determined or who, after their claims have been refused, have not left the UK or been removed.

These exercises have provided a basis for non-nationals, including stateless persons, to apply to regularise their immigration status outside the Immigration Rules. In some cases these measures have been accompanied by administrative rearrangement and allocation of case working resources to undertake the exercise.<sup>141</sup> In other cases, the policies have been maintained more broadly. Examples include the “one-off family exercise” for asylum-seekers who had claimed asylum before 1 October 2000 and who had dependent children,<sup>142</sup> specific policies in respect of non-national children who had been in the UK for seven years,<sup>143</sup> and non-nationals who married British citizens or persons who were settled in the UK.<sup>144</sup>

The Immigration Rules themselves also contain provisions that could facilitate stateless persons who had not left the territory acquiring leave to enter or remain. Paragraph 395c mandates caseworkers to consider the compassionate circumstances of the case before enforcing administrative removal. Policy guidance on how compassionate circumstances should be interpreted includes taking into account, amongst other things, the prospect of enforcing removal.<sup>145</sup> Given the problems that exist in removing stateless persons, it is likely that the application of this provision by the Case Resolution Directorate has resulted in the regularisation of a significant number of stateless persons, albeit that no formal identification of their statelessness was made during decision-making.<sup>146</sup>

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<sup>140</sup> Participants 8, 9, 19, 28, 33 were all regularised by the Case Resolution Directorate. Those participants regularised who did not experience a period in limbo were participant 23, who was granted indefinite leave to remain under the “one-off family exercise” before his asylum claim was decided and participants 22 and 37 who were granted Humanitarian Protection which is the equivalent of “subsidiary protection” under the EC Qualification Directive.

<sup>141</sup> For example in the operation of the Case Resolution Directorate which aimed to either remove or grant leave to enter or remain to all asylum-seekers who had claimed asylum before March 2007.

<sup>142</sup> See for details *AL (Serbia) (FC) v. Secretary of State for the Home Department; R (on the application of Rudi) (FC) v. Secretary of State for the Home Department*, [2008] UKHL 42, United Kingdom: House of Lords (Judicial Committee), 25 June 2008, available at: <http://www.unhcr.org/refworld/docid/486246502.html>, paras. 17–19.

<sup>143</sup> See Home Office, *DP2/93 and the Enforcement Instructions and Guidance*, Chapter 53.5, available at: [www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter53?view=Binary](http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter53?view=Binary).

<sup>144</sup> *Ibid.*, DP3/96.

<sup>145</sup> See UK Border Agency, *Enforcement Instructions and Guidance*, Chapter 53, available at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter53?view=Binary>.

<sup>146</sup> Anecdotal evidence from a semi-structured interview with a UKBA Senior Caseworker (15 August 2011) suggested that while the lack of prospects of enforcing the removal of a stateless persons would be one factor considered in the application of paragraph 395c, it would not in itself be conclusive.

In addition to specific regularisation programmes, undocumented stateless and “unreturnable” persons may acquire an immigration status as a result of changes in their personal circumstances, for example, by having children or marriage to an EEA national who is exercising treaty rights in the UK. In addition, recent developments in EU law may benefit the stateless or “unreturnable” parents of children who become British or EU nationals.<sup>147</sup> Furthermore, paragraph 276A of the Immigration Rules sets out the circumstances in which persons can remain in the UK on the basis of long residence.<sup>148</sup> There is also relevant guidance contained within the Discretionary Leave policy.<sup>149</sup>

It could be argued that measures that facilitate regularisation of the immigration status of stateless persons provide a mechanism to protect human rights, as they have the effect of providing an opportunity for stateless persons to access the entitlements that they are otherwise denied. The evidence, however, from the participants in this study indicates that regularisations are an inadequate safeguard. They result in stateless persons being left on the territory for a period of sometimes several years where they do not have leave to enter or remain and risk, in particular, destitution, homelessness and immigration detention. In addition, the evidence from the study shows that measures that should facilitate the regularisation of stateless persons, such as an individual assessment of the prospects of enforcing removal, are not consistently applied to the benefit of stateless persons.<sup>150</sup> In conclusion, if the human rights of stateless persons are to be respected, then it is necessary to identify stateless persons on the UK territory as quickly as possible and, if appropriate, grant them leave to remain. There will, however, be circumstances where it will not be appropriate to grant leave to remain. This reflects part of the UNHCR Geneva Summary Conclusions:

“When States recognize individuals as being stateless, they should provide such persons with a lawful immigration status from which the standard of treatment envisaged by the 1954 Convention flows. Having a lawful status contributes significantly to the full enjoyment of human rights.

...

“While the 1954 Convention does not explicitly prescribe a right of residence to be accorded upon a person’s recognition as stateless, granting such a right is reflected in current State practice to enable stateless individuals to live with dignity and in security. Participants agreed that this approach is the best means of ensuring protection of stateless persons and upholding the 1954 Convention. Without such status, many stateless persons may be deprived of the protection of the Convention. Nonetheless, it was also discussed whether in a limited set of circumstances it may not be necessary to provide for residence upon recognition. One view was that this would be the case for stateless persons in a migration context who can immediately return to a State of former habitual residence where they enjoy permanent residence as well as the full range of civil, economic, social and cultural rights and have a reasonable prospect of acquiring nationality of that State.

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<sup>147</sup> *Zambrano v. Office National de l’Emploi (Reference for a preliminary ruling from the Tribunal de travail, Brussels, Belgium)*, Case C-34/09, Court of Justice of the European Union, 8 March 2011, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-34/09>.

<sup>148</sup> Although, at the time of writing the Home Office was consulting on whether there was a need to maintain the policy. See UK Border Agency, *Family Migration – a consultation*, July 2011, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/consultation.pdf?view=Binary>, p. 64.

<sup>149</sup> Asylum Policy Instruction on Discretionary Leave (currently under review, on file with authors).

<sup>150</sup> For example, it is not evident that significant weight has automatically been given to statelessness or barriers to removal by the Case Resolution Directorate when reviewing cases. Indeed, six participants (2, 3, 4, 10, 20 and 29) whose cases were within the remit of the Directorate as a result of having applied for asylum before March 2007, had either been refused or not had their cases considered by the Case Resolution Directorate at the time of interview.

Similarly, while a form of protection (including some kind of immigration status), may be necessary in the short term, grant of residence may not be necessary where an individual can acquire or re-acquire nationality of another State within a reasonable period of time through simple, accessible and purely formal procedures, where the authorities do not have any discretion to refuse to take the necessary action.”<sup>151</sup>

#### 4.4.4 Identity and Travel Documents

The 1954 Convention makes specific provision to ensure that stateless persons are able to obtain identity documents and, if lawfully staying on the territory, travel documents. The two relevant provisions “are intended to act in conjunction to ensure that every stateless person benefits from one form of documentation or another”.<sup>152</sup>

Article 27 of the 1954 Convention provides: “The Contracting State shall issue identity papers to any stateless person in their territory who does not possess a valid travel document”.

A leading commentary on the 1954 Convention sets out the nature of the obligation that this places on state parties to the Convention:

“The ‘identity papers’ with which Article 27 deals are for internal use, as contrasted with the ‘travel documents’ to be used for journeys abroad. It is a paper certifying the identity of a stateless person (certificate of identity) and, in countries with a passport system, a substitute for a ‘domestic’ passport. Contrary to other articles, Article 27 deals with ‘any stateless person in their territory’, thus indicating verbally that neither residence nor even lawful presence is required. All that is necessary, is that the stateless person be physically in the territory of the given state. It was made clear in the Refugee Conference that this Article in no way impaired the right of Contracting States to control the admission and sojourn of refugees in other words, the issuance of an identity paper does not obligate the state to keep the stateless person within its borders.

“The Convention does not prescribe the nature of the identity papers. As said, they may be temporary or final; they need not be official papers in the sense used in Europe and may [simply] consist of a document showing the identity of the [the stateless person]. In countries where no identity papers are required or issued, Article 27 would not impose on stateless persons an obligation to possess one because its purpose is only to safeguard the interests of the stateless persons, and not to stigmatize them in any way.”<sup>153</sup>

There is no provision in UK immigration law that allows for stateless persons who do not possess travel documents to apply to the UK Border Agency to be recognised as stateless and obtain identity documents if they do not have a valid travel document. This gap appears to conflict with the UK’s international obligations.<sup>154</sup>

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<sup>151</sup> UNHCR, *Geneva Summary Conclusions*, paras. 25 and 27.

<sup>152</sup> Van Waas, L., *Nationality Matters: Statelessness under International Law*, Intersentia, 2008, p. 374, citing Goodwin-Gill, G., and McAdam, J., *The Refugee in International Law*, Oxford University Press, 2007, p. 515.

<sup>153</sup> Robinson, N., *The Convention relating to the Status of Stateless Persons. Its History and Interpretation*, UNHCR, 1955, available at: <http://www.unhcr.org/refworld/docid/4785f03d2.html>.

<sup>154</sup> There are specific provisions in UK law and policy to provide an Application Registration Card to asylum-seekers, the card is issued only to asylum-seekers and does not claim to constitute identity papers. See UK Border Agency. *Asylum Policy Instruction Application Registration Card*, July 2006, available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/applicationregistrationcard.pdf?view=Binary](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/applicationregistrationcard.pdf?view=Binary).

The obligation to provide travel documents is contained in the 1954 Convention, Article 28:

“The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other stateless person in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence.”

The UK Border Agency has a procedure that allows for an individual who is recognised as a stateless person to apply for a Stateless Person’s Travel Document.<sup>155</sup> It requires that the applicant holds at least six months leave to enter or remain at the time of the application<sup>156</sup> and that the applicant must pay an application fee.<sup>157</sup> These restrictions risk conflicting with Article 28 in that persons who may have less than six months leave to enter or remain outstanding on a period of leave of a number of years, and who intend to extend their leave, would not qualify for such a document but could be considered to be “lawfully staying”.<sup>158</sup> However, the UK Border Agency justifies this position by stating “[y]ou must have permission to stay here for at least six months from the date you make your application. This is because other countries may not accept your travel document if you have less than six months’ permission to return to the United Kingdom”.<sup>159</sup> Furthermore, as these documents are issued on a discretionary basis, the Secretary of State could grant such documents to stateless persons who did not possess six months leave to enter or remain, avoiding the risk of any incompatibility.<sup>160</sup> That said, there is no evidence in practice or policy that indicates that the Secretary of State is prepared to grant a 1954 Convention Travel Document to stateless persons in the UK that are not lawfully staying.

No details are given in published UK Border Agency policy about the procedure that is used to determine whether a person has the status of a stateless person for the purposes of obtaining a Stateless Person’s Travel Document. The only public documents available are the application form<sup>161</sup> and the very limited guidance note provided for applications for a Stateless Person’s Travel Document.<sup>162</sup>

However, anecdotal information was obtained from a semi-structured interview with members of the Travel Document team.<sup>163</sup> During this interview it was suggested that the whole of the immigration file is reviewed when considering whether to issue a travel document, and that this was necessary because usually there had been no prior formal identification of

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<sup>155</sup> See UK Border Agency, *Stateless persons’ travel document*, available at: [www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/travel-abroad/traveldocuments/statelessperson/](http://www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/travel-abroad/traveldocuments/statelessperson/).

<sup>156</sup> See UK Border Agency *TD112 Guidance Notes*, Version 04/2011, available at: [www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/traveldocuments/td112-guidance.pdf](http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/traveldocuments/td112-guidance.pdf).

<sup>157</sup> The Immigration and Nationality (Fees) Order 2011 No. 445. The fee in 2011 was £77.50 for adults and £49 for children. See UK Border Agency *UK Border Agency Fees* April 2011, available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/fees-table-spring-2011.pdf](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/fees-table-spring-2011.pdf).

<sup>158</sup> See, for a discussion of the interpretation of “lawful stay”, Section 5.3.1.

<sup>159</sup> See UK Border Agency *TD112 Guidance Notes*, Version 04/2011, available at: [www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/traveldocuments/td112-guidance.pdf](http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/traveldocuments/td112-guidance.pdf).

<sup>160</sup> The authors are grateful to Paul Luckhurst, Counsel, Blackstone Chambers, for this point.

<sup>161</sup> UK Border Agency *TD 112 Guidance Note*, *op. cit.*

<sup>162</sup> *Ibid.*

<sup>163</sup> Semi-structured interview with UKBA Travel Document Team (9 August 2011). It was not possible to systematically audit individual files involving Stateless Person Travel Document applications in order to verify the approach taken.

whether the individual applying was stateless. Before 2008, decision-making on applications where statelessness had not been previously identified was undertaken by the asylum policy team but this was now the responsibility of the Travel Document team. It was explained that the *Bradshaw* test<sup>164</sup> was adopted, the burden of proof was placed on the applicant and that the Travel Document team would not usually take any role in contacting consular authorities. Moreover, although reliance was placed upon the 1954 Convention, there was no internal guidance on how statelessness ought to be assessed. It was emphasised that the consideration of these application was a very small proportion of the team's work.<sup>165</sup>

In conclusion, the UK should ensure that it has a procedure in place to issue identity documents to stateless persons who do not have valid travel documents and are on the UK territory. To support this, the research suggests that it may be necessary to develop guidance on the identification of statelessness and training on it could be given to members of the Travel Document team. UNHCR will issue Guidelines on the definition of a stateless person in Article 1(1) of the 1954 Convention that should inform the guidance developed.

## 4.5 The identification of statelessness in immigration law

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This section will begin by setting out UK immigration law on the identification of statelessness, before continuing to set out themes that emerged from the evidence gathered by the researchers in respect of the identification of statelessness. These findings are based on participants' testimonies and review of their immigration files, as well as several semi-structured interviews with UK Border Agency officials. Given that the vast majority of participants had claimed asylum, much of the analysis concerns how statelessness is engaged with within the UK asylum procedure.

A common feature for many of the participants interviewed was the lack of a substantive investigation of their actual or potential statelessness by the UK Border Agency. Consequently, their stateless status was hidden and did not affect the way in which they were treated by the UK Border Agency and other public authorities.

A review of participants' immigration case files showed that participants' claims to be stateless were not prioritised. Legal representatives made detailed submissions on statelessness to the UK Border Agency in only a handful of cases.<sup>166</sup> Where such submissions were made, they usually took the form of further submissions following the refusal of an asylum claim.

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<sup>164</sup> See Section 4.6.3.

<sup>165</sup> In 2010, 135 Stateless Person Travel Documents were issued, whereas the team estimated that it received 20,000 applications for Travel Documents, for example under the 1951 Refugee Convention, per year.

<sup>166</sup> Participants 2, 3, 5, 20, 28, 33 and 37. However, more cursory references to the fact of an individual being stateless were made in relation to some other participants, and for some cases it was not possible to review the full immigration file in order to assess whether representatives' submissions engaged with the issue of statelessness.

## The law relating to the identification of statelessness

There is limited State practice on the assessment of eligibility for stateless status with reference to Article 1(1) of the 1954 Convention. Taking examples from States that operate statelessness determination procedures, in Spain it appears that in practice the burden of proof is shared between the authorities and the individual, with the individual under an obligation to “fully cooperate”, but there is no standard of proof identified. In Hungary the determining authority is obliged, as a result of general administrative law, to establish the relevant facts of the case. In practice, the determining authority takes an active role in searching for evidence. In France there is no explicit reference to a standard of proof, but the brief guidance published by OFPRA<sup>167</sup> for applicants identifies that the proof must be “sufficiently precise and serious”.<sup>168</sup>

That said, the definition of “stateless person” in Article 1(1) is challenging and UNHCR aims to publish guidelines soon. The conclusions to the Geneva Expert Meeting organized by UNHCR in December 2010 provide guidance on the appropriate application of the provision:

“The 1954 Convention requires proving a negative: establishing that an individual is not considered as a national by any State under the operation of its law. Because of the challenges individuals will often face in discharging this burden, including access to evidence and documentation, they should not bear sole responsibility for establishing the relevant facts. In statelessness determination procedures, the burden of proof should therefore be shared between the applicant and the authorities responsible for making the determination.”<sup>169</sup>

Despite the lack of a statelessness determination procedure in the UK, there is established caselaw on the evidentiary requirements for assessing whether an individual is stateless in the context of immigration law. The eligibility for nationality of another country is a matter for the municipal law of the foreign country.<sup>170</sup> Consequently, as with all assessments of foreign law, it is a matter of fact.<sup>171</sup>

Where an applicant has asserted statelessness in immigration proceedings, the Scottish Outer House of the Court of Session held in the case of *Bradshaw*<sup>172</sup> that “he or she would have to apply to those states which might consider her to be and might accept her as a national”. This places a high evidentiary burden on the applicant. It could be argued that the reasoning in *Bradshaw* is the result of the particular facts of the case, namely that the applicant asserted that she was stateless on the basis of evidence of Ukrainian and Russian nationality law but, in circumstances where her credibility was otherwise in doubt, refused to put forward any further evidence in respect of her situation.

The *Bradshaw* approach has been criticised by the leading commentary on British nationality law. It observes that “[a]lthough it was said that he who asserts statelessness must prove it, this case should be limited to its facts, as the test referred would be onerous and/or practically impossible in many cases and therefore inappropriate as a universal requirement”.<sup>173</sup> However,

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<sup>167</sup> *Office Français de Protection des Réfugiés et Apatrides*. This is the body in France which is responsible for deciding applications for asylum and for recognition of stateless status.

<sup>168</sup> Mandal, R., “UNHCR Handbook on the Determination of Stateless Status, Discussion Paper No. 3. Procedures for Determining whether a person is stateless”, Nov. 2010, on file with the authors.

<sup>169</sup> UNHCR, *Geneva Summary Conclusions*, para. 13.

<sup>170</sup> *Stoeck v. Public Trustee*, [1921] 2 Ch. 67.

<sup>171</sup> *MA (Ethiopia) v. Secretary of State for the Home Department*, [2009] EWCA Civ 289, United Kingdom: Court of Appeal (England and Wales), 2 April 2009, available at: <http://www.unhcr.org/refworld/docid/49da220e2>, para. 63.

<sup>172</sup> *R. (Bradshaw) v. SSHD*, [1994] Imm AR 359.

<sup>173</sup> *Fransman's British Nationality Law*, 3rd Edition, 2011, p. 591.

this criticism has not been examined by the UK Courts and the *Bradshaw* approach has been approved in the context of assessing statelessness in asylum applications.<sup>174</sup>

The *Bradshaw* approach does not result in the burden of proof being shared between the applicant and the authorities. Further, the requirement that the applicant “would have to apply to those states which might consider her to be and might accept her as a national” runs the risk of conflicting with the Prato Summary Conclusions. They found that “[w]hether an individual actually is a national of a State under the operation of its law requires an assessment of the viewpoint of that State. This does not mean that the State must be asked in all cases for its views about whether the individual is its national in the context of statelessness determination procedures”.<sup>175</sup> Further, “given that Article 1(1) is a negative definition, ‘by any State’ could be read as requiring the possibility of nationality to be ruled out for every State in the world before Article 1(1) can be satisfied. However, the adoption of an appropriate standard of proof would limit the States that need to be considered to those with which the person enjoys a relevant link (in particular by birth on the territory, descent, marriage or habitual residence)”.<sup>176</sup> The practical problems that result from the *Bradshaw* approach can be seen in the case of Steven,<sup>177</sup> one of the participants in the study.

Name:	<b>Steven (Participant 29)</b>
Country of origin:	<b>Mozambique</b>
Date of arrival in UK:	<b>July 2003</b>
Time in detention:	<b>N/A</b>
Time in limbo:	<b>76 months</b>
Current status:	<b>None</b>

Steven is 29. He believes he was born in Mozambique, but has no evidence of this, nor of entitlement to Mozambique or any other nationality. He spent his entire childhood travelling between Mozambique, Zimbabwe and Zambia with his mother. This cycle continued until 2000 when his mother left him alone in Zimbabwe, since which time he has not had any further contact with her. He left Zimbabwe following problems caused by his involvement with the Movement for Democratic Change (MDC) and travelled to the UK where he claimed asylum in July 2003.

His asylum claim was refused, as was his subsequent appeal in December 2003. His most recent further submissions were refused in March 2011, although no removal directions have been set, apparently due to uncertainty about his nationality.

He describes his efforts since being in the UK to try to establish his nationality.

“I have no identity documents to show that I am from a country which I could be returned to. I contacted IOM [the International Organisation for Migration] about voluntary return, but they advised me that I need to be able to prove where I am from in order to be returned there. I have phoned the Zimbabwean embassy in London but they told me that I need to have documentary evidence to show that I am from Zimbabwe before they can assist me. I asked them if they could search the population registrar but they told me that I would have to do this physically in Harare. I also contacted the Zambian embassy but they told me the same thing. Recently

<sup>174</sup> *M.A. (Ethiopia) v. SSHD*, *op. cit.* paras. 52-53.

<sup>175</sup> UNHCR, *Prato Summary Conclusions*, para. 12.

<sup>176</sup> *Ibid.*, para. 22.

<sup>177</sup> It was not possible to obtain a full paper file for this case but factual aspects were checked on CID as well as the limited papers available.

I completed a biodata interview and form with UKBA in relation to Mozambique and they have arranged an appointment for me with the Mozambique embassy but I still first need to be able to obtain the money to travel to London. I believe that it will be necessary for me to arrange formal appointments with the Zambian and Zimbabwean embassies because UKBA are unlikely to accept my account of telephone conversations. Only this way will I be able to establish if I have a nationality or a solution to my current situation. When I asked immigration officers what would happen next if these embassies did not accept me they said 'It is your problem'. I find this frustrating as I am trying to cooperate with them."

Steven has been denied section 4 support<sup>178</sup> and, at the time of his interview for the research, was destitute and sleeping at a homeless shelter. He has very limited resources with which to try to establish his nationality, lacking even the cost of a two hour train journey to London to attend interviews with relevant embassies. His perception of his situation and treatment is that:

"They are happy to leave me in limbo because they know that I am not a risk to the public and they do not need to pay the cost of detaining me. They do not care how I support myself as this is not a consideration for them."

Other relevant UK caselaw exists, relating to how nationality ought to be assessed in the context of refugee status determination procedures. The Court of Appeal has outlined the standard of proof that an asylum applicant must meet if he or she is to show that their State of nationality will not provide appropriate travel documentation, as well as the evidence that an applicant is expected to produce to discharge the burden of proof. First of all, unlike other aspects of an asylum claim, the standard of proof is the "balance of probabilities". Secondly, the Court recognised that in some circumstances it will not be appropriate to expect an asylum applicant to approach the consular authorities of their country of nationality to show that they are not prepared to re-document the applicant, as this might put the applicant or family members in the country of origin at risk. Thirdly, it has held that in a "normal case" the authorities can require the applicant "to act *bona fide* and take all reasonably practicable steps to seek to obtain the requisite documents to enable her to return".<sup>179</sup>

Further, the Immigration Appeal Tribunal and Asylum and Immigration Tribunal have rejected a hierarchical approach to the sources of evidence in assessing nationality. A wide range of sources of evidence can be considered which include:

- (i) Relevant documentation. The relevant country of nationality may be established with documentation such as a passport or travel document. In *Polivina (18441)*, in which a claimant was adjudged to be Croatian, possession of a passport was held to create a strong presumption of citizenship which could only be displaced by weighty evidence to the contrary. However, other items of documentation may be relevant, e.g. letters from relevant authorities in the country concerned or (as in the instant case) birth certificates in respect of countries that operate qualified or unqualified *ius soli*;
- (ii) The claimant. Where documentation is not available or admitted to be false, evidence from the claimant will be especially important. Relatives and friends may also have relevant evidence. Just because there is no documentary evidence to support the appellant's claimed nationality is not fatal if his word is believed as to his nationality;

<sup>178</sup> See Section 5.3.

<sup>179</sup> *M.A. (Ethiopia) v. SSHD*, *op. cit.* paras. 49-50 and 78-83.

- (iii) Agreement between the parties;
- (iv) Expert oral or affidavit evidence;
- (v) Foreign and Commonwealth Office letters;
- (vi) Text of relevant nationality law of country(ies) concerned;<sup>180</sup> and,
- (vii) Secretary of State for the Home Department asking questions of a relevant country's Embassy.<sup>181</sup>

In conclusion, the UK courts currently consider that if an applicant seeks to establish statelessness, the burden of proof is placed on the applicant. It appears that there is a strict requirement for the applicant "to apply to those states which might consider her to be and might accept her as a national". In contrast, in the context of refugee status determination, the UK courts have been prepared to consider a greater number of sources of evidence. The *Bradshaw* approach to the interpretation of Article 1(1) of the 1954 Convention risks frustrating its object and purpose of assuring "stateless persons the widest possible exercise of these fundamental rights and freedoms".<sup>182</sup> The participants' testimony explains how difficult it is for individuals to prove that they are stateless, particularly if they are vulnerable. It is therefore recommended that in assessing statelessness in the future the courts should take into account and give appropriate weight to forthcoming UNHCR Guidelines.

## 4.6 Guidance and training

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There is little UK Border Agency guidance on how to identify statelessness within asylum claims.<sup>183</sup> Officials are aware of the guidance and it was referred to in semi-structured interviews with the New Asylum Model (NAM+) Training Team, a Senior Asylum Caseworker, the Quality Audit Team and Screening Officers at Asylum Screening Unit.<sup>184</sup> The limited existing guidance that exists emphasises, in respect of "Doubtful Nationality Cases", that:

"It is important to keep in mind that the fact that the officer does not accept the applicant's claim to nationality but has insufficient evidence of an alternative country or territory to which the applicant can be removed, does not mean the applicant falls to be granted asylum as a Stateless person. In order to make a claim for refugee status as a Stateless person, the applicant must satisfy the officer that they have no nationality and that they are outside the country of their last habitual residence owing to a well-founded fear of persecution for a Convention reason, and that owing to such a fear they are unable or unwilling to return to it."<sup>185</sup>

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<sup>180</sup> The above is an edited version of the guidance in *Smith (Liberia) v SSHD* [2000] UKIAT 00TH02130.

<sup>181</sup> See *MA (Disputed Nationality) Ethiopia v. SSHD*, [2008] UKAIT 00032, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 17 April 2008, available at: <http://www.unhcr.org/refworld/docid/48076a1c2.html>.

<sup>182</sup> 1954 Convention, Preamble.

<sup>183</sup> See UK Border Agency, *Nationality Doubtful, Disputed and Other Cases*, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/natinality-doubtful-disputed?view=Binary>.

<sup>184</sup> Anecdotal information from semi-structured interviews with the NAM+ Training Team (19 July 2011), a UKBA Senior Asylum Caseworker (15 August 2011), the Quality Audit Team (1 August 2011) and the Asylum Screening Unit (15 August 2011).

<sup>185</sup> UK Border Agency, *Nationality Doubtful, Disputed and Other Cases*, *op. cit.*, para. 5.2.

It continues to focus on what are termed “Disputed Statelessness Cases”. It directs that these should be treated in the same way as “Disputed Nationality Cases”. In particular, it states that:

“In instances where the UK Border Agency disbelieves the applicant’s assertion that they are stateless, but cannot be satisfied on the basis of all the available documentary and oral evidence that the applicant is a national of a country other than the country in which they were formerly habitually resident, only the country in which they were formerly habitually resident should be specified. In such cases officers should take particular care to thoroughly investigate the evidence of statelessness/nationality at interview so that wherever possible the UK Border Agency can rebut their claim to be stateless.”

There is further guidance on how a nationality should be identified in correspondence with the applicant in “Disputed Statelessness Cases”. It provides that alongside an applicant’s name, the fact that the applicant claims to be stateless should be identified, as well as the nationality that the UK Border Agency believes the applicant to have.<sup>186</sup>

Caseworkers are guided to update CID records in disputed statelessness cases in the following way:

“An applicant’s nationality should only be recorded as Stateless on CID where the applicant has produced a Convention document which defines them as Stateless under the 1951 or 1954 Convention. In all other cases, their claim to be Stateless should only be recorded in ‘Person notes’. Should the applicant be considered to be Stateless following consideration of the claim, officers should amend CID to reflect this.”<sup>187</sup>

Given that statelessness is recognised rather than granted,<sup>188</sup> it is a matter of concern that the current guidance on disputed statelessness cases requires an individual to present with a stateless person travel document (or subsequently to be issued with one) in order to have their statelessness recorded in the nationality field on CID. Although this guidance should only be applied to a defined group of cases, if it were applied broadly it would limit the UK Border Agency’s ability to collect accurate data about the number of stateless persons on UK territory.

Moreover, from the participants’ CID records it emerged that in 22 of the 36 files reviewed the guidance had either been followed only partially or not at all, as illustrated in more detail in section 4.6.1 on screening and early identification. These seemingly common recording and data entry problems appear to have hindered the proper consideration of nationality and/or statelessness issues as the cases progressed. Anecdotal evidence from interviews with the UK Border Agency also confirmed this pattern.<sup>189</sup>

A further limitation with the guidance is that no explicit reference is made to the 1954 Statelessness Convention and no direction is given on how to properly identify statelessness. This is compounded by an apparent lack of comprehensive training on statelessness for

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<sup>186</sup> *Ibid.*, Section 7.

