

Strategic Litigation: An Obligation
for Statelessness
Determination under the
European Convention on
Human Rights?

Discussion Paper 09/14



European Network on Statelessness

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This discussion paper was commissioned by the European Network on Statelessness (ENS) a civil society alliance with 53 member organisations in over 30 countries, committed to addressing statelessness in Europe. Among other objectives, ENS advocates for the establishment of specialised, effective and rights-based determination and protection mechanisms for stateless persons. This guide is therefore intended to support the ENS Campaign to Protect Stateless Persons in Europe which was launched in October 2013.

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1. Introduction

At least 600.000 people remain stateless within the borders of Europe,¹ and new cases continue to emerge. European states have obligations to respect the rights of stateless persons and prevent statelessness under their international and regional (treaty) commitments. A majority of European states are party to the 1954 United Nations (UN) Convention relating to the Status of Stateless Persons.² Furthermore, instruments of both the Council of Europe (CoE) and the European Union (EU) address the prevention of statelessness and the protection of stateless persons.³ Among these, the European Convention on Human Rights⁴ is particularly significant because all 47 CoE Member States are parties to this instrument. Although the ECHR does not explicitly recognise the right to a nationality, the European Court of Human Rights,⁵ the supervisory body of the ECHR, has dealt with questions regarding nationality and statelessness.⁶ Moreover, the ECtHR has also ruled on numerous causes in which stateless persons were the complainant and therefore plays a crucial role in protecting the fundamental rights of stateless persons in Europe.⁷ The Convention is therefore a tool in litigating for both the avoidance of statelessness and the protection of stateless persons.

Many different issues could be pursued through litigation to improve the situation of stateless people in Europe. One could think of issues like access to a nationality, the avoidance of loss and/or deprivation of nationality, access to particular rights and services as a stateless person, and protection from (arbitrary) detention of stateless persons. The current campaign⁸ of the European Network on Statelessness (ENS) focuses on the urgent need to ensure better protection of stateless persons in Europe by addressing the legal limbo that stateless persons face and the grave consequences that this can have, such as destitution, discrimination and arbitrary detention.⁹ The identification of persons as stateless is key in ensuring that they receive the appropriate treatment.¹⁰ As such, statelessness determination is the first step for stateless persons towards adequate

¹ Europe is defined, for the purposes of this paper, as the region comprising the countries of the Council of Europe. See <http://www.coe.int/en/web/about-us/our-member-states;jsessionid=ABC7BCB90C679DE9AC5F711702C799AD>.

² Hereinafter: '1954 Convention'.

³ Relevant in CoE context are *inter alia* the European Convention on Human Rights (ECHR), European Convention on Nationality and the CoE Convention on the Avoidance of Statelessness in Relation to State Succession and case law of the Court on the ECHR, e.g. *Genovese v Malta* (App no 53124/09 (ECtHR 11 October 2011)). With regard to the EU system, for instance the Returns Directive (Directive 2008/115/EC), the Qualification Directive (2011/95/EU) and EC Regulation 883/04 are of importance.

⁴ Hereinafter: 'ECHR' or 'the Convention'.

⁵ Hereinafter: 'ECtHR' or 'the Court'.

⁶ Some of the important cases that were brought before the ECtHR regarding nationality and statelessness included: *Andrei Karassev and family v Finland* App no 31414/96 (ECtHR 12 January 1999); *Kuric and others v Slovenia* App No 26828/06 (ECtHR 26 June 2012); ECtHR, *Genovese v Malta* App no 53124/09 (ECtHR 11 October 2011).

⁷ E.g. *Auad v Bulgaria* App No 46390/10 (ECtHR 11 October 2011), *Al-Nashif and others v Bulgaria* App No 50963/99 (ECtHR 20 June 2002), *Andrejeva v Latvia* App No 55707/00 (ECtHR 18 February 2009), *Slivenko v Latvia* App No 48321/99 (ECtHR 9 October 2003).

⁸ See ENS Campaign to Protect Stateless Persons in Europe, <http://www.statelessness.eu/node/417>, as well as the ENS Petition to Protect Stateless Persons in Europe at <http://www.statelessness.eu/act-now-on-statelessness>.

⁹ For more information about ENS, please refer to <http://www.statelessness.eu/>.

¹⁰ See also Laura van Waas, *Nationality Matters. Statelessness under International Law* (Intersentia 2008); and UNHCR, *Geneva Conclusions* (Expert Meeting on Stateless Determination Procedures and the Status of Stateless Persons, Geneva, Switzerland, 6-7 December 2010). <http://www.unhcr.org/refworld/docid/4d9022762.html>.

protection. This is why promoting statelessness determination procedures is central to the ENS campaign.

Currently, many European countries do not (yet) have a statelessness determination procedure,¹¹ but do have international obligations towards stateless persons. These obligations not only flow from the specific UN treaties regarding statelessness,¹² but also from international human rights treaties.¹³ The identification of stateless persons is an obligation that is implicit in the 1954 Convention, which establishes the international legal status of 'stateless person' and attributes a range of rights to those who enjoy this status. Importantly though, it is also relevant to the application of international human rights law, including the ECHR. Statelessness is a juridically relevant fact under international (human rights) law.¹⁴ It is therefore unclear how the aforementioned obligations towards stateless persons can be fulfilled in the absence of a procedure or mechanism that determines statelessness. If the case can be made under the ECHR for an obligation to determine statelessness then this would constitute an important tool to secure better protection for stateless persons in Europe.

This paper investigates the question of a possible obligation for statelessness determination under the Convention by examining five relevant articles. These are:

- The prohibition of torture and inhuman or degrading treatment (Article 3);
- The right to liberty and security of person (Article 5);
- The right to respect for private and family life (Article 8);
- The right to an effective remedy (Article 13); and
- The prohibition of discrimination (Article 14).¹⁵

The hope is that a better informed and more proactive use of these Articles of the ECHR as a tool in the litigation of relevant cases involving stateless persons, at the ECtHR and also at the national level, will improve their protection – including by affirming that a determination as to whether a person is stateless is required in various settings where fundamental rights are in issue and that the introduction of a statelessness determination procedure (where absent) would be prudent.

