European Network on Statelessness

PROTECTING STATELESS PERSONS FROM ARBITRARY DETENTION

IN THE UNITED KINGDOM

SUMMARY OF FINDINGS

An estimated 10 million people worldwide are stateless, which means that according to the 1954 Statelessness Convention they are "not considered as a national by any State under the operation of its law". Citizenship has often been described as the 'right to have rights'. Statelessness, in turn, is a corrosive condition that impacts almost every aspect of daily life. In the United Kingdom (UK), between the introduction of the statelessness determination procedures on 9 April 2013 and 31 March 2016, a total of 1,592 applications were made. In the immigration detention context in particular, the protection needs of those who cannot be returned to their presumed country of origin often significantly overlap with those of the stateless.

In recent years the UK has witnessed considerable changes in relation to addressing statelessness. The 2011 United Nations High Commissioner for Refugees (UNHCR) and Asylum Aid report *Mapping Statelessness in the United Kingdom* presented recommendations on the identification and registration of stateless persons, compliance with the Statelessness Conventions and improvements in the protection of stateless persons. Under pressure from civil society, the UK adopted a statelessness determination procedure and made provision for the grant of leave to remain in the UK as a stateless person through new Immigration Rules which came into effect on 6 April 2013. The Home Office (HO) released Guidance on 1 April 2013 to explain the policy, process and procedures for considering applications for leave to remain as a stateless person in the UK and updated this guidance on 18 February 2016.

LAW AND POLICY CONTEXT

The right to a nationality and/or protection of stateless persons is reinforced by a range of international and regional instruments to which the UK is a party, including the International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as well as the two Statelessness Conventions: the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. However, the UK did not sign two Council of Europe Conventions relevant to statelessness, namely the 1997 European Convention on Nationality and the 2006 Convention on the Avoidance of Statelessness in Relation to State Succession. The practice of administrative detention is also regulated by a variety of instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), although the UK opted out of the 2008 EU Return Directive.

Overall it can be concluded that the national legal framework of the UK falls short of its international and regional obligations. Neither the UK legislation nor the guidance which govern the administrative deprivation of liberty address the specific vulnerabilities of the stateless. While the Immigration Acts 1971 to 2016 provide that the only stated purpose for administrative detention is to examine someone's immigration status, or to facilitate removal or deportation, administrative detention has been increasingly relied on to the point of becoming a central feature of many asylum cases and related immigration enforcement policy. In particular, it has become routine practice to detain former foreign nationals who have served a prison sentence if they have a deportation order that the HO seeks to enforce or if a decision to deport them is pending. Although the HO policy in the Enforcement and Instructions Guidance states that that detention must be used "sparingly" and for "the shortest period necessary", there is no statutory time-limit to immigration detention. As a result, detention can last for months or years, especially for cases of persons whose identity and nationality are difficult to establish.

The provisions on alternatives to detention are partially a positive feature although concerns remain that such measures are not subject to a time limit or automatic reviews. There is concern especially with regard to electronic tagging, which can actually be viewed as an alternative *form of* detention. The curfew imposed by the HO on those who are tagged is particularly controversial, and the courts have determined that the HO has no authority to impose such curfews. The requirement that any decision to detain should clearly consider whether an alternative could be employed to reach a similar aim is often not applied in practice.

Some positive improvements in the area of immigration detention should be noted, including the reduction of detention of children and families (although disappointingly the commitment to end child detention has not been met) and the recent introduction of an automatic bail hearing after four months of detention (although persons with prior criminal convictions are excluded).

DATA ON STATELESSNESS AND DETENTION

Available data on stateless persons and detention is flawed and incomplete as individuals are not usually recorded as stateless when they enter detention unless they have already been recognised to be so. Often, the stateless are wrongly attributed a nationality or sometimes categorised as 'persons with unknown nationality' and therefore the real numbers of stateless persons or at risk of statelessness in detention are likely to be higher than the published figures.

Notwithstanding the limitations of the available data, the published figures indicate that over the past six years there has been a gradual increase in the number of stateless persons being detained, showing that while only 17 stateless persons were detained in 2009, the number went up to 45 in 2012 and more than doubled by the end of 2015 to 108.