<sup>187</sup> *Ibid.*, Section 7.1.

<sup>188</sup> UNHCR, *Geneva Summary Conclusions*, para. 21.

<sup>189</sup> Anecdotal information from semi-structured interviews with the NAM+ Training Team (19 July 2011), a UKBA Senior Asylum Caseworker (15 August 2011), the Quality Audit Team (1 August 2011) the Asylum Screening Unit (15 August 2011). The UKBA travel document team (9 August 2011) and the Nationality Directorate (1 August 2011).

decision-makers. During a semi-structured interview, the NAM+ training team<sup>190</sup> explained that limited reference to statelessness was included in the foundation training compulsory for all new caseowners. A module on “Nationality and Stateless Persons” is provided as part of consolidation training which is usually provided to caseowners after three to six months. The content of these training notes, however, do not engage in detail with the 1954 Convention, nor the procedures necessary to identify stateless persons or the rights owing to them. Moreover, there is apparently no training on how to record or update CID or other databases where an applicant is identified as being stateless. As has been discussed, the research has already identified this as a major problem.

An important component of the accurate identification of statelessness is the availability of country of origin information relating to relevant nationality laws and their application, as well as the position of particular stateless populations in foreign states. While some relevant information is contained in Country of Origin Information Service (COIS) reports and through individual information requests,<sup>191</sup> it is not clear whether decision-makers systematically make use of this facility or fully understand how to assess nationality laws when identifying statelessness.<sup>192</sup> During the interview with COIS<sup>193</sup> it was explained that they are already able to reference a range of sources on nationality law<sup>194</sup> but it was accepted that additional training might be beneficial on their specific application to the issue of statelessness.

One mechanism available to the UK Border Agency to potentially better evaluate the identification of statelessness and the use of relevant country of origin information would be through the UK Border Agency’s Asylum Quality Audit Team. A semi-structured interview with the Asylum Quality Audit Team<sup>195</sup> identified that at present statelessness was only directly relevant to two of the 97 indicators used to assess quality of asylum decisions. It was accepted that this was an area that could potentially be further developed. However, it was emphasised that currently the team’s remit is restricted to initial asylum decisions made by the UK Border Agency and, consequently, would only engage with a limited area of casework.

In conclusion, it appears that there is limited policy guidance for caseworkers on assessing statelessness. Although doubts were expressed by some interviewees that statelessness was a pressing issue in asylum casework, it was also accepted that statelessness might

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<sup>190</sup> Anecdotal information from semi-structured interviews with the NAM+ Training Team (19 July 2011).

<sup>191</sup> Anecdotal information from semi-structured interviews with the Country of Origin Information Service (COIS) (4 August 2011).

<sup>192</sup> Anecdotal information from semi-structured interviews with a UKBA Senior Asylum Caseworker ((15 August 2011).

<sup>193</sup> Anecdotal information from semi-structured interviews with the Country of Origin Information Service (COIS) (4 August 2011).

<sup>194</sup> Information provided in email from COIS dated 4 August 2011 and referring to the following sources: The US Office of Personnel Management’s Citizenship Laws of the World, March 2001; <http://www.multiplecitizenship.com/worldsummary.html>; also <http://www.opm.gov/extra/investigate/is-01.pdf>; International Labour Organisation, [http://www.ilo.org/dyn/natlex/country\\_profiles.byCountry](http://www.ilo.org/dyn/natlex/country_profiles.byCountry); Law Library of (US) Congress, <http://www.loc.gov/law/help/guide/nations.php>; Legislation online, <http://www.legislationline.org>; Richmond University (Virginia, USA), <http://confinder.richmond.edu>; World Law <http://www.worldlii.org/catalog/215.html>; University of Pittsburgh’s School of Law journal the Jurist, <http://jurist.org/>; Max Planck Institute for Comparative Public Law and International Law, <http://www.mpil.de/ww/en/pub/news.cfm>; IDMC (more for documentation) [http://www.internal-displacement.org/8025708F004CE90B/\(httpSectionHomepages\)/\\$first?OpenDocument&count=1000](http://www.internal-displacement.org/8025708F004CE90B/(httpSectionHomepages)/$first?OpenDocument&count=1000); Refworld: <http://www.unhcr.org/refworld/topic/4565c2252/459d2ecd2.html>; European Union Democracy Observatory, which has a useful database for European countries (including Turkey).

<sup>195</sup> Anecdotal information from semi-structured interviews with the Quality Audit Team (1 August 2011).

be a hidden issue.<sup>196</sup> It was suggested that more complete guidance on the identification of statelessness would be useful and that this could be a basis upon which increased training on the issue, potentially to Senior Caseworkers, could be considered as well as with regard to future reforms to the Quality Audit Team's decision-making quality assurance matrix and remit.

#### 4.6.1 Screening and early identification

One trend that appeared in the analysis of the immigration files of participants was the failure by UK Border Agency officials to record on CID where individuals identify themselves as stateless at the initial screening interview after the participant had claimed asylum.<sup>197</sup> This was particularly evident among Kuwaiti Bidouns, several of whom describe having identified themselves as stateless on arrival but subsequently discovered that their nationality was recorded by immigration officers as "Kuwaiti". In some cases, when this was queried, participants reported that it was said this was because "this is where you are from".

The officials who work at the Asylum Screening Unit are responsible for taking initial details from applicants who claim asylum having already passed through port immigration control. When interviewed for this study,<sup>198</sup> officials stated that they came across few statelessness related cases. The majority of stateless applicants self-identified as being stateless. Screening officers record these individuals on CID as "stateless" using one of the relevant nationality categories. Screening officers tended to trust the self-identification by individuals. Furthermore, in the Screening Unit's experience it would be rare for a stateless person to have documentation to prove their statelessness. The Kuwaiti Bidoun stateless participants referred to above recalled a different experience with their nationality being recorded as Kuwaiti despite their recollection that they indicated that they considered themselves to be stateless Bidouns. Three of this group applied for asylum in-country at the Asylum Screening Unit<sup>199</sup> and the other two participants<sup>200</sup> applied on arrival at port. This indicates that there may be issues in the identification and recording of stateless persons at ports and in the Asylum Screening Unit.

The officials at the Asylum Screening Unit also noted that they were not aware of a difference between the CID nationality categories of "Officially stateless", "Stateless Convention 1954 - Article 1", "Unknown nationality" and "Unspecified nationality". Moreover, the researchers observed that there was no consistent approach adopted in the use of these categories. It was also noted that where specific categories on CID exist, such as "Kuwaiti Bidoun" or "Palestinian" these categories would be used in preference to generic statelessness categories. In these instances, applicants would not be identified on CID by one of the stateless related categories despite the fact they may have self-declared as stateless, which could result in statelessness being masked. Furthermore, when reviewing participant files on CID numerous examples emerged where information on nationality had been entered inaccurately or inconsistently.<sup>201</sup>

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<sup>196</sup> Anecdotal information from semi-structured interviews with the Quality Audit Team (1 August 2011) and with a UKBA Asylum Senior Caseworker (15 August 2011).

<sup>197</sup> For example participants 10, 15, 16, 27 and 31.

<sup>198</sup> Anecdotal information from semi-structured interview with the Asylum Screening Unit (15 August 2011).

<sup>199</sup> Participants 10, 15 and 31.

<sup>200</sup> Participants 16 and 27.

It was noted that there was no training given to ASU staff on the identification of nationality, and no relevant continuous professional development training was provided.

The attribution of a nationality category at the beginning of the asylum process is particularly important because there is evidence that CID nationality categories are not automatically amended when someone is subsequently found to be stateless, such as after a hearing at the Tribunal.<sup>202</sup> Moreover, even if an individual is subsequently granted asylum or another form of leave to remain, a failure to properly record statelessness at the outset may subsequently impact on the person's ability to obtain a 1954 Convention Travel Document or, at least, complicate the decision-making process before this can be issued.<sup>203</sup>

The evidence confirms the need to rationalise stateless and unknown nationality categories on CID and the importance of the development of new guidance and training on the identification of statelessness at screening and in other areas of the asylum process.

#### **4.6.2 The attribution of nationality without appropriate evidence**

The evidence also indicated that, in some instances, UK Border Agency officials would attribute a nationality without sufficient or appropriate evidence.<sup>204</sup> There was also evidence that officials would not adjust the nationality categorisation of an individual, despite evidence to the contrary. This included where an embassy or consulate had refused to acknowledge an individual as a national of the State in question after an interview.<sup>205</sup>

This is a prominent feature of the case of one participant,<sup>206</sup> where the UK Border Agency continued to assert his nationality as Ethiopian despite a previous refusal by the Ethiopian authorities to acknowledge this. As the Eritrean authorities had also refused to recognise him as a national, this failure to recognise his stateless status contributed to his detention under the Immigration Act 1971 for a cumulative total of over five years, whilst unsuccessful attempts were made to remove him.

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<sup>201</sup> For example participant 1, who had entered the UK on a stateless person travel document issued by Lithuania, but on CID and in correspondence his "nationality" was erroneously recorded as Lithuanian. Several instances were also observed of individuals who, despite being recognised by the UK Border Agency as an undocumented Bidoun from Kuwait, had their country of nationality erroneously recorded as "Kuwait" on CID and in status letters (e.g. participant 31). Participant 28 was recorded in the nationality field on CID as "Kuwait Bidoun" but in correspondence as variously "Kuwait", "Kuwait Bidoun" and "Kuwait (Bidoun Claimed)". Yet in other cases where it was disputed that the participant was Bidoun as claimed the nationality was simply recorded as "Kuwait" with no other record having been made in the person notes on CID.

<sup>202</sup> Participant 6, case study set out at the start of Chapter 4.

<sup>203</sup> See anecdotal information from semi-structured interview with UKBA Travel Document team (9 August 2011).

<sup>204</sup> Participants 1, 2 and 26.

<sup>205</sup> Participants 3, 4 and 20.

<sup>206</sup> Participant 17.

The file reviews also provided examples of where the UK Border Agency had maintained a participant's nationality after failing to take account of evidence on the immigration file<sup>207</sup> or where a participant had been refused entry by the receiving state during an attempted removal to their attributed country of nationality.<sup>208</sup>

In relation to the two cases above, it is suggested that the refusal by the receiving state to recognise nationality combined with the absence of any other state to which either participant had a relevant connection indicated that the participants should have been identified as being stateless. A leading jurist in this area has observed that “[i]f the foreign state refuses to recognise the person involved as a national, other States are absolutely not entitled to conclude that the person in question is nevertheless a national of this foreign State. If the person involved does not possess any other nationality, this person is *de jure* stateless and must enjoy the advantages of statelessness according to reducing provisions”.<sup>209</sup> However, this did not happen in either case.

The above examples illustrate that there are instances of UK Border Agency officials registering stateless persons as being of unconfirmed (or incorrectly attributed) nationality on CID. This creates a risk that their stateless status is masked or there is a failure to determine whether, in fact, the individual is stateless. This acts as an additional barrier preventing stateless persons from accessing rights guaranteed under the 1954 Convention and international human rights law.

### 4.6.3 Difficulties in establishing whether consular authorities treated participants as nationals

A common issue that appeared from the participants' testimony and case files was a reluctance by consular authorities to engage with requests of individuals to be documented and treated as a national, or to put in writing their conclusions as to whether the individual making the approach was a national.<sup>210</sup> The refusal of consular authorities to engage or respond in writing appears to be a particular problem where the participants themselves approached consular authorities, but is also evident where direct contact takes place between UK Border Agency and the relevant authority.

While such difficulties may be wholly or partly attributable to the conduct of either the individual or embassy concerned, the evidence examined did not reveal a systematic or consistent process by which the UK Border Agency engages with consular authorities to obtain documentation to facilitate removal. Furthermore there was evidence of a failure to pursue enquiries with due diligence.<sup>211</sup> The difficulties present in trying to establish an entitlement to nationality or consular protection are illustrated by the case of Tauy.

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<sup>207</sup> Participant 28. Here the participant had his nationality recorded as “Sierra Leone” despite the fact that he was a British protected person (BPP) and the UKBA were asserting him to be Lebanese by descent (this in spite of the participant having adduced letters from both the Lebanese and the Sierra Leonean authorities confirming that he was not a national).

<sup>208</sup> For example, participant 6.

<sup>209</sup> De Groot, G-R., *A clarification of the fundamental rights implications of stateless and persons erased from the register of residents*, Briefing paper European Parliament, 2007, p. 4.

<sup>210</sup> Participants 3, 16, 24, 25, 29, and 30.

<sup>211</sup> For example, participant 18.

Name: **Tauy (Participant 3)**  
Country of origin: **Belarus**  
Date of arrival in UK: **February 2002**  
Time in detention: **N/A**  
Time in limbo: **60 months**  
Current status: **None**

Tauy is 59 and is from Belarus. He claimed asylum in 2002, but the claim was refused and he exhausted his appeal rights in 2005. He has since spent over five years in limbo in the UK. He has not been able to leave the UK because he has been unable to establish an entitlement to Belarusian or any other nationality. He has not seen his four children for over 10 years.

Tauy applied three times for Assisted Voluntary Return, and a letter dated December 2006 from IOM (which at that time ran the scheme for the government) confirmed that it had been unable to facilitate his departure. The letter confirms that the IOM had arranged interviews with the Belarus embassy in February and November 2006 in an effort to obtain travel documents. Neither had succeeded. The Belarus embassy “confirmed that he was not recognised by them as a citizen of Belarus” and that “there was no need to put this in writing as they have no responsibility for him”. The IOM letter also notes that interviews were subsequently arranged in December 2006 with both the Russian and Ukrainian embassies (countries with which Tauy had relevant connections) but that both embassies had refused to issue travel documents “stating that from the documentation he has presented that he is a citizen of Belarus”.

The documentation in question was a copy of Tauy’s expired Belarusian passport. The original had, at that time, been lost by the UK Border Agency.<sup>212</sup> This was one reason why the Belarus embassy refused to accept him as a national.

In 2008, Tauy made further submissions in respect of his asylum claim which were, in part, based on his statelessness. The UK Border Agency dismissed the further submissions in 2010 and subsequently withdrew the support and accommodation that Tauy had been receiving while the submissions were under consideration.

The UK Border Agency’s position was set out in a letter to Tauy’s MP from April 2010. It stated:

“Unfortunately the UK Border Agency is unable to issue a travel document for Mr [blacked] to return to Belarus as these can only be issued by the authorities for his home country, i.e. the Belarus Embassy.”

“As with all passport applications for foreign nationals, the embassy will require proof of the applicant’s identity and nationality. This is a matter between Mr [blacked] and the Belarus Embassy and the UK Border Agency is unable to assist. I am sorry that I cannot help further with this enquiry.”

This letter did not mention that, in fact, it was the UK Border Agency that had been responsible for the loss of the original passport. It also overlooked the fact that Tauy’s UK Border Agency file contained a letter that had been faxed by the Belarusian embassy in March 2007 confirming that Tauy was not considered one of their nationals. There is

<sup>212</sup> Following his interview for the research in February 2011, the participant emailed to say that his original expired passport had finally been located and returned to him by the UKBA.

also a note of a communication from IOM to the UK Border Agency from May 2007 which stated that it is "...unlikely that he [Tauy] would receive a document as he is stateless". Furthermore, the support that Tauy was given as a refused asylum-seeker was withdrawn twice only to be quickly reinstated following successful appeals in June 2010 and January 2011 respectively, after it was found that he was cooperating with attempts to remove him.

Despite so many years in limbo, the UK Border Agency decided not to grant Tauy leave under paragraph 395c of the Immigration Rules when his case was considered by the Case Resolution Directorate in February 2011. It appears that, contrary to UK Border Agency policy,<sup>213</sup> no weight was attached to the clear evidence on file that there was little prospect of enforcing removal.

Tauy's frustration at his treatment and continuing limbo (exacerbated by the fact that he is highly qualified and has been offered university places which he cannot take up due to his lack of status) is evident: "They are trying to destroy me physically. It is dirty tricks. I am stateless."

He describes seeing himself as "an undesirable alien" and being prepared to leave immediately if this were possible:

"I see that according to the law they will not allow me to go out of this country. Give me a travel document and I will leave immediately – you will not see me again. If I am undesirable here then okay but allow me to go out."

"My life started in the Soviet gulag and now I have ended up stuck in this gulag."

Tauy's situation also reflects a potential confusion of roles between the UK Border Agency and the organisation contracted to run the Voluntary Assisted Return Scheme (at that time IOM). IOM, often in the absence of UK Border Agency involvement, took a role in facilitating or assisting with relevant enquiries to try and establish nationality or to obtain travel documents for the purposes of return.<sup>214</sup> In Tauy's case,<sup>215</sup> IOM were prepared to provide written confirmation of the difficulties that Tauy was having in persuading the Belarus consular authority to treat him as a national, but this did not occur in other participants' cases.<sup>216</sup> If the UK Border Agency is to successfully identify stateless persons who are not being treated as nationals by consular authorities of a State to whom the applicant has a relevant link and share the burden of proof with the applicant, it will be necessary for the Agency to participate actively in the process, to collect and consider relevant evidence.

This is particularly important in the context of evidence that came to light during the research. This showed that where individuals are either held in detention, are destitute or lack legal representation, it is more difficult for them to establish that they are not being treated as a national under the operation of the law of the States to which they have a relevant link. Given the significant incidence of both detention and destitution among stateless and "unreturnable" persons interviewed during the research, it is all the more problematic that the UK Border

<sup>213</sup> UK Border Agency, Enforcement Instructions and Guidance, Chapter 53.3.1 available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter53?view=Binary>.

<sup>214</sup> This was also evident in the cases of participants 3, 4, 5, 11, 18, and 20.

<sup>215</sup> It was also the case in the case of participant 11.

<sup>216</sup> For example, participant 20.

Agency role in these matters is limited. Such difficulties are well summed up by the case of Steven cited above.<sup>217</sup>

The findings of the research in this area are similar to recent initial findings made by the Independent Chief Inspector of the UK Border Agency in a thematic inspection. The report found that:

“We appreciate that the re-documentation process is far from straightforward. Even where foreign national prisoners cooperate and provide detail, political and diplomatic issues can affect the availability of documentation, as can relations with Embassies and High Commissions. Staff and managers were aware of the difficulties in obtaining travel documentation from particular countries. However, we saw little evidence that cases were prioritised on the basis of the length of time and potential difficulty in obtaining travel documentation.

“The scope of this inspection did not include an assessment of the Agency’s processes for obtaining, or using, [emergency travel documents] in detail. However, given the findings of both this inspection and our inspection of asylum, we intend to carry out a more detailed examination in the future.”<sup>218</sup>

Semi-structured interviews with UK Border Agency officials and a review of policy guidance indicates there are no directions linking the issue of the refusal by consular authorities to document an individual for the purposes of return with statelessness. The testimonies of the participants above are evidence of the limbo in which individuals can find themselves despite having taken reasonable and necessary steps to try to establish their entitlement to a nationality. At the same time, it should be acknowledged that it was extremely difficult to confirm in every case where statelessness or “unreturnability” was an issue whether the individual had in fact taken all reasonable steps to establish whether consular authorities would treat him or her as a national. This should, however, be viewed in light of the inherent difficulties and limitations that individuals who are in limbo may face. As such, there is a clear need to identify a more balanced and systematic approach to such enquiries and to questions of proof.

It is important to note that an efficient statelessness determination procedure has the potential to help the efficient operation of immigration control. If such a procedure was in place it would allow the government to identify those who could and could not be removed. It would also recognise the link between statelessness on the one hand and the failure of consular authorities, in some circumstances to provide documentation. If such a procedure has a possible outcome of regularisation for those who were stateless and who did not have residence in another state where their human rights would be respected, then it would provide a reason for individuals to cooperate with re-documentation processes if they believed that they were stateless. The UK Border Agency’s approach to statelessness is therefore a relevant factor in evaluating its approach to removal and documentation.

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<sup>217</sup> Participant 29.

<sup>218</sup> Independent Chief Inspector of the UK Border Agency, “A Thematic inspection of how UK Border Agency manages foreign national prisoners”, 27 October 2011, available at: <http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/Thematic-inspection-report-of-how-the-Agency-manages-Foreign-National-Prisoners.pdf>, paras 5.20 and 5.21.

## 4.6.4 The approach of legal representatives

The review of participants' case files revealed that, even in cases where the participant was demonstrably stateless and no issues of further investigation or proof arose, relatively few files contained detailed submissions relating to statelessness by legal representatives.<sup>219</sup> This apparent lack of engagement by lawyers in statelessness may in part derive from the fact that, in contrast to refugee status, there is no provision or policy that sets out the circumstances in which stateless persons ought to be granted immigration status following recognition. Thus, there may be a lack of incentive to expend limited resources exploring questions of statelessness and nationality. In any event, it indicates a need for increased training and awareness-raising among lawyers and advice agencies.

Furthermore, the government does not consider that proving statelessness is a matter for which legal aid should be granted because applications are straightforward.<sup>220</sup> This conclusion does not accord with the evidence in this study which shows the complexities that exist in proving statelessness. Furthermore, the provision of legal aid is one mechanism by which the identification of stateless persons will improve, and is a necessary part of any statelessness determination procedures.<sup>221</sup>

## Conclusions

Despite the fact that the UK is bound by the obligations contained in the 1954 Convention, reference to the 1954 Convention was taken out of the Immigration Rules in 1980. Prior to 1980, the Immigration Rules contained a reference to the international conventions relating to stateless persons and, thus, stateless persons could rely on their protection. In addition, from 1998 a policy provided that those recognised as stateless, where they had no residence rights in another State and where the UK was the most appropriate country of residence, were granted the same period of leave to enter or remain as refugees. However that policy changed in 2002.

At present, in the context of immigration law,<sup>222</sup> statelessness appears to only provide an entitlement to a 1954 Convention Travel Document in limited circumstances, but there is no basis upon which they can first apply to be recognised as stateless. Current UK law and policy does not make specific provision to grant identity documents to stateless persons who do not possess valid travel documents. Stateless persons who are undocumented must seek immigration status either through relying on provisions where their statelessness is either irrelevant, for example through their marriage to an EEA national exercising treaty rights, or through regularisation programmes that they may qualify for, usually as failed asylum-seekers on the basis of long residence and established connections with the UK.

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<sup>219</sup> From a review of available immigration files it appeared that detailed submissions on statelessness were only made in relation to participants 2, 3, 5, 20, 28, 33 and 37. However, more cursory references to the fact of an individual being stateless were made in relation to some other participants, and for some cases it was not possible to review the full immigration file in order to assess whether representatives' submissions engaged in detail with the issue of statelessness.

<sup>220</sup> *The Reform of Legal Aid in England and Wales: the Government Response*, available at: <http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf>, p. 38 and p. 133.

<sup>221</sup> See UNHCR, *Geneva Summary Conclusions*, para. 10.

<sup>222</sup> Nationality law is discussed in Chapter 6.

In addition to the problems identified within the current legal and policy framework, there is significant evidence that statelessness is not appropriately identified within the operation of immigration control. The evidence indicates that this is true both when an individual presents initially to the UK Border Agency but, also, in the context where the Agency is seeking to re-document a non-national for the purposes of removal. The lack of appropriate identification of statelessness resulting from the lack of a statelessness determination procedure potentially contributes to inefficient border control. In addition, there is evidence that the current framework contributes to profound human rights concerns for stateless persons on the UK territory, which will be discussed in detail in the next chapter.

## Recommendations

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The UK should incorporate the 1954 Convention into domestic law to ensure that stateless persons in the UK are able to access their rights guaranteed under the Convention.



The Home Office and UK Border Agency should develop an accessible procedure for identifying stateless persons on the territory in order to meet the UK's legal obligations under the 1954 and 1961 Conventions and in international human rights law.



The Home Office and UK Border Agency should develop guidance on the identification of stateless persons and adopt a position in accordance with forthcoming UNHCR Guidelines on the definition of “stateless person” in international law. In particular this guidance should ensure that the burden of proof is shared between the applicant and the State and that the approach to assessing evidence meets the developing understanding of the interpretation and application of Article 1(1) of the 1954 Convention. It should make it clear that statelessness may only become apparent during the process of documentation to allow a person to return to a foreign State, and in the light of responses received from that State's consular or other national authorities.



The UK government should ensure that legal aid is available to stateless persons, who cannot afford to pay for a lawyer themselves, and are seeking to have their status recognised. Legal aid is a necessary part of an efficient procedure for determining statelessness and helps to ensure that the UK's legal obligations under the 1954 Convention and in international human rights law are met.

# CHAPTER 5: THE HUMAN RIGHTS CHALLENGES FACED BY STATELESS AND “UNRETURNABLE” PERSONS IN THE UK

The human rights of stateless and “unreturnable” persons in the UK are guaranteed under existing obligations under international law. There are, however, significant gaps and omissions in the way in which stateless persons are treated in practice.

This chapter examines some of the reasons why these obligations may not be met. It explores the extent to which both groups are at risk of human rights infringements, especially as a result of destitution, limitations on access to healthcare, arbitrary detention and disruption of family life.

## 5.1 Introduction

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The previous chapter examined the status of the 1954 Convention in UK immigration law and the significant problems that exist in identifying stateless persons in the operation of immigration control. This chapter will provide a complementary analysis of the human rights challenges faced by stateless and “unreturnable” persons in the UK. It will examine each issue by reference to the UK’s international obligations,<sup>223</sup> taking into account the participants’ testimony, evidence in their immigration case files and current UK law and policy. It will also examine issues that were identified in the assessment of stateless persons’ claims for international protection, before drawing conclusions and making recommendations.

The focus will be on the cases of persons left in limbo, predominantly after their asylum claim has been refused and appeal rights have been exhausted. One third of participants in the study had been held in administrative detention under powers contained in the Immigration Act 1971 at some point in time.<sup>224</sup> All participants had, at some point, been granted temporary admission or release whereby they were at liberty subject to conditions, typically with a requirement to report to the UK Border Agency at varying intervals, along with restrictions on the place of residence and working. It is important to note that this is not the equivalent of a grant of leave to enter or remain and, as was set out in the previous chapter, stateless persons who have no outstanding claim to remain in the UK are expected to leave the UK, like other undocumented migrants.<sup>225</sup> A small number, eight out of 37, of participants benefited from a grant of leave to enter or remain at the time they were interviewed for the research, resulting in significantly improved rights protection.<sup>226</sup>

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<sup>223</sup> In particular under the 1954 Convention, the 1951 Convention and international human rights law.

<sup>224</sup> In particular, Schedule 2.

<sup>225</sup> See Chapter 4, Section 4.4.2.

<sup>226</sup> Participants 8, 9 19, 22, 23, 28, 33 and 37.

## 5.2 Relevant provisions of international law

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The 1954 Convention establishes statelessness as a status in international law, bringing with it a number of rights and protections. These are complemented by protections in international human rights law, some of which are incorporated into UK domestic law.

### 5.2.1 International human rights law

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International human rights law applies equally to stateless persons and others within the UK's jurisdiction. Relevant obligations are found across all the universal treaties from the International Covenant on Civil and Political Rights<sup>227</sup> to the Convention on the Rights of Persons with Disabilities.<sup>228</sup> These Conventions have not been directly or completely incorporated into UK law.<sup>229</sup> As with the unincorporated provisions of the 1954 Convention, the UK is obliged, as a matter of international law, to perform its obligations under these treaties in good faith, and the UK may not invoke the provisions of its internal law as justification for any failure to perform its obligations.<sup>230</sup>

In contrast, the European Convention on Human Rights and Fundamental Freedoms<sup>231</sup> is substantially incorporated into domestic law by the Human Rights Act 1998.<sup>232</sup> The Act contains certain key provisions to achieve this end, including:

- (i) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights;<sup>233</sup>
- (ii) It is unlawful for a public authority to act in a way which is incompatible with a Convention right;<sup>234</sup>
- (iii) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may:
  - a. Bring proceedings against the authority under the Act in the appropriate court or tribunal; or,
  - b. Rely on the Convention right or rights concerned in any legal proceedings but only if he is (or would be) a victim of the unlawful act.<sup>235</sup>

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<sup>227</sup> 999 UNTS 171, in force 4 January 1969, UK ratification 20 May 1976 and UN Human Rights Committee (HRC), General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: <http://www.unhcr.org/refworld/docid/478b26ae2.html>, para. 10.

<sup>228</sup> 2515 UNTS 3, in force 3 May 2008, UK ratification 8 June 2006.

<sup>229</sup> Although there are particular provisions in domestic legislation aimed to try to ensure compliance with some of these international law obligations (e.g. Borders, Immigration and Citizenship Act, section 55, discussed in Chapter 6).

<sup>230</sup> Articles 26 and 27 of the Vienna Convention on the Law of Treaties 1969, UNTS, vol. 1155, p. 331, in force 27 January 1980.

<sup>231</sup> ETS No 5, in force 3 September 1953.

<sup>232</sup> Entry into force 2 October 2000.

<sup>233</sup> Human Rights Act, section 3.

<sup>234</sup> *Ibid.*, section 6.

<sup>235</sup> *Ibid.*, section 7.