It must be acknowledged that the case law of the Court regarding statelessness is, in general, extremely limited. Where statelessness determination is concerned, case law is so far non-existent. Nonetheless, some interesting observations can be made using existing

¹¹ Some European states have a statelessness-specific protection regimes, which grant protection on the basis that someone is stateless and thus have some kind of mechanism in place to determine that a person is stateless. These countries are: France, Italy, Spain, Latvia, Hungary, Moldova, Georgia, United Kingdom, Slovakia and Turkey. See ENS, *Statelessness determination and the protection status of stateless persons. A summary guide of good practices and factors to consider when designing national determination and protection mechanisms* (ENS 2013) 7.

¹² The 1954 Convention and the 1961 Convention on the Reduction of Statelessness.

¹³ Such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child.

¹⁴ UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person' (UNHCR 2012) HCR/GS/12/02, <http://www.refworld.org/docid/4f7dafb52.html>.

¹⁵ Note that there may be overlap between these articles and several may be implicated within a single case, depending on the circumstances. For example, where a person is detained for a lengthy period pending deportation, he or she may be able to invoke Articles 3, 5, 8, 13 and 14 of the ECHR.

case law regarding potential avenues for strategic litigation with a view to affirming an obligation for states to identify whether a person is stateless. For each of the Articles of the Convention discussed, some of the issues that have been considered by the ECtHR and that can be linked to statelessness determination are examined. For each issue, the interpretations of the Court, the link to statelessness determination and the feasibility of pursuing this link further under the ECHR will be discussed.

For the purpose of this study, statelessness determination has been defined broadly as *any* mechanism that aims to identify whether a person has a nationality, and which this is, or is stateless. Finally, it is important to emphasise that this paper is intended as a tool to facilitate discussion rather than to provide a definitive or exhaustive analysis of the issues under consideration. For example, it should be noted that other provisions, such as Article 6 of the Convention, which protects the right to a fair trial, may also be of interest to statelessness cases.¹⁶ However, this paper considers only the five articles listed above.

2. Article 3 ECHR: The Prohibition of Torture and Inhuman or Degrading Treatment

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 3 of the Convention is very short in its simple statement that prohibits torture and inhuman and degrading treatment or punishment. This also demonstrates the absolute and fundamental nature of this Article; no derogation is permitted, not even in times of war or public emergency.¹⁷ When examining this provision more closely, a number of issues that have been considered by the ECtHR could be linked to problems that stateless persons may face, and may point to an obligation for statelessness determination. Below, four of these matters will be discussed, as well as the feasibility of pursuing these problems under the ECHR.

2.1. Mental suffering and uncertainty

The first issue concerns mental suffering and uncertainty. The prohibition of inhuman and degrading treatment, as laid down in the Convention, does not only refer to the infliction of physical suffering; the Court has included mental suffering under Article 3.¹⁸ This means that this Article might also encompass the uncertainty that unidentified stateless persons face on a daily basis because the state is failing to respond to their specific needs or circumstances. The interpretation of Article 3 by the ECtHR in a case regarding a disappearance is of interest here. The mother of the victim of disappearance was the applicant in this case, and she contended that she herself was a victim of inhuman and degrading treatment on account of her son’s disappearance at the hands of the authorities. She requested the Court to find that the suffering she had endured engaged the responsibility of the respondent State under

¹⁶ Note that Article 6 has been held not to apply in relation to immigration matters. Nonetheless, the following case gives rise to some debate in this regard: *Jurisc and Collegium Mehrerau v Austria* App No 62539/00 (ECtHR 27 July 2006).

¹⁷ *Chahal v the United Kingdom* App No 22414/93 (ECtHR 15 November 1996), see also Robin White & Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) 167.

¹⁸ Pieter van Dijk, Fried van Hoof, Arjen van Rijk & Leo Zwaak (eds), *Theory and practice of the European Convention on Human Rights* (Intersentia 2006) 416-417.

Article 3 of the Convention.¹⁹ In this case the ECtHR accepted that the lack of serious consideration given by the authorities to the applicant's complaint made the applicant a victim of the authorities' complacency in the face of her anguish and distress, which was suffered over a prolonged period of time, and amounted to ill treatment within the scope of Article 3.²⁰

How could this be related to the uncertainty that a stateless person may face? When a stateless person explains to governmental officials that he or she is stateless and asks the state for some sort of status and help, the state can respond in different ways. However, when the state does not respond, but rather ignores this person and the fact that he or she is stateless over a prolonged period of time, while refusing to identify this person or give him or her some sort of status, the person involved could suffer not only destitution,²¹ but also severe distress and fear. This is related to the consequential uncertainty that this person faces, especially where the lack of determination or status results in detention and/or attempted expulsion. Even though the case law of the Court relates to the specific context of disappearance, one could imagine that the circumstances of stateless persons could be more or less compared to that of persons confronted with a disappearance, as their constant anxiety is generally comparable. Moreover, the uncertainty suffered is caused by the lack of a response from the authorities. Ignoring unidentified applicants and failing to determine their (possible) statelessness could, due to the distress and fear it might cause, therefore be considered a breach of Article 3 of the ECHR or as treatment verging on a breach of Article 3 in respect of which legal remedies (interim and/or final) are required in order to avoid or prevent such a breach. Construed in this manner, the mental suffering and uncertainty that a stateless person can face may point to a positive obligation²² for states to determine statelessness. However, a high standard is set by the disappearance case, because an important restrictive factor is the fact that the son's applicant was at the hands of the authorities when he disappeared. More generally, it needs to be taken into account that the fact that such disappearance is imputable to the state played a role in finding the violation.²³ When arguing for an obligation to identify a stateless person as such, it may therefore be necessary to, in addition, argue that the stateless condition of the person concerned is imputable to the state authorities. Yet, it will not always be possible to argue that the statelessness is imputable to the Contracting Party that is involved, because cases often surface in the migratory context. Furthermore, it is likely that the simple anguish caused by the uncertainty a stateless person experiences would need to reach an acute level before Article 3 would be engaged. Where determination of statelessness is the gateway to preventing mental suffering for an individual, and where the Contracting Party has knowledge of the mental suffering and its root cause in the statelessness of that person and the effects of that statelessness, the case will need to be made for a positive obligation to be

¹⁹ *Kurt v Turkey* App No 24276/94 (ECtHR 25 May 1998) 130.

