



European
Network on
Statelessness

PROTECTING STATELESS PERSONS FROM ARBITRARY DETENTION



IN POLAND

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SUMMARY OF FINDINGS

The 1954 Statelessness Convention defines a stateless person as someone who is not considered as a national by any State under the operation of its law. According to UNHCR, the identification of such a person requires “a careful analysis of how a State applies its nationality laws in an individual’s case in practice ... This is a mixed question of fact and law.” 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.

Poland remains one of four EU states (alongside Estonia, Malta and Cyprus) still not party to either of the UN Statelessness Conventions. Even though Poland admittedly took steps aimed at reducing statelessness by adopting its new law on citizenship in 2012, a formal procedure to identify the stateless has not yet been introduced, resulting in protection gaps and exposing stateless persons to arbitrary detention. Paradoxically, it is the prospect of imminent detention that seems to be the main factor deterring stateless persons from disclosing themselves and approaching state authorities to initiate legal proceedings to regularise their status. With the threat of detention, many prefer to live in a legal limbo as “invisibles”, remaining on the margins of society, without any legal guarantees to the exercise of their human rights.

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 Poland is party, including the ICCPR, CERD, CRC and CEDAW. Significantly though, Poland has not acceded to the 1954 and 1961 Statelessness Conventions and has signed but not ratified the European Convention on Nationality. The introduction of a new citizenship law in 2012 allowed for commencing the ratification process of the European Convention on Nationality. Furthermore, in November 2014, the Ministry of Interior announced that it had decided to recommend that Poland signs the 1961 Convention on the Reduction of Statelessness while further analysis was being prepared in order to decide whether accession to the 1954 Convention Relating to the Status of Stateless Persons is also possible and necessary. This matter was also taken up by the Polish Ombudsperson.

The practice of (administrative) detention is also governed by a variety of instruments that Poland is party

to, including the ICCPR, the European Convention on Human Rights and the EU Returns Directive, all of which protect against arbitrary detention.

At present, the legal position of foreigners in Poland is governed by the Act on Foreigners and the Protection Act. While this framework is inadequate to identify stateless persons and protect them from arbitrary detention, amendments to the Foreigners Act in May 2014 brought about various changes, mostly positive. These include the introduction of alternatives to detention, enabling Border Guards to grant humanitarian protection or tolerated stay if there are grounds for protection against deportation, a prohibition on detaining unaccompanied minors under 15 years, introducing stronger guarantees allowing for judicial review of the administrative process in migration or protection proceedings and establishing a system for NGOs to monitor return operations.

DATA ON STATELESSNESS AND DETENTION

A scarcity of available data itself illustrates that statelessness is a hidden issue in the country, and the relatively small size of the stateless population seems to be used as a key argument for ignoring their plight. As there is no homogenous group of stateless persons nor a stable in-situ residing population, every case is regarded as a separate occurrence rather than part of a broader phenomenon. According to data gathered through the 2011 Polish Census, 8,805 people were documented as having “undefined nationality” and 2020 as “stateless persons”. This data is likely to contain some inconsistencies due to the fact that there was no verification of the results. According to a different data source – the Office for Foreigners – in 2014 there were 6,621 stateless persons in the country, of which 38 submitted asylum applications and 22 were granted refugee status. The Office also has records of 625 stateless persons holding valid residence cards in 2014.

In 2014, of the 2,916 foreigners apprehended by Border Guards, 753 persons were detained. In 364 cases, alternative measures were applied. In comparison in 2013 (before alternatives to detention had been introduced) 1,738 people were detained. The Border Guards do not gather separate statistics on apprehended or detained stateless individuals. However, during the last two years, the Border Guard requested foreign diplomatic missions to identify 1,392 persons, of which, 927 were identified. The status of the remaining 465

persons is unclear, but many are likely to be at risk of statelessness, if not stateless.