The European Court of Human Rights has considered a number of cases in relation to stateless persons.<sup>236</sup> In applying the provisions of the Act, “[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less”.<sup>237</sup> This chapter will examine some of the principles that derive from the caselaw of the European Court of Human Rights, and how it should be applied to the particular situation of stateless persons to ensure appropriate legal protection. The testimony of the participants in the project shows that, at present, these principles are not always applied in practice.

## 5.2.2 International refugee law

The UK owes stateless persons who are also refugees obligations arising from the 1951 Convention.<sup>238</sup> A refugee is defined in the relevant part Article 1A(2) of the 1951 Convention as being a person who:

“...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”<sup>239</sup>

These obligations are cemented in EU law by the Qualification Directive.<sup>240</sup> The UNHCR Prato Summary Conclusions find that “[i]f a stateless person is simultaneously a refugee, he or she should be protected according to the higher standard which in most circumstances will be international refugee law, not least due to the protection from *refoulement* in Article 33 of the 1951 Convention”.<sup>241</sup> However, not all stateless persons are refugees.<sup>242</sup>

Stateless persons claiming asylum in the UK are entitled to be treated in accordance with the minimum standards contained in the Reception Conditions Directive<sup>243</sup> and to have their

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<sup>236</sup> For example, *Karashev and Family v. Finland*, 31414/96, Council of Europe: European Court of Human Rights, 12 January 1999, available at: <http://www.unhcr.org/refworld/docid/45d076a92.html> *Silvenko v. Latvia* Application No. 48321/99, *Kuric and Others v. Slovenia*, Application no 26828/06, Council of Europe: European Court of Human Rights, 13 July 2010, available at: <http://www.unhcr.org/refworld/docid/4c3f01312.html>.

<sup>237</sup> *Ahsan Ullah v. Special Adjudicator; Thi Lien Do v. Secretary of State for the Home Department*, [2002] EWCA Civ 1856, United Kingdom: Court of Appeal (England and Wales), 16 December 2002, available at: <http://www.unhcr.org/refworld/docid/404f17c04.html>, at 350 per Lord Bingham.

<sup>238</sup> 189 U.N.T.S. 150, in force 22 April 1954, UK ratification 11 March 1954.

<sup>239</sup> Note that the Convention does not apply to those who fall within Article 1D, 1E and 1F.

<sup>240</sup> *Council Directive 2004/83/EC of the European Union on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, (hereafter “the Qualification Directive”).

<sup>241</sup> UNHCR, *Prato Summary Conclusions*, para. 5.

<sup>242</sup> See *Ravenko v Secretary of State for the Home Department* [2000] EWCA Civ 50 where the Court of Appeal held that that a stateless person who is unable to return to his or her country of habitual residence is not a refugee unless he or she is able to demonstrate a well-founded fear of persecution.

<sup>243</sup> *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers*, (hereafter “the Reception Conditions Directive”).

asylum claims considered in accordance with the minimum standards contained within the Asylum Procedures Directive.<sup>244</sup>

These sources of law are, to a significant extent, incorporated<sup>245</sup> or transposed into UK law.<sup>246</sup> However, the analysis of the way in which the claims for asylum or complementary protection of stateless persons are considered has identified a number of concerns and, in particular, divergence from UNHCR's interpretation of Article 1D of the 1951 Convention.<sup>247</sup> That said, the quantitative analysis indicates that their claims for international refugee protection are significantly more likely to be successful than other asylum-seekers. This is because stateless persons are often subject to discrimination and human rights abuse in their countries of former habitual residence.<sup>248</sup>

## 5.3 Destitution (including access to employment, social assistance and housing)

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Of the 37 participants interviewed, 28 had experienced destitution. Of these, 11 participants had experienced rough sleeping or homelessness.<sup>249</sup> Their testimony and the analysis of their case files raises a complex set of issues relating to the compatibility of their treatment with obligations under the 1954 Convention and international human rights law; in particular, obligations that aim to ensure access to employment, housing and social assistance. Further, the circumstances in which the destitution of stateless and “unreturnable” persons on the UK territory can constitute prohibited “inhuman and degrading treatment” are particularly important as this obligation is enforceable in domestic law.<sup>250</sup>

### 5.3.1 Entitlement to work

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The 1954 Convention provides qualified obligations in respect of the right to work which is an important right in avoiding destitution. Stateless persons who are “lawfully staying in the territory” are guaranteed “treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances” in respect of

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<sup>244</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States, (hereafter “the Asylum Procedures Directive”).

<sup>245</sup> See, for example, the Asylum and Immigration Appeals Act 1993, section 2 which provides that “[n]othing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention” and the Immigration Rules HC 395, Part 11.

<sup>246</sup> Though see *FA (Iraq) v. Secretary of State for the Home Department*, [2010] EWCA Civ 696, United Kingdom: Court of Appeal (England and Wales), 18 June 2010, available at: <http://www.unhcr.org/refworld/docid/4c1f76b02.html> para. 16 on the imperfect transposition of the Qualification Directive in UK law.

<sup>247</sup> See Section 5.9.1.

<sup>248</sup> See Section 3.4.

<sup>249</sup> Participants 1, 4, 6, 10, 11, 17, 18, 26, 28, 29 and 36.

<sup>250</sup> Within the meaning of Article 7 ICCPR, the relevant part of which provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and, particularly, Article 3 ECHR, which provides “No one shall be subjected to torture, inhuman or degrading treatment or punishment”.

“wage-earning employment”,<sup>251</sup> “practising a liberal profession,”<sup>252</sup> or “self-employment”.<sup>253</sup> UNHCR guidance<sup>254</sup> provides that:

“On the basis of the travaux and other provisions of the Convention, it is reasonable to conclude that ‘stay’ means something less than durable residence, although clearly more than a transit stop, while ‘lawful’ normally is to be assessed against prevailing national laws and regulations:

- A judgment as to lawfulness should nevertheless take into account all the prevailing circumstances, including the fact that the stay in question is known and not prohibited, i.e. tolerated, because of the precarious circumstances of the person;
- Implying lawfulness in such circumstances is legitimate and necessary if a State is to implement its international obligations under the Convention.”

On this analysis, a stateless person may, depending on his or her circumstances, be “lawfully staying” in the UK, even if he or she is admitted on temporary admission and has not been granted leave to enter or remain.<sup>255</sup> That said, domestic caselaw indicates that if this matter was ever considered by the UK courts<sup>256</sup> a stateless person would have to have their stateless status recognised to benefit from this protection.<sup>257</sup> Further, the same caselaw applies a more restrictive view on the level of connection required to establish “lawful presence” or “lawful stay” than that adopted by UNHCR.<sup>258</sup>

An analysis of relevant provisions of international human rights law concludes that stateless persons will only benefit from protections<sup>259</sup> in respect of employment “if they have gained lawful access to the state’s jurisdiction”.<sup>260</sup> This would apply to stateless persons granted temporary admission or release. However, the relevant treaty provisions are not incorporated into UK domestic law and cannot be directly relied on in domestic courts. In some circumstances, the right to employment is protected within the sphere of private life guaranteed by Article 8 ECHR.<sup>261</sup> However, the UK courts have not examined the application of this provision to the situation of stateless persons or “unreturnable” persons who are prohibited from working.

Most of the participants were prohibited from working by the conditions of their temporary admission or release. Indeed, if a stateless person who is subject to immigration control works

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<sup>251</sup> 1954 Convention, Article 17.

<sup>252</sup> *Ibid.*, Article 19.

<sup>253</sup> *Ibid.*, Article 18.

<sup>254</sup> UNHCR, *Lawfully Staying – A Note on Interpretation*, 3 May 1988, available at: <http://www.unhcr.org/refworld/docid/42ad93304.html>.

<sup>255</sup> *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64.

<sup>256</sup> The current lack of incorporation of the provision means that this is presently unlikely.

<sup>257</sup> *Szoma v Secretary of State for Work and Pensions*, *op. cit.*, paras. 24 and 25.

<sup>258</sup> *Ibid.* The House of Lords held that persons who make an application for leave to enter or remain at port on arrival and are granted temporary admission by the UK Border Agency can be considered to be “lawfully present” on the UK territory. The Court did not consider what was required to establish the greater level of attachment of lawful stay.

<sup>259</sup> For example the International Covenant on Economic, Social and Cultural Rights (hereafter the ICESCR), Article 6.

<sup>260</sup> Van Waas, L., *Nationality Matters: Statelessness under International Law*, Intersentia, 2008, p.315, but note the restrictive conclusion arrived at in applying this test.

<sup>261</sup> See *Niemietz v. Germany*, 72/1991/324/396, European Court of Human Rights, 16 Dec. 1992, available at: <http://www.unhcr.org/refworld/docid/3f32560b4.html> and *Tekle v. Secretary of State for the Home Department*, [2008] EWHC 3064 (Admin), United Kingdom: High Court (England and Wales), 11 December 2008, available at: <http://www.unhcr.org/refworld/docid/494678492.html>.

without permission, then he or she may have committed an offence.<sup>262</sup> A small number of participants were able to work because they had been granted leave to enter or remain which did not have a limitation on employment.<sup>263</sup> One participant had been granted permission to work even though his asylum claim was still outstanding.<sup>264</sup>

There are no provisions in current UK law or policy which allows stateless persons to work as a result of their stateless status. They are prohibited from working unless they gain the entitlement upon another basis, such as being granted leave to enter or remain without a restriction on employment, or unless the Secretary of State for the Home Department exercises discretion in their favour.<sup>265</sup> The same is true of “unreturnable” persons. This should be placed in the context of the UK Border Agency’s increasing focus on the detection, arrest and prosecution of non-nationals who work without permission.<sup>266</sup> The seven participants who admitted to having worked without permission in order to avoid destitution were therefore at increased risk of detection and prosecution if they continued to work.

### 5.3.2 Entitlement to benefits, housing and the right to a minimum standard of living

The 1954 Convention obliges state parties to provide the same treatment to stateless persons as to nationals in respect of “public relief and assistance”<sup>267</sup> and, subject to additional limitations, “social security”.<sup>268</sup> However, as in respect of employment, there is an additional requirement that the stateless person be “lawfully staying” if he or she is to fall within the scope of the obligation.

The UK’s obligations in international human rights law require recognition of the right of everyone to social security, including social insurance.<sup>269</sup> In addition, they recognise the rights of individuals to minimum standards of living<sup>270</sup> and the highest attainable standard of health.<sup>271</sup> In the case of undocumented stateless persons on the UK territory, these provisions are mutually reinforcing, and in the event that the individual is prohibited from or is unable to

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<sup>262</sup> Immigration Act 1971, section 24 makes it an offence to, without reasonable excuse, fail to “observe any restriction imposed on him under Schedule 2 or 3 of this Act...as to employment or occupation.”

<sup>263</sup> Participants 9, 14, 23, 26, 34, 35 and 37 had worked, while participants 8, 19, 28 and 33 had not worked despite their immigration status permitting them to do so.

<sup>264</sup> See Immigration Rules (HC 395), paragraph 360 and *ZO (Somalia) v Secretary of State for the Home Department* [2010] UKSC 36. The Immigration Rules prescribe that asylum-seekers are not permitted to work unless their claim for asylum has not been decided for 12 months or, following litigation, if they have made further representations after the refusal of their initial application and any appeal, if no decision has been made on the further representations for 12 months. In August 2010, the provision was amended to restrict access to shortage occupation professions. These provisions purport to comply with a minimum standard contained within Article 11 of the Reception Conditions Directive.

<sup>265</sup> For example, if granted temporary admission, under Immigration Act 1971, Schedule 2, paragraph 22 (2).

<sup>266</sup> See, for example, Immigration Law Practitioners’ Association, “Information Sheet: Illegal Working”, available at: <http://www.ilpa.org.uk/resources.php/4600/illegal-working>

<sup>267</sup> 1954 Convention, Article 23.

<sup>268</sup> *Ibid.*, Article 24.

<sup>269</sup> ICESCR, Article 9.

<sup>270</sup> *Ibid.*, Article 11.

<sup>271</sup> *Ibid.*, Article 12

work, may require access to alternative forms of support and accommodation to ensure that core entitlements guaranteed by the right are not infringed.<sup>272</sup>

The European Convention on Human Rights has been interpreted by both the European Court of Human Rights and the House of Lords<sup>273</sup> to provide relevant obligations. For example, the right not to be subjected to inhuman or degrading treatment<sup>274</sup> can be engaged where asylum-seekers, who have no other means of support, are left destitute.<sup>275</sup>

In 2011 the European Court of Human Rights considered this issue in a case brought by an asylum seeker who had been transferred from Belgium to Greece under the Dublin Regulation.<sup>276</sup> The Court held, in respect of living conditions, that:

“The Court considers that the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.”<sup>277</sup>

The relevant domestic caselaw also focuses on the treatment of asylum-seekers. Under the Nationality, Immigration and Asylum Act 2002, section 55, the Secretary of State is prohibited from providing asylum support to asylum-seekers who did not claim asylum “as soon as is reasonably practicable”. An exception, contained in section 55(5), gave the power for the Secretary of State to provide support, even in the case of a late claim “to the extent necessary to prevent a breach of the person’s ECHR rights” and to provide support where the applicant has a dependent child under 18 years old. Once the provision was brought into force and applied in practice, it received significant judicial scrutiny, resulting in a landmark decision of the House of Lord’s in *R (Limbuella) v Secretary of State for the Home Department*

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<sup>272</sup> See United Nations Committee on Economic, Social and Cultural Rights (hereafter the CESCR) General Comment 3, *The nature of State parties obligations*, 12/14/1990: General Comment 18, *The Right to Work*, E/C.12/GC/18.

<sup>273</sup> Formerly the highest court in the UK. Its function has now been taken over by the Supreme Court.

<sup>274</sup> Protected by Article 3 ECHR. The relevant part of ICCPR, Article 6 provides, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment.”

<sup>275</sup> UK case law that preceded the coming into force of the Human Rights Act 1998, indicated that such treatment could breach protections in the common law See *M, R (on the application of) v London Borough of Hammersmith & Fulham* [1996] EWHC Admin 90 (8th October, 1996), per Collins, J. “The right to life is a fundamental human right. It is one that the law will protect. This consideration was referred to in *R v Inhabitants of Eastbourne* (1803) 4 East 103, where Lord Ellenborough C.J. said at p.107: “As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving...”.

<sup>276</sup> *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.htm>.

<sup>277</sup> *Ibid.*, para. 263.

(*Shelter Intervenor*).<sup>278</sup> In that case, the Court held that the Secretary of State's failure to provide support and accommodation to an asylum seeker for whom there was no apparent alternative source of support constituted degrading treatment, in breach of Article 3 ECHR. Consequently, section 55 could only be applied in cases where such an alternative means of support was proven to exist. This decision is based upon the premise that the asylum seeker cannot be expected to return to his or her country of origin in order to survive economically. The expectation of return was not appropriate because the outstanding asylum claim alleges that return would constitute a breach of the 1951 Convention, Article 33(1) or a breach of Article 3 ECHR in the country of origin.

The importance of the fact that the applicant in *Limbuela* could not, lawfully, be expected to return to her country of origin because her asylum claim was outstanding, can be seen in subsequent litigation concerning a provision that empowered the Secretary of State to remove support from failed asylum-seekers who had dependent children.<sup>279</sup> When the provision began to be used on a pilot basis, the Asylum Support Tribunal held that the withdrawal of support in these circumstances would not infringe Article 3 or Article 8 ECHR, because the support would be reinstated if the appellant showed that he or she was taking reasonable steps to leave the UK.<sup>280</sup> An application for Judicial Review challenging both the Tribunal's decision and the lawfulness of policy regime as a whole failed.<sup>281</sup> In the cases of asylum-seekers whose claims had been considered, refused and whose appeal rights were exhausted, it was considered acceptable to make support conditional upon compliance with removal even if they had dependent children.

The courts have yet to consider the application of Article 3 ECHR to the situation of destitute stateless persons on the UK territory. However, stateless persons share several similar characteristics to those of asylum-seekers. They are often vulnerable and, as a matter of fact rather than legal prohibition, are unable to leave the territory of their country of residence because no other State will admit them. It is therefore likely that Article 3 ECHR will be engaged where a stateless person is destitute, has no other means of support, and can be shown to be in a comparable position to asylum-seekers.

### 5.3.3 Relevant domestic provisions

Most persons who are subject to immigration control in the UK are not entitled to state benefits (including social security).<sup>282</sup> There are multiple exceptions to this rule. However, there is no exception that is expressly tailored to the situation of stateless or "unreturnable" persons. Consequently, in most cases, stateless or "unreturnable" persons will only be entitled to access a form of state benefit if they qualify by meeting one of the exceptions to the general rule.

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<sup>278</sup> *Regina v. Secretary of State for the Home Department (Appellant), ex parte Adam (FC) (Respondent); Regina v. Secretary of State for the Home Department (Appellant), ex parte Limbuela (FC) (Respondent); Regina v. Secretary of State for the Home Department (Appellant), ex parte Tesema (FC) (Respondent) (Conjoined Appeals)*, [2005] UKHL 66, United Kingdom: House of Lords (Judicial Committee), 3 November 2005, available at: <http://www.unhcr.org/refworld/docid/43fc2d1a0.html>.

<sup>279</sup> Immigration and Asylum (Treatment of Claimants) Act, 2004, section 9.

<sup>280</sup> ASA 05/08/9824 and ASA 06/09/05.

<sup>281</sup> See Willman, S. and Knapfler, S., *Support for Asylum Seekers and other Migrants: A guide to legal and welfare rights*, Legal Action Group, 2009.

<sup>282</sup> *Ibid.*, p. 118.

The majority of participants in the study had claimed asylum and had had their claims for asylum refused. This section will therefore primarily concentrate upon the entitlements to support and accommodation for asylum-seekers. These provisions, combined with the current law and policy in respect of the entitlement to work, provide the legal and policy framework that results in such a high proportion of participants in the research being left destitute. However, as the analysis continues, it will reveal that there is a provision in domestic law<sup>283</sup> that stateless or “unreturnable” persons can seek to rely upon to obtain low level support and accommodation, without having claimed asylum. There is, however, no evidence that participants in the study benefited from this possibility. In any event, it is a provision which could only ever provide support and accommodation for a short period. Support and accommodation on this basis would not provide an adequate solution for the needs of stateless persons.

Asylum-seekers are, as a category, excluded from mainstream state benefits by operation of statute.<sup>284</sup> However, the Secretary of State for the Home Department was given the power to provide support to asylum-seekers.<sup>285</sup> This power has been interpreted by the courts as creating a duty on the Secretary of State to provide support where the criteria are met<sup>286</sup> and is supplemented by a number of measures that aim to transpose provisions of the Reception Conditions Directive.<sup>287</sup> However, this provision is only available to asylum-seekers, a definition that does not include undocumented stateless persons seeking recognition of their stateless status.<sup>288</sup> This provides one possible explanation as to why stateless persons may be compelled to claim asylum even if they are not at risk of persecution.

In addition, the asylum seeker has to show, if applying for support, that he or she will be “destitute” either due to a lack of “adequate accommodation” or if he or she cannot meet the household’s “essential living needs” within 14 days, or if he or she has already been receiving support, within 56 days. These terms have been subject to extensive scrutiny and interpretation in Tribunals and Higher Courts.

With regard to the current analysis it is important to note two points. First, stateless or “unreturnable” persons who do not make a claim for asylum or whose removal would breach Article 3 ECHR are not entitled to asylum support. Secondly, for stateless and “unreturnable” persons who make asylum claims that are subsequently refused and their appeal rights exhausted, the entitlement to asylum support ends. An exception exists if he or she has a dependent child under the age of 18 born before all asylum claims and appeals were rejected but, as described above, there are circumstances in which that exception can be revoked.<sup>289</sup>

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<sup>283</sup> Immigration and Asylum Act 1999, s4 (1). There are exceptions: for example those who had subsisting asylum claims in February 2006 or April 2000 and fall within separate transitional provisions. However, no participant in the study was eligible under these provisions.

<sup>284</sup> See Immigration and Asylum Act 1999, s115.

<sup>285</sup> Immigration and Asylum Act 1999, s95(1). “Asylum-seeker” in this context can be broken down into the following parts - as persons who are 18 years or older, and; who have made a claim for asylum as a refugee or a human rights claim under the Article 3 ECHR which has been recorded, and has made the claim at the port of entry or at a designated place (most commonly the Asylum Screening Unit at Lunar House in Croydon), and is awaiting the result of this claim or appeal (or is within the timescale for lodging a further appeal), or has a dependent child under 18 born before all asylum claims and appeals were rejected.

<sup>286</sup> *Hamid Ali Husain v. Asylum Support Adjudicator and SSHD*, CO/105/2001, United Kingdom: High Court (England and Wales), 5 October 2001, available at: <http://www.unhcr.org/refworld/docid/3dec98bf4.html>.

<sup>287</sup> See Asylum Seekers (Reception Conditions) Regulations 2005, Regulation 5.

<sup>288</sup> See Immigration and Asylum Act 1999, s115.

<sup>289</sup> Willman, S. and Knapfler, S., *op. cit.*, p.220.

At the point of losing their asylum support following refusal of their asylum claim, many interviewees were able to mitigate their destitution, at least temporarily, by staying with friends.<sup>290</sup> In many cases such help was provided for many months or even years, although by its nature it remained precarious and often placed great strain on the personal relationships involved. However, the need for such reliance stems from the lack of access for stateless persons to relevant social and economic rights.

### Case study: Kuwaiti Bidouns refused asylum

Ten Kuwaiti Bidouns were interviewed and thus formed a sizeable proportion of the participants in the study. In Arabic, Bidoun means “without”, reflecting the fact that this group is excluded from Kuwaiti nationality. They face systemic discrimination in Kuwait.<sup>291</sup> Many Kuwaiti Bidouns are granted asylum in the UK. However, caselaw and guidance indicates that decision-makers on asylum claims should draw a distinction between “documented” and “undocumented” Bidouns on the basis that a significant number of Bidouns have been provided with social security cards between 1996 and 2000, which facilitates some access to social entitlements.<sup>292</sup> However, it emerged from the research that this guidance was not consistently or correctly applied and that as a result some participants, despite evidence that they were in fact “undocumented” Bidouns, were not recognised as refugees. This appeared to be reinforced by the failure or inability of the UK Border Agency to enforce removal which in turn resulted in lengthy time spent in limbo, at risk of destitution.

The case of Ghanim,<sup>293</sup> aged 67, raised common issues for those Bidouns who are not granted asylum. After he claimed asylum he was initially accommodated in Dover and then moved to Birmingham. He was given £50 per week to live on. But this was stopped after his asylum appeal was dismissed in April 2006. In June that year he and his wife, who was also in her late 60s, were evicted from their accommodation. Ghanim explained:

“My wife and I had nowhere to go so we went and sat in the bus station for 5 hours. Then a man came up to me and said that he had seen us there earlier and now we were still there so he asked me what the problem was, what was my story? I explained our situation and he immediately invited us to come and stay with him at his house where we remained for three months.”

Soon after this Ghanim was admitted to hospital with serious kidney problems and was operated on. After his discharge from hospital, the Refugee Council made an application for section 4 support which was granted in November 2006. However, after further

<sup>290</sup> Participants 5, 6, 10, 12, 14, 15, 16, 17, 27, 28, 30, 35 and 36.

<sup>291</sup> See Human Rights Watch, *Prisoners of the past: Kuwait Bidoun and the burden of statelessness*, available at: <http://www.hrw.org/reports/2011/06/13/prisoners-past> and Refugees International and Open Society Foundations, *Without Citizenship: Statelessness, Discrimination and Repression in Kuwait*, 2011, available at: [www.refugeesinternational.org/sites/default/files/120511\\_Kuwait\\_With\\_Citizenship\\_0.pdf](http://www.refugeesinternational.org/sites/default/files/120511_Kuwait_With_Citizenship_0.pdf).

<sup>292</sup> *HE (Bidoun - Statelessness - Risk of Persecution) Kuwait v. Secretary of State for the Home Department*, CG [2006] UKAIT 00051, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 21 June 2006, available at: <http://www.unhcr.org/refworld/docid/46836aa0d.html>.

<sup>293</sup> It was not possible to obtain a full paper file for this participant but factual aspects were checked on CID as well as the limited papers available.

submissions were refused in September 2010 and having once again lost his support and having been evicted from his accommodation, he and his wife have been staying with a friend. Ghanim describes how being stateless makes him feel “lost”. He said that “every day I feel like I’m going to die, I feel that events will crush me. Sometimes I want to die, to get rid of these things.”

Other stateless Kuwaiti Bidouns interviewed describe similar experiences of being totally reliant on friends following the refusal of their asylum applications.<sup>294</sup> Imad, aged 28, has spent almost a year destitute and finds uncomfortable parallels between his situation in the UK and the conditions he had fled in Kuwait. He explained: “Firstly, I have no papers, this is the same as back home. Secondly, I can’t move or travel, also the same as back home. Thirdly, I have no job. It is the same life as I was living in Kuwait, there is no difference...I see myself as not a human. Because I have no documents I am not a human. Of course it affects me as a human because since birth when I opened my eyes for the first time I have had no status. I don’t want my children to have to feel the same way I do. It is a tragedy.” Amani,<sup>295</sup> aged 35, was destitute and in limbo immediately after her asylum appeal was dismissed in September 2008 until she was interviewed for the research in February 2011. She has also had three sets of further submissions refused, despite producing expert evidence that she is a “undocumented” Bidoun as claimed. Her assessment of her situation chimes with that of Imad. She says: “the refusal is difficult. Because of this my situation is the same as it was in Kuwait. I have no ID, no work, no education, no freedom.”

#### **Section 4 accommodation and support for stateless and “unreturnable” refused asylum-seekers**

The majority of participants in the study were refused asylum-seekers. The government expects them to leave the UK as they have been found to have no right to remain.

However, the Secretary of State is empowered to provide “facilities and accommodation” to someone who was, but is no longer, an asylum seeker.<sup>296</sup> The Secretary of State has made regulations that set out eligibility criteria which are applied in all cases except where the applicant is being released from detention.<sup>297</sup> Applicants must pass a two-stage test. First, the “failed asylum-seeker” must appear to the Secretary of State to be “destitute”.<sup>298</sup> There are references in secondary sources that indicate that refused asylum-seekers have difficulty in proving that they are destitute.<sup>299</sup> Secondly, they must satisfy one of five conditions. The most relevant conditions for participants in this study were either that the person is taking all reasonable steps to leave the UK or to place themselves in a position in which he or she is able to leave the UK,<sup>300</sup> or that the provision of accommodation is necessary for the purpose of avoiding a breach of a person’s Convention rights, within the meaning of the Human Rights Act 1998.<sup>301</sup>

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<sup>294</sup> Participant 15.

<sup>295</sup> It was not possible to obtain a full paper file for this case but factual aspects were checked on CID as well as the limited papers available.

<sup>296</sup> Immigration and Asylum Act 1999, section 4(2).

<sup>297</sup> Immigration and Asylum (Provision of Accommodation to Failed Asylum-seekers) Regulations 2005.

<sup>298</sup> The definition of destitution is the same as considered in the test for section 95 support.

<sup>299</sup> Willman, S. and Knapfler, S., *op. cit.*, pp. 279-81.

<sup>300</sup> The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 No 930, Regulation 3(2)(a).

<sup>301</sup> *Ibid.*, Regulation 3(2)(e).

These provisions have been applied in a number of appeals against the refusal to provide support to stateless and “unreturnable” persons.<sup>302</sup> These cases do not indicate any link between statelessness, the lack of a prospect of removal, and eligibility for asylum support. Stateless and “unreturnable” asylum-seekers are often asked to apply for voluntary assisted return. There is, however, one particularly relevant decision which holds that a person who has applied for leave to enter or remain on the basis that they are stateless should be granted section 4 support because the failure to do so would leave him destitute, in breach of Article 3 ECHR.<sup>303</sup>

A number of conclusions can be drawn about support for refused asylum-seekers. First of all, the criteria for granting section 4 support were not drafted with the situation of stateless refused asylum-seekers in mind, who will often be unable to secure travel documentation or admittance to any country of former habitual residence. Requiring stateless persons to register for voluntary return when such return is, in the individual case, objectively impossible appears unduly onerous, and risks infringing human rights norms if applied too strictly. Secondly, although the Tribunal has recognised that statelessness can be a “juridically relevant fact”<sup>304</sup> when assessing whether a failed asylum seeker should be entitled to support, it has done so on the basis of further submissions requesting leave to remain on the basis of statelessness.

### **Other powers to provide support and accommodation**

The Secretary of State also has the power to provide accommodation to those on temporary admission, those given temporary release and those released on bail.<sup>305</sup> Although none of the participants in the study appears to have received support on this basis, it appears that the power is sufficiently broadly drawn to allow the Secretary of State to provide support for stateless persons, particularly if she considers that their human rights would be breached if such support was not provided. This power could be used to ensure that those stateless persons who do not claim asylum and are not permitted to work avoid destitution and the social problems that can arise. However, none of the participants in the research benefited from the application of this provision to their situation.