²⁰ *Ibid.* 134.

²¹ That stateless persons may face destitution was demonstrated in e.g. UNHCR, *Mapping Statelessness in The United Kingdom* (UNHCR 2011) 93; UNHCR, *Mapping Statelessness in The Netherlands* (UNHCR 2011) 34.

²² 'Positive obligation' is a concept under the Court's case law. According to the ECtHR, the main feature of positive obligations is that they demand national authorities to take the necessary measures to safeguard a right enshrined in the ECHR. See Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights. A Guide to the implementation of the European Convention on Human Rights* (Human Rights Handbooks, No. 8, CoE 2007).

²³ *Kurt v Turkey* App No 24276/94 (ECtHR 25 May 1998) 131.

imposed on that state to determine whether the person is stateless as part of the effort to secure practical legal remedies at national level.

2.2. Expulsion

An interesting issue that the ECtHR has considered in a number of cases involving Article 3 is expulsion. If a person, on the basis of substantive grounds, is considered to face a real risk of ill treatment in the country to which he or she will be deported or otherwise expelled, this could constitute a breach of Article 3 ECHR. When considering statelessness in a migratory context, it is important to note that stateless persons can also be refugees.²⁴ Furthermore, they are often members of vulnerable groups that are denied citizenship in their home countries. Examples are the Maktoum Kurds in Syria²⁵ and Rohingya in Burma – who can actually be refugees too.²⁶ The fact that they are denied citizenship and left stateless is an indication of the way they are treated in the country of origin or former residence; often statelessness is but one of the problems they are facing. These might include systematic discrimination, destitution, persecution, and lack of adequate food, housing, health care and education. It is important to keep this in mind when looking at the prohibition of *refoulement* under Article 3 of the Convention. On this matter:

“In its Cruz Varas judgment of 20 March 1991 the Court held that expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.”²⁷

The threshold that must be reached for Article 3 to be invoked must be more than “a general risk – a mere possibility.”²⁸ There must be substantial grounds of a real risk. As applied, this test imposes a lower standard of proof than that of beyond all reasonable doubt or of the balance of probability. In recent cases the ECtHR has adopted a liberal approach,²⁹ which makes it clear that proof beyond reasonable doubt is not necessary in asylum cases. The expulsion of a stateless person to a country of former residence might thus give rise to a risk of a breach of Article 3 of the ECHR, as statelessness is a relevant indication – a sort of ‘marker’ – of circumstances that the person might face if expelled which would violate Article 3. When a state does not determine whether a person is

²⁴ In that context, in addition to the human rights protection against *refoulement*, also the prohibition of *refoulement* of the 1951 Convention relating to the Status of Refugees applies.

²⁵ For more information, please refer to Zahra Albarazi, *Stateless Syrians* (Statelessness Programme 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269700.

²⁶ More information can be found in Equal Rights Trust, *Burning homes, sinking lives: a situation report on violence against stateless Rohingya in Myanmar and their refoulement from Bangladesh* (Equal Rights Trust 2012), <http://www.equalrightstrust.org/ertdocumentbank/The%20Equal%20Rights%20Trust%20-%20Burning%20Homes%20Sinking%20Lives.pdf>.

²⁷ *Vilvarajah and others v. The United Kingdom* App Nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR 30 October 1991) 103.

²⁸ Pieter van Dijk, Fried van Hoof, Arjen van Rijk & Leo Zwaak (eds), *Theory and practice of the European Convention on Human Rights* (Intersentia 2006) 435; *Vilvarajah and others v. The United Kingdom* App Nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR 30 October 1991) 111-112.

²⁹ Which is noted in Pieter van Dijk, Fried van Hoof, Arjen van Rijk & Leo Zwaak (eds), *Theory and practice of the European Convention on Human Rights* (Intersentia 2006) 436 on the basis of, for instance, *Jabari v Turkey* App No 40035/98 (ECtHR 11 July 2000) and *Said v The Netherlands* App No 2345/02 (ECtHR 5 July 2005).

stateless, it might ignore the real risk of a stateless person being exposed to treatment breaching the prohibition of torture or inhuman or degrading treatment or punishment in the Convention. Especially given the liberal approach that the ECtHR seems to take, there seems to be a necessity to determine statelessness to avoid expulsions that involve a real risk of the violation of Article 3, even when the stateless person involved is not recognised as a refugee.

The case of *Auad v Bulgaria*,³⁰ concerning the expulsion of a stateless Palestinian, is also of interest here. In this case, the Court acknowledged the importance of the applicant's statelessness to the judgement on the merits in order to conclude that he would not be able to go anywhere other than a specific refugee camp in Lebanon. Due to the violent situation in that refugee camp and the lack of a legal framework providing adequate safeguards in Bulgaria, the ECtHR found that there would be a real risk of a violation of Article 3 ECHR if he were deported to Lebanon and that therefore there was a breach of Article 3.³¹ The case indirectly shows that the status of a person – that of stateless Palestinian – can be of importance in judging the risk of ill treatment that he or she may or may not be subjected to. This points towards an obligation to determine statelessness for states in order to meet the standards regarding expulsion under Article 3 of the Convention.

Nonetheless, it should be noted that it may be hard to identify cases where statelessness itself is a material consideration and requires determination. For example, where a stateless person is also a refugee, a judicial decision may not determine the issue of statelessness, but may focus solely on the refugee question. Much will depend on the treatment that the person faces on return by virtue of being treated as stateless in the state of return.

2.3. Destitution and administrative practice

Another interesting concept that the Court has developed in its interpretation of Article 3 is that of an 'administrative practice'. One can speak of an administrative practice when the facts of a case show repeated conduct of a certain kind by (an agent of) the state that – even though unlawful – was tolerated (at a higher level).³² Reports on statelessness in different European countries have more than once identified that stateless persons are often confronted with repeated periods of (arbitrary) detention when awaiting (impossible) expulsion.³³ This, at least, points to a practice, in some countries, of a repetitive nature. Furthermore, the destitution that some (unidentified) stateless persons face because they are not being afforded with the rights they should enjoy according to international law, might constitute an administrative practice if states continue to fail to respond to stateless persons that ask for assistance or recognition. Where an irremovable stateless person lacks permission to work and is excluded from access to social assistance, he or she maybe subject to a regime of treatment thereby that renders him or her destitute and verging on treatment contrary to Article 3 of the ECHR by virtue of the inhuman or degrading treatment

³⁰ *Auad v Bulgaria* App No 46390/10 (ECtHR 11 October 2011).