More generally, HO statistics show that between 2010 and 2015, the average length of detention for all immigrant detainees varied between 38.8 and 42.4 days. During the same period, the length of detention of all detainees increased, and there has been a drastic increase in the number of people detained for 29 days-2 months, 2-3 months and 3-4 months. In 2015, 910 people were detained for 6-12 months, 196 people were detained for 12-18 months and 59 people were detained for 18-24 months.

The UK's capacity to detain under immigration powers is approximately 3,500 places in immigration removal centres, but the UK can also detain migrants in prisons at the end of their sentences while attempts are made to deport them. Moreover, migrants can be detained in up to thirty small temporary holding facilities at airports and in police cells. There is no data concerning length of detention, or numbers of people detained in prisons and temporary holding facilities.

KEY ISSUES OF CONCERN

Based on desk research, legal analysis and stakeholder interviews, the following key areas of concern were identified with regard to the detention of stateless persons in the UK.

a) Identification and determination procedures

Although statelessness determination procedures have been adopted, access to them is still too limited especially for those in detention. Several cases are often perceived from an ill-fitting asylum perspective, and the situation of stateless persons is easily misunderstood. Of significant concern is the failure of immigration officers to take any action when they are or should be aware that a detained person is stateless or at risk of statelessness, and to acknowledge the fact that in most cases of statelessness, return is intrinsically impossible. Importantly, the statelessness procedure does not appear to be viewed by the UK authorities as a protection tool, but rather as a mechanism to regularise the stay of a small group of otherwise un-removable persons.

The new rules and HO Stateless Guidance governing the statelessness determination procedure have also been criticised for their one-sided and stringent burden of proof; low approval rate; the length of time to obtain a decision; the lack of appeal rights; the lack of legal aid; and confusing and restricting provisions regarding who is excluded from the definition of stateless person and from leave to remain.

b) Decision to detain and procedural guarantees

The research found current procedural safeguards to be inadequate in practice. The initial decision to detain under immigration powers is authorised by immigration officers and HO officials on behalf of the Secretary of State and does not require judicial authorisation. There is a presumption in favour of temporary admission or release and, whenever possible, alternatives to detention should be used. Once authorised, detention must be internally reviewed after 24 hours, and then after 7, 14 days and every month as well as every time there is a change in circumstances relevant to the reasons for detention. However, concerns persist about the adequate assessment of these factors in practice when authorising initial or continued detention, and also about how reviews are carried out. In particular, the requirement that there should be reasonable prospects of removal is not always met, and between a third and half of all detainees are subsequently released without removal having been effected.

Detainees can request to be released on temporary admission, temporary release or immigration bail subject to a number of restrictions and conditions. In practice, such requests are almost always rejected. Detainees can also make a bail application to the Immigration Tribunal. However, the grant of bail is discretionary and is usually subject to the provision of sureties and other conditions, including having accommodation. If bail is refused, a new application can be made after 28 days unless the situation has changed significantly. In addition to bail applications, detainees may also challenge the lawfulness of their detention in the High Court either by *habeas corpus* or judicial review.

Under the 2016 Immigration Act, there is automatic review by an immigration judge after four months of detention (and every four months thereafter), but not for those who have previous criminal convictions. The procedural fairness of a system which requires such a long time before an automatic review and excludes those who have served a criminal conviction from such automatic review must be questioned. This undermines

the notion that immigration detention is purely an administrative mechanism and implies a punitive purpose.

c) Length of detention

UK case law has established the principle that the power to detain is limited by a reasonable duration and circumstances consistent with its statutory purpose. The European Court of Human Rights in a number of cases has held that the Secretary of State does not have power to detain indefinitely and that failure to carry out removal within a reasonable period of time and with due diligence can breach of Article 5 of the ECHR.

However, the absence of a statutory maximum time limit and the authorities' liberal interpretation of the 'prospect of removal' requirement result in people being detained for extremely lengthy periods. The risk of lengthy detention is exacerbated for stateless persons or those at risk of statelessness, particularly when the detaining authorities have failed to identify them as such and engage in futile (and often repeated) efforts to obtain proof of their nationality to secure their removal.

d) Removal and re-documentation

Immigration authorities often assume return to be feasible, which is problematic because this assumption influences the decision to detain. The impact of non-cooperation by diplomatic missions in removal proceedings appears to be underestimated, as well as the fact that many individuals are ill-equipped and/or unaware of how to pursue their re-documentation process.