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 Poland:

a) Identification & determination procedures

There is no legal definition of statelessness or procedure to identify stateless people under Polish law. Thus, stateless persons in need of protection are first always categorised as unidentified migrants who may be returned to their country of origin and hence are channelled into the return procedure. Statelessness may be identified under the refugee status determination procedure. However, as this is not the objective of the procedure, decision-makers are hesitant to ascribe a status of statelessness to individuals. Due to the lack of a dedicated procedure, a stateless person may only obtain an identification document under the Foreigners Act, based on a legal status that isn't related to international protection. Legalisation of stay may be obtained through temporary or permanent residence permits. However, the practical implementation of these provisions are problematic, as applicants are required to provide proof of a documented stay in Poland and refused applicants are subject to return proceedings and immigration detention. This is a major disincentive to people using this procedure.

b) Decision to detain and procedural guarantees

According to Polish legislation the decision to detain must specify the legal and factual grounds for detention and the detention period. Nevertheless as detention is often used as a deterrent to irregular migration (contrary to international standards) it usually does not take into account the individual circumstances of detainees. Even though the Return Directive considers detention as a measure of last resort and requires it to be necessary, in everyday practice Polish Courts are inclined to rigorously follow criteria contained in the Foreigners Act and the Protection Act, relying more on basic facts established by Border Guards rather than carrying out an individualised assessment as to the necessity and the proportionality of detention. One key concern is that the law allows for an individual to be detained when there is only a likelihood that the return decision will be issued, potentially leading to arbitrary detention, as the difficulties related to removal only come to light when the evidence related to removal is assessed as part of the removal decision. On the positive side, the Polish legal framework provides for regular periodic reviews of the necessity to detain irregular migrants.

c) Length of detention

It is possible to detain an individual for up to 24 months: 6 months under the asylum procedure and 18 months under the return procedure. However, there have been no reported cases of persons being detained for so long. The key legal principle which is yet to be acknowledged and acted on by Polish Courts and authorities, is that detention should only be extended when there is an enforceable return decision, actions to deport are taken with due diligence and deportation is possible within a reasonable period of time. Consequently, stateless persons are at risk of extensively lengthy deprivation of liberty without adequate scrutiny into the diligence and likely success of identification and removal processes.

d) Removal and re-documentation

Migrants can be detained in Poland for the duration of procedural measures leading to verification of a person's nationality and up until the issuance of necessary documentation for the purpose of removal. This identification process may take anything from hours to months and is dependent on the type of documentation already in possession of the person, the country of origin and its established cooperation with Polish authorities and the level of cooperation between the individual and the Border Guard. Countries with whom Poland has signed readmission agreements are bound by formal deadlines, but others often do not comply with any deadlines whatsoever, and may often fail to respond to formal identification requests. Thus, persons from such "problematic" states may face prolonged detention until their status is resolved. Their risk of statelessness is also heightened.

e) Alternatives to detention

As stated above, the new Foreigners Act contains provisions concerning alternatives to detention both in the migration and asylum context. This has led to a significant reduction in the number of persons detained. Among alternatives granted in 2014 the most common was an obligation to report to immigration authorities at regular intervals. Other alternatives imposed included the obligation to reside at a particular address, to surrender a travel document and bail. However, it is evident that contrary to international standards, alternatives are not considered first, before resorting to detention only as a last resort. Perhaps this is because, Poland being a transit country, the authorities tend to believe that migration control objectives cannot be effectively achieved outside of detention.

f) Children, families and vulnerable groups

Currently, Polish law does not provide for individual assessment of vulnerability, when deciding to detain. However, the latest amendment to the law on providing protection presented for consultation at the beginning of 2015 provides for some positive changes in the asylum procedure. For instance, it contains a non-exhaustive list

of vulnerable groups and requires assessment of whether a vulnerable person needs special treatment or social assistance in asylum proceedings. Disappointingly, provisions concerning detention (including conditions for release) remain unchanged and no adequate rules for identifying vulnerability have been introduced. It is of particular concern that minors can be subject to immigration detention under Polish law.

g) Conditions of detention

Conditions of detention have generally been reported to comply with international standards. For example, detainees have access to UNHCR, Polish government agencies, foreign diplomatic missions, their legal representatives and NGOs providing legal aid. Within detention facilities, foreigners can move unescorted and relatively freely, allowing them to access indoor and outdoor recreation areas, libraries and medical units. Border Guards are not permitted to wear uniforms inside detention centres. Detainees have access to medical (including hospital) care, the right to undisturbed sleep for 9 hours each night, good access to toilets and sanitary facilities, the freedom of religion and to correspond and communicate with the outside world.