³¹ *Ibid.* 107-108.

³² See also *Ireland v the United Kingdom* App No 5310/71 (ECtHR 18 January 1978) para. 159 and Robin White & Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) 169.

³³ UNHCR, *Mapping Statelessness in The United Kingdom* (UNHCR 2011) 93; UNHCR, *Mapping Statelessness in The Netherlands* (UNHCR 2011) 34; UNHCR, *Mapping Statelessness in Belgium* (UNHCR 2012) 41, 71.

suffered in consequence. As statelessness determination would be the only way to at least identify who is stateless, it is something that might be linked to administrative practices. Where there is a real risk of such treatment, interim or final remedies may be sought to avoid or prevent such a violation. Where such treatment is viewed retrospectively, if the destitution can be proved to fall within the scope of Article 3 and the applicant(s) can demonstrate beyond reasonable doubt that the state – after being notified by the applicant(s) in question – has repeatedly left unidentified persons to live in destitution, a finding of a breach of Article 3 of the Convention ought to follow. To fall within the scope of Article 3, the ill treatment must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.³⁴

An example of destitution of stateless persons and neglect by states regarding for their circumstances, and which might give an indication of how feasible it may be to pursue this issue, can be found in evidence from mapping studies by UNHCR.³⁵ The studies show that undocumented persons, also persons that belong to groups that are widely known to be affected by statelessness, such as Myanmar's Rohingya or Kuwait's Bidouns,³⁶ were refused a legal status, for instance in the United Kingdom. Still, the state appears to be unable to remove them from the country, which results in lengthy time spent in limbo, often facing destitution. That (possibly) stateless persons are consistently being denied a status or support while the state cannot enforce removal, seems evident of a state repeatedly ignoring the relevance of (possible) statelessness, and its consequences. This might breach Article 3 of the Convention, and therefore points to the necessity to determine statelessness in order to afford these persons with the protection and support they clearly need.

In this regard, a case regarding destitution would likely need to involve a stateless person (undocumented and/or irregularly present) facing an accumulation of problems in order for Article 3 to be engaged. Firstly, he or she would need to be prohibited from work and secondly also excluded from access to social assistance. Thirdly, the person would need to face a legal or practical impediment to removal. It could be that the principle of *non-refoulement* was engaged (although that might suggest recourse to other protection mechanisms). Alternatively, the impediment might be a practical one, a person cannot be returned due to the absence a viable route of return. More likely is that the impediment is that the person cannot be returned because the person is stateless and inadmissible to any state at all or to a state where he or she could secure food, accommodation and essential living needs to avoid destitution contrary to Article 3 of the Convention. Where a person is prohibited from work, excluded from social assistance and is irremovable (as a stateless person), and absent any third party support from friends, family, charities, etc., he or she

³⁴ *Ireland v the United Kingdom* App No 5310/71 (ECtHR 18 January 1978) para. 162.

³⁵ UNHCR, *Mapping Statelessness in The United Kingdom* (UNHCR 2011); UNHCR, *Mapping Statelessness in the Netherlands* (UNHCR 2011).

³⁶ For more general information about stateless Kuwaiti Bidouns, please refer to (for example) Sarnata Reynolds & Kirsten Cordell, *Kuwait: Bidoun nationality demands can't be silenced* (Refugees International Field Report 2012).

will very soon be destitute and thereby verging on treatment contrary to Article 3.³⁷ Where that person is verging on destitution that would engage Article 3 then, in order to prevent such an outcome, destitution need not be proved beyond reasonable doubt, as it is not past or historic destitution that is being considered. The stateless person (undocumented and/or irregularly present) would require a determination of his or her statelessness in order to establish that he or she is being subjected to treatment contrary to Article 3. Such destitution cases thus offer a useful basis for establishing the necessity of a statelessness determination procedure. They would also raise issues regarding denial of permission to work or access to social assistance, and the question of whether regularisation would be a sensible solution.

2.4. Detention

Detention is another matter that has been decided on by the Court.³⁸ For instance, it dealt with a case relating to the prospects of release in *A and others v the United Kingdom*.³⁹ This case concerned a number of foreign nationals that were suspected of terrorism and were detained without a trial because they could not be deported. They claimed – *inter alia* – that the high security measures in detention were inappropriate and damaging to their health, and that the indeterminate nature of the detention, with no end in sight, and its actual long duration, gave rise to abnormal suffering.⁴⁰ The Court acknowledged that the uncertainty and fear of indeterminate detention are to be taken into account, which also confirms the earlier findings on uncertainty as an issue that can raise questions under Article 3. However, it did not find a violation of Article 3 (or Article 3 in conjunction with Article 13) because of the availability of proceedings and remedies to challenge the legality of detention and the conditions of detention.⁴¹ Accordingly, the ECtHR did not find that the detention of the applicants reached the high threshold of inhuman and degrading treatment.⁴²

Stateless persons are at particular risk of arbitrary detention. As a national, a person should always be able to enjoy return to the country of nationality. If a person is not a national of a country, he or she will be subject to immigration laws and regulations. This puts a stateless person, who is not a national of *any* state, in a disadvantaged position, because he or she will always be subject to the immigration rules of any country he or she is in. Stateless persons in this situation are more vulnerable to detention awaiting (impossible) expulsion. A first question that one might ask is whether the detention of stateless persons (awaiting expulsion) in itself is a breach of the prohibition of torture or inhuman or degrading treatment or punishment, because they do not have a nationality and therefore will generally have no hope of release, as there is no country they can be expelled to. The conclusion on the basis of the aforementioned case can be that detaining stateless persons as such does not reach the threshold of the prohibition of torture or inhuman or degrading

³⁷ See also *M.S.S. v Belgium and Greece* App No 30696/09 (ECtHR 21 January 2011) and a House of Lords case in the United Kingdom: *Limbuela v Secretary of State for the Home Department* Session 2005-6 [2005] UKHL 66 (UKHL 3 November 2005).

³⁸ See also section 3 of this paper regarding Article 5 of the ECHR.