### **Evaluation of participants' situations**

In conclusion, 11 of the 34 participants interviewed for this project had experienced rough sleeping or homelessness in the UK.<sup>306</sup> Six of these 11 participants experienced homelessness after section 4 support was stopped or denied.<sup>307</sup> Eight participants had been granted leave to enter or remain by the time that they were interviewed for this study. None of those with leave to enter or remain were homeless or destitute because the leave that they had been granted to not have restrictions on access to public funds. Two were in employment,<sup>308</sup> two were in full time education<sup>309</sup> and three were receiving welfare benefits or in the process of applying for these.<sup>310</sup> The remaining 29 participants continued to live in limbo with no immediate prospect of being granted leave to enter or remain.

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<sup>302</sup> See AST 06/03/12859 and AST 07/11/16508 cited in, S. and Knapfler, S., *op. cit.*, p. 282 and AST 10/05/23245, AST 09/07/20070.

<sup>303</sup> AST 06/03/13043.

<sup>304</sup> See UNHCR *Geneva Summary Conclusions*, para. 30.

<sup>305</sup> Immigration Act 1999, section 4(1).

<sup>306</sup> Participants 1, 4, 6, 10, 11, 17, 18, 26, 28, 29 and 36.

<sup>307</sup> Participants 4, 11, 17, 18, 26 and 29.

<sup>308</sup> Participants 23 and 37.

<sup>309</sup> Participants 19 and 22.

<sup>310</sup> Participants 8, 9, 28 and 33.

These figures are indicative of a legal and policy framework which does not offer stateless persons the opportunity to be granted leave to enter or remain, if appropriate, on the basis of their statelessness. The figures reflect the fact that the current law and policy in relation to entitlement to work, welfare benefits and other areas of public assistance fails to provide a sufficiently robust social safety net to ensure that stateless persons in the UK avoid homelessness and destitution. It indicates that, first of all, a procedure that is able to identify stateless persons and, where this is recognised, results in the grant of leave to enter or remain in appropriate cases would be the primary tool to avoid the risk of human rights breaches identified. Further, reforms to domestic law, policy or practice are required to ensure access to welfare benefits, asylum support and section 4 support for stateless persons. Entitlement to work should be considered in order to ensure that stateless persons are not at risk of destitution and street homelessness whilst a claim for recognition of their stateless status is being considered. These changes would help to alleviate the considerable risk that stateless persons face of human rights infringement linked to destitution.

## 5.4 Healthcare

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International law provides protections for stateless persons in respect of access to healthcare. Although the 1954 Convention does not make specific provision in respect of access to healthcare, Article 24 mandates state parties to accord stateless persons lawfully staying on the territory the same treatment as nationals in respect of social security. However, the UK entered a reservation against that article<sup>311</sup> justified on the basis that the National Health Service (Amendment) Act 1949 gave a power for the government to make regulations that would limit access to the National Health Service only to those who are ordinarily resident in the UK. At the time the reservation was entered, no such regulations were made and the UK stated that it was “prepared in the future, as in the past, to give the most sympathetic consideration to the situation of stateless persons”.<sup>312</sup> The reservation has not been withdrawn. However, as is described below, regulations limiting access to secondary healthcare have been made, and recently amended.

International human rights law does make specific provision in respect of access to healthcare. Article 12 of the ICESCR obliges the UK to “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. Although this is a right that is subject to progressive realization, the treaty body that monitors compliance with the Convention has given guidance on the scope of this obligation. It has stated that “the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health”.<sup>313</sup> These entitlements include “timely and appropriate health care”.<sup>314</sup> Such provision has to be accessible to those in the jurisdiction of the State. No discrimination is permitted on prohibited grounds in respect of access to healthcare, particularly in relation to vulnerable

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<sup>311</sup> “The Government of the United Kingdom of Great Britain and Northern Ireland, in respect of such of the matters referred to in sub-paragraph (b) of paragraph 1 of Article 24 as fall within the scope of the National Health Service, can only undertake to apply provisions of that paragraph so far as the law allows.” See UNHCR, *1954 Convention: Signatories, Declarations and Reservations*, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opensslpdf.pdf?reldoc=y&docid=4c0f4b1f2>.

<sup>312</sup> CESCR, General Comment No. 14, *The Right to the highest attainable standard of health*, para. 38, 11 Aug. 2000, E/C.12/2000/4, available at: <http://www.unhcr.org/refworld/docid/4538838d0.html>.

<sup>313</sup> *Ibid.*, para. 9.

<sup>314</sup> *Ibid.*, para. 11.

and marginalised sections of the population.<sup>315</sup> It must be economically accessible, that is to say affordable for all, with “a special obligation to provide those who do not have sufficient means with the necessary health insurance and health care facilities”.<sup>316</sup> It must also be of good quality.<sup>317</sup> Emergency healthcare, essential primary healthcare and non-discrimination in the provision of healthcare are identified as core entitlements that States must meet.<sup>318</sup>

Several participants interviewed revealed a range of health issues including a bowel condition,<sup>319</sup> mental health problems and epilepsy,<sup>320</sup> mental health problems and alcohol/drug dependency,<sup>321</sup> a kidney condition,<sup>322</sup> lymphatic cancer,<sup>323</sup> Hepatitis B,<sup>324</sup> Hepatitis C,<sup>325</sup> and chronic asthma and dental problems.<sup>326</sup> However, except for one case of denied access to (non critical) dental treatment<sup>327</sup> no participants were refused access to healthcare or required to pay for treatment before receiving it.

However, the research identified other evidence that stateless persons were not always able to access healthcare as a result of previous Regulations and Department of Health Guidance.<sup>328</sup> The legality of this guidance was challenged in a case brought by a stateless Palestinian who had claimed asylum when he arrived in the UK.<sup>329</sup> His asylum claim had failed, but he could not leave the UK. He required treatment for lymphatic cancer, which was deemed “urgent” but not “immediately necessary” secondary healthcare. The hospital required him to pay a charge before he would be treated, on the basis that he had been neither “ordinarily resident” nor had been “lawfully present” for 12 months. The Court of Appeal held that, although the hospital was correct in its application of the Regulation and the Guidance, it maintained a discretion to treat the applicant. The Court held that the Guidance ought to be reviewed to consider the “plight of those who cannot be returned” and those for whom there is no prospect of paying for the treatment.

Since the Court of Appeal’s judgment, new Regulations and Guidance have been brought into force.<sup>330</sup> As before, if the person in need of treatment is not “ordinarily resident” he or she may be charged for it. Specific sorts of treatment, such as accident and emergency services, family planning or treatment for specific diseases which is necessary to protect public health, cannot be charged for.<sup>331</sup> Importantly, these now provide that charges should not be applied to failed asylum-seekers who are in receipt of section 4 support, on the premise that “[s]ection 4 support is given to those failed asylum-seekers taking reasonable efforts to leave the UK but for whom there are genuine recognised barriers to their return home”.<sup>332</sup>

The new Regulations and Guidance do not expressly cover the situation of the stateless because, first of all, not all stateless persons in the UK claim asylum and, secondly, evidence

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<sup>315</sup> In accordance with ICESCR Articles 2(2) and 3 in particular and other prohibitions on discrimination discussed in Chapter 5.

<sup>316</sup> CESCR General Comment No. 14, para. 18.

<sup>317</sup> *Ibid.*, para. 12.

<sup>318</sup> *Ibid.*, para. 48.

<sup>319</sup> Participant 3.

<sup>320</sup> Participant 4.

<sup>321</sup> Participant 1.

<sup>322</sup> Participant 10.

<sup>323</sup> Participant 19.

<sup>324</sup> Participant 21.

<sup>325</sup> Participant 36.

<sup>326</sup> Participant 27.

<sup>327</sup> Participant 27.

<sup>328</sup> National Health Service (Charges to Overseas Visitors) Regulations 1989 (SI 1989 No. 306 as amended) and the guidance to the NHS Trust Hospitals in England given by the Secretary of State for Health.

<sup>329</sup> *R (YA) v Secretary of State for Health* [2009] EWCA Civ 225.

<sup>330</sup> See The National Health Services (Charges to Overseas Visitors) Regulations 2011 No 1556 and Guidance on Implementing the Overseas Visitors Hospitals Charging Regulations 2011.

<sup>331</sup> See Guidance on Implementing the Overseas Visitors Hospitals Charging Regulations 2011, section 3.26.

<sup>332</sup> *Ibid.*, section 3.63.

set out above reveals that not all stateless and “unreturnable” refused asylum-seekers receive section 4 support even though they “cannot be returned”. The Regulations and Guidance should be applied in a way that stateless and “unreturnable” persons who are not deemed “ordinarily resident” are able to access necessary and urgent secondary healthcare in compliance with the UK’s obligations under international human rights law.

## 5.5 Detention

In 1997, UNHCR noted that there was an emerging trend across the globe of stateless persons being held in detention. The causes underlying the issue appeared to vary from State to State and the magnitude of the problem was not clear. It was therefore identified as an area that required further study with reference to “principles of international law relating to arbitrary detention, the right to return and agreements between States on confirmation of nationality”.<sup>333</sup>

One third of the participants in the research had been detained under immigration powers.<sup>334</sup> The amount of time that each individual spent in immigration detention ranged from three days to over five years. Although the reasons for immigration detention varied greatly from case to case and often depended on personal circumstances, these figures indicate that the trend identified by UNHCR also exists in the UK. That said, the quantitative evidence analysed in Chapter 3 is insufficiently robust to draw conclusions about the scope of the problem.<sup>335</sup> The experiences of Fatima, set out below, show the risks stateless persons face of being placed in immigration detention and, also, the personal impact that even a short period in detention can have on the individual.

Name: **Fatima (Participant 31)**  
Country of origin: **Kuwait (Bidoun)**  
Date of arrival in UK: **April 2008**  
Time in detention: **3 days**  
Time in limbo: **32 months**  
Current status: **None**

Fatima is a 27 year old stateless Bidoun from Kuwait who arrived in the UK and claimed asylum in April 2008. Fatima describes having attended school in Kuwait until the Gulf War in 1991, after which she and her family suffered increasing discrimination. None of the family was entitled to Kuwaiti citizenship so they were forced to live a precarious existence as illegal residents. Over the years, her father had made numerous but futile attempts to obtain Kuwaiti citizenship. Instead they were issued with “green” identity cards, which simply confirmed their irregular status and bestowed no entitlements to rights or services.

The family’s situation worsened after her brother’s involvement in protests for Bidoun rights came to the attention of the authorities. He fled the country but the authorities continued to harass the family. In April 2008, concerned for her safety, her father arranged for Fatima to leave the country.

<sup>333</sup> UN High Commissioner for Refugees, *UNHCR Brief on Statelessness and Detention Issues*, 27 November 1997, available at: <http://www.unhcr.org/refworld/docid/4410638fc.html>.

<sup>334</sup> Participants 4, 7, 13, 14, 18, 19, 24, 25, 26, 31 and 35.

<sup>335</sup> See Section 3.4.

She came to the UK, joining her brother who had, in the meantime, been recognised as a refugee. Fatima's application for asylum was refused in May 2008, and her subsequent appeal was also rejected in September 2008.

Since then Fatima has been required to report monthly to immigration officers in Hounslow, but no efforts have been made to return her to Kuwait. She maintains that she has always kept the UK Border Agency informed of any change of address. Initially she lived with her brother but, in April 2009, she moved in with her husband whom she had recently married in an Islamic ceremony. They were unable to marry in a civil ceremony as they were awaiting a Certificate of Approval to Marry, a requirement since abolished. Her husband is also a Kuwaiti Bidoun and has been recognised as a refugee in the UK. He will be eligible to apply for indefinite leave to remain in 2011.

In November 2009, Fatima was detained. In view of the fact that she had always complied with immigration control and was reporting monthly, her arrest and detention came as a terrible shock to Fatima and her husband. She describes what happened.

“Very early in the morning ten or so immigration officers raided our flat. They banged violently on the door of our flat, pointed torches through the letterbox and demanded to be let in. They forced us out of bed without allowing us time to even get dressed. We tried to explain that we were married but they would not accept this and shouted at us that we had no right to get married without permission. They said that I would be arrested as I had no right to remain in the UK. They told me that I had two minutes to get ready and then I was taken away in front of all the neighbours who had come out to see what was happening. My husband was not allowed to come with me. I was terrified by what was happening to me.”

Fatima was held by immigration services overnight and then taken to a detention centre where she was detained for three nights. She describes being interviewed and placed under pressure to sign a voluntary return disclaimer, after which she was released. Disturbingly, the reasons justifying her detention in the form given to her appear questionable and do not take into account her statelessness. One reason given was that Fatima had not left the UK when required to do so, when the reality is that she has never had any travel documents to enable her to do this even if she was happy to go. Another was that her removal was imminent, but a review of the file indicates that there had been no attempt to try to document Fatima for removal before the detention occurred. A third reason justified detention on the basis that she did not have enough close family ties despite in reality having a husband and a brother resident in the UK. A further reason given was that Fatima had failed to comply with the terms of her temporary admission. Fatima denies this, and her claim is supported by the fact that she was reporting monthly at the time of her arrest and that the UK Border Agency was aware of her home address.

To Fatima it appears inexplicable why her flat was raided in this fashion, but the experience continues to haunt her:

“My biggest worry is that what happened when I was arrested and detained will happen again. I always lock all the doors and windows because I am really afraid.”

The rationale for detaining her in this fashion appears even more questionable in view of the fact that the UK Border Agency has not taken any enforcement action since her arrest. Fatima remains stuck in limbo, without status here but unable to be returned to Kuwait because she is stateless. Similar to the perception of other Bidouns interviewed she says that, “I feel that I have no rights, either in Kuwait or here”.

## International obligations

International human rights law provides that everyone, including stateless persons, should never be detained in an arbitrary manner. Detention will be arbitrary unless it is:

- 1) carried out in pursuit of a legitimate objective;
- 2) lawful;
- 3) non-discriminatory;
- 4) necessary;
- 5) proportionate and reasonable; and,
- 6) carried out in accordance with procedural safeguards in international law.<sup>336</sup>

Article 5 ECHR provides an additional source of legal protection for stateless persons in the UK against arbitrary administrative detention, and can be relied on in domestic law as a result of the Human Rights Act.<sup>337</sup> At present the jurisprudence on the application of Article 5 ECHR to stateless persons is limited.<sup>338</sup> However, there is notable judicial comment that implies that the common law provides as much protection in respect of immigration detention as Article 5.<sup>339</sup> The case law of the European Court of Human Rights indicates that the requirements to avoid arbitrariness for the purposes of Article 5 ECHR<sup>340</sup> are less demanding than those required by Article 9 ICCPR.<sup>341</sup>

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<sup>336</sup> See *Guidelines on the Detention of Stateless Persons: Consultation Draft Equal Rights Review*, Volume 7, (2011) [http://www.equalrightstrust.org/ertdocumentbank/ERR7\\_guidelines%20draft.pdf](http://www.equalrightstrust.org/ertdocumentbank/ERR7_guidelines%20draft.pdf) and UNHCR, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>.

<sup>337</sup> For an example of its application to the situation of a stateless person in detention, see *Al-Nashif v. Bulgaria*, 50963/99, Council of Europe: European Court of Human Rights, 20 June 2002, available at: <http://www.unhcr.org/refworld/docid/468cbc9d0.html>.

<sup>338</sup> The Court appeared to have had an opportunity to provide further guidance on the issue in a case that had been communicated to the parties but a friendly settlement was reached. See *Lakatosh and others v. Russia* Application No. 32002/10.

<sup>339</sup> "The common law is just as respectful of the liberty of the person, and just as distrustful of arbitrary and secret decision-making by officials acting on behalf of Government, as the Convention": see *Walumba Lumba (previously referred to as WL) (Congo) 1 and 2 (Appellant) v. Secretary of State for the Home Department (Respondent); Kadian Mighty (previously referred to as KM) (Jamaica) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2011] UKSC 12, United Kingdom: Supreme Court, 23 March 2011, available at: <http://www.unhcr.org/refworld/docid/4e2d849c2.html>, para. 206, per Lady Hale.

<sup>340</sup> See, for example, *Saadi v. United Kingdom*, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008, available at: <http://www.unhcr.org/refworld/docid/47a074302.html>, and *Lokpo et Touré v. Hungary*, Application no. 10816/10, Council of Europe: European Court of Human Rights, 20 September 2011, available at: <http://www.unhcr.org/refworld/docid/4e8ac6652.html>, paras. 16-18.

<sup>341</sup> It should be noted that the Human Rights Committee has identified higher thresholds of what must be satisfied for arbitrariness to be avoided under Article 9 ICCPR than the Strasbourg Court has applied to Article 5(1)(f) of the ECHR. The ICCPR "imports concepts of reasonableness, necessity, proportionality and non-discrimination" into the consideration of the compatibility of detention. However, as a result of the lack of incorporation of Article 9 ICCPR into domestic law, these provisions cannot be directly relied upon in the domestic courts. That said, the UK is obliged as a matter of international law to perform its obligations and it may not invoke the provisions of its internal law as justification for any failure to perform its obligations under Article 9. See UNHCR, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, *op. cit.*, p.20.

The 1954 Convention does not make specific provision in respect of the detention of stateless persons, although Article 26 relating to freedom of movement has been cited as providing some potentially relevant obligations.<sup>342</sup> This provision, however, is not incorporated into UK domestic law.

## Domestic law and policy

The Immigration Act 1971 contains provisions which give immigration officers and the Secretary of State for the Home Department the power to detain those subject to immigration control who are liable to examination, administrative removal or deportation.<sup>343</sup> Immigration detention is administrative and does not require prior judicial authorization. There is no mandatory judicial scrutiny of the lawfulness or appropriateness of detention. Those detained under the powers in the Immigration Act 1971 may apply to an Immigration Officer for temporary admission or release, and can apply for a Chief Immigration Officer or to an Immigration Judge for bail. Further, the legality of any detention can be challenged by way of application to the High Court for a writ of *habeas corpus* or Judicial Review.

The evidence of the participants in the research indicates that stateless and “unreturnable” persons are most likely to be detained under immigration powers for the purposes of their removal or deportation.<sup>344</sup> The statutory power to detain in these circumstances is regulated by the common law. The *Hardial Singh*<sup>345</sup> principles set out the nature of that regulation. They have been summarised by the Court of Appeal as follows:

- (i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
- (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
- (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; and,
- (iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.<sup>346</sup>

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<sup>342</sup> UNHCR *The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, *op. cit.*, pp.13-17.

<sup>343</sup> See Immigration Act 1971, Schedules 2 and 3.

<sup>344</sup> Participants 4, 7, 19, 31 and 35 were detained for the purposes of administrative removal and participants 13, 14, 18, 24, 25 and 26 were detained for the purposes of deportation.

<sup>345</sup> These were set out in *R v. Governor of Durham Prison, Ex parte Hardial Singh*, [1984] 1 All ER 983, [1984] 1 WLR 704, [1983] Imm AR 198, United Kingdom: High Court (England and Wales), 13 December 1983, available at: <http://www.unhcr.org/refworld/docid/3ae6b6ce1c.html>, per Woolf, J.

<sup>346</sup> *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2003] INLR 196, para. 46, recently approved by the majority of the Supreme Court in *Walumba Lumba (previously referred to as WL) (Congo) 1 and 2 (Appellant) v. Secretary of State for the Home Department (Respondent)*; *Kadian Mighty (previously referred to as KM) (Jamaica) (Appellant) v. Secretary of State for the Home Department (Respondent)*, *op. cit.*

The research did not uncover specific caselaw on the effect of an individual's statelessness on the legality of detention. However, the Supreme Court in *Walumba Lumba*<sup>347</sup> has recently clarified the relevance of whether an individual can or is willing to return voluntarily to the application of the *Hardial Singh* principles. Lord Dyson, with whom the majority of the Justices agreed, delivered the leading judgment. He held:

"It is necessary to distinguish between cases where return to the country of origin is possible and those where it is not. Where return is not possible for reasons which are extraneous to the person detained, the fact that he is not willing to return voluntarily cannot be held against him since his refusal has no causal effect."<sup>348</sup>

Although not all stateless persons will be unable to leave the UK voluntarily, as stateless persons are more likely than others not to have the right to enter another state, they are more likely to be able to show that return is not possible. However, several participants interviewed for the research were detained for significant periods even after it emerged that their claimed country of origin had either denied or refused to confirm that they were entitled to nationality and would not therefore be admitted.<sup>349</sup>

The UK Border Agency's published policy sets out how the power to detain will be exercised. The policy must be followed in the absence of a good reason not to.<sup>350</sup> The current policy provides that in considering whether to detain an individual there is a "presumption in favour of temporary admission or release and that, wherever possible, [the UK Border Agency] would use alternatives to detention".<sup>351</sup> It further provides that "[d]etention must be used sparingly, and for the shortest period necessary".<sup>352</sup>

The policy requires that "[a]ll relevant factors must be taken into account when considering the need for initial or continued detention".<sup>353</sup> It references a number of factors that may be relevant, but statelessness is not identified as a specific consideration. The factors that are specified that are particularly relevant to the situation of stateless persons are:

"What is the likelihood of the person being removed and, if so, after what timescale?"

"Is there a previous history of complying with the requirements of immigration control?" (e.g. by applying for a visa, further leave, etc)

"What are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? Does the person have a settled address/employment?"

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<sup>347</sup> *Walumba Lumba (previously referred to as WL) (Congo) 1 and 2 (Appellant) v. Secretary of State for the Home Department (Respondent); Kadian Mighty (previously referred to as KM) (Jamaica) (Appellant) v. Secretary of State for the Home Department (Respondent)*, *op. cit.*

<sup>348</sup> *Ibid.*, paras. 127-8.

<sup>349</sup> For example, participants 13, 14, 18, 19 and 26.

<sup>350</sup> See, for example, *Shepherd Masimba Kambadzi (previously referred to as SK (Zimbabwe)) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2011] UKSC 23, United Kingdom: Supreme Court, 25 March 2011, available at: <http://www.unhcr.org/refworld/docid/4e2d8a782.html> para. 36.

<sup>351</sup> UK Border Agency Enforcement Instructions and Guidance, Section 55.1.1, available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/).

<sup>352</sup> *Ibid.*, Section 55.1.3 and see further Section 55.3.

<sup>353</sup> *Ibid.*, Section 55.3.1.

“What are the individual’s expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?”<sup>354</sup>

The policy sets out the frequency with which detention has to be reviewed and the grade of official who must authorize detention and carry out the review.<sup>355</sup> The failure to undertake these reviews can render the detention unlawful but does not necessarily give rise to a claim for anything more than nominal damages if, on examination, the detainee would have been detained if a review had taken place.<sup>356</sup> However, if an official of the wrong grade undertakes the review, the detention is not unlawful.<sup>357</sup>

## Evaluation of the legal protection for stateless persons against arbitrary detention in the UK

Current UK domestic law does not contain any protections that are designed to specifically protect stateless persons against the risk of arbitrary detention. Furthermore, the research has not found any references to a detainee’s statelessness being identified as a relevant consideration or “juridically relevant fact”<sup>358</sup> in the assessment of the lawfulness of a decision to detain. In addition, there is no time limit on the period of immigration detention in UK law. Time limits have been identified as a valuable protection for stateless persons at risk of arbitrary detention and are reflected in the domestic law of a number of EU member states as well as EU legislation.<sup>359</sup>

The research identified that some participants may have been detained under an unpublished policy which, in contrast to the Secretary of State’s published policy, created a presumption of detention for all former foreign national prisoners subject to exceptions on compassionate grounds. The Supreme Court ruled that detention under the unpublished policy was unlawful.<sup>360</sup> Indeed such a policy would have had a disproportionate impact on stateless and “unreturnable” persons as many, in theory, could have benefited from the provisions of the published policy on the basis of the poor prospects that existed of them departing from the UK.

This unpublished policy is, however, no longer applied and it is important to note that both the *Hardial Singh* principles and the Secretary of State’s policy on immigration detention provide stateless and “unreturnable” persons with valuable protections. In many ways the provisions of the current policies are at odds with the prevalence and length of immigration detention experienced by participants. If accurately and effectively applied, these protections would provide substantial, although not sufficient, guarantees against the risk of the arbitrary detention of stateless persons. However, the qualitative data indicates that that is not the case. Consideration should therefore be given to forthcoming guidelines on the detention of stateless persons which, at time of writing, will soon be published by the Equal Rights Trust,

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<sup>354</sup> *Ibid.*

<sup>355</sup> *Ibid.*, Section 55.8.

<sup>356</sup> *SK (Zimbabwe) v Secretary of State for the Home Department*, *op.cit.*

<sup>357</sup> *Ibid.*, para. 60.

<sup>358</sup> Cf. By analogy with states that do not have a statelessness determination procedure see UNHCR, *Geneva Summary conclusions*, para. 30.

<sup>359</sup> UNHCR, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, *op.cit.*, pp 23-24; the Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and Protection Needs of Stateless Persons*, July 2010, available at: [www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf](http://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf); and London Detainee Support Group, *Detained Lives*, January 2009, available at: [www.detainedlives.org/wp-content/uploads/detainedlives.pdf](http://www.detainedlives.org/wp-content/uploads/detainedlives.pdf)

<sup>360</sup> *Lumba (WL) v Secretary of State for the Home Department*, *op. cit.* paras. 16 and 17.

to see if they form a basis for the improvement of protection for stateless persons against arbitrary detention.<sup>361</sup>

In conclusion, a similar picture emerges as to the most effective way to ensure that stateless persons are not subject to arbitrary immigration detention. If statelessness were identified in a determination procedure which had the grant of leave to enter or remain as a possible outcome, this would limit the risk stateless persons face of arbitrary detention.

In order to ensure that an individual's statelessness is taken into account in the decision to detain, the UK Border Agency should amend its guidelines on immigration detention to recognise an individual's statelessness as a factor that weighs against detention, on the basis that it is likely to indicate that there are no reasonable prospects of removal. In any event, UK Border Agency officials who make decisions to detain should be trained in how to identify stateless persons and, if identified, how this should affect the application of the presumption against detention.

Further, the fact that an individual is stateless may only become apparent through the process of documentation for removal and in the light of responses received from consular authorities. Consequently the issue of whether an applicant is stateless is a matter that should be regularly considered afresh during any period of detention pending removal, taking into account responses or lack of responses from consular authorities. Finally, consideration should be given to enacting in legislation a reasonable maximum time limit on immigration detention, in order to act as a protection against the risk of indefinite detention, as found in many other European States.<sup>362</sup>

## 5.6 Failed forced removal

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International law provides protections for stateless persons against removal in a number of situations. Article 31 of the 1954 Convention provides substantive and procedural protections in the context of the expulsion of stateless persons who are lawfully on its territory.<sup>363</sup> In addition, stateless persons who are also refugees benefit from the prohibition on *refoulement* contained in Article 33(1) of the 1951 Convention. However, in an appeal decided in 1978 the Immigration Appeals Tribunal held that expulsion for reasons of immigration control was

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<sup>361</sup> *Guidelines on the Detention of Stateless Persons: Consultation Draft Equal Rights Review*, Volume 7, (2011), available at: [http://www.equalrightstrust.org/ertdocumentbank/ERR7\\_guidelines%20draft.pdf](http://www.equalrightstrust.org/ertdocumentbank/ERR7_guidelines%20draft.pdf).

<sup>362</sup> As of 17 June 2008, two thirds of EU Member States had maximum period of pre-removal detention of less than 18 months, whereas seven had not maximum period fixed in law, see European Council of Refugees and Exiles, *Returns Directive: EU fails to uphold human rights*, 18 June 2008, available at: [www.ecre.org/component/downloads/downloads/165.html](http://www.ecre.org/component/downloads/downloads/165.html).

<sup>363</sup> "Article 31

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

always justified on the grounds of public order. Consequently the substantive protection against expulsion in line with Article 31 of the 1954 Convention is not guaranteed. This decision may, however, not stand judicial scrutiny in the future.<sup>364</sup>

Stateless persons may also be protected against removal by international human rights law where, in particular, there are substantial grounds for believing that there is a real risk that they will be subject to torture, inhuman or degrading treatment in the country of return.<sup>365</sup>

The failure of forced removal can also engage human rights obligations, particularly if the applicant is subjected to inhuman or degrading treatment during the expulsion. This is a risk that is particularly prevalent for stateless persons. Repeated attempts at expulsions to a country that refuses to admit the individual concerned may amount to inhuman or degrading treatment.<sup>366</sup> Indeed, the European Commission on Human Rights held that:

“the repeated expulsion of an individual, whose identity was impossible to establish to a country where his admission is not guaranteed, may raise an issue under Article 3 of the Convention [...] Such an issue may arise, *a fortiori*, if an alien is, over a long period of time, deported repeatedly from one country to another without any country taking measures to regularise his situation.”<sup>367</sup>

In addition, the Secretary of State’s power to remove stateless persons for whom there is no reason to think that they will be admitted to the destination state is regulated by the common law in the UK. Longstanding authority prohibits the setting of removal directions where there is no rational basis to believe that the person being removed will be admitted to the destination State.<sup>368</sup>

The research identified three cases of failed forced removals where individuals had been returned to the UK after the destination State had refused to accept him or her as a national.<sup>369</sup> However despite a review of a further sample of files, it did not appear that there was a consistent pattern that linked statelessness to failed forced removal. Nonetheless the examples raise important issues.