h) Conditions of release and re-detention

Release from detention does not resolve the statelessness of the individual, who is not granted an immigration status. Moreover, in most respects the stateless former detainee remains excluded from Polish society as current provisions do not guarantee that after release a foreigner will be provided with any kind of support from the state. Social benefits are reserved only for those who seek asylum in Poland or who have been already recognised as refugees or beneficiaries of complementary protection. Those no longer in detention but still subject to a return procedure are not entitled to receive any social assistance. They have no access to medical care and the labour market, even if the process goes on for more than 6 months. They are not routinely provided with any documentation after being released. Cases of re-detention in such a context, while not reported, are technically possible. In a positive development, in April 2015, the Polish authorities acknowledged the need to implement a national programme dedicated to foreigners in return proceedings staying outside guarded centres, providing them with assistance to cover their essential needs in terms of housing, food, guaranteed access to basic education and medical care.

CONCLUSIONS AND RECOMMENDATIONS

In Poland, there is no protection or provision of status to stateless persons solely on the basis of being stateless, leaving a significant gap for some of the most vulnerable persons in need of a durable solution. The lack of a proper statelessness determination procedure often leads to the

situation in which these individuals are left in a grey zone. Moreover, according to Polish law, foreigners can be detained solely for the purpose of confirming their identity, but once a stateless person is placed in detention the focus turns to removal, which in itself is problematic, as it does not resolve the protection needs of the stateless person.

Furthermore, because removal in case of stateless persons is often impossible, what should be short-term detention in preparation of removal often becomes long-term detention, as Polish officials try to convince another country to accept a non-national. The issue of lengthy detention, particularly for administrative reasons is a key concern, which could be avoided if alternative protection mechanisms for this group were to be put in place. Nevertheless, Poland has not yet acceded to the 1954 Convention Relating to the Status of Stateless Persons, nor introduced a statelessness determination procedure.

There are also no standards developed in Poland that would provide early intervention and individual risk assessment as part of a decision to detain, on a case by case basis. This lack of a proper case assessment mechanism may also have an impact on stateless individuals particularly because the authority to detain in order to establish an identity is formulated in general terms. Other shortcomings in the Polish law and policy framework, which make stateless persons particularly vulnerable, include the possibility of detaining foreigners under return procedures for up to 18 months and the lack of an assessment of vulnerability procedure that could lead to additional support for vulnerable groups including stateless persons.

Having in mind the above mentioned concerns and the other findings of this research, the following recommendations are made:

1. State authorities should collect accurate data regarding stateless persons, including those in detention. Data on statelessness is necessary to ascertain the extent of the problem and to design effective solutions. Accurate information is necessary in order to understand who the affected persons are, and how they are being treated.
2. Poland should accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, which provide part of the legal framework for the protection of the rights of stateless persons, as well as reducing and preventing statelessness. Poland should also fulfil its obligations to the stateless under international human rights law, including obligations to not discriminate against and to not arbitrarily detain the stateless.
3. State authorities should undertake a comprehensive review of legislation affecting the rights of stateless