³⁹ *A. and others v the United Kingdom* App No 3455/05 (ECtHR 19 February 2009).

⁴⁰ *Ibid.* 116.

⁴¹ *Ibid.* 131 & 133. As detention is already discussed here, it will not be discussed separately again under section 4.

⁴² *Ibid.* 134.

treatment or punishment under the Convention, as long as adequate remedies to challenge this are available.

However, there has been a case which shows that the determination of statelessness and the arbitrary detention of stateless person may raise an issue under Article 3 of the ECHR. The European Commission of Human Rights,⁴³ declared an application admissible that dealt with the repeated expulsion and detention of a person whose identity was impossible to establish as an issue under Article 3.⁴⁴ The Court never decided on this case because a friendly settlement was reached. Nonetheless, this case does show that a Member State should determine the identity of a person, which includes the nationality or – in absence of a nationality – statelessness of a person. This again points to the importance of determining statelessness from an Article 3-perspective in cases involving detention.

3. Article 5 ECHR: The Right to Liberty and Security

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;*
 - (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*
- 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*
- 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
- 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

⁴³ The European Commission of Human Rights was a supervisory body of the ECHR that existed before the introduction of Protocol No. 11 to the ECHR.

⁴⁴ *Giama v Belgium* App No 7612/76 (Report of Commission, 17 July 1980).

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The purpose of Article 5 of the ECHR is to guarantee liberty and security of the person, and to provide, in particular, guarantees against arbitrary arrest or detention.⁴⁵ To that end, the Article comprises an exhaustive list of grounds for detention.⁴⁶ Under Article 5 of the Convention, arbitrary detention in relation to expulsion is a key issue in relation to statelessness. Above, this paper has already discussed detention under Article 3, but Article 5 is particularly pertinent to the issue of determination of whether a person is stateless in the context of detention. That stateless persons are at risk of being (arbitrarily) detained for the purpose of (impossible) expulsion has already been addressed in paragraph 2.4. For the purposes of Article 5, it should be kept in mind that a stateless person who the state is seeking to expel does not have the opportunity to seek admission to any other state as a national of that state. The question arises as to whether another state will, in fact, admit him or her at all. Where a stateless person is held in immigration or other administrative detention with the intention to deport or otherwise expel, but deportation or other expulsion is not possible (or not foreseeable within a reasonable period of time) because a person is stateless, detention for deportation or expulsion purposes may violate Article 5 of the Convention. It is therefore important to identify who is stateless in the detention context.⁴⁷ Nonetheless, Article 5 does not contain an explicit obligation of statelessness determination. The following paragraph discusses to what extent this obligation may be inferred from the way in which the Court has interpreted Article 5 of the ECHR and therefore what scope there is for litigation on this issue.

3.1. Detention

Article 5(1)(f) of the Convention governs questions around the detention of stateless persons. Regarding Article 5, there is academic authority that "[t]he first limb is for the prevention of an unauthorised entry into the country, and the second is where detention is required where action is being taken to deport or extradite someone".⁴⁸ Even though detention for the prevention of unauthorised entry into a country may be an issue that stateless persons face as well,⁴⁹ it is the second limb of Article 5 that will be focused on, based on earlier findings with regards to the patterns of detention stateless persons face. Under that second limb, CoE Member States may keep a person in detention for the purpose of his or her deportation, other form of expulsion or extradition, "where such an order has been issued and there is a realistic prospect of removal". The detention is considered to be arbitrary when "no meaningful action with a view to deportation is under way or actively pursued in accordance with the requirement of due diligence".⁵⁰ It is furthermore a fundamental principle that no detention that is arbitrary can be compatible

⁴⁵ Robin White & Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) 209.

⁴⁶ FRA – CoE, *Handbook on European Law relating to Asylum, Borders and Immigration* (FRA – CoE 2013) 137.

⁴⁷ See also Equal Rights Trust, *Guidelines to Protect Stateless Persons from Arbitrary Detention* (ERT 2012).

⁴⁸ Robin White & Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) 234.

⁴⁹ Note that an important case on detention to prevent unauthorised entry is *Saadi v the United Kingdom* App No 13229/03 (ECtHR 29 January 2008).

⁵⁰ FRA – CoE, *Handbook on European Law relating to Asylum, Borders and Immigration* (FRA – CoE 2013) 146; *Chahal v the United Kingdom* App No 22414/93 (ECtHR 15 November 1996) and *Quinn v France* App No 18580/91 (ECtHR 22 March 1995).

with Article 5(1) and the notion of “arbitrariness” in Article 5(1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.⁵¹ In addition, detention under Article 5(1)(f) of the ECHR is arbitrary if it is not carried out in good faith, if the detention is not closely connected to the detention ground(s), if the place and conditions of detention are not appropriate, and when the length of the detention exceeds the reasonably required amount of time for the purpose pursued.⁵² What is considered to be arbitrary will, however, always depend on the facts of the case.

An example of a case that was decided upon by the ECtHR and concerns these matters is *Mikolenko v Estonia*.⁵³ The applicant in this case was a Russian national who lived in Estonia. After the authorities’ refusal to extend his residence permit, the applicant was detained in a deportation centre from 2003 until his release in 2007. He complained to the Court that this detention was unlawful. The ECtHR responded by recalling the standards it set in previous case law, as outlined above. Applying these to the facts of the case, the Court accepted that the applicant’s expulsion had become virtually impossible – this was because, for all practical purposes, it required his co-operation, which he was not willing to give. The ECtHR concluded that the grounds for the applicant’s detention – i.e. for the purposes of his deportation – did not remain valid for the whole period of his detention due to the lack of a realistic prospect of his expulsion and the domestic authorities’ failure to conduct the proceedings with due diligence.⁵⁴

The case of *Auad v Bulgaria* is also of interest.⁵⁵ As already discussed in paragraph 2.2, this case concerned a stateless Palestinian and the question of his removal from Bulgaria. Here too, in finding a violation of Article 5 (1) the Court held that the grounds for the applicant’s detention – action taken with a view to his deportation – did not remain valid for the whole period of his deprivation of liberty due to the authorities’ failure to conduct the proceedings with due diligence. The ECtHR came to this conclusion because the government, apart from their own statements for the purposes of the proceedings before the Court, did not provide evidence that any effort had been made to secure the applicant’s admission to a third country. They could therefore hardly be regarded as having taken active and diligent steps with a view to deporting the applicant. It was true that the applicant’s detention was subject to periodic judicial review, which provided an important safeguard, but this was not sufficient to change the Court’s opinion on the case. Furthermore, the fact that neither the expulsion order nor any other binding legal act specified the destination country, as this was not required under domestic law, was considered to be problematic. The Court said that lack of clarity as to the destination country could hamper effective monitoring of the authorities’ diligence in handling the deportation. The ECtHR also commented on the length of the detention:

⁵¹ E.g. *Saadi v the United Kingdom* App No 13229/03 (ECtHR 29 January 2008) 67.