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<sup>364</sup> *Kelzani v. Secretary of State for the Home Department*, [1978] Imm AR 193, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 7 November 1978, available at: <http://www.unhcr.org/refworld/docid/3ae6b62e8.html>. See Section 4.4.1 for further details.

<sup>365</sup> In particular under the Convention against Torture, Article 3 the relevant part of which provides “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture; ICCPR, Article 7 the relevant part of which provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and the European Convention on Human Rights, Article 3 which provides “No one shall be subjected to torture, inhuman or degrading treatment or punishment”.

<sup>366</sup> UNHCR, *UNHCR Handbook on the Determination of Statelessness Discussion Paper No. 4: What Status Should Stateless Persons Have at the National Level*, November 2010, copy on file with the authors.

<sup>367</sup> *Harabi v The Netherlands* Application No. 10798/84, 5 March 1986, p112 cited in Van Wass, L., *Nationality Matters. Statelessness under International Law*, Intersentia, 2008, p258.

<sup>368</sup> *R v. Secretary of State for the Home Department, Ex parte Khalil Yassine, Rahma Yassime, Mohammad El-Nacher, Hicham Ali Hachem, Salam Bou Imad, Zouheir Bou Imad*, [1990] Imm AR 354, United Kingdom: High Court (England and Wales), 6 March 1990, available at: <http://www.unhcr.org/refworld/docid/3ae6b69210.html> Note that the ratio in this judgment was given a restrictive interpretation in *AL & Others (Malaysia BOCs) Malaysia v. Secretary of State for the Home Department*, [2009] UKAIT 00026, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 3 July 2009, available at: <http://www.unhcr.org/refworld/docid/4a5457862.html>.

<sup>369</sup> Participants 13, 19 and 35.

Participant 13, a Kuwaiti Bidoun, was refused entry by the Kuwaiti authorities. Participant 34, a British overseas citizen who was formerly a Malaysian national was refused entry by the Malaysian authorities before being returned. Of particular concern is the fact that two of the three individuals were detained following their return to the UK.<sup>370</sup> The way in which Hassan, the third of these cases whose circumstances are set out below, was treated by the UK Border Agency after he was returned to the UK following the failure of his forced removal indicates that no consideration was given to whether he should now be considered to be stateless, nor to any of the consequences that flowed from his experiences.

Name: **Hassan (Participant 19)**  
Country of origin: **Chad**  
Date of arrival in UK: **August 2002**  
Time in detention: **2 months**  
Time in limbo: **52 months**  
Current status: **Indefinite Leave to Remain (granted in February 2010 by the Case Resolution Directorate)**

Hassan was born in Abeche, Chad, and experienced a normal childhood until becoming involved in student politics during his final year in High School. His political activities brought him to the attention of the police who followed him and two friends to his home after a meeting. One of his friends tried to escape but was shot dead in front of them. When his mother tried to intervene she too was shot in the leg. Hassan and his remaining friend were blindfolded and placed in separate cars, after which he was taken to a prison where he was repeatedly tortured and interrogated.

After two months in detention his cousin paid a bribe to secure his release. His cousin gave Hassan \$1,000 dollars to cross the border into Niger from where Hassan travelled via Algeria and he now believes France, before arriving and claiming asylum in the UK in August 2002. However, his application was refused in October 2002 and his appeal was also rejected in March 2003. Following the refusal of his application for leave to appeal in June 2003, he was evicted from his accommodation.

Hassan describes how, after his support ceased, he had no option except to work illegally. For about two years he did a variety of jobs to support himself and cover his rent including stints working at different warehouses.

In September 2005, the Immigration Service raided the warehouse where Hassan was working. He was arrested and detained in Tinsley House Immigration Removals Centre. He had no solicitor at this time. Four weeks after being detained, he was woken up and told that he was being taken to the airport to be returned to Chad. Hassan describes being very frightened but he had given up hope so he did not resist removal. The plane flew via Libya and, on arrival in Chad, the captain escorted him to the immigration authorities and handed over his file of papers. One official told him to wait in a room and then he was joined by another man. Immediately they started to beat and punch him around the head and back. They asked why he had gone to the UK to claim asylum. They beat him so badly that he partially lost his hearing in one ear and both sides of his head became badly swollen. At this point another official ran a check on his computer and told the two other officials that he was not even from Chad.

Hassan believes that this official must have been sympathetic to his situation. Whatever the reason, it saved his life.

<sup>370</sup> Participants 13 and 19.

The information was relayed by radio to the captain of the plane who was preparing to take off. The captain postponed take-off so that Hassan could be placed back on the plane. The captain spoke Arabic, and during the stopover at Tripoli airport he spoke with and showed Hassan a letter faxed from the Chadian authorities at the airport. It stated that Hassan he was not a national of Chad and that he should not be returned there.

When the plane landed back in Gatwick he was met and interviewed by immigration officers. Despite telling them what had happened, he was taken back to Tinsley House and detained there for two weeks before being transferred to Dover Immigration Removals Centre for a further two weeks. He made a fresh claim for asylum. After being released from detention Hassan once again found himself destitute. He applied for section 4 accommodation, but the application was refused. He considers himself lucky because he was able to stay at a shelter called Coventry Peace House where he was also provided with meals in the morning and evening. He had to leave the shelter every day. With nowhere else to go, he went to the library.

“I felt stateless for the period after I returned from Chad and before I got my ILR [Indefinite Leave to Remain]. During the time before I got my flat sometimes I almost felt that I preferred detention because at least I had my own room where I could be during the day rather than being forced to be outside, never being able to relax.”

Hassan was suffering with dizzy spells and the sides of his head were still swollen from the beating in Chad. He went to see a doctor and was diagnosed with lymphoma cancer. He received radiotherapy for one month and then had an operation in May 2006. The hospital let him stay there to recuperate for a further three months because he had nowhere else to go. After being discharged from hospital his solicitor made a support application and social services agreed to provide a one bedroom flat and a weekly support allowance because of his health condition. When his health improved he started studying English, Maths and IT studies at college. He still had checkups at the hospital every six weeks and later every three months.

There was still no decision on the further submissions. Then in 2008 the application was refused, the news of which hit Hassan hard. He had already been highly anxious about his continuing limbo. Five years had passed since his initial asylum application had been refused, and more than two years since the unsuccessful attempt to remove him to Chad. He felt constant stress:

“Because of what happened to me and all the stress, I feel that I have lost some of my life. I feel older than I am.”

He was eventually granted ILR by the Case Resolution Directorate in 2010. To this day he does not know why he was kept in limbo for so long after it had become clear that he had no country to return to, that he was stateless. At last he can now feel more positive about the future. He is currently doing a degree in IT studies after which he plans to build a career in this field.

“It is complicated. The future will be better than before because now I can at least think in a positive way. But if you had asked me two years ago then I would have said that there was no future, nothing.”

Being without a nationality has increased the urgency of his desire to obtain British nationality but despite now being eligible to apply, he is struggling to find the money to pay the fees. “I want to apply for British citizenship. This is very important for me but at the moment I can’t afford the £780 application fee. I will try to borrow the money.”

In conclusion, the cases of failed forced removal reveal the importance of identifying stateless persons before enforcement action occurs and ensuring that they will be admitted to their destination country. International human rights law obligations mandate that, in order to ensure that the person being removed is not subject to inhuman and degrading treatment, the removing state should consider whether the applicant will be admitted and that there is no real risk that the deportee will not be removed to a third state with no prospect of admittance there. This is in addition to the obligation to ensure that the deportee is not subject to torture, inhuman or degrading treatment or punishment on arrival or if admitted. The evidence confirms that stateless persons are more likely not to be admitted to the destination state as a result of the fact that they are not nationals of the destination state, unless they enjoy the right of residence there. “Unreturnable” persons are, by definition, in a similar position. This strongly indicates that the determination of whether an individual is stateless before removal, in a migration context, is necessary to help ensure that human rights obligations are met.

Furthermore, consideration should be given as to whether an individual is stateless in the event they are refused admittance to their country of presumed nationality or habitual residence. In appropriate circumstances, the grant of leave to remain would avoid the detention, period in limbo and destitution that Hassan faced.<sup>371</sup>

## 5.7 Immigration-related offences

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The 1954 Convention does not make any provision to protect stateless persons from being penalised for the illegal entry to or presence on the host’s state territory. This contrasts with the 1951 Convention, Article 31, which does provide such protection for refugees and asylum-seekers.<sup>372</sup> Stateless persons who are not refugees or asylum-seekers are at particular risk of being convicted of an immigration offence because, first of all, they will often not have any travel documents and, secondly, as has been set out above, they are at particular risk of being left in destitution or limbo which they may seek to escape by leaving the UK using a false document.

Three participants in the study had been convicted of immigration-related offences.<sup>373</sup> The story of one who used a false Romanian identity card to try to depart from the UK, resulting in a conviction for using a false document, is set out below.

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<sup>371</sup> This may have been the Secretary of State’s policy in the past. See Chapter 4, section 4.4.2. AF (Return) Estonia [2002] UKAIT 02544.

<sup>372</sup> See *R v. Asfaw*, [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008, available at: <http://www.unhcr.org/refworld/docid/4835401f2.html>.

<sup>373</sup> Participants 14, 16 and 30.

Name: **Kathem (Participant 14)**<sup>374</sup>  
Country of origin: **Iraq**  
Date of arrival in UK: **February 2003**  
Time in detention: **12 months**  
Time in limbo: **6 months**  
Current status: **None**

Kathem, aged 33, shares the predicament of a number of those interviewed. He was served with a notice of intention to deport him yet, at the time of the interview, it had proved impossible to remove him from the UK. His conviction was for using a false document. But, in his case, he was using the document in a bid to escape a life trapped in limbo and destitution in the UK.

Born to Jewish parents in Naseriah, Iraq, Kathem was brought up by his parents who ran a small copy shop business. His father was born in Iraq and his mother in Nasrah, Israel. Both had suppressed their Jewish identity in the wake of discrimination by Saddam Hussein's regime from the late 1960s, and according to Kathem he was not recognised as an Iraqi citizen because he was Jewish. He describes having possessed only a "blue" ID card entitling him to access healthcare, employment and the right to travel internally. He recounts how when he made enquiries about applying for full citizenship he was told that he was not eligible, and that if he wanted to leave the country then he would only be provided with a single-use travel document. Life changed dramatically for Kathem at the age of 16 when his father was arrested and killed by the authorities on suspicion of allowing Shia groups to use the copy shop for political purposes. After this Kathem became responsible for running the copy shop until he himself came under suspicion by the authorities for the same reasons and he was forced to flee Iraq. He travelled to the UK on a false document, and claimed asylum in February 2003.

His asylum claim was refused in September 2003, but he was granted exceptional leave to remain for six months. Kathem moved to a new town where he obtained a job as a machinist and started renting his own flat. He began a five-year relationship with an Italian woman, who moved in with him along with her child from her previous relationship. He describes how he applied for an extension of his leave shortly before it was due to expire. Unbeknown to him, this application was refused in August 2004, but notification sent to the wrong address. He only discovered this in 2007 after he instructed a solicitor to follow up what was happening with his immigration case. When it transpired that he had no legal entitlement to work he was forced to give up his job as a machinist, and after exhausting his savings he eventually had no option but to quit his rented accommodation. He applied for section 4 support but this was refused. By now destitute, he went to stay with a friend living in Birmingham.

After becoming increasingly frustrated with his inability to work or progress his life, Kathem was persuaded by relatives in France that he could make a fresh start and have a better life by moving there. However, he was stopped by French immigration officers trying to board a ferry at Folkestone using a false Romanian ID card. He was advised by his solicitor to plead guilty and to expect a sentence of around three months. In fact he was sentenced to one year in prison, and a deportation order was issued at May 2009. In November 2009, after serving six months, his prison sentence ended, but his detention was continued under immigration powers. He applied for bail, but this was refused at

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<sup>374</sup> It was not possible to obtain a full paper file for this case but factual aspects were checked on CID as well as through selected immigration papers provided by the participant.

a hearing in April 2010. Months passed, and then in August 2010 an appointment was made for him to be interviewed by the Iraqi delegation in the UK.

“At the interview the official from the Iraqi delegation was accompanied by a UKBA immigration officer. The Iraqi official asked me questions about my place of birth, family background and what I knew about the Naseriah area. I answered all these questions but at the end of the interview he turned to me and said in Arabic that there was no way I would be accepted back. I translated to the immigration officer what she had said but she just shrugged her shoulders”.

Following a bail hearing in November 2010, Kathem was released from detention and subsequently provided with section 4 support. He is required to report to the UK Border Agency every week, but no attempt has been made to deport him. He remains in limbo. Because of his conviction he is not eligible for regularisation under paragraph 395c of the Immigration Rules.

Although international law does not make special provision to protect stateless persons who risk prosecution for immigration-related offences, the qualitative evidence would suggest that this represents a gap in the international protection regime. There is also evidence from the qualitative data that the treatment of stateless persons in the UK may play a part in why stateless persons may try to leave the UK travelling on false documentation and, additionally, why they may work without permission in order to avoid destitution.

## 5.8 Private and family life

Article 8 ECHR requires that the UK respect the private and family life of everyone within its jurisdiction. The right is qualified, and proportionate infringement can be justified if it is in accordance with the law and pursued for a legitimate reason.<sup>375</sup>

Given the length of time many participants have spent in the UK, it is unsurprising that many had formed relationships subsequent to arriving in the UK that would fall within the scope of either family or private life. Five such relationships were subsisting at the date of interview<sup>376</sup> and a further five had ended.<sup>377</sup> It appeared that the lack of an immigration status and travel document had contributed to the end of the relationship in one case.<sup>378</sup>

Of those relationships still subsisting, a lack of immigration status had created a barrier to marriage in two cases<sup>379</sup> where a Certificate of Approval for Marriage had been denied.<sup>380</sup> In two further cases, reliance on section 4 support and accommodation was preventing the individuals concerned from living closer to their respective partners and/or children, and thereby infringing their private and family life.

<sup>375</sup> ICCPR, Article 17 provides that “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”

<sup>376</sup> Participants 4, 13, 20, 26, 31 and 32.

<sup>377</sup> Participants 7, 9, 14, 18, and 29.

<sup>378</sup> Participant 29.

<sup>379</sup> Participants 13 and 31.

<sup>380</sup> This scheme was abolished in May 2011. It required that those subject to immigration control apply for permission to marry, paying a fee and obtaining a Certificate of Approval before a civil marriage or registration of a civil partnership took place.

No choice is generally provided about where section 4 support is given. Although UK Border Agency policy guidance suggests that family ties ought to be taken into account in assessing where support is provided and that the UK Border Agency is under a statutory duty to safeguard and promote the welfare of children, the policy still indicates that accommodation should be provided outside of London and the South East “in the absence of exceptional circumstances”.<sup>381</sup>

Name: **Derek (Participant 20)**  
Country of origin: **Liberia**  
Date of arrival in UK: **April 2006**  
Time in detention: **7 months**  
Time in limbo: **52 months**  
Current status: **None**

Derek, aged 23, fled the civil war in Liberia in 1999 after his mother was killed, and he was subsequently bought up in a refugee camp in Nigeria. He describes how he was never granted permanent residence or citizenship before travelling hidden in a container ship to the UK, arriving in April 2006 aged 19.

He claimed asylum and was detained in Harmondsworth Immigration Removals Centre, where his claim was considered in the detained fast track procedure. He was moved to Haslar Immigration Removals Centre after his asylum appeal was refused. After seven months in immigration detention he was released because his removal could not be effected. The UK Border Agency had received confirmation from both the Liberian and the Nigerian consular authorities that they did not accept Derek as a national. Each asserted that he was a national of the other country.

He was, at first, granted section 4 support and accommodation. However, Derek describes how this was stopped on four separate occasions because it was claimed that he was not cooperating with attempts to remove him from the UK. This is in spite of the fact that Derek has applied twice for assisted voluntary return but was told by the IOM, which administered the scheme at that time, that it could not assist him further as he was allowed a maximum of two applications.

Meanwhile, no new evidence has come to light that either Liberia or Nigeria would be willing to treat him as a national, despite the fact that UK Border Agency officials continue to submit requests for him to be issued with an emergency travel document.

At the time of his interview for the research, Derek found himself once again without section 4 support and facing destitution. His solicitor sent a number of letters to the UK Border Agency making further submissions, including on the basis that he is stateless, but all have been refused. Derek remains in limbo.

Derek has a relationship with a British woman which started while he was in the UK. They have a son, and Derek describes his anxiety to regularise his immigration status in order that he can be a proper father. At the time of the interview he has to live apart from his son, who lives with his mother and her parents in London. Derek has been dispersed to live in Birmingham, where he has received section 4 support and accommodation. If he

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<sup>381</sup> UK Border Agency, Asylum Support Policy *Bulletin 31– Dispersal*, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumsupportbulletins/dispersal/pb31?view=Binary>, paras. 1, 3 and 5.1 to 5.6.

does not live in the accommodation allocated he risks losing the low level support and accommodation that he is provided with.

“I’m not able to see my son the way I want to see him. That is my biggest worry.”

He sees his statelessness and lack of money as impacting on his ability to be a good father.

“It affects me very badly. I can’t afford to do things for my son. Sometimes I sit at home crying. I praise the Mum as she is doing everything.”

When asked about his continuing limbo and how he sees the future Derek replies,

“The future (laughing)... I don’t know what to say about the future. I don’t want to say bad things to myself but I can’t see any future. It’s bad.”

In conclusion, evidence from the participants indicates that the current legal and policy framework in respect of the treatment of stateless persons can contribute to infringements of protected family and private life. In particular, the provision of accommodation in dispersal areas for two participants granted of section 4 support resulted in both being separated from family members because they were only provided with housing in a different part of the country. Once again it can be observed that, if an individual’s stateless status was identified and resulted, in appropriate cases, in a grant of leave to enter or remain, the risks of such infringements would be significantly diminished. In addition, maintaining family unity for stateless persons who potentially face long periods relying on section 4 support could be considered an exceptional circumstance which justified the provision of accommodation near to the applicant’s family.

## 5.9 Refugee status determination

The UK Border Agency is sometimes obliged to assess whether an applicant is stateless for the purposes of determining his or her application for asylum.<sup>382</sup> Guidance on the way in which claims for asylum from stateless people ought to be considered is given in an Asylum Policy Instruction. It provides:

“Sometimes asylum seekers who are stateless might claim that they will not be re-admitted to their previous country of residence and therefore should be granted asylum in the UK. However, issues of statelessness and whether or not an individual is returnable should not affect the decision maker’s decision on whether to grant asylum, as they are not relevant factors in the refugee determination process.”<sup>383</sup>

<sup>382</sup> Immigration Rules paragraph 334, by inference, incorporate Article 1 (A) (2) of the 1951 Convention relating for the Status of Refugees which provides that refugees can include those “...not having a nationality and being outside the country of former habitual residence [owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion], is unable or, owing to such fear, is unwilling to return to it”.

<sup>383</sup> UK Border Agency, Asylum Policy Instruction, *Considering the Protection (Asylum) Claim and Assessing Credibility* available at: [www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/asylum-assessing.credibility.pdf?view=Binary](http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/asylum-assessing.credibility.pdf?view=Binary), p 21.

UNHCR provides fuller guidance on the assessment of the asylum claims of stateless persons. In particular:

“In the case of stateless refugees, the “country of nationality” is replaced by “the country of his former habitual residence”, and the expression “unwilling to avail himself of the protection...” is replaced by the words “unwilling to return to it”. In the case of a stateless refugee, the question of “availment of protection” of the country of his former habitual residence does not, of course, arise. Moreover, once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return.

“Such reasons must be examined in relation to the country of “former habitual residence” in regard to which fear is alleged. This was defined by the drafters of the 1951 Convention as “the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned....”

“A stateless person may have more than one country of former habitual residence, and he may have a fear of persecution in relation to more than one of them. The definition does not require that he satisfies the criteria in relation to all of them.

“Once a stateless person has been determined a refugee in relation to “the country of his former habitual residence”, any further change of country of habitual residence will not affect his refugee status.”<sup>384</sup>

It appears from the case of Nischal that UNHCR’s guidance on how to assess the country of former habitual residence in the claims for asylum of stateless persons is not being uniformly followed. In Nischal’s case, the Tribunal considered both India and Bhutan in this context, rather than focusing solely on Bhutan as the UNHCR guidance requires.<sup>385</sup>

However, the UK courts recognise that the discriminatory denial of nationality resulting in statelessness can form the basis for a successful claim to asylum.<sup>386</sup> The Court of Appeal has recently considered whether stateless people who are prevented from returning to their country of former habitual residence by an occupying power are being persecuted, concluding that they were not.<sup>387</sup> It has also considered the circumstances in which the discriminatory denial by a state of nationality of rights arising out of nationality, such as the deprivation of identity documents and the refusal to re-document a national, can ground a claim for asylum.<sup>388</sup> The difficulties that arise in assessing the asylum claims for Kuwaiti Bidouns have already been outlined.<sup>389</sup> The remainder of this section will discuss the approach to the asylum claims of Palestinians, many of whom will be stateless.

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<sup>384</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>, paras. 101 and 103-5.

<sup>385</sup> See for Nischal’s case study, Chapter 4.

<sup>386</sup> For example, the Court of Appeal has held that a stateless person who is unable to return to his or her country of habitual residence is not a refugee unless they are able to demonstrate a well founded fear, see *Ravenko v Secretary of State for the Home Department* [2000] EWCA Civ 50.

<sup>387</sup> *MS (Palestinian Territories) v. Secretary of State for the Home Department*, [2009] EWCA Civ 17, United Kingdom: Court of Appeal (England and Wales), 23 January 2009, available at: <http://www.unhcr.org/refworld/docid/497eea512.html>.

<sup>388</sup> *EB (Ethiopia) v SSHD* [2007] EWCA Civ 809 and *MA (Ethiopia) v SSHD* [2009] EWCA Civ 289.

<sup>389</sup> See Section 5.3.3.

## 5.9.1 Palestinians and refugee status

A particular issue arises in respect of the treatment of the claims for asylum made by Palestinians, some of whom the UK recognises as stateless, many of whom are “unreturnable”. Palestinians may be refugees on the basis that they can establish a valid claim under Article 1A(2) of the 1951 Convention. The Convention will not apply to Palestinians if they are in receipt of protection and assistance from UNRWA (an organ or agency of the UN) by the operation of Article 1D of the 1951 Convention. However, the second paragraph of Article 1D provides that “[w]hen such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.” This raises the question of how the claims for asylum of Palestinians in the UK should be treated taking into account Article 1D.

This issue was considered by the Court of Appeal in 2002 in *El-Ali*.<sup>390</sup> The Court declined to follow UNHCR’s third-party intervention in that case and held that only Palestinians who had been in receipt of UNRWA assistance when the Refugee Convention was adopted on 28 July 1951 were within the scope of Article 1D, and so only Palestinians who had been in receipt of UNRWA’s assistance before that date risked exclusion.

However, the Court also held that an individual who was excluded under Article 1D would only be able to be “entitled to the benefits of the Convention” if UNRWA ceased operating, except in “exceptional circumstance”, for example where the refugee is actually prevented from returning there by the relevant authorities.<sup>391</sup> Finally, the Court accepted the “benefits of the Convention” would apply automatically to the defined group.

The decision in *El-Ali* has been criticised in the leading academic text on international refugee law<sup>392</sup> and is inconsistent with UNHCR’s interpretation of the provision.<sup>393</sup> The Court of Justice of the European Union has considered a preliminary reference from Hungary on the interpretation of Article 12 of the EC Qualification Directive, which to a large degree reflects Article 1D. The Court came to a different conclusion than that of the Court of Appeal in relation to the first part of its reasoning to limit the persons to whom Article 1D applied to those displaced before the 1951 Convention was adopted. It held that “a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance.”<sup>394</sup>

Consequently, the first conclusion of the Court of Appeal in *El-Ali* should no longer be applied. However, at the time of writing, the UK Border Agency has not reviewed its guidance on the issue and maintains a restrictive interpretation to this provision.<sup>395</sup> The consequence of the UK’s approach to the Article 1D can be seen in the case of Yasser, set out below.

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<sup>390</sup> *Amer Mohammed El-Ali v. The Secretary of State for the Home Department and Daraz v. The Secretary of State for the Home Department (The United Nations High Commissioner for Refugees, Intervener)*, United Kingdom: Court of Appeal (England and Wales), 26 July 2002, available at: <http://www.unhcr.org/refworld/docid/3f278a3a4.html>.

<sup>391</sup> See Goodwin-Gill, G.S. and McAdam, J., *The Refugee in International Law*, 2<sup>nd</sup> Edition, 2007, pp. 157-159.

<sup>392</sup> *Ibid.*

<sup>393</sup> See UN High Commissioner for Refugees, *UNHCR Revised Statement on Article 1D of the 1951 Convention*, October 2009, available at: <http://www.unhcr.org/refworld/docid/4add79a82.html>.

<sup>394</sup> See *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, European Court of Justice, 17 June 2010, available at: <http://www.unhcr.org/refworld/docid/4c1f62d42.html>, paras. 47 and 53.

<sup>395</sup> There are reports that a further preliminary reference has been made to the Court of Justice of the European Union which that should result in the court ruling on the issues left unresolved in *Bolbol*. *Ibid.*

Name: **Yasser (Participant 2)**  
Country of origin: **Lebanon (Palestinian)**  
Date of arrival in UK: **December 2006**  
Time in detention: **N/A**  
Time in limbo: **42 months**  
Current status: **None**

Yasser, aged 34, was born in the Shabreb refugee camp in Lebanon, where his parents had fled from Palestine during the Nakba of 1948. While having an ancestral connection with Palestine, therefore, he grew up as a stateless Palestinian in Lebanon. He describes growing up without any identity papers or right to residence in Lebanon, where he was also denied any possibility to apply for citizenship. He attended a school run by UNRWA.

His family received financial support because his father fought for the Palestine Liberation Army. After leaving school he did odd jobs to support himself. Yasser's problems started after the Israeli invasion of Lebanon in 2006, when he describes coming under pressure to fight in the Palestinian Liberation Front. He refused, and felt he had no option but to leave the country.

He arrived in the UK in December 2006 and claimed asylum. However, his asylum application was refused in January 2007 and, after challenging that decision on appeal, he exhausted his appeal rights in August 2007. His asylum support was stopped at this point.

He made a number of further submissions between June 2008 and December 2010, and his application for support and accommodation was granted in July 2008. However, in December 2010 his support and accommodation was again stopped, only to be reinstated in March 2011 after he successfully appealed. Throughout this time he has reported as required to the UK Border Agency. No attempt has been made to remove him, and he therefore remains in limbo.

Yasser describes seeing himself "as a bird with nowhere to rest on the ground but which can't spend his whole life in the sky".

He describes how "so as not to get depressed I try to keep myself busy". For several years he has worked as a volunteer at a charity which helps drug addicts and the homeless. He mainly cooks for them but also helps with other activities. He is studying a course in catering and hospitality.

One set of further submissions made by his solicitor argued that he should receive the benefits of the 1951 Convention under Article 1D. However, the Secretary of State has refused these submissions, and continues to assert that Yasser can be returned to Lebanon despite the absence of any evidence that removal would be possible.

Despite being anxious about his predicament, Yasser still holds out hope for the future.

"I hope that I will live as other people with status do... The people here have freedom which I was not used to before I came here."

The consequence of the UK's approach to the 1951 Convention, Article 1D is that Palestinians who do not have the right of residence abroad whose asylum claims fail are left in limbo, with the limited possibility of accessing section 4 support, if they apply to voluntarily depart from the UK. The risks of destitution and the consequent breaches of human rights are significant. To avoid this risk, the UK should amend its guidance on the application of Article 1D to accord with UNHCR's interpretation of the Article.

## 5.10 The situation of British Overseas citizens

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In recent years the situation of a number of British Overseas citizens (BOCs) from Malaysia who are stuck in limbo in the UK has attracted interest and discussion.<sup>396</sup> In many ways it is unique. Two individuals that are part of this group participated in the research. Their stories are outlined in full below and provide an in-depth insight into the situation faced by this particular population.

There are no official figures of the numbers of individuals affected. Their situation is similar to other “unreturnable” persons interviewed as part of the study, but it is also different because they are British nationals, albeit with limited rights.<sup>397</sup> For this reason, they are not considered “stateless” within the definition used by the current study.<sup>398</sup> However, unlike British citizens, they are subject to immigration control. Notwithstanding their British nationality, the testimonies of Ernest and Constantine, as set out below, raise a number of human rights issues similar to other “unreturnable” persons.

### Relevant provisions of British nationality law

There are certain categories of British national who do not have the right of abode and are therefore subject to the provision of UK immigration law.<sup>399</sup> The British Nationality Act 1981, section 4B, provides for those British nationals (specifically BOCs, British subjects, British Nationals (Overseas) and British protected persons) to register as British citizens if they do

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<sup>396</sup> See for example Daily Telegraph, *Malaysians left 'stateless' in UK after passport gamble backfires*, 13 October 2009, available at: <http://www.telegraph.co.uk/news/worldnews/asia/malaysia/6316612/Malaysians-left-stateless-in-UK-after-passport-gamble-backfires.html>.