- persons, to amend or replace legislation which does not comply with the 1954 and 1961 Conventions or general principles of international law, and to adopt new legislation as required to fulfill those aspects not covered by existing measures. Authorities should also give adequate attention to the need to ensure appropriate consultation with and involvement of civil society during the review process.
4. Poland should expedite the introduction of a dedicated statelessness determination procedure – accessible to all persons in the territory of the country and in accordance with guidance contained in UNHCR’s Handbook on Protection of Stateless Persons. Determination of statelessness in a dedicated procedure should unequivocally rule out the detention of applicants during the consideration of their claims. The procedure should provide a possibility of regularisation of legal residence status of such persons and issuance of identity and travel documents. Accordingly, the law should set clear rules governing the statelessness determination procedure providing inter alia, that everyone who wishes to determine their statelessness status can do so quickly and effectively.
 5. The circumstances facing stateless persons should be considered as a significant factors during the process of determining the lawfulness of immigration detention. The initial decision to detain should always be based on the individual circumstances and personal history of the person in question. Decisions should contain clear reasons why other non-custodial measures would be inadequate for the purpose and, in the light of existing alternative measures, there should be clear proportionality between the detention and the end to be achieved. In particular, when detention proceedings are carried out, state authorities should identify whether or not a person is stateless or at risk of statelessness having in mind that the lack of appropriate documentation or presenting expired documentation should not per se justify the decision to detain and should not be equalled to a risk of absconding.
 6. Throughout detention – state authorities must be diligent enough to identify whether people who they initially assessed as not being at risk of statelessness are now at risk – and act accordingly. The Border Guard motions to court, asking for a prolongation of detention of a stateless person should always contain a detailed justification explaining what measures aimed at determining the nationality of the person in question were already taken, what the reaction of the diplomatic mission of the country contacted was and what the prospect of a successful return of this person to the country of origin/former habitual residence is.
 7. It should be unlawful to detain persons before a decision to remove them has been taken.
 8. It should be ensured that detention is always used as a last resort, after all alternatives (starting with the least restrictive) are exhausted. Less restrictive measures must be shown to be inadequate before detention is applied. Detention should not be applied en masse and state authorities should always bear in mind that detaining stateless persons under a general deterrence justification violates their rights and violates constitutional and international human rights obligations. Therefore, Polish legislators should introduce a general principle of applying alternatives to detention in the first place and considering detention only as a measure of last resort. The choice of alternative to detention should be influenced by the individual assessment of the circumstances of stateless persons.
 9. There is a need to recognise that even where the rules of treatment apply in an equal way to stateless persons and third country nationals, the impact of administrative detention on stateless persons (such as the risk of long-term detention) may be more harmful due to their particular vulnerabilities. If identified as being at risk of statelessness, and if alternatives are deemed not suitable, detention of foreigners and prospects of removal should be closely monitored, and release ordered the moment it becomes clear they cannot be removed within a reasonable period of time.
 10. Foreigners should be able to effectively enjoy a right to participate in court hearings when they file an objection against a detention order and courts should ex officio appoint a lawyer for the foreigner if he or she does not speak Polish and is unable to arrange his or her representation by an authorised representative.
 11. Stateless children – whether separated or travelling with their parents or guardians should not be detained. The parents or guardians of children should not be separated from children and detained.
 12. The age assessment process of stateless children should be carried out as quickly as possible and persons claiming to be minors should not be placed in detention for prolonged periods of time while awaiting the result of such assessments.
 13. Special measures for undertaking an early identification of vulnerable stateless persons, including unaccompanied stateless minors, should be formulated and implemented as soon as possible. The task of such identification should be assigned to Border Guards at entry points, detention facilities staff members, medical and psychological staff, refugee centres’ social workers and Office for Foreigners officials. Vulnerable persons should be provided with adequate forms of assistance and treatment. Stateless children should be provided a speedy, simplified procedure of regularisation and ultimately naturalisation.

14. Polish legislators should include the provision for accommodation in open centres for foreigners, as an alternative to detention, is available not only to asylum seekers but also to other migrants such as persons in the return procedure or stateless persons
15. Efforts at re-documentation should be subject to 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 offered. People must not end up as victims of a state's reluctance to facilitate return.
16. Polish legislators should bring the law in line with the maximum time limit allowed in the Return Directive. The possibility of detaining an individual for a total of 24 months under the asylum and return procedures should be eradicated.
17. Stateless persons should be entitled to the same social, medical, psychological and financial assistance, irrespective of whether they reside in the open centre for foreigners or a place of their choice. A proper procedure for providing such assistance should be established.
18. All released detainees (who could not be removed within a reasonable period of time), should be granted legal status with corresponding rights related to work, access to welfare etc. Documentation which protects them from re-arrest and detention should be provided in all cases.

ABOUT THE PROJECT

The European Network on Statelessness (ENS), a civil society alliance with 103 members in over 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, will be 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.

ENS is grateful to the Oak Foundation 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”.

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