⁵² *A. and Others v the United Kingdom* App No 3455/05 (ECtHR 19 February 2009) 164.

⁵³ *Mikolenko v Estonia* App No 10664/05 (ECtHR 8 October 2009).

⁵⁴ *Ibid.* 64-68.

⁵⁵ *Auad v Bulgaria* App No 46390/10 (ECtHR 11 October 2011).

“It is true the applicant did not spend such a long time in detention as the applicants in some other cases, such as Chahal [...]. However, Mr Chahal’s deportation was blocked, throughout the entire period under consideration, by the fact that proceedings were being actively and diligently pursued with a view to determining whether it would be lawful and compatible with the Convention to proceed with his deportation [...]. By contrast, in the present case the [Bulgarian] Supreme Administrative Court refused to give any consideration to the point whether the applicant would be at risk if returned to Lebanon [...]. Moreover, under Bulgarian law the order for the applicant’s expulsion was immediately enforceable at any time, regardless of whether a legal challenge was pending against it [...]. The delay in the present case can thus hardly be regarded as being due to the need to wait for the Supreme Administrative Court to determine the legal challenge brought by the applicant against the order for his expulsion.”⁵⁶

How could these views of the Court be used for litigating for an obligation for states to identify whether a person is stateless? Using some creativity and deconstructing Article 5, it becomes apparent that statelessness determination is actually essential in some cases. The main point that can be distilled from the above descriptions is obviously that detention is only lawful for the purpose of deportation or other expulsion, i.e. if deportation or other expulsion cannot take place within a reasonable period of time (and so as not to violate Article 3), the detention will not be lawful. Thus, there is an implicit obligation at the outset to identify if the person can be removed or not, in order to conduct the proceedings with due diligence. The question of whether the person is stateless or not, is a relevant consideration in this regard. This is something that is indirectly demonstrated in the case of *Auad v Bulgaria*, where the statelessness of the applicant was relevant to the question of the refugee camp he would have to return to. This played a role in the assessment of whether he would be at risk of ill treatment within the scope of Article 3 of the ECHR, which in turn was of importance to the considerations under Article 5. Therefore, there is an implicit obligation to identify stateless persons subject to detention in deportation proceedings. The failure to do this could not only result in a violation of Article 3 (lengthy and indefinite detention could be cruel, inhuman, and/or degrading), it could also be considered a violation of Article 5 (if deportation or expulsion is not possible in a reasonable period of time, it ceases to be a legitimate objective and therefore ceases to be lawful). An element to be mindful of is furthermore that, to achieve maximum redress, Article 5 should be read in conjunction with Article 14 of the Convention. A person’s statelessness, addressed through the lens of discrimination, may require the state to treat him or her differently to other non-nationals, because their situation is factually different. The identification of stateless persons in order to avoid discrimination in the enjoyment of ECHR rights, including Article 5, becomes an important step in the process. This is addressed in more detail below in section 6 of this paper.

Recently, in July 2014, the Court found violations of Articles 3, 5(1)(f) and 5(4) of the Convention in a case regarding the detention of a stateless person with a view to expulsion.

⁵⁶ *Ibid.* 134.

In this case, *Kim v Russia*,⁵⁷ the ECtHR observed in particular that the applicant had no procedure available to him to challenge his detention, and that he had remained in detention, even though there was no realistic prospect of securing his expulsion. According to the Court, the domestic authorities' furthermore failed to conduct the proceedings with due diligence.⁵⁸ The ECtHR also found that Russia was to take appropriate measures to provide for procedures in order to prevent the applicant from being re-arrested and detained for the offences resulting from his status as a stateless person.⁵⁹ If one is to avoid this, it indeed needs to be acknowledged that the person involved is stateless. Therefore, such measures would clearly have to include the determination of statelessness (and granting an appropriate status), thus providing for an important precedent on the matter of statelessness determination mechanisms in relation to detention (with a view to expulsion) of stateless persons. Under Article 46 of the ECHR,⁶⁰ the Court considered it necessary to indicate general measures to Russia required to prevent other similar violations in the future. Above all, the Court held that Russia, through appropriate legal and/or other measures, should secure a mechanism which allows individuals to institute proceedings for the examination of the lawfulness of their detention pending removal. Furthermore, the ECtHR recommended that the state should take the necessary general measures to limit detention periods so that they remain connected to the ground of detention applicable in an immigration context.⁶¹ Bearing in mind that this case concerned a stateless person, this further reinforces the practical necessity of enacting statelessness determination procedures. Notably, the Court demonstrated how concerned it was about the vulnerable situation of the applicant:

*“As a stateless person, he was unable to benefit from consular assistance and advice, which would normally be extended by diplomatic staff of an incarcerated individual’s country of nationality. Furthermore, he appears to have no financial resources or family connections in Russia and he must have experienced considerable difficulties in contacting and retaining a legal representative.”*⁶²

As such, this recent case provides for a strong statement of the ECtHR on the issue of statelessness and the measures that a state needs to take – at least in relation to detention of stateless persons with a view to expulsion – in order to comply with the provisions of the Convention. Based on the considerations of the Court, it appears that a statelessness determination mechanism – even though not mentioned explicitly – could be the appropriate tool for meeting the requirements of the ECHR for such measures to be put in place.

⁵⁷ *Kim v Russia* App No 44260/13 (ECtHR 17 July 2014). Note that this judgement was not final yet at the time of writing.

⁵⁸ *Ibid.* 56.

⁵⁹ *Ibid.* 74.

⁶⁰ Article 46 of the ECHR concerns binding force and execution of judgements.

⁶¹ *Kim v Russia* App No 44260/13 (ECtHR 17 July 2014) 70-72.