<sup>397</sup> For a full description of the situation and rights pertaining to categories of British nationality other than British citizenship see generally *Fransman's British Nationality Law*, 3<sup>rd</sup> Edition, 2011 (hereafter *Fransman's*). See also ILPA, *Submission to Lord Goldsmith for the Citizenship Review: The Different Categories of British Nationality*, 21 December 2007.

<sup>398</sup> See UNHCR, *Prato Summary Conclusions*, para. 3. “The issue under Article 1 (1) is not whether or not the individual has a nationality that is effective, but whether or not the individual has a nationality at all. Although there may sometimes be a fine line between being recognised as a national but not being treated as such, and not being recognised as a national at all, the two problems are nevertheless conceptually distinct. The former problem is connected with the rights attached to a nationality, whereas the latter problem is connected with the right to nationality itself”.

<sup>399</sup> It is beyond the immediate focus of this study to provide a detailed analysis of the historical and current situation facing the holders of these categories of British nationality. See footnote 397 *supra*.

not have any other form of citizenship or nationality.<sup>400</sup> Management data provided by the UK Border Agency shows a significant number of applications and a high grant rate for persons both inside and outside of the UK.<sup>401</sup> However, the data provided reveals that the applications made under this provision by BOCs in the UK who were born in Malaysia have a significantly lower grant rate.<sup>402</sup>

A number of these applications are likely to have been made by persons who, like Ernest and Constantine, renounced their Malaysian nationality after July 2002 and therefore fell to be refused. It appears that many of this group renounced their Malaysian nationality following receipt of incorrect legal advice. They were told that after renunciation they would subsequently be eligible to apply to be registered as British citizens under the British Nationality Act, section 4B. When the applications were refused, this group found themselves left in limbo. Having renounced their Malaysian nationality, it was subsequently impossible to reacquire it and, in some cases, even to return to Malaysia. At the same time, they were not entitled, as of right, to reside in the UK.

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<sup>400</sup> British Nationality Act 1981 s4B as inserted by the Nationality, Immigration and Asylum Act 2002, s 12 (1) and amended by the Borders, Citizenship and Immigration Act 2009, s44 provides:

**4B Acquisition by registration, certain persons without other citizenship**

- (1) This section applies to a person who has the status of
- (a) British Overseas citizen
  - (b) British subject under the Act,
  - (c) British protected person, or
  - (d) British National (Overseas)
- (2) A person to whom this section applies shall be entitled to be registered as a British citizen if
- (a) He applies for registration under this section,
  - (b) The Secretary of State is satisfied that the person does not have, apart from the status mentioned in subsection (1), any citizenship or nationality, And
  - (c) The Secretary of State is satisfied that the person has not after the relevant day renounced, voluntarily relinquished or lost through action or inaction any citizenship or nationality..
- (3) For the purposes of subsection 2 (c), the 'relevant day' means
- (a) In the case of a person to whom this section applies by virtue of subsection 1 (d) only, 19th March 2009, and
  - (b) In any other case, 4th July 2002."

Note the commentary on this provision in *Fransman's*, pp. 572-578, includes the analysis that "although s.4B is a provision that alleviates the position of British nationals who are for practical purposes stateless, it operates in such a way as to exclude from its provisions not merely those who apply after the relevant date (4 July 2002 for BOCs, British subjects and BPPs; 19 March 2009 for BN(0)s) to renounce or voluntarily give up any other citizenship or nationality, but also those who lose any other citizenship or nationality through action or inaction".

<sup>401</sup> Between 2001 and 2010 there were a total of 22,373 applications made under section 4B (by all countries of birth), of which 20,240 (90.5%) were granted. Of the total number of applications, 11,355 (50.7%) were submitted by applicants in the UK while 11,018 were submitted by applicants outside the UK territory. Of the total number of grants, 10,168 (50.2%) were made to persons in the UK and 10,072 to those outside UK territory. Management data received from the UKBA Planning & MI Team North West Region by email dated 19 September 2011 with the disclaimer that 'the information has been provided from local management information and is not a National Statistic. As such it should be treated as provisional and therefore subject to change'.

<sup>402</sup> Between 2001 and 2010 there were 201 in-country applications under section 4B made by individuals born in Malaysia of which 102 have been granted. Management data received from the UKBA Planning & MI Team North West Region by email dated 19 September 2011 with the disclaimer that "the information has been provided from local management information and is not a National Statistic. As such it should be treated as provisional and therefore subject to change".

## The treatment of British Overseas citizens from Malaysia in the UK

The treatment of this group varies. Some of those refused or ineligible to register as British citizens were granted leave to remain under UK Border Agency policy which envisages a grant of Discretionary leave to enter to some BOCs who met certain criteria and face being left in limbo in the UK.<sup>403</sup> There is also evidence to show that not all BOCs who renounced their Malaysian nationality have been able to demonstrate that they had taken all reasonable steps to re-acquire their nationality, or to provide evidence of their inability to do so resulting in their situation being unresolved.<sup>404</sup>

However, as illustrated by Ernest's testimony below, there are cases where individuals have found it impossible re-acquire Malaysian nationality despite genuine, sustained and documented attempts to do so. Moreover, Ernest was not only unable to automatically regain his nationality but he was also prevented from returning to Malaysia with a permanent visa that would have allowed him the possibility to eventually re-naturalise as a Malaysian national.

Name: **Ernest (Participant 34)**<sup>405</sup>  
Country of origin: **Malaysia (BOC)**  
Date of arrival in UK: **June 1999**  
Time in detention: **N/A**  
Time in limbo: **18 months**  
Current status: **BOC (but with no leave to remain in the UK)**

Ernest, aged 54, was born in Malaka, Malaysia, in 1956. He became both a Malaysian citizen and a CUKC (Citizen of UK and the Colonies) by birth. After completing school, he worked his way up in the accounting department of a multinational company until in 1999 they offered to partly fund his further education in the UK. He initially arrived in the UK with a six-month visit visa in June 1999 before applying to vary this to leave to remain as a student in order to study a degree in chartered accountancy in Newcastle. In March 2003, however, his application to further extend his leave to remain as a student was refused, as was his appeal in November 2004.

Shortly before this, in September 2004, he had applied for and been granted a BOC passport. Soon after this, in November 2004, his then solicitors advised him that the grant of the BOC passport debarred him from continuing to possess Malaysian citizenship due to that country's prohibition on dual nationality. He was advised that upon renouncing his Malaysian nationality he would be eligible to apply for British citizenship and with it the right of abode in the UK. He went to the Malaysian High Commission in London to renounce his citizenship and subsequently received a certificate from the Malaysian Home Affairs Ministry confirming that he was no longer a Malaysian national. In February 2005, Ernest made an application for registration as a British citizen, but this was rejected in March 2005. He was instead advised to make an application for indefinite leave to remain, which he did in May 2005. However, the application was eventually refused in May 2007.

<sup>403</sup> See UK Border Agency *Immigration Directorate Instructions* Chapter 22, Section 2.9, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDs/idichapter22/section2/section2.pdf?view=Binary>. However, there is some uncertainty about how this policy was applied in the past. See *AL & Others (Malaysia BOCs) Malaysia, op.cit.* paras. 88-94.

<sup>404</sup> *AL & Others (Malaysia BOCs) Malaysia, op. cit.*

<sup>405</sup> It was not possible to obtain a full file for this participant but relevant information was reviewed and checked on CID as well as in papers provided by the participant.

He appealed but this was unsuccessful after two hearings in July and November 2007 respectively.

In March 2009 removal directions were set to Malaysia. Ernest and his wife were returned on an EU *laissez-passer* as it was not possible to secure a travel document from the Malaysian authorities. This removal was enforced despite Ernest having received that same month a letter from the Malaysian Under-Secretary General of the Office of Home Affairs confirming that Ernest had renounced his Malaysian citizenship on 31 September 2004. The letter said:

“As per Article 24 of the Constitution of Malaysia he thereby forfeits all rights and privileges bestowed to Malaysian citizens ... With regard to the above Mr [omitted] can only enter Malaysia on a social visit pass, like all other foreign citizens.”

This letter followed previous letters from the Malaysian authorities confirming that Ernest was no longer entitled to citizenship, including letters dated 3 October 2007 and 30 January 2009.

Ernest describes how on arrival in Malaysia he was interviewed by Malaysian immigration officials for over six hours, and that their initial intention was to return him immediately to the UK given that he was unable to provide evidence of his plans beyond the 30 days' leave he was permitted as a visitor. However, he explained that he needed to obtain evidence about his entitlement to Malaysian nationality in order to challenge the refusal to allow him to remain in the UK and on this basis he was given a short stay foreigners' visa allowing him to remain in Malaysia for 30 days. He was subsequently given a 30-day extension, but, when it was issued, he was also told after it expired he would be liable to detention if he remained in Malaysia. Ernest describes how subsequently in May 2009 he therefore had no option but to leave Malaysia from where he caught a flight back to the UK.

On his arrival at Newcastle airport he was interviewed but upon presenting evidence of his unsuccessful efforts to re-acquire citizenship or any form of permanent leave to remain in Malaysia he was granted temporary admission, initially for 30 days. In August 2009 he was granted a period of six months Discretionary leave to remain in the UK in order to produce evidence that he could not return to Malaysia. His subsequent application to extend this leave was refused in January 2011 despite him having made further efforts to obtain confirmation from the Malaysian authorities regarding his entitlement to nationality, including sending letters in June 2010 and February 2011. Ernest does not understand why he is being asked to supply further evidence when an earlier letter from the Malaysian Home Affairs Ministry dated 30 January 2009 stated:

“This is to confirm that based on clarification of this Ministry, it has been established that there is no entitlement for reapplication of Citizenship in accordance to section 18 (2) of the Constitution as applied by Mr [omitted]. This is due to the principle condition that the applicant must hold a Permanent Resident status of Malaysia.

“Based on your letter dated 10 October 2008, there is no evidence to establish that Mr [omitted] is the holder of Malaysian Permanent Residence status. Therefore, he is not entitled to reapply for citizenship status in accordance to the above stated Constitution.”

Anxious to seek some way out of his predicament, in February 2011 Ernest submitted an application to the Malaysian authorities for a spouse visa given that his wife had retained her Malaysian nationality. However, no decision has been made on this application

despite follow up letters, and notwithstanding the lack of responsiveness by the Malaysian authorities, Ernest is anyway doubtful that he would be granted a spouse visa because he would not meet the qualifying criteria (including due to his wife's inability to financially support him). Moreover, even if he were successful in obtaining a spouse visa he would have to wait a further five years as a dependant of his wife (unable to work or start a business himself) before being eligible for permanent residence status, let alone to re-acquire his Malaysian nationality.

Meanwhile he remains stuck in limbo in the UK, with no status or permission to work. He and his wife currently live with their daughter as well as caring for his wife's elderly mother, both of whom are British citizens. His most recent application for further leave to remain in the UK was refused in June 2011. Ernest describes how the uncertainty of his situation has placed huge stress on him and his family.

“Every morning when I wake up I am worried and stressed, not knowing what will happen to me. There are so many things I want to achieve but it is not possible because I do not know where I stand.”

While one of his daughters was able to acquire Indefinite leave to remain in the UK as a result of long residence and then to naturalise as a British citizen, his younger daughter was refused because she was a dependant of his application. In the end the stress of her life in limbo in the UK became too much and she decided to return to Malaysia to try to make her own life there. She is now separated from the rest of the family, and Ernest continually worries about her living as a single woman without family in Malaysia.

He describes feeling puzzled by his treatment given his connections with Britain:

“I feel part and parcel of British life and want to live lawfully in and contribute to the UK. I see other people getting on with their lives but I can do nothing to plan ahead.”

Ernest's treatment by the UK Border Agency has been mixed. On the one hand, the fact that he was granted six months' Discretionary leave to remain after having to return from Malaysia to the UK in 2009 to allow him to obtain further evidence would have facilitated the protection of his human rights during that period. However, that period of leave to remain was not extended and, despite the evidence that Ernest has obtained and the efforts that he has made, the UK Border Agency does not consider that he meets the terms of the policy relating to BOCs and “Discretionary Leave and Limbo”. This puts respect for his human rights at risk.

Similar risks can be seen in the account of Constantine, the second BOC participant in the research. He was returned to the UK following a failed forced removal to Malaysia.

Name: **Constantine (Participant 34)**<sup>406</sup>  
Country of origin: **Malaysia (BOC)**  
Date of arrival in UK: **September 2005**  
Time in detention: **4 days**  
Time in limbo: **18 months**  
Current status: **BOC (but with no leave to remain in the UK)**

Constantine, aged 28, was born in Penang, Malaysia, and acquired both Malaysian and Commonwealth and UK Citizenship at birth. He attended school and university before obtaining a student visa to study a postgraduate degree in mechanical engineering at Sunderland University in September 2005. He extended this leave for a further year in September 2006.

In 2007 he applied for and was granted a BOC passport. He used this to travel on three occasions to Europe during 2008. On the first two occasions he was able to travel to the Netherlands and the Czech Republic without problem. However, on a third occasion, he was stopped by immigration officers when returning from Germany. He was interviewed and advised that he had no leave to remain in the UK. He was released and granted temporary admission but told that he had one week to leave the UK. Constantine describes being previously unaware that the grant of his BOC passport did not confer any right to remain in the UK. He obtained advice from a solicitor who sought to challenge the decision requiring him to leave the UK. Unable to work or resume his studies he was reliant on financial support from his parents and from two uncles living in London. He was required to report to immigration officers weekly. At the same time as challenging his removal he applied to renounce his Malaysian nationality on the advice of his solicitors.

On one occasion while reporting in February 2011, he was detained by immigration officers without notice. He was told that his application for Judicial Review to prevent his removal had been refused. Constantine describes how he was initially detained in Manchester for one and a half days before being transferred to an Immigration Removals Centre in Scotland for a matter of only a few hours. He was then transferred to a further Immigration Removals Centre, near Stansted airport from where his removal was scheduled.

“At each detention centre it took hours to check me in. I could not sleep and became very stressed. I was still wearing the same clothes. They treated me like a criminal”.

He was taken to Stansted airport where he was placed on a flight to Malaysia escorted by three security guards. He was removed on an EU *laissez-passer* although his BOC passport was returned to him.

On arrival in Malaysia, he was interviewed by Malaysian immigration officials. Constantine recalls how they did not seem to know about BOC nationality and even asked him if he was from Hong Kong. He told them that he had renounced his Malaysian nationality but that the UK immigration authorities had nonetheless forced him to return to Malaysia. The officials asked for evidence of this, which was faxed over by his solicitors in the UK. When the officials received the fax he was told that as a non-citizen he was only eligible to receive a visit visa valid for 30 days. The officials asked to know what he would do after its expiry, one remarking whether “he would after that live in space”. When he was

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<sup>406</sup> It was not possible to obtain a full file for this participant but relevant information was reviewed and checked on CID as well as in papers provided by the participant.

unable to explain what he would do after this period they made a decision to refuse him entry to Malaysia and he was returned to the UK, still accompanied by the three security escorts.

On his return he was interviewed for several hours and then granted temporary admission which has since been extended month by month. He reports every month, but the UK Border Agency has given no indication of what action they will take and he therefore remains in limbo. Constantine is in the process of making further formal enquiries of the Malaysian authorities to confirm that he is unable to re-acquire his Malaysian nationality.

Constantine describes not having citizenship of any country as causing him nightmares and sees himself as an “illegal immigrant”.

“I can’t do what I want to. I can’t study or work. I really can’t say what the future will hold. I hope that I will get Indefinite Leave to Remain. It has been four years now. I don’t know why the UK authorities don’t give leave to remain to people in my situation, they could end our pain.”

Constantine, like Ernest, is left in limbo. The attempt to remove him to Malaysia without ensuring that he would be admitted risked breaching human rights obligations, and may have been inconsistent with UK Border Agency policy.<sup>407</sup>

A long term solution will only be found for individuals in this situation if there is clarity about the way in which they will be treated by the Malaysian government and, in particular, whether they will be able to re-acquire Malaysian nationality. Both the participants interviewed for this research have been unable to obtain sufficient evidence to clarify the way they would be treated to the satisfaction of the UK Border Agency, and neither was able to sustainably return to Malaysia. A way of achieving certainty would be for the UK government to take a pro-active approach with the Malaysian authorities to clarify how each case will be treated, with each individual cooperating fully with those enquiries. At the same time, each person’s rights could be protected through a grant of Discretionary leave to remain, as Ernest was given after he returned from Malaysia to the UK. If, after enquiries, the situation remained unchanged, then further period of Discretionary leave to remain should be granted in accordance with the UK Border Agency policy, which would lead to settlement and result in the end of the period of protracted limbo.

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<sup>407</sup> See section 5.6 above and UK Border Agency *Enforcement Instructions and Guidance*, Chapter 48.8 which provides: “Removing BDTC, BOTC, BNO and BOC passport holders: A holder of a BNO or BOC passport may be served with notice of illegal entry but removal is not straightforward. The person concerned must apply for entry clearance to the appropriate Embassy or High Commission of the country to which he is to be removed. If entry clearance is issued, he may then be removed. If the Embassy or High Commission refuse the application and he can prove this by presenting a letter from them, leave to remain in the UK may be granted by the Managed Migration Directorate (MMD) if further efforts to obtain re-admission to his country of origin are unlikely to prove successful.” Available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter48?view=Binary>.

## Conclusions

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The evidence provided by the participants in the study and the legal analysis indicates that the majority of the human rights concerns faced by stateless persons on the UK territory could be solved by the adoption of a statelessness determination procedure that had, as an outcome in appropriate cases, the grant of leave to enter or remain without restrictions on access to public funds or employment. The analysis in Chapter 4 reveals that this was, in effect, the case between at least 1998 and 2002. Furthermore, it reflects the UNHCR *Geneva Summary Conclusions*:

“When States recognize individuals as being stateless, they should provide such persons with a lawful immigration status from which the standard of treatment envisaged by the 1954 Convention flows. Having a lawful status contributes significantly to the full enjoyment of human rights.

“In some cases stateless persons may have a right of residence in the State pursuant to international human rights law, for example under Article 12 of the ICCPR. Current practice demonstrates that most States with determination procedures grant a status in national law, including the right of residence, upon recognition, often in the form of fixed-term, renewable residence permits.

“While the 1954 Convention does not explicitly prescribe a right of residence to be accorded upon a person’s recognition as stateless, granting such a right is reflected in current State practice to enable stateless individuals to live with dignity and in security. Participants agreed that this approach is the best means of ensuring protection of stateless persons and upholding the 1954 Convention. Without such status, many stateless persons may be deprived of the protection of the Convention. Nonetheless, it was also discussed whether in a limited set of circumstances it may not be necessary to provide for residence upon recognition. One view was that this would be the case for stateless persons in a migration context who can immediately return to a State of former habitual residence where they enjoy permanent residence as well as the full range of civil, economic, social and cultural rights and have a reasonable prospect of acquiring nationality of that State. Similarly, while a form of protection (including some kind of immigration status), may be necessary in the short term, grant of residence may not be necessary where an individual can acquire or re-acquire nationality of another State within a reasonable period of time through simple, accessible and purely formal procedures, where the authorities do not have any discretion to refuse to take the necessary action.”<sup>408</sup>

It is important to note that leave to enter or remain may not be required for all stateless persons who are identified. As the expert meeting concluded above it may not be appropriate in cases where the applicant can immediately return to a State where he or she has a right of residence and where there will be a full enjoyment of human rights. Likewise, where an applicant can acquire or re-acquire a nationality through a formality, although a short period of stay may be necessary in such cases to ensure that human rights are respected.

Further, this chapter identified a number of human rights concerns that stateless and “unreturnable” persons faced which could be addressed through appropriate changes to law, policy and practice. In addition, specific changes to UK Border Agency guidance relating to statelessness in refugee status determination procedures and, in particular, the guidance on the application of 1951 Convention, Article 1D should be made.

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<sup>408</sup> UNHCR, *Geneva Summary Conclusions*, paras. 25-27.

## Recommendations

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The Home Office should change its policy and grant leave to enter or remain to stateless persons, in appropriate circumstances, to ensure that the UK's obligations under the 1954 Convention and in international human rights law are met.

The UK government should ensure that provisions relating to the accessibility of welfare benefits, asylum support and section 4 support and the entitlement to work do not result in stateless and "unreturnable" persons being at risk of destitution and street homelessness to ensure compliance with the UK's obligations under the 1954 Convention and international human rights law.

The Home Office and the UK Border Agency should amend the guidance on immigration detention to expressly identify an individual's statelessness as a factor that will weigh against detention on the basis that it is likely to indicate that there are no reasonable prospects of removal. Legislation should also be considered that would place a reasonable maximum time limit on immigration detention, to act as an additional protection against the risk of indefinite detention of stateless persons. These changes would help meet the UK's international human rights law obligations to stateless persons.

The UK Border Agency should improve its training in respect of statelessness to ensure that officials are able to identify and register stateless persons and, if identified, are aware of the consequences that flow in respect of immigration status, entitlement to support and accommodation, the appropriateness of immigration detention, and the approach that should be taken to removal.

The Home Office and the UK Border Agency should review guidance on the application of Article 1D of the 1951 Convention to ensure that it accords with UNHCR's interpretation of that Article.

UK civil society should develop accessible training for legal representatives on statelessness and its treatment in UK law to help ensure that stateless persons on the UK territory are identified.

The Department of Health Regulations and Guidance on charging for secondary healthcare should be applied in a way that stateless and "unreturnable" persons who are not deemed "ordinarily resident" are able to access necessary and urgent secondary healthcare in compliance with the UK's obligations under international human rights law.

British Overseas citizens currently "in limbo" in the United Kingdom, who after having renounced their Malaysian nationality are unable to register as British citizens, should be granted limited Discretionary leave to remain whilst the government makes further enquiries of the Malaysian authorities. Each individual should cooperate fully with those enquiries. If after examination on a case-by-case basis no durable solution in Malaysia is possible, a longer period of Discretionary leave to remain should be granted, as a first step to achieving a long-term solution.



# CHAPTER 6: THE REDUCTION AND PREVENTION OF STATELESSNESS IN BRITISH NATIONALITY LAW

This chapter will examine the provisions in British nationality law that aim to prevent and reduce statelessness, as compared with the UK's international obligations. These are obligations that arise not only from international instruments that focus exclusively on statelessness but also from international human rights law and, to a lesser degree, European Union law.

It will analyse the extent to which the UK meets these obligations, recognising a number of protections that already exist in British nationality law to avoid and reduce statelessness. It will also recommend a number of measures to help improve compliance with relevant obligations under international law.

## 6.1 Introduction

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Two points should be stated at the outset of this chapter. First, the clear trend that emerged from both the referrals to, and the participants in, this study was that statelessness on the UK territory was primarily a migratory phenomenon. Although the reach of British nationality law extends beyond the UK territory, particularly to the populations of former British colonies, that aspect was outside the scope of the study.<sup>409</sup> Secondly, there were no children or young persons who were referred to the study as potential participants. Therefore there is a lack of qualitative data about the impact that statelessness has on children, particular those born in the UK. That said, it is clear from the quantitative data analysed in Chapter 3 that there are stateless children on the UK territory.

## 6.2 International obligations

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The UK is party to a number of universal treaties that seek to address statelessness and provide obligations in respect of British nationality law.<sup>410</sup> Most importantly, the UK was one of the first states to ratify and implement the 1961 Convention on the Reduction of Statelessness.<sup>411</sup> It is also a party to the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws,<sup>412</sup> and to the Protocol Relating to a Certain Case of Statelessness<sup>413</sup> (a protocol to the

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<sup>409</sup> See, for discussion, Fransman's, pp.792-796.

<sup>410</sup> *Ibid.*, Appendix 1, pp. 1479-1522.

<sup>411</sup> The UK is one of 40 States Parties to have ratified the Convention. See: [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg\\_no=V-4&chapter=5&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg_no=V-4&chapter=5&lang=en).

<sup>412</sup> 179 LNTS 89, in force 1 July 1937, ratification for Great Britain and Northern Ireland and all parts of the British Empire.

<sup>413</sup> 179 LNTS 15, in force 1 July 1937, ratification for the UK deposited January 14th, 1932.

1930 Convention).<sup>414</sup> The UK has also ratified the 1954 Convention, which makes provision in respect of the naturalisation of stateless persons.<sup>415</sup>

However, the UK has not signed the 1997 European Convention on Nationality, although it was actively involved in the negotiations of the treaty.<sup>416</sup> In addition, the UK has not signed the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession<sup>417</sup> “which builds upon the general principles of nationality in relation to state succession found in the European Convention on Nationality by providing specific rules regarding state succession”.<sup>418</sup>

International human rights law recognises the right of every person to a nationality and its provisions aid in the interpretation of the 1961 Convention.<sup>419</sup> This interplay is recognised in the summary conclusions of a UNHCR organised expert meeting on the subject of “Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children”. The meeting concluded:

“Article 15 of the Universal Declaration of Human Rights establishes the right of every person to a nationality. This right is fundamental for the enjoyment in practice of the full range of human rights. The object and purpose of the 1961 Convention is to prevent and reduce statelessness, thereby guaranteeing every individual’s right to a nationality. The Convention does so by establishing rules for Contracting States on acquisition, renunciation, loss and deprivation of nationality.

“The provisions of the 1961 Convention, however, must be read in light of subsequent developments in international law, in particular international human rights law.”<sup>420</sup>

The conclusions focused, particularly, on obligations arising from the Convention on the Rights of the Child.<sup>421</sup> The UK ratified the CRC, but entered a reservation which provided that:

“The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.”<sup>422</sup>

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<sup>414</sup> Article 1 of the Protocol provides that, “In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State”.

<sup>415</sup> 1954 Convention, Article 32.

<sup>416</sup> ETS No 166.

<sup>417</sup> CETS 200, Strasbourg, 19 May 2006.

<sup>418</sup> *Fransman’s*, 3<sup>rd</sup> Edition, p790.

<sup>419</sup> See Vienna Convention on the Laws of Treaties 1969. Entered into force on 27 January 1980, United Nations, “Treaty Series”, vol. 1155, p. 331, Article 32 (3).

<sup>420</sup> UNHCR, *Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children (Summary Conclusions)*, September 2011, available at: <http://www.unhcr.org/refworld/docid/4e8423a72.html> hereafter the “UNHCR Dakar Summary Conclusions”.

<sup>421</sup> United Nations, U.N.T.S. Vol 1577, p. 3, entry into force 2 September 1990. UK ratification 16 December 1991, (hereafter “the CRC”).

<sup>422</sup> See The Joint Committee on Human Rights, *The Treatment of Asylum Seekers*, Tenth Report, Session 2006-7, 30 March 2009, HL Paper 81, HC Paper 60, available at: <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8108.htm>.

However, this reservation was withdrawn in December 2008.<sup>423</sup> The enforceability of the CRC in domestic law with regard to the work of the UK Border Agency is now reflected in domestic legislation,<sup>424</sup> guidance issued under that legislation<sup>425</sup> and the jurisprudence of the Supreme Court.<sup>426</sup>

In addition, the UNHCR *Dakar Summary Conclusions* recognise the importance of the principle of gender equality, in ensuring that women have the same rights as men to confer their nationality on their children, as contained in the ICCPR and CEDAW.<sup>427</sup> The Convention on the Rights of Persons with Disabilities also provides relevant obligations.<sup>428</sup>

Turning to domestic law, the British Nationality Act 1981 and subsequent legislative amendments provide a framework by which individuals automatically obtain, are granted or deprived of British nationality. There are a number of provisions within that framework that refer to statelessness and which generally aim to ensure compliance with the UK's applicable international obligations.<sup>429</sup>

## 6.3 The definition of statelessness in British nationality law

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The references to statelessness in British nationality law should be interpreted to have the same meaning as in the 1954 Convention, Article 1(1), namely “a person who is not considered as a national by any State under the operation of its law”.<sup>430</sup> This was confirmed by the Special Immigration Appeals Commission in the case of *Hamza*, in the context of a case concerning a deprivation of citizenship order and whether its enforcement would leave the appellant stateless.<sup>431</sup>

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<sup>423</sup> See ILPA, *Information Sheet: Children's Welfare*, 3 December 2008, available at: <http://www.ilpa.org.uk/resources.php/4635/childrens-welfare>.

<sup>424</sup> Borders, Citizenship and Immigration Act 2009, section 55.

<sup>425</sup> UK Border, *Every Child Matters Change for Children: Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children*, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/bci-act1/change-for-children.pdf?view=Binary>, paras. 2.6 and 2.7.

<sup>426</sup> *ZH (Tanzania) (FC) (Appellant) v. SSHD (Respondent)*, [2011] UKSC 4, United Kingdom: Supreme Court, 1 February 2011, available at: <http://www.unhcr.org/refworld/docid/4d5aa242.html>, para. 23.

<sup>427</sup> Convention on the Elimination of All forms of Discrimination Against Women, 1249 UNTS 13, entry into force 3 Sep. 1981, UK ratification 7 April 1986 and UNCHR, *Dakar Summary Conclusions* paras. 7 to 9.