Moreover, despite HO statistics showing that enforced removal to certain places is notoriously difficult, such as to the Occupied Territories, the detention for presumed nationals from these countries continues to occur.

e) Alternatives to detention

HO caseworkers or HO Border Force officers are responsible for an individual assessment as to whether there are grounds to detain and whether the same aims can be reached through a less coercive and proportionate measure. However, alternatives to detention are not always considered and used, and they are not subject to automatic reviews or time-limit.

Particular concerns have been raised regarding the use of tagging as it may violate Article 3 ECHR's prohibition on inhuman or degrading treatment due to the pain or psychological harm it can cause, especially if an individual has particular vulnerabilities, or as a result of constant surveillance. It could also contravene Article 5 of the ECHR, as arbitrary 'detention in another form', if it obliges the individual to remain at a particular place all or most of the time and it is imposed for long periods of time in combination with the imposition of curfew. Moreover, tagging can violate Article 8 (right to private and family life) of the ECHR if it imposes restrictions that interfere with carrying out normal activities of a family life, or that reveal private information.

f) Children, families and vulnerable groups

In the last few years, the state has made major changes relating to the detention of families and children. Although in 2010 the UK announced it would end the detention of children and this has not been achieved, the detention of families is generally now used only in pre-departure accommodation and as a last resort.

A child or family may not be detained for more than 72 hours, or seven days only in exceptional circumstances with Ministerial authorisation. The Immigration Act 2014 introduced additional limitations on the detention of unaccompanied minors, who can be detained for a maximum of 24 hours and where removal directions have been issued or are likely to be issued. Moreover, they cannot be detained in an Immigration Detention centre but only in special accommodation centres.

Besides minors, the Enforcement Instructions and Guidance recognises seven categories of persons considered suitable for detention only in very exceptional circumstances: the elderly; pregnant women; persons suffering from serious medical conditions; persons suffering from serious mental illness; victims of torture; persons with serious disabilities; and victims of trafficking. Stateless persons are not included in this list and statelessness is not a factor in the decision to detain. In any case, in practice even vulnerable persons who fall under the current Guidance are often detained.

g) Conditions of detention

The Detention Centre Rules 2001 set out minimum conditions of detention facilities, but there is evidence that they are not always complied with. The residential units have been reported to be noisy and dirty, often austere, prison-like or run-down. There is little for detainees to do during the day, and when work is permitted, it is paid at one Pound per hour, well below the minimum national wage. The bullying and lack of respect of removal centre staff was also highlighted as a major form of distress for detainees. Additionally, transfers from one detention centre to another often occur, especially to those persons who are subject to prolonged detention, and create difficulties in accessing legal representation and keeping in contact with family, friends, support groups and sureties.

h) Conditions of release and re-detention

Persons released on 'temporary admission' do not have lawful status and are not protected from re-detention. This heightens the likelihood of repeat detention. Stateless persons in limbo are often not eligible for state support, except possibly Section 4 support for stateless persons who are also refused asylum seekers.

Provision for section 4 support for stateless persons and for those who cannot leave the UK will be further reduced under the 2016 Immigration Act, likely with effect from April 2017, but it appears that failed asylum seekers who encounter serious obstacles to leave the country, as well as those in detention who need accommodation, will still be able to access state support.

CONCLUSIONS AND RECOMMENDATIONS

In spite of several positive developments in the field of statelessness, in particular with the adoption of the statelessness determination procedure in 2013, a number of problems remain deeply entrenched. In general, access to the procedure for those in detention is too limited. The situation of stateless persons is easily misunderstood and the biggest issue is that the authorities fail to acknowledge that in most cases of statelessness, return is intrinsically impossible. Since detention should only be imposed as long as a reasonable prospect of removal exists, there is a due diligence requirement to rule out statelessness prior to any decision to detain. In practice the prospect of removal is too easily assumed to exist and the examination of personal circumstances including the juridically relevant fact of statelessness figure insufficiently, or not at all, in decisions to detain.

This also impacts on the length of a person's detention. The length of detention in the UK does not have any statutory limit and stateless persons are more likely to be detained for long periods. This is especially concerning where the inability to return is not due to an individual's lack of cooperation but because of some embassies' systematic refusal to facilitate the return of their nationals. The UK is aware of these 'difficult countries' and the fact that in several cases long-term detention has not resulted in removal. Here administrative detention appears to have become punitive in nature and intended to act as a deterrent instead of a measure of supervision.