⁶² *Ibid.* 54.

4. Article 8 ECHR: The Right to Respect for Private and Family Life

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 8 obliges states to refrain from interferences in private and family life. However, this is one of the articles of the Convention that contains express limitations (in the second paragraph), and in that sense does not constitute an absolute right. However, only the restrictions that are expressly permitted by the ECHR are allowed.

The wording in Article 8 of the ECHR with “respect to...” seems to refer primarily to non-interference of the state. However, there can also be positive obligations inherent in an effective respect for private and family life.⁶³ This is of importance to the present study, which focuses on the search for a positive obligation to determine statelessness. There is academic authority asserting that positive obligations can arise when a state has to take action to secure respect for the rights under Article 8, or where the state has to protect a person from interference with their rights under Article 8 by (an)other individual(s).⁶⁴ Furthermore, whether such a positive obligation exists should be determined by considering the fair balance between the general interests of the community and those of the individual, and boundaries between positive and negative obligations can thus not be defined. At the ECtHR, states do have a considerable margin of appreciation though.⁶⁵ Below are some of the issues that have arisen under Article 8 of the Convention and which may point to an obligation for statelessness determination.

4.1. Individual circumstances

The right to respect for private life has – relatively recently – been used to protect migrants in certain circumstances. Since stateless persons are not nationals of any state and are therefore usually subject to a state’s immigration laws, it is relevant to consider these cases here. In *Slivenko v Latvia*, the ECtHR held that the removal of individuals from a country “where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being”⁶⁶ constituted an interference with their private life under Article 8 of the ECHR. This was deemed to be the case because the removal scheme did not allow for any possibility of taking into account the individual circumstances of persons not exempted by domestic law from removal.⁶⁷ These individual circumstances can include statelessness, as clearly demonstrated by the fact that the applicants in this case were stateless (they were left without a nationality when Latvia

⁶³ *Markx v Belgium* App No 6833/74 (ECtHR 13 June 1979) 31.

⁶⁴ Robin White & Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) 338.

⁶⁵ *Ibid.* 361.

⁶⁶ *Slivenko v Latvia* App No 48321/99 (ECtHR 9 October 2003) 96.

⁶⁷ *Ibid.* 122.

regained independence in 1991). To a stateless person – living in a country since birth and facing removal – his or her statelessness can be highly relevant to his or her personal circumstances due to the consequences that statelessness can have.⁶⁸ Statelessness is also a juridically relevant fact. Therefore, the state may be obliged to determine statelessness for the purposes of taking into account this fact and the consequences of the person's statelessness when assessing the personal circumstances in the context of a decision on removal.

4.2. Uncertainty

In another case, the Court found a violation of – *inter alia* – the right to respect for private and family life in a case regarding eleven applicants who belong to a group of persons known as the 'erased'. They complained that the Slovenian authorities prevented them from acquiring citizenship of the new Slovenian State that had been established in 1991, and from retaining their status as permanent residents.⁶⁹ The ECtHR has held in this case:

*"The Court is of the opinion that, in the particular circumstances of the present case, the regularisation of the residence status of former SFRY citizens was a necessary step which the State should have taken in order to ensure that failure to obtain Slovenian citizenship would not disproportionately affect the Article 8 rights of the "erased". The absence of such regulation and the prolonged impossibility of obtaining valid residence permits have upset the fair balance which should have been struck between the legitimate aim of the protection of national security and effective respect for the applicants' right to private or family life or both."*⁷⁰

Furthermore, the Court said that the 'erased' were discriminated against as they were disadvantaged when compared to other non-nationals in Slovenia.⁷¹ The Court particularly noted that the 'erasure' led to insecurity, legal uncertainty and a number of adverse consequences, such as the destruction of identity documents, the loss of job opportunities and the loss of health insurance, which amounted to a violation of Article 8. Even though the applicants were not (all) stateless,⁷² their situation was factually the same. The Court considered that the applicants in this case were effectively left stateless due to the 'erasure' and this erasure, in combination with the lack of regularising the status of these persons, interfered with the rights under Article 8 of the Convention. Where the situation of a stateless person can be compared to that of the applicants, which in terms of the adverse consequences identified in this case may very well be possible, statelessness in itself violates Article 8 ECHR if the state does not respond appropriately to it without lawful justification. Statelessness therefore is highly relevant to very many considerations under Article 8, which demonstrates a necessity to determine it. It furthermore seems that the articles of the Convention under consideration in this case, Articles 8 – the only substantive right, 13 and 14 could possibly prevent the denial of some status (or even a nationality) to people who

⁶⁸ These consequences can be destitution, reduced or no access to health care, education, work, dependence on help from others, *etc.*

⁶⁹ *Kuric and others v Slovenia* App No 26828/06 (ECtHR 26 June 2012).

⁷⁰ *Ibid.* 359.

⁷¹ *Ibid.* 396.

⁷² Some had acquired the nationality of another successor state and were therefore foreign nationals residing in Slovenia.

would otherwise be (effectively) stateless. Even though construing an obligation to provide a residence permit might be a step too far in these cases, due to the often-repeated statement of the Court that Article 8 does not guarantee this, the establishment of statelessness is a relevant factor in establishing whether there has been a breach of Convention rights, and again demonstrates the necessity to identify someone as stateless.

That the uncertainty of stateless persons, but also other migrants, can be considered under Article 8 of the Convention, is also evidenced by the case of *Sisojeva and others v Latvia*. The case concerned Russian nationals and a stateless person living in Latvia, whose residence was based on a series of temporary residence permits. The applicants argued that this uncertainty interfered with their private life. In this case:

“The Grand Chamber’s decision was to strike the case out of the list in so far as it related to Article 8. The respondent State had offered to regularise the residence of the applicants by the time that the Court came to consider the issue, but the Court’s judgement makes clear that the effect of uncertainty in relation to immigration status can interfere with private life, but went on to observe that the Convention did not guarantee any right to a particular type of residence permit. That was a matter for the discretion of the Contracting Parties.”⁷³

That uncertainty is an issue that stateless persons are often confronted with was already considered in section 2.1 above. As stateless persons in any country have to rely on residence permits *per se* due to their lack of any nationality, uncertainty is something that is common and impacts heavily upon their personal life (except in cases where permanent residence permits, with a strong set of rights attached, have been granted). Uncertainty about a status leads to uncertainty about other matters, which can include issues regarding housing, education, health care, and freedom of movement and can have great impact on the day-to-day life of a person.⁷⁴ If a stateless person remains unidentified, and as a consequence, is not granted an appropriate immigration status, the lack of statelessness determination by the state could interfere with the private life of this person. In such cases, identifying a person as being stateless could be a necessity in order to provide this person with more certainty and to provide a pathway to possible solutions for his or her status. This would enable the state to comply with the positive obligations flowing from the right to respect for private life under Article 8 of the ECHR.