<sup>428</sup> UN Convention on the Rights of Persons with Disabilities 2515 UNTC 3, in force 3 May 2008, UK ratification 8 June 2009, Article 18.

<sup>429</sup> See *Fransman's*, p. 792.

<sup>430</sup> See Section 4.3.

<sup>431</sup> *Hamza v. SSHD*, *op. cit.*, para. 5.

## 6.4 The prevention and reduction of statelessness

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### 6.4.1 Children born on the UK territory

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British nationality law contains a number of provisions that aim to prevent and reduce statelessness. These supplement the general framework of nationality law in relation to birth on the UK territory.<sup>432</sup>

The general framework of British nationality law currently provides that if a child is born on the UK territory he or she is a British citizen if either parent is a British citizen or is settled<sup>433</sup> in the UK, or would have been but for their death or if either parent is a member of the armed forces.<sup>434</sup> Where either parent subsequently becomes a British citizen or settled, the child can make an application before he or she reaches 18 years old to register as a British citizen as of right.<sup>435</sup> The same is true of children who have a parent who joins the armed forces.<sup>436</sup> If a child has remained in the UK for ten years since the date of birth, without being absent for more than 90 days in any one year he or she is also eligible to register as a British citizen, subject to a good character test.<sup>437</sup>

Although six participants<sup>438</sup> had children who were born in the UK, none of these were stateless at the time of the study. This was for one of three reasons. First, the child may have been born to a parent who was settled.<sup>439</sup> Second the child was, after birth, able to register as a British citizen because a parent was subsequently granted settlement.<sup>440</sup> Third, the child was able to obtain a nationality through descent from the parent who was not stateless.<sup>441</sup>

The UK is under an obligation to grant British nationality to children born in the territory who would otherwise be stateless under the 1961 Convention, Article 1. States may implement their obligations by granting nationality at birth or through an application procedure, which may be made subject to certain conditions.<sup>442</sup> The UK has adopted the latter approach with the general provisions in respect of the acquisition of British citizenship as of right being supplemented by provisions that aim to reduce statelessness amongst children born in the UK. One provision allows a child born in the UK who is and has been stateless since birth

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<sup>432</sup> Given the geographic scope of the study, this section will focus on provisions that are relevant to the UK mainland territory.

<sup>433</sup> British Nationality Act 1981, s 50(2) provides that references to a person being “settled in the United Kingdom... are references to his being ordinarily resident in the United Kingdom...without being subject under the immigration laws to any restriction on the period for which he may remain”. Further provision as regards being settled in the UK is made by the British Nationality Act s 50(3), (4). For a more detailed discussion see *Fransman’s*, pp. 336-340.

<sup>434</sup> British Nationality Act, section 1 (1), (1A). See *Fransman’s*, pp. 361-363.

<sup>435</sup> British Nationality Act, section 1(3). See *Fransman’s*, pp. 372-373.

<sup>436</sup> British Nationality Act, section 1(3A). See *Fransman’s*, pp. 373-374.

<sup>437</sup> See *Fransman’s*, pp. 374-375. Discretion may be exercised to disregard excess absences, British Nationality Act 1981, s 1(7).

<sup>438</sup> Participants 9, 20, 23, 28, 29 and 32.

<sup>439</sup> Participants 23 and 28.

<sup>440</sup> Participants 9, 23, 28 and 32.

<sup>441</sup> Participants 20 and 29.

<sup>442</sup> 1961 Convention, Article 1.

to register as a British citizen as of right.<sup>443</sup> The child must be under 22 years of age on the date of application and must have spent the 5 years preceding the application in the UK or, if mostly in the UK, with the remainder of the time spent in the British overseas territories, subject to a residence requirement of 450 days in that period.<sup>444</sup> This provision aims to meet the UK's obligations under the 1961 Convention.<sup>445</sup>

There are additional protections for the children of British overseas territories citizens, British Overseas citizens and British subjects who would otherwise be born stateless.<sup>446</sup>

Even with these provisions in force, however, some stateless children born on the UK territory will have to wait a minimum period of five years before they are able to register as a British citizen as of right under this provision. The fact that there are a small number of children born in the UK stateless is confirmed by examining the management data provided by the UK Border Agency.<sup>447</sup> Further data indicates that there were only 10 applications and five grants under the British Nationality Act, Schedule 2 paragraph 3, between 2001 and 2010.<sup>448</sup> This trend was confirmed in a semi-structured interview with officials in the Nationality Directorate.<sup>449</sup> However, alongside this, it should be recognised, that the analysis of the data relating to grants of 1954 Convention Travel Documents in Chapter 3 indicates that there were up to 200 children who applied for and were issued by the UK Border Agency with such documents between 2002 and 2010.<sup>450</sup> Further, it is also clear from the management data provided by the UK Border Agency that there were 145 children recorded on the UK Border Agency's CID as stateless who were born in the UK, and who subsequently registered as British citizens

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<sup>443</sup> British Nationality Act 1981, Schedule 2, paragraphs 3. A making provision for a person born in the UK or a British overseas territory after 1982 and who is and always has been stateless. He or she must have spent no more than 450 days outside the UK and the British overseas territories in the 5 years ending with the date of application. The Secretary of State has discretion to disregard excess absences. See *Fransman's*, pp. 375-6.

<sup>444</sup> British Nationality Act, Schedule 2, paragraph 6.

<sup>445</sup> UK Border Agency, *Nationality Instructions*, Volume 1, Chapter 5, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/nationalityinstructions/nichapter5/chapter5?view=Binary>.

<sup>446</sup> See *Fransman's*, p. 375. There are provisions for a person born in the UK to automatically acquire British overseas territories citizenship, British Overseas citizenship or British subject status, where born otherwise stateless and where born to a parent who holds that citizenship or status; see also the British Protectorates, Protected States and Protected Persons Order 1982, art 7 for equivalent provision in respect of British protected persons. British overseas citizenship, British subject status and British protected person status do not however, without more, confer a right of abode in the UK.

<sup>447</sup> See Section 3.3.5 confirms that 74% of the 27 children under 5 years old issued Stateless Person Travel Documents (between 2001 and 2010) were born in the UK which would suggest that they were born stateless but not yet eligible to apply for registration as British citizens because of their age.

<sup>448</sup> Between 2001 and 2010 there were only 10 applications submitted and five grants of citizenship made under British Nationality Act Schedule 2 paragraph 3. Management data received from the UKBA Planning & MI Team North West Region by email dated 19 September 2011 with the disclaimer that "the information has been provided from local management information and is not a National Statistic. As such it should be treated as provisional and therefore subject to change".

<sup>449</sup> Anecdotal information from a semi-structured interview with the Nationality Directorate (1 August 2011).

<sup>450</sup> See Section 3.3.5, Figure 17.

when either parent became settled or a British citizen between 2001 and 2010.<sup>451</sup> There also appear to be 210 children recorded on CID as being stateless who were registered as British citizens under discretionary provisions between 2001 and 2010.<sup>452</sup> For the latter two data sets, however, a caveat must be placed on the reliability of the data given that this study has highlighted a general trend concerning the poor identification and recording of statelessness on casework systems.<sup>453</sup>

Consequently there appears to be a small population of stateless children who are born on the UK territory and who either remain stateless, or who rely on discretionary provisions to register as British citizens or, on the basis that their parents either become settled or naturalise as British citizen, register as British citizens. From the available data it would appear that the protections specifically designed to meet the UK's international obligations towards stateless persons are little used.

These particular protections in British nationality law can be compared to UNHCR *Dakar Summary Conclusions*:

“The rules for preventing statelessness among children contained in Articles 1(1) and 1(2) of the 1961 Convention must be read in light of later human rights treaties, which recognize every child's right to acquire a nationality, in particular where they would otherwise be stateless. The right of every child to acquire a nationality (CRC Article 7) and the principle of the best interests of the child (CRC Article 3) together create a presumption that States need to provide for the automatic acquisition of their nationality at birth by an otherwise stateless child born in their territory, in accordance with Article 1(1)(a) of the 1961 Convention.

“Where Contracting States opt for an application procedure to grant their nationality to otherwise stateless children, developments in international human rights law create a strong presumption that States should limit application requirements so as to allow children to acquire nationality as soon as possible after birth.”<sup>454</sup>

In the light of these conclusions, it is therefore recommended that the UK reviews the provisions of its nationality law to ensure the provisions that allow stateless children born in the UK to acquire British citizenship meet its obligations under the 1961 Convention and, in particular, the CRC. This is particularly important given the lifting of the reservation to the CRC relating to nationality law in December 2008. In particular, the UK should apply the absence criteria

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<sup>451</sup> Between 2001 and 2010 there were 145 grants of citizenship made under the British Nationality Act 1981, Section 1 (3) to children recorded on CID as “Stateless Person (Article 1 of the 1954 Convention)”, five recorded as “Stateless” and 95 “as “Unspecified Nationality”. Management data received from the UKBA Planning & MI Team North West Region by email dated 19 September 2011 with the disclaimer that “the information has been provided from local management information and is not a National Statistic. As such it should be treated as provisional and therefore subject to change”.

<sup>452</sup> British Nationality Act 1981, section 3(1). Between 2001 and 2010 there were 210 grants of citizenship under the discretionary powers contained in British Nationality Act, section 3(1) to children recorded on CID as “Stateless Person (Article 1 of the 1954 Convention)”, five recorded as “Stateless” and 105 as “Unspecified Nationality”. However, anecdotal information from a semi-structured interview with the UKBA Nationality Directorate (1 August 2011) called into question how many of these children are in fact stateless given the prevalence of inaccurate data recording on CID. It was also suggested that there are relatively few applications received concerning stateless children born to foreign surrogate mothers.

<sup>453</sup> The fact that this was also an issue in the work of the Nationality Directorate was confirmed in anecdotal information from a semi-structured interview with the Nationality Directorate (1 August 2011).

<sup>454</sup> UNHCR, *Dakar Summary Conclusions*, paras. 22-23.

flexibly to ensure stateless children who are habitually resident are not refused registration on the basis of excess absences.<sup>455</sup>

Although the treatment of refugees is not a focus of this research, the situation of children born to refugee parents on the UK territory raises an issue in respect of the prevention of statelessness. Children of refugees who are born stateless fall under the safeguard set out in Article 1 of the 1961 Convention and relevant provisions of UK nationality law. However, children who have in principle acquired their parents' nationality automatically at birth are also left without an effective citizenship by virtue of the very fact that they are refugees and therefore unable to exercise their nationality, for example through acquisition of proof of nationality from a consulate. The children of refugees are, therefore, traditionally viewed as *de facto* stateless. This can limit the possibility of transferring nationality by descent. The Council of Europe's Recommendation on the nationality of children recommends that States "treat children who are factually (*de facto*) stateless, as far as possible, as legally stateless (*de jure*) with respect to the acquisition of nationality".<sup>456</sup> However, there are currently no provisions that facilitate the acquisition of British citizenship for the children of refugees. It is therefore also recommended that the UK should review its nationality laws to consider whether it would be appropriate to make specific provision through operation of law at birth or by application as envisaged by the 1961 Convention, Article 1, paying special regard to the circumstances of refugee children.<sup>457</sup>

## 6.4.2 Children born outside of the UK

British nationality law allows for the acquisition of British citizenship by descent if either parent possesses British nationality and the child was born outside the territory in specified circumstances. Children who are born outside of the UK or qualifying territories<sup>458</sup> now acquire British citizenship by descent if either their father or mother was a British citizen otherwise than by descent.<sup>459</sup> However, those who acquire British citizenship by descent do not ordinarily pass British citizenship to a child if the child is born outside the UK or qualifying territories. There is therefore a general prohibition against nationality passing to a second generation born outside the UK. The prohibition also applies to, for example, children who have registered as British citizens on the basis of purely discretionary provisions.<sup>460</sup> However, persons who naturalise are British citizens other than by descent, and are therefore able to pass their nationality to their children born outside of the UK.

There are exceptions to this rule for those who are in "Crown Service" or equivalent,<sup>461</sup> or in the service of an EU institution.<sup>462</sup> For a child born before 1 July 2006, there is a requirement for automatic transmission of citizenship in the paternal line that the father must have been married to the mother at the time of the birth.

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<sup>455</sup> 1961 Convention, Article 1(2)(b) sets a maximum qualification period of five years "habitual residence". British Nationality Act, 1981 Schedule 2, paragraph 3 demands, within the five year qualification period that the applicant is not absent from the UK for more than 450 days although paragraph 6 permits the state to disregard excess absences.

<sup>456</sup> Recommendation CN/Rec (2009) 13 of the Committee of Ministers to member states on the nationality of Children. Article 7.

<sup>457</sup> UNHCR, *Dakar Summary Conclusions*, paras. 17 and 18.

<sup>458</sup> These are defined as the British overseas territories apart from the Sovereign Base Areas in Cyprus.

<sup>459</sup> For the statutory definition of those born "by descent" see British Nationality Act, section 14 and *Fransman's*, pp. 361-380.

<sup>460</sup> British Nationality Act, section 3(1).

<sup>461</sup> See for details *Fransman's*, pp. 381-407.

<sup>462</sup> See for details *Fransman's*, pp. 381-407.

These provisions are supplemented by a number of statelessness specific provisions. For example, stateless children who are born outside the UK to a parent who has British citizenship by descent may register as British citizens at any time whilst they are children.<sup>463</sup> There are additional requirements relating to the parent's presence in the UK in the three years before the birth, as well as the fact that one of the parent's parents has to have been a British citizen otherwise than by descent or became or would have become so upon the commencement of the British Nationality Act 1981.

In addition there are provisions that allow a stateless person born outside the UK and the British overseas territories after 1982 to register in the same form of British nationality as his or her parents. The individual must always have been stateless and one of his or her parents at birth must have been a British citizen, a British overseas territories citizen, a British Overseas citizen or a British subject. The stateless person must have spent no more than 270 days outside the UK and the British overseas territories in the three years ending with the date of application. The Secretary of State has discretion to disregard excess absences.<sup>464</sup>

A further provision stipulates that birth outside the UK on a British registered ship or aircraft or an unregistered ship or aircraft of the government of the UK constitutes birth in the UK if at least one of the parents was a British citizen or the child would be stateless, and consequently a child born in such circumstances will be a British citizen.<sup>465</sup> There is also a very specific provision relating to those who would have been entitled to be a Citizen of the United Kingdom and Colonies under legislation in force before 1983 if that legislation had continued, but are otherwise stateless.<sup>466</sup> Finally there are protections which aim to ensure that children who are born otherwise stateless are able to acquire a form of British nationality that does not provide the right of abode in the UK.<sup>467</sup>

These provisions in UK law can be compared to the relevant provisions of the 1961 Convention. Guidance on the interpretation of the relevant provisions is contained in the UNHCR *Dakar Summary Conclusions* which find that:

“Article 1 of the 1961 Convention places primary responsibility on Contracting States in whose territory otherwise stateless children are born to grant them nationality to prevent statelessness. The Convention also sets out two subsidiary rules. The first is found in

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<sup>463</sup> British Nationality Act 1981, section 3(2) as amended by the Borders, Citizenship and Immigration Act 2009, section 43.

<sup>464</sup> British Nationality Act 1981, Schedule 2, paragraph 4 and 6; see also the British Protectorates, Protected States and Protected Persons Order 1982, art 7 for equivalent provision in respect of British protected persons. British Overseas citizenship, British subject status and British protected person status do not however, without more, confer a right of abode in the UK. Between 2001 and 2010 there were 205 applications submitted and 150 grants of citizenship made under British Nationality Act Schedule 2 paragraph 4. Management data received from the UKBA Planning & MI Team North West Region by email dated 19 September 2011 with the disclaimer that “the information has been provided from local management information and is not a National Statistic. As such it should be treated as provisional and therefore subject to change”.

<sup>465</sup> British Nationality Act 1981, section 50 (7); see also s 50(7A) for those born in the qualifying territories to a British citizen or British overseas territories citizen parent and s 50(7B) for those born in a British overseas territory other than a qualifying territory (in practice the Sovereign Base Areas) to a British overseas territories citizen parent.

<sup>466</sup> British Nationality Act 1981, Schedule 2, paragraph 5. Between 2001 and 2010 there were only 30 applications submitted and 15 grants of citizenship made under British Nationality Act Schedule 2 paragraph 5. Management data received from the UKBA Planning & MI Team North West Region by email dated 19 September 2011 with the disclaimer that “the information has been provided from local management information and is not a National Statistic. As such it should be treated as provisional and therefore subject to change”.

<sup>467</sup> See *Fransman's*, pp. 642-645 and 648-649.

Article 1(4) and applies where an otherwise stateless child is born in a Contracting State to parents of another Contracting State but does not acquire the nationality of the country of birth automatically and either misses the age to apply for nationality or cannot meet the habitual residence requirement. In such cases, responsibility falls to the Contracting State of which the parents of the individual concerned are citizens to grant its nationality to that individual. In these limited circumstances where Contracting States must grant nationality to children born abroad in another Contracting State to one of their nationals, States may require that an individual lodge an application and meet certain criteria set forth in Article 1(5) that are similar to those set forth in Article 1(2), with some distinctions.

“The second subsidiary rule applies where children of a national of a Contracting State who would otherwise be stateless are born in a non-Contracting State. This rule is set out in Article 4. Although granting nationality in these circumstances is obligatory, Article 4 gives Contracting States the option of either granting their nationality to children of their nationals born abroad automatically at birth or requiring an application subject to the exhaustive conditions listed in Article 4(2).

“Like Article 1, Article 4 of the 1961 Convention must be read in light of subsequent developments in international human rights law. The right of every child to acquire a nationality, as set out in CRC Article 7 and the principle of the best interests of the child contained in CRC Article 3, create a strong presumption that Contracting States should provide for automatic acquisition of their nationality at birth to an otherwise stateless child born abroad to one of its nationals. In cases where Contracting States require an application procedure, international human rights law, in particular the CRC, obliges States to accept such applications as soon as possible after birth.”<sup>468</sup>

In the light of this interpretation it is recommended that the UK reviews the provisions of its nationality law to ensure that the provisions that allow stateless children born outside the UK to acquire British citizenship meet its obligations under the 1961 Convention and, in particular, the CRC. This review should take into account the lifting of the reservation to the CRC relating to nationality in December 2008. In particular, the residence test required for registrations under British Nationality Act 1981 Schedule 2, paragraph 4 – that the applicant should have been in the UK for three years preceding the application to register, and not outside the UK for more than 270 days in that period – should be applied flexibly. Excess absences must be considered in a way that those who are habitually resident in the UK are not prohibited from registering, as this may risk inconsistency with the obligation in the 1961 Convention, Article 4(2)(b). Further, consideration should be given to whether stateless children born to British nationals abroad should acquire British nationality as of right, thereby completely eliminating the occurrence of statelessness in such circumstances.

### 6.4.3 Foundlings

The 1961 Convention makes special provision to protect children who are discovered on the territory of a state whose parentage is unknown. It provides: “A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.”<sup>469</sup> With the purpose of meeting this international obligation, the British Nationality Act 1981 interprets foundling to mean new born infants found abandoned after 1983. They shall unless the contrary

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<sup>468</sup> UNHCR, *Dakar Summary Conclusions*, paras. 35-37.

<sup>469</sup> 1961 Convention, Article 4.

is shown, be deemed to have been born in the UK to a parent who was a British citizen at the time of birth. Consequently, such children will acquire British citizenship as of right.<sup>470</sup>

The Nationality Instructions, which give guidance to caseworkers in the Nationality Directorate who consider such applications, provide:

“There is no definition as to what ‘new-born’ means in terms of age, and we should interpret the phrase generously. As a broad rule of thumb, we would expect it normally to apply to a child no more than a few months old when found. But we should consider the circumstances of each child, and there may be cases where it would be right to regard a child as much as one year old as ‘new-born’ for the purposes of s.1(2) of the British Nationality Act 1981.”<sup>471</sup>

The UNHCR *Dakar Summary Conclusions* found that there is a divergence of state practice in respect of the interpretation of the 1961 Convention, Article 2 where “several Contracting States limit granting nationality to foundlings that are very young (12 months or younger) while most Contracting States apply their rules in favour of foundlings to older children, including in some cases up to the age of majority”.<sup>472</sup> In addition it was recommended that “[a]t a minimum, the safeguard for Contracting States to grant nationality to foundlings should apply to all young children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth. This flows from the object and purpose of the 1961 Convention and also from the right of every child to acquire a nationality. A contrary interpretation would leave some children stateless.”<sup>473</sup> Article 18 on the Convention on the Rights of Persons with Disabilities also provides relevant obligations.

Consequently, it appears that the UK adopts a restrictive approach in law compared to some other states. It is therefore recommended that the UK reconsider its current practice relating to who is considered to be a foundling in the light of State practice that provides higher levels of protections, and to particularly consider whether the definition should extend to older children who are unable to express their State of origin.

## 6.5 Proof of statelessness in nationality law

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The approach to the proof of statelessness in British nationality law is distinct, but similar, to the approach in immigration law.

The Special Immigration Commission has recently held, in assessing a case where statelessness was raised in defence to an attempt to deprive an individual of his or her nationality, that the burden of proof was on the applicant and that the standard of proof was the balance of probabilities.<sup>474</sup> Thus, as a matter of law, the burden of proof is not shared between the applicant and the decision maker.<sup>475</sup>

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<sup>470</sup> British Nationality Act 1981, Section 1(2).

<sup>471</sup> UK Border Agency, “Nationality Instructions”, Chapter 3, at para. 3.5.2.2, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/nationalityinstructions/nichapter3/chapter3?view=Binary>.

<sup>472</sup> UNHCR, *Dakar Summary Conclusions*, para. 43.

<sup>473</sup> UNHCR, *Dakar Summary Conclusions*, paras. 43-44.

<sup>474</sup> *Hamza v Secretary of State for the Home Department op. cit.*, paragraph 5. See *Fransman’s*, pp. 590-591 and pp. 791-792 for an analysis.

<sup>475</sup> See Chapter 4 for a more detailed discussion.

In a semi-structured interview with officials in the Nationality Directorate of the UK Border Agency, it was noted that the burden of proof falls on the applicant, although it was suggested that officials are able to help by identifying the questions at issue and the evidence that the applicant would need to produce in order to prove that he or she was, in fact, stateless.<sup>476</sup> The officials noted that the applicant is expected to provide supporting evidence as required by the prescribed application forms and guidance.<sup>477</sup> For those born abroad, letters from the authorities of the country of the applicant's birth as well as letters from the authorities of the country or countries of nationality of their parents which confirm that the applicant is not a national of that country are the primary sources of evidence that are expected. Where the applicant has not provided relevant evidence along with their application, the caseworker would contact the applicant, setting out what evidence was required asking for it within 21 days. The caseworkers in the Nationality Directorate sometimes research the nationality law of foreign States, and have on occasion contacted experts in foreign nationality law. However, in general, it was considered that the onus was on the applicant to submit relevant evidence and it was not usual practice for caseworkers to make enquiries to the Country of Origin Information Service. It was not common for caseworkers in the Directorate to contact consular authorities in the UK or national authorities in respect of individual cases.<sup>478</sup> Guidance, however, does permit such action to be taken with the consent of the applicant where applicants "claim to have tried, unsuccessfully, to obtain a letter confirming non-possession of another citizenship".<sup>479</sup>

This approach to the evidentiary assessment of statelessness contains a number of elements of good practice. The fact that officials research nationality law themselves and have used expert witnesses to provide evidence of the application of nationality law in practice shows that the Nationality Directorate is prepared to enter into evidence gathering. Furthermore, the willingness to identify gaps in the evidence provided in support of an application and to provide the applicant an opportunity to obtain further evidence is likely to make decision-making more efficient. However, the lack of an established practice of the decision-maker contacting the consular authorities of the State where the applicant has a relevant link is a notable gap. This aspect of the approach is inconsistent with the UNHCR *Geneva Summary Conclusions*, which emphasized the need for the applicant and the authorities to share the burden of proof in assessing statelessness.<sup>480</sup> Given that the provisions in UK nationality law relating to statelessness are intended to reflect the UK's international obligations, the current approach to the assessment of evidence risks being inconsistent with the object and purpose of the relevant Conventions. Consequently, it is recommended that the approach to the evidentiary assessment of statelessness in British nationality law be reviewed in the light of forthcoming UNHCR Guidelines.

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<sup>476</sup> Anecdotal information from a semi-structured interview with the Nationality Directorate (1 August 2011).

<sup>477</sup> See UK Border Agency, *BN5 Information about provisions for Reducing Statelessness*, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/britishcitizenship/informationleaflets/bnchapters/bn5.pdf?view=Binary>.

<sup>478</sup> Anecdotal information from a semi-structured interview with the Nationality Directorate (1 August 2011).

<sup>479</sup> UK Border Agency, Nationality Instructions, Chapter 12, Annex D Claims to have no Other Citizenship or Nationality, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/nationalityinstructions/nichapter12/ch12annexd?view=Binary>.

<sup>480</sup> UNHCR, Geneva Summary Conclusions, December 2010, available at: <http://www.unhcr.org/refworld/docid/4d9022762.html>, para. 13.

## 6.6 Naturalisation

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The 1954 Convention, Article 32 provides that:

“Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.”

Stateless persons who seek to naturalise do so on the same terms as other non-nationals. Consequently they are required to be settled and lawfully present in the UK for a period of three or five years (depending on whether or not they are married to/are the civil partner of a British citizen), with restrictions on time spent outside the UK during the qualifying period.<sup>481</sup> There are no statutory provisions or published policies that facilitate the assimilation or naturalisation of stateless persons by abridging time qualifying periods or prioritising applications. The lack of specific provisions for stateless persons is of particular concern. Stateless persons who are granted leave to enter or remain in a category where it is envisaged that settlement and naturalisation is a possibility are treated in the same way as other non-nationals. This limits the possibility of stateless persons obtaining a durable solution to their statelessness in the form of the acquisition of nationality. The predicament that stateless persons face is reflected in the case of Khalil.

Name:	<b>Khalil (Participant 37)<sup>482</sup></b>
Country of origin:	<b>Palestinian (Lebanon)</b>
Date of arrival in UK:	<b>October 2004</b>
Time in detention:	<b>N/A</b>
Time in limbo:	<b>N/A</b>
Current status:	<b>Indefinite leave to remain in the UK</b>

Khalil, aged 33, is a Palestinian from Lebanon recognised as stateless by the UK Border Agency. Fearing persecution from a political faction, he fled to the UK in October 2004 and claimed asylum on arrival. He faced numerous delays in the consideration of his application and appeal. During that time he met his future wife, a British citizen. He was eventually granted humanitarian protection in June 2007 and married a few months later. However, his immigration status meant that he would have to wait five years before he was able to obtain settlement and, subsequently, apply to naturalise as a British citizen. There was no procedure whereby he could expedite to naturalise as a British citizen and obtain a durable solution to his statelessness through the acquisition of British citizenship.

Khalil said: “It has been bizarre not being able to access my rights as a stateless person or to more effectively progress my immigration status.” He describes how as a result of his statelessness he “needs to belong somewhere” and emphasises that this “is not from a nationalistic perspective” but “in order to be able to have somewhere to return to”.

After switching his immigration status into a spouse category and making extensive representations with the pro bono assistance of Asylum Aid’s legal team, Khalil obtained

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<sup>481</sup> British Nationality Act 1981, Schedule 1: see *Fransman’s*, Chapter 16.

<sup>482</sup> Participant 37. Unlike other participants, Khalil agreed to take part in this research having been provided with legal assistance by Asylum Aid, following a referral from UNHCR London.

indefinite leave to remain in August 2011. This has provided him the opportunity to submit an application to naturalise as a British citizen that is currently pending.

Khalil observes: “Statelessness is not a choice, it is something that arises from a person’s history. It is not something that can just be manufactured.” But he is at least now more optimistic when asked about the future because he now hopes to acquire British citizenship shortly.

“Hopefully the future will be better for me as well as for other stateless individuals.”

In addition, the participants in the study indicated that fees can act as a barrier to naturalisation and, consequently, the acquisition of a permanent solution for stateless persons on the UK territory. Three of the five participants who are now settled in the UK, and therefore eligible to apply for naturalisation, described the registration fee as an obstacle.<sup>483</sup> Abbas,<sup>484</sup> aged 36, a Palestinian who arrived in the UK in 2001 but spent six years in limbo between his unsuccessful asylum appeal in 2004 and being granted settlement by the Case Resolution Directorate. When interviewed for this study, he said “I want to apply for British citizenship. I want to apply for my son at the same time so this will cost me £780 plus £520, which is a lot of money”.<sup>485</sup> Another participant, who had also had been granted leave to enter or remain by the Case Resolution Directorate commented: “I have seen the light at the end of the tunnel but now another shadow has arisen because I cannot afford the fees to naturalise as a British citizen”.<sup>486</sup>

In the light of this analysis, it is recommended that the UK reviews its naturalisation provisions and fees in order to identify what measures can be taken in accordance with its obligations under the 1954 Convention, Article 32. In particular, consideration should be given to providing a route whereby stateless persons who are granted leave to enter or remain can have an accelerated access to settlement or naturalisation where the UK is the most appropriate country for a settlement solution. Specific consideration should be given to ensure that fees for naturalisation applications for stateless persons, especially children, are not prohibitive and are reduced as far as possible.