One of the most important contributions the UK government can make towards the lives of stateless people is to end what has often amounted to a lifetime of uncertainty. Without clear solutions, stateless persons will continue to fear repeated detention, while also being unable to return. Even when released, few of them perceive a solution, and they are often left to live aimlessly and invisibly on the margins of society. Actively utilising the threat of detention to enforce their cooperation to be removed is simply inhumane, but also mostly ineffective. As the UNHCR has highlighted, "for detention not to be arbitrary, it must be necessary in each individual case, reasonable in all the circumstances, proportionate and non-discriminatory."

Recommendations on identifying statelessness and the statelessness determination procedure

1. The UK's statelessness determination procedure should be transformed into a procedure through which successful applicants receive protection they are entitled to under international law (similar to the refugee status determination procedure).
2. Applicants under the statelessness determination procedure and stateless persons in other situations in which their rights are at risk (including in removal and detention contexts) should have access to legal aid so they may receive appropriate advice and representation.
3. All stateless persons and persons at risk of statelessness should have access to the statelessness determination procedure, including those who have previous criminal convictions. A past criminal record is irrelevant to a finding of statelessness under international law, and should not be the basis on which recognition of statelessness is denied. As with all criminal offenders, the criminal code – with its inbuilt procedural and substantive safeguards – should be the basis on which any risk to society posed by a stateless former offender is assessed and regulated. Once statelessness is determined, and where appropriate, Home Office decision-makers should be afforded discretion to grant protection status to individuals with criminal convictions, including for 'administrative' offences such as possessing false documents and/or working illegally (offences which are likely to have been precipitated by their situation of being stateless and in limbo). At a minimum such individuals should be afforded a status that allows them to live in dignity which ensures full respect for their social, cultural and economic rights.
4. In order to enable the implementation of Recommendation 3 above, the definition of statelessness under the UK procedure should be brought fully in line with the 1954 Convention definition. As such, persons who fall under the exclusion clauses which limit access to protection under the 1954 Convention (but not human rights law), should not be viewed as falling beyond the scope of the definition of statelessness.
5. The UK statelessness determination procedure should be made more accessible. In particular, the application form to apply for stateless status should be simplified and offered in a variety of languages. This application form and notices announcing the procedure should be made freely available, including in immigration detention centres.
6. The burden of proof in the statelessness determination procedure should be shared between the applicant and the decision-maker, and the Home Office should utilise its resources to assist with evidentiary assessment – including with regard to

securing responses to enquiries made of foreign states.

7. Additional resources should be dedicated to statelessness determination, expanding the size, reach, capacity and expertise of the statelessness determination team to avoid delays and improve the quality of decision-making.
8. Where necessary, Home Office procedures and policies relating to administrative detention should be updated, adapted and brought in line with the statelessness determination procedure. In particular, there should be a clear referral system (referenced in other relevant policies) to obligate immigration officers to refer persons who may be stateless or at risk of statelessness to the statelessness determination team.

Recommendations related to the decision to detain, ongoing detention and procedural guarantees

9. Statelessness is a juridically relevant fact in any decision to remove or detain and the implementation of such decision. Failure to adequately assess and consider statelessness, can render such decision arbitrary and disproportionate. Therefore, statelessness must be identified at the point of the decision to detain and on a continued basis. In removal proceedings, where there is lack of clarity around the nationality of an individual, or there is reason to believe that an individual may be stateless or at risk of statelessness, such individual should be immediately directed to the dedicated statelessness determination procedure. Failure to do so is likely to render detention arbitrary.
10. The UK should not detain persons who have a statelessness application pending, unless there are clear and compelling reasons why detention is necessary and in accordance with international law in that particular case. The least restrictive alternative to detention should be used wherever possible.
11. Screening a person's identity, nationality, prospect of removal or deportation and vulnerability should be done thoroughly and in the earliest stage possible before a decision to detain is made. Applying detention when it could already have been determined that removal or deportation is unattainable is arbitrary. Immigrants serving criminal sentences in prisons should have their likelihood of deportation assessed during such time, not after having served their sentence. Documents that might become available in the future cannot justify detention in the interim. Detention should always be implemented as a last resort, after all alternatives (starting with the least restrictive) are exhausted. If the risk of absconding is high, alternatives to detention can be employed. To facilitate screening, checklists and guidance should be developed.
12. Immigration officers who make decisions to detain should be trained to identify risk of statelessness so such persons may immediately be referred to the statelessness determination procedure. They should also be trained to identify and act on other types of vulnerability on an ongoing basis. All decisions to detain should be subject to external and not only internal assessment and review.
13. Detention should be for the shortest period of time possible in every case. The government should follow the call by the All Party Parliamentary Group on Migration and introduce a 28 day maximum time limit on immigration detention to end unlimited detention in the UK.
14. Alternatives to detention should be reasonable, not be used indefinitely, and subject to active reviews. They should be subject to front-loaded case working that ensures that people should i) be treated with dignity, ii) be informed about the process and rights, as well as responsibilities and possible consequences for not complying with them, iii) be provided with adequate legal advice, iv) receive material support to be able to live in the community, and v) have their cases individually managed. The use of electronic tagging and curfew as an alternative to detention should be reviewed in line with recent court judgments. Migrants and asylum-seekers should be empowered and programmes and partnerships should be built between Government and civil society. The Home Office should investigate, develop and pilot community-based alternatives similar to those used in other jurisdictions.
15. Conditions of detention should at all times comply with the UK's international obligations and ensure that detainees are safe, secure, in a clean and sanitised environment, productively occupied, have access to educational and recreational facilities and to religious and cultural expression. Detainees should have adequate access to lawyers, Non-Governmental Organisations, the United Nations, religious organisations, visitors and monitoring groups. When placing individuals in detention, the proximity of facilities to their families and communities must be taken into consideration and subsequent transfers should be minimised and justified at all times.

Recommendations related to removal, release from detention and re-detention

16. Efforts at re-documentation should be subject to reasonable limitations, both in terms of time and the number of embassy presentations. After repeated rejections or prolonged non-response, statelessness should be assumed – and all corresponding rights and benefits granted. People must not end up as victims of a state's reluctance to facilitate return.
17. The law should contain clear provisions outlining the criteria for repeated detention and imposing a limit to

the number of times it may be applied as an instrument to facilitate return. The total cumulative period of detention should be recorded and information made publicly available. Detention should not be used as a means to enforce cooperation with removal. Punishing non-cooperation in this way is contrary to the administrative nature of immigration detention.

18. Past efforts to deport should be considered more strongly in any decision to re-detain or to grant bail, both by the immigration-case-owners and by the immigration courts.
19. Bail should be automatically reviewed more frequently than every four months and detainees with past criminal records should not be excluded from this automatic review process.
20. All released detainees (who could not be removed within a reasonable period of time), should be granted at least a temporary legal status with corresponding rights – including the right to work and access social welfare - relevant to their situation. Documentation which protects them from re-arrest and detention should be provided in all cases, at least until meaningful new facts or circumstances have arisen.

ABOUT THE PROJECT

The European Network on Statelessness (ENS), a civil society alliance with over 100 members in 39 European countries, is undertaking a project aimed at better understanding the extent and consequences of the detention of stateless persons in Europe, and advocating for protecting stateless persons from arbitrary detention through the application of regional and international standards.

The project will deliver a series of country reports (including this report) investigating the law, policy and practice related to the detention of stateless persons in selected European countries and its impact on stateless persons and those who are 'unreturnable' and therefore often at risk of statelessness. The methodology for all country reports follows a common research template – combining desk-based analysis alongside interviews with relevant stakeholders (civil society and government) as well as stateless persons.

In addition the project has developed a regional toolkit for practitioners on protecting stateless persons from arbitrary detention – which sets out regional and international standards that states must comply with. The toolkit, along with the full version of this and other country reports, are available on the ENS website at www.statelessness.eu

Please refer to the full version of this report for citation purposes and for more detailed acknowledgements. This report has been researched and written by Katia Bianchini, a consultant researcher and ENS member.

ENS is grateful to the Oak Foundation and the UN Refugee Agency for its generous support which made this publication possible. ENS also wishes to acknowledge the Institute on Statelessness and Inclusion as an expert partner for the ENS project "Protecting Stateless Persons from Arbitrary Detention".

info@statelessness.eu
www.statelessness.eu

London, United Kingdom
Charity Number 1158414

European Network on Statelessness

Cover photograph: © Greg Constantine