A case that may clarify the necessity to determine statelessness because of a situation of uncertain legal identity is that of *Velimir Dabetić v Italy*, which has yet to be decided. The application contends that “maintaining individuals in a situation of uncertain legal identity has a profound impact on their ability to establish personal identity and develop ties to society, a facet of personal autonomy protected under Article 8”. The application furthermore links the situation of denial of a legal status and the uncertainty and other

⁷³ Robin White & Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) 389-390.

⁷⁴ That uncertainty about legal status and/or lack of documents can have serious impact on day-to-day life and that this can interfere with the private life of the person concerned is demonstrated by *Smirnova v Russia* App Nos 46133/99 and 48183/99 (ECtHR 24 July 2003) and *Aristimuno Mendizabal v France* App No 51431/99 (ECtHR 17 January 2006).

problems flowing from that to legal identity and dignity; issues that have already been brought within the scope of Article 8 by the ECtHR.⁷⁵

4.3. Freedom of movement

The right to respect for private life might also be of importance to cases in which persons are prevented from leaving a country. As the ECtHR has stated:

“At a time when freedom of movement, particularly across borders, is considered essential to the full development of a person's private life, especially when, like the applicant, the person has family, professional and economic ties in several countries, for a State to deprive a person under its jurisdiction of that freedom for no reason is a serious breach of its obligations.”⁷⁶

The question whether or not deprivation of freedom of movement interferes with private life for Article 8 purposes needs to be considered alongside the specific provision made for freedom of movement in Article 1 of Protocol No. 7 to the ECHR (for lawfully resident aliens) and, to a lesser extent, Articles 2 and 4 of Protocol No. 4 to the Convention.⁷⁷ Where provision is made for freedom of movement in the ECHR, the application of Article 8 to free movement issues will be conditioned by the relationship between all the relevant Convention articles. The limited provision made for the free movement of aliens in the ECHR, coupled with a state's exercise of control over its borders, requires careful consideration of what may be achieved under Article 8. Stateless persons may also suffer from restrictions on freedom of movement within a state and this too may occasion a violation of Convention rights.

As could be seen above, deprivation of the freedom of movement without due cause is considered to be a breach of the obligations of the state under the Convention. It would seem that this could be turned around: the state in principle has an obligation to ensure freedom of movement, as it is essential to the development of a person's private life. If a stateless person lacks freedom of movement due to the fact that a state does not identify him or her as being stateless, this would interfere with that person's right to respect for private life and could breach Article 8 ECHR. Stateless persons often have difficulty obtaining official (identity) documents, because of the fact that they are not considered a national by any state. No state may feel the responsibility to issue identity documents to that person, as they are usually associated with some sort of (immigration) status or nationality. This causes problems when they would like to enjoy their freedom of movement. In order to lawfully cross borders, proof of identity (and nationality) usually has to be shown, which is something that stateless persons in particular may be unable to do due to the reasons set out above. The problems that stateless persons face in this regard could be solved to a large extent by giving them an official document that confirms their identity and status. This is usually achieved by issuing a residence permit and/or a stateless person travel document. However,

⁷⁵ See *Velimir Dabetić v Italy* File No 31149/12 (Application) 66.

⁷⁶ *Iletmiş v Turkey* App No 29871/96 (ECtHR 6 December 2005) 50.

⁷⁷ Article 1 of Protocol No. 7 lays down procedural safeguards relating to the expulsion of lawfully resident aliens. Article 2 of Protocol No. 4 contains a specific provision regarding freedom of movement and Article 4 of Protocol No. 4 prohibits the collective expulsion of aliens.

as Article 8 of the Convention does not include a right to this, there may be hurdles to leap over to secure an obligation for the determination of statelessness in this case. It should be remembered though that statelessness determination in this study has been defined as the identification of stateless persons. A simple identity document that identifies a person as being stateless can already help to facilitate freedom of movement.⁷⁸ Constructed in this way, statelessness determination can be a solution to the interference with Article 8 due to the unnecessary impossibility to exercise freedom of movement, and thus implies the necessity to identify stateless persons. As such, the issue of a want of identity documents for stateless persons (which confirm their statelessness) looks like a useful way to develop case law under Article 8.

4.4. Nationality

The development of case law under the notion of private life in Article 8 of the Convention on matters of nationality is highly relevant to this discussion paper. An important step on this subject was taken in the case of *Karashev v. Finland*,⁷⁹ in which the Court observed that the fact that the right to a nationality as such is not guaranteed by the Convention does not exclude that arbitrary denial of citizenship might raise issues under Article 8 under certain circumstances because of the impact of such denial on the private life of an individual. It also referred to the definition of nationality as established by the International Court of Justice (ICJ).⁸⁰ However, the ECtHR did not find a violation of Article 8 in this case.⁸¹

In *Genovese v. Malta*⁸² the Court seems to give some clarification on nationality issues under Article 8 of the Convention. The applicant in this case was a British national who was born out of wedlock to a British mother and a Maltese father. However, he also wanted to become a Maltese national, but this was denied because he was born out of wedlock and according to the relevant domestic laws at that time, only the mother could confer Maltese nationality in such circumstances. The Court found in this case that there had been a violation of Article 14 (prohibition of discrimination) in conjunction with Article 8.⁸³ In order to find this violation, the Court first had to bring this issue regarding nationality within the scope and ambit of Article 8. It did so by observing that:⁸⁴

“(...) even in the absence of family life, the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person’s social identity. While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant’s social identity was such as to bring it within the general scope and ambit of that Article.”

The reasoning of the Court continued by demonstrating that, even though the Maltese Government had gone beyond its obligations under Article 8 of the Convention by expressly

⁷