## 6.7 Deprivation and loss of nationality

The 1961 Convention contains protections in respect of the deprivation and loss of nationality. In this context “deprivation” means a process initiated by the government or the courts whereas “loss” happens automatically on the occurrence of an event. The 1961 Convention prohibits the deprivation of a person’s nationality if it would render him or her stateless. It also provides for procedural protections, including a right to a fair hearing before a court or other independent body.<sup>487</sup> Upon signature, the UK elected to retain the right “to deprive a

<sup>483</sup> Participants 8, 9 and 19.

<sup>484</sup> Participant 9.

<sup>485</sup> Since Abbas was interviewed the fees have risen to £836 and £540 respectively. See UK Border Agency *UK Border Agency Fees from 6 April 2011*, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/fees-table-spring-2011.pdf>.

<sup>486</sup> Participant 33. It was not possible to obtain a full paper file for this participant but factual aspects were checked on CID as well as through selected immigration papers provided by the participant.

<sup>487</sup> 1961 Convention, Article 8.

naturalised person of his nationality” on grounds relating to the person’s duty of loyalty to the state even where such would leave the individual stateless as was permitted.<sup>488</sup> Indeed, the reason why the UK chose not to sign the European Convention on Nationality 1997 arises from concerns that it would limit the power of the UK to deprive a person of British nationality and render him or her stateless.<sup>489</sup>

The British Nationality Act 1981, as amended, provides for the circumstances in which an individual can be deprived of British nationality. They have expanded in recent years and the Secretary of State can now deprive those who had acquired British nationality by right at birth of that nationality.<sup>490</sup> In addition, the grounds of such deprivation have been broadened to include where the Secretary of State “is satisfied that deprivation is conducive to the public good”.<sup>491</sup> However, a provision of domestic law prevents the Secretary of State from making an order on those grounds, if it would result in a person being stateless.<sup>492</sup> Rather, the Secretary of State has the power to deprive nationality acquired by registration or naturalisation if it was obtained by fraud, false representation or concealment of a material fact<sup>493</sup> even if this would result in statelessness.

The current UK legislation on the deprivation of nationality provides greater protections than those demanded by the 1961 Convention. Deprivation of nationality on grounds other than that nationality has been obtained by fraud, misrepresentation or concealment of a material fact is not permitted if it will result in statelessness. That said, UK law provides for a broader power to deprive nationality than would be permitted under the 1997 European Convention on Nationality<sup>494</sup> but the UK has not signed or ratified the 1997 Convention and is therefore not bound, in international law by its provisions. Furthermore, the European Court of Justice has found that additional obligations arise in EU law<sup>495</sup> in respect of the deprivation of British nationality for British nationals who can be said to have European Union Citizenship.<sup>496</sup> They demand that the principle of proportionality must be observed in the decision to withdraw

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<sup>488</sup> See “Declarations and Reservations to the 1961 Convention on the Reduction of Statelessness as of 20 September 2006”, [www.unhcr.org/416113864.html](http://www.unhcr.org/416113864.html), page 3, paragraph 11. The declaration provides that the UK retains the power to “deprive a naturalised person of his nationality on the following grounds, being grounds existing in United Kingdom law at the present time: that, inconsistently with his duty of loyalty to Her Britannic Majesty, the person (i) Has, in disregard of an express prohibition of Her Britannic Majesty, rendered or continued to render services to, or received or continued to receive emoluments from, another State, or (ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty”.

<sup>489</sup> Immigration Law Practitioner’s Association, *Briefing Borders, Citizenship and Immigration Bill, House of Lords Committee Part 2 Citizenship Clause 39 The qualifying period Amendment to Clause 39 (2)*, available at: <http://www.ilpa.org.uk/pages/briefings-on-the-borders-citizenship-and-immigration-bill-2009.html>.

<sup>490</sup> British Nationality Act 1981, Section 40 substituted by Nationality, Immigration and Asylum Act 2002 section 4.

<sup>491</sup> British Nationality Act, Section 40 (2) substituted by Immigration, Asylum and Nationality Act 2006, s56, in force 16 June 2006. For a discussion of when this test is met see *Fransman’s*, p617-619.

<sup>492</sup> British Nationality Act 1981, Section 40(4). See *Al-Jedda v Secretary of State for the Home Department* SC/23/2003, 5 November 2003 and *Hamza*, *op. cit.*

<sup>493</sup> British Nationality Act 1981, Section 40(6).

<sup>494</sup> See European Convention on Nationality, Article 7(1)(d) “A State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases:...(d) conduct seriously prejudicial to the vital interests of the State Party”.

<sup>495</sup> See *Janko Rottman v Freistaat Bayern* C-135/08, European Court of Justice. 2 March 2010, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:62008cj0135:en:html>.

<sup>496</sup> *Fransman’s* identifies this protection as extending to British citizens, Gibraltar British Overseas Territories Citizens, or British subjects with the right of abode in the UK of that nationality status or immigration status. See *Fransman’s*, p. 604.

citizenship. Although the decision is not restricted to cases where the deprivation of nationality results in statelessness, it also applies in the context where nationality has been acquired by deception. In contrast, the 1961 Convention permits States parties to deprive individuals of nationality even if it results in statelessness, if the nationality had been obtained by misrepresentation or fraud, without any requirement for proportionality.<sup>497</sup>

Those deprived of citizenship can appeal to the First-tier Tribunal (Immigration and Asylum Chamber) or, where the Secretary of State certifies the appeal on specified grounds relating to national security or state interest, the appeal will be considered by the Special Immigration Appeals Commission.<sup>498</sup> This right of appeal seeks to meet the obligation in Article 8(4) of the 1961 Convention.<sup>499</sup>

The 1961 Convention also contains protections in respect of the loss of citizenship. British nationality law complies with these international obligations. A British citizen may make a declaration of renunciation,<sup>500</sup> but the Secretary of State will only register it if certain safeguards are met. Those safeguards are that the person who is renouncing nationality will after registration have or acquire some other citizenship. If the person concerned does not acquire a new citizenship or nationality within 6 months of the date of registration, the declaration of renunciation will be invalid and the person is deemed to have remained a British citizen.<sup>501</sup> There are additional protections for children.<sup>502</sup> Further a British citizen may not lose their nationality on the grounds of departure, residence abroad or a failure to register.<sup>503</sup>

In the areas of loss and deprivation of nationality, the UK complies with the substantive protections required by the 1961 Convention.

## Conclusions

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The evaluation of British nationality law and its capacity to reduce and prevent statelessness indicates that substantive protections exist, and, in particular, appear to meet the UK's international obligations in a number of important areas. However, there remain further steps that could be taken in order to ensure that the rights ensured by British nationality law can be extended to stateless persons, particularly in respect of stateless children.

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<sup>497</sup> 1961 Convention, Article 8(2)(b).

<sup>498</sup> British Nationality Act 1981, Section 40A. See *Fransman's*, p. 619.

<sup>499</sup> This provides: "A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body." However, the procedural protections in an appeal to the Special Immigration Appeals Commission arguably may not constitute a "fair hearing". See, for example, not in a deprivation of nationality context, *W. (Algeria) & Ors v. SSHD* [2010] EWCA Civ 898.

<sup>500</sup> British Nationality Act 1981 section 12 (1), (2). See *Fransman's*, p. 608.

<sup>501</sup> British Nationality Act 1981, section 12(3) complying with 1964 Convention, Article 7(1).

<sup>502</sup> See *Fransman's*, p. 608.

<sup>503</sup> 1961 Convention, Article 7(3) and 7(4).

## Recommendations

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The Home Office and UK Border Agency should review their approach and guidance to assessing statelessness in the context of applications for British nationality to ensure that the UK meets their obligations in international law, as reflected in forthcoming UNHCR Guidelines on the definition of “stateless person” in Article 1(1) of the 1954 Convention and on the interpretation of Articles 1 to 4 of the 1961 Convention. In particular, it should ensure that the burden of proof is shared between the State and the applicant and that the approach to assessing evidence of statelessness is consistent with those Guidelines.

The Home Office and UK Border Agency should review the relevant provisions of British nationality law to ensure that, for children either born in the UK or born to British citizens abroad, the UK’s obligations contained within the Convention on the Rights of the Child in respect of a child’s right to acquire a nationality are properly considered when interpreting and applying the provisions of the 1961 Convention.

The Home Office and UK Border Agency should review their approach to “foundlings”. In such cases, current provisions that can limit the presumption of being born on the UK territory to “new born infants” should be reconsidered in light of the object and purpose of the 1961 Convention of preventing statelessness and more liberal practice of other States.

Given that the research uncovered quantitative data suggesting that there are children who are born stateless on the UK territory, it is recommended that further research should be undertaken to evaluate the numbers and profile of the children affected.

The Home Office and the UK Border Agency should review existing naturalisation law and policy with regard to Article 32 of the 1954 Convention in order to better facilitate the assimilation and naturalisation of stateless persons. This should include the introduction of provisions that allow for expedition of naturalisation procedures for stateless persons as well as the reduction of relevant fees to ensure that stateless persons’ prospects of naturalisation are not inappropriately limited.

# CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

The research had multiple aims. It hoped to map the number and the profile of stateless and “unreturnable” persons in the UK, putting a human face on the issue through interviews and trying to gain a deeper understanding of the way they are treated by the UK Border Agency through reviewing their immigration case files. It also sought to research the UK’s obligations in international law towards stateless persons and to analyse law, policy and practice to evaluate the extent to which those obligations were being met.

Unfortunately, the data in the wide range of data sets examined was not of sufficient quality to accurately estimate the number and profile of stateless persons on the UK territory. The indirect data examined was not of a sufficient quality to even attempt an analysis of the number of “unreturnable” persons. Any attempt to identify the number and profile of stateless persons risks a significant undercount because of poor identification and recording, lack of clarity and inconsistency in the categorisation of statelessness within both published statistics and the UK Border Agency’s management data.

The data recorded in respect of stateless persons should be improved through adopting a uniform definition, in accordance with forthcoming UNHCR Guidelines, through developing clearer guidance specifically for UK Border Agency officials on the identification of statelessness and through increasing awareness and training. This could be complemented with small but important changes to casework databases. The categorisation of “stateless” contained in Home Office published immigration statistics since August 2011 needs to be refined. In addition, the 2011 Census data should be analysed alongside other data sources to build the best achievable current picture of the numbers and profile of stateless persons in the UK.

Despite these limitations it was possible to identify a number of key trends in the data examined. First of all, there appears to be a number of stateless persons who come to the UK with the grant of prior entry clearance or a visa, who are granted leave to enter on arrival, and who either return to their country of origin or settle in the UK. This group seems to present few challenges for immigration control, but it was not possible to estimate their number. However, an examination of various data sets indicated a figure of around 400-500 persons per year, either stateless or unknown nationality, making applications under immigration and EEA law.

A detailed examination of the published asylum statistics shows that there are around 150-200 asylum-seekers identified as stateless by the UK Border Agency each year. The grant rate in these asylum applications is significantly higher than average, with a recognition rate of 50%. This leaves up to 100 stateless persons each year who are refused asylum and, according to numbers disaggregated from the removals statistics, around 10% of these stateless persons refused asylum are being removed from the UK each year. Without a means to determine their status in the UK, it can only be concluded that the remaining individuals are left in limbo. This pattern is supported by the profile of participants referred to the project and the interviews and file reviews undertaken.

An in-depth analysis of the circumstances of the participants in this study revealed that stateless and “unreturnable” persons without leave to remain face the risk of a number of human rights challenges that are directly linked to their lack of immigration status. These range from destitution and street homelessness to immigration detention. Although there are protections in domestic law for this group, they appear to be inadequate because they are not specifically applied to or tailored in a way that addresses the unique situation of stateless persons and the international obligations that they are owed, particularly under international human right law.

Between 1973 and 1980, the international conventions relating to statelessness were referred to in the Immigration Rules. However, this reference was deleted, apparently on the basis of a Tribunal judgment that today would likely be considered to have been made in error. Further, between 1998 and 2002, a policy was in place to allow those identified as being stateless, if appropriate, to be granted indefinite leave to remain.

In the absence of the effective identification of stateless and “unreturnable” persons, the evidence showed that they faced a number of complex and significant human rights challenges. These were most profound in the areas of immigration detention and access to employment and social assistance. Although caselaw and guidance does engage with issues relating to the prospects of removal of non-nationals who have not been granted leave to enter or remain, the engagement with statelessness is limited. Statelessness should be understood as a relevant consideration for which specific provision should be made to ensure that the UK respects its obligations under the 1954 Convention and in international human rights law. Law and policy in these areas needs to expressly take into account the specific needs of stateless persons and be applied in a way that ensures that international law obligations are respected.

The study also revealed that, at present, in both immigration and nationality law, when an individual asserts that he or she is stateless, the burden of proof is placed on the individual rather than being shared between the state and the individual. In addition, despite references in case law, there is little developed judicial or UK Border Agency guidance on how to assess whether a state considers an individual as a national under the operation of its law. The guidance that does exist does not correspond to the conclusions of expert meetings convened in 2010 and 2011 to facilitate the development of UNHCR Guidelines, in particular on the interpretation of stateless person within Article 1(1) of the 1954 Convention. The UK’s approach to identifying stateless persons should be reviewed in the light of the forthcoming UNHCR Guidelines and the UK Border Agency should devise guidance that is consistent with those Guidelines.

The development by the Home Office and UK Border Agency of a procedure for determining stateless status as quickly and efficiently as possible is the key measure that would help alleviate many of the human rights challenges which stateless persons currently face in the UK. This measure should be complemented by a change in Home Office policy which would result in those entitled to the protection of the 1954 Convention, in appropriate cases, being granted leave to enter or remain if they are currently without immigration status. There should not be restrictions on entitlement to work or recourse to public funds for those granted such leave. The combination of these changes would help to ensure that the UK’s obligations under the 1954 Convention and international human rights law were met. Furthermore, such a procedure could help establish whether some undocumented non-nationals possess or are entitled to a nationality, which could facilitate the operation of immigration control.

Turning to British nationality law, which includes specific provisions designed to meet obligations under the 1961 Convention, the statistical evidence showed that it is generally effective at preventing statelessness at birth. There is, however, evidence of a small number of stateless children who were born on the territory and remained stateless for five years before being able to register as British citizens as of right. Furthermore, there is no accelerated or prioritised route through which stateless persons on UK territory can naturalise as British citizens, as addressed in Article 32 of the 1954 Convention. These are both areas that should be reviewed in the light of the UK’s international obligations.

UNHCR and Asylum Aid have developed a series of recommendations from this research, addressed to those who are responsible for the areas where improvements can be made. Some recommendations are addressed to government as a whole, where responsibility lies across a number of Departments. The majority of recommendations are addressed to the Home Office, which is responsible for policy in immigration and nationality matters and to the UK Border Agency with operational responsibility in those areas, although there are a small number that are addressed specifically to each.

# Recommendations

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## The identification of stateless persons and improving their treatment

1

The Home Office and the UK Border Agency should develop an accessible procedure for identifying stateless persons on the territory in order to meet the UK's legal obligations under the 1954 and 1961 Conventions and in international human rights law.

2

The Home Office should change its policy and grant leave to enter or remain to stateless persons, in appropriate circumstances, to ensure that the UK's obligations under the 1954 Convention and in international human rights law are met.

3

The UK should incorporate the 1954 Convention into domestic law to ensure that stateless persons in the UK are able to access their rights guaranteed under the Convention.

4

The Home Office and UK Border Agency should develop guidance on the identification of stateless persons and adopt a position in accordance with forthcoming UNHCR Guidelines on the definition of "stateless person" in international law. In particular this guidance should ensure that the burden of proof is shared between the applicant and the State and that the approach to assessing evidence meets the developing understanding of the interpretation and application of Article 1(1) of the 1954 Convention. It should make it clear that statelessness may only become apparent during the process of attempting to obtain documentation to allow an individual to return to a foreign State, and in the light of responses received from that State's consular or other national authorities.

5

The UK government should ensure that legal aid is available to stateless persons, who cannot afford to pay for a lawyer themselves, and are seeking to have their status recognised. Legal aid is a necessary part of an efficient procedure for determining statelessness and helps to ensure that the UK's legal obligations under the 1954 Convention and international human rights law are met.

6

The UK government should ensure that provisions relating to the accessibility of welfare benefits, asylum support, section 4 support and the entitlement to work do not result in stateless and "unreturnable" persons being at risk of destitution and street homelessness to ensure compliance with the UK's obligations under the 1954 Convention and in international human rights law.

7

The Home Office and the UK Border Agency should amend the guidance on immigration detention to expressly identify an individual's statelessness as a factor that will weigh against detention on the basis that it is likely to indicate that there are no reasonable prospects of removal. Legislation should also be considered that would place a reasonable maximum time limit on immigration detention, to act as an additional protection against the risk of indefinite detention of stateless

persons. These changes would help meet the UK's international human rights law obligations to stateless persons.

8

The UK Border Agency should improve its training in respect of statelessness to ensure that officials are able to identify and register stateless persons and, if identified, are aware of the consequences that flow in respect of immigration status, entitlement to support and accommodation, the appropriateness of immigration detention and the approach that should be taken to removal.

9

The Department of Health Regulations and Guidance on charging for secondary healthcare should be applied in a way that stateless and "unreturnable" persons who are not deemed "ordinarily resident" are able to access necessary and urgent secondary healthcare in compliance with the UK's obligations under international human rights law.

10

UK civil society should develop accessible training for legal representatives on statelessness and its treatment in UK law to help ensure that stateless persons on the UK territory are identified.

11

British Overseas citizens currently "in limbo" in the United Kingdom, who after having renounced their Malaysian nationality are unable to register as British citizens, should be granted limited Discretionary leave to remain whilst the government makes further enquiries of the Malaysian authorities. Each individual should cooperate fully with those enquiries. If after examination on a case by case basis no durable solution in Malaysia is possible, a longer period of Discretionary leave to remain should be granted, as a first step to achieving a long-term solution.

12

The Home Office and the UK Border Agency should review guidance on the application of Article 1D of the 1951 Convention to ensure that it accords with UNHCR's interpretation of that Article.

## The reduction of statelessness in British nationality law

13

The Home Office and UK Border Agency should review its approach and guidance to assessing statelessness in the context of applications for British nationality to ensure that the UK meets its obligations in international law, as reflected in forthcoming UNHCR Guidelines on the definition of "stateless person" in Article 1(1) of the 1954 Convention and on the interpretation of Articles 1 to 4 of the 1961 Convention. In particular, it should ensure that the burden of proof is shared between the State and the applicant and that the approach to assessing evidence of statelessness is consistent with those Guidelines.

14

The Home Office and UK Border Agency should review the relevant provisions of British nationality law to ensure that, for children either born in the UK or born to British citizens abroad, the UK's obligations contained within the Convention on the Rights of the Child in respect of a child's right to acquire a nationality are properly considered when interpreting and applying the provisions of the 1961 Convention.

15

The Home Office and UK Border Agency should review their approach to “foundlings”. In such cases, current provisions that can limit the presumption of being born on the UK territory to “new born infants” and should be reconsidered in light of the object and purpose of the 1961 Convention of preventing statelessness and more liberal practice of other States.

16

Given that the research uncovered quantitative data suggesting that there are children who are born stateless on the UK territory, it is recommended that further research should be undertaken to evaluate the numbers and profile of the children affected.

17

The Home Office and the UK Border Agency should review existing naturalisation law and policy with regard to Article 32 of the 1954 Convention in order to better facilitate the assimilation and naturalisation of stateless persons. This should include the introduction of provisions that allow for expedition of naturalisation procedures for stateless persons as well as the reduction of relevant fees to ensure that stateless persons’ prospects of naturalisation are not inappropriately limited.

## Statistics, IT Systems and Recording

18

To obtain a more complete understanding of the number and profile of persons who may be stateless in the UK, the Home Office should undertake an analysis of the 2011 Census data. This analysis should be compared with the analysis of other data sources identified in this study to try to build the best achievable overall picture.

19

The statistical recording and reporting of stateless persons as defined by Article 1(1) of the 1954 Convention should be made available as a disaggregated group in published Home Office immigration statistics. Recent progress in this area should be consolidated with further changes necessary to ensure that stateless persons are not conflated with refugees, and that both groups are distinct in published statistics.

20

The UK Border Agency should consolidate the numerous categories relating to stateless persons and those of unknown or unspecified nationality into distinct groupings to facilitate more accurate recording and identification. In particular, the Border Agency should have a consistent approach as to whether statelessness should be identified as a specific “nationality” category on casework databases, such as the Case Information Database (CID).

21

To ensure a more accurate registration and recording of stateless persons the UK Border Agency could develop its IT systems. For example:

When “stateless” or “unknown nationality” is selected on the CID drop-down menu, a country of birth or origin option should also be available for case owners/screening officers to fill in; and,

When an individual knows their country of origin, but is uncertain about their nationality but does not declare themselves to be stateless, this uncertainty should be recorded in a systematic and easily accessible way to allow statistical analysis. It should not be noted in the CID notes field as this means the issue becomes hidden. This should also be the case where an individual asserts themselves to be stateless but this is not accepted by the UK Border Agency, or there is not yet sufficient information to confirm this.

22

New UK Border Agency guidance relating to the recording of statelessness on CID and other IT systems should be developed to ensure that officials use a consistent approach and to avoid the risk of incorrect attribution of nationality or the failure to record when an individual is stateless. This guidance should take into account UNHCR’s forthcoming Guidelines on the definition of “stateless person” in international law to ensure that the UK’s obligations under the 1954 and 1961 Conventions are met for all those who are stateless.

# SCHEDULE OF PARTICIPANTS

The participants interviewed for the research are scheduled below, as referenced in the report by their pseudonym and/or assigned number. It was not possible to profile all the case studies in full because of space limitations as well in some instances where it was not possible to verify relevant information provided during the interview. Further information can be found in the methodology in Section 1.3.

## Participant Pseudonym / Profile

- |  |  |
|--|--|
| 1. Vladimir / <b>Lithuania</b>           | 21. Li / <b>China</b>  |
| 2. Yasser / <b>Palestinian (Lebanon)</b> | 22. Mary / <b>Burundi</b>  |
| 3. Tauy / <b>Belarus</b>                 | 23. Mohammed / <b>Kuwaiti Bidoun</b>                             |
| 4. Omar / <b>Kenya</b>                   | 24. Akbar / <b>Iran</b>  |
| 5. Amari / <b>Palestinian</b>            | 25. Ali / <b>Iran</b>  |
| 6. Nischal / <b>Bhutan (Nepalese)</b>    | 26. Kidane / <b>Eritrea/Ethiopia</b>                             |
| 7. Thierry / <b>France</b>               | 27. Amani / <b>Kuwaiti Bidoun</b>                                |
| 8. Antwan / <b>Palestinian</b>           | 28. Philip / <b>Sierra Leone<br/>(British protected person)</b>  |
| 9. Abbas / <b>Palestinian</b>            | 29. Steven / <b>Mozambique</b>                                   |
| 10. Ghanim / <b>Kuwaiti Bidoun</b>       | 30. Nasser / <b>Kuwaiti Bidoun</b>                               |
| 11. Amir / <b>Palestinian (Kuwait)</b>   | 31. Fatima / <b>Kuwaiti Bidoun</b>                               |
| 12. Mustafa / <b>Syrian Kurd</b>         | 32. Nisreen / <b>Kuwaiti Bidoun</b>                              |
| 13. Ahmad / <b>Kuwaiti Bidoun</b>        | 33. Colin / <b>Zimbabwe</b>                                      |
| 14. Kathem / <b>Iraq (Jewish)</b>        | 34. Ernest / <b>Malaysia<br/>(British overseas citizen)</b>      |
| 15. Imad / <b>Kuwaiti Bidoun</b>         | 35. Constantine / <b>Malaysia<br/>(British overseas citizen)</b> |
| 16. Hussain / <b>Kuwaiti Bidoun</b>      | 36. Yusuf / <b>Kuwaiti Bidoun</b>                                |
| 17. Bashir / <b>Syria</b>                | 37. Khalil / <b>Palestinian (Lebanon)</b>                        |
| 18. Farid / <b>Algeria</b>               |  |
| 19. Hassan / <b>Chad</b>                 |  |
| 20. Derek / <b>Liberia</b>               |  |

# SEMI-STRUCTURED INTERVIEW QUESTIONNAIRE<sup>504</sup>

Start the interview by introducing yourself and explaining the purpose of the research. Emphasise that Asylum Aid is an independent charity working on behalf of asylum-seekers and that all information will be treated in confidence. Read through and sign the consent form (after ensuring that this is fully understood by the interviewee).

Record personal details: name/gender/age /current address and contact details.

## 1. Reasons for becoming stateless

I want to begin by asking you some introductory questions about your family as well as the place where you were born and anywhere else you have lived before you came to the UK:

- Where were you born (town and country)? Were your parents married? Where were your parents born? Where were your grandparents born? Do you have brothers and sisters?
- Are you a member of any particular ethnic group? Were your parents of the same ethnic group?
- Do you practise any religion? If so, did your parents have the same religion?
- Are/have you been married? What is/was the nationality, place of birth, ethnic group and religion of your spouse/s? Did marrying affect your nationality? Do you have children? If so, where and when were they born and what is their nationality? Were you and your partner married at the time your children were born?
- Other than the country where you were born, where else have you lived before coming to the UK? For each place please describe the length of time you lived there, school/education/employment details, family members present and immigration status?
- Have you ever applied for and been refused the citizenship of any country? If yes, please give details, including by describing any documents that you provided in support of your application. If you previously held citizenship please explain how and when you lost this.
- Have you ever possessed a passport, birth certificate or identity document (that stated your nationality), either from the country where you were born or any other country you have lived in? If yes, how did you come to lose this?
- Have you already or would you be able to apply for a replacement passport or identity document? If not, why not? Could you go back home if you wanted? When was the last time you went home to your country of origin? Have you ever contacted the consular representatives of your country for assistance? If so, when/how often? Did you get the assistance requested? Please describe.

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<sup>504</sup> As with all semi-structured interview formats, the listed questions are neither exhaustive nor obligatory, and were used variably depending on the particular circumstances of each interviewee.

## 2. Immigration history since entering the UK

- How did you get to the UK (and did anyone assist you)? When and where exactly did you arrive in the UK? Did you identify yourself to be stateless? How was this recorded?
- Did you have a valid visa to enter the UK or did you travel by other means? Please describe.
- If you travelled by other means, on what basis did you apply to remain in the UK? What reasons did you give? Did these include the fact that you are stateless? Did a lawyer assist you with your application (if so may we contact them and what are their details)?
- What was the outcome of your application? If granted, what status were you given? If refused, when was this and what were the reasons? Whether your application was granted or refused, did the UK authorities accept that you are stateless?
- Did you appeal against the refusal? If so when was your appeal and did this address the issue of your statelessness? What was the outcome of your appeal? If granted, what status were you awarded? If refused, what reasons were given and did the judge make a finding as to whether you are stateless?
- Did you make any further appeal/s? What was the outcome/s? Please give details.
- Did you make any other/subsequent applications? What was the outcome? Please describe
- What is your current immigration status? Has UKBA ever set removal directions for you? Has UKBA ever attempted to remove you unsuccessfully? Please give details.

## 3. Living conditions while in the UK

- Have you experienced problems as a stateless person? If so, what have been the three most difficult things for you during your time in the UK as a stateless person?
- Have these difficult things changed over time? Please explain.
- Where have you lived and how have you supported yourself during your time in the UK?
- Have you worked or studied during your time in the UK? Please describe.
- If you have received government assistance and/or accomodation, have there been any periods of time when you did not receive this and what did this mean for you?
- Have you ever been destitute during your time in the UK, without access to any support or accommodation from anyone? Please describe, including when and for how long this lasted?
- Have you ever been detained during your time in the UK? [See additional questions below]

If the person is or has been detained during their time in the UK:

- When were you detained and for how long? Were you detained more than once?
- What were the reasons for your detention/s? Were you detained under immigration powers and/or because you were convicted of a criminal offence? Please give details.
- Where were you detained? Please describe the conditions? Did you have access to a lawyer to assist with your release from detention? How many times did you apply for release from detention before you were released (or until now if you are still detained)?
- Did the reasons given to either continue or end your detention include your statelessness and/or difficulties in removing you to your country of origin?
- What were the most difficult things for you during your time in detention?
- What happened to you after your release from detention?

#### 4. Statelessness and the individual

- What is your biggest worry?
- Please complete the following sentence about yourself: “I see myself as...”
- How does statelessness affect the way you see yourself?
- Do you consider yourself to have special needs that other people do not have? Please explain.
- Do you know other stateless persons who are in a similar position to you?
- How do you view the future? What do you think will be the outcome of your current situation?

#### 5. Ending the interview

- These are all the questions I have. Is there anything else you would like to tell me that you think is important?
- Would you like to make any clarifications? Is there anything you would like to ask me?

Thank the participants again and reiterate contact details in the event of questions or concerns.

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# Statelessness



**United Nations High Commissioner for Refugees/Asylum Aid**  
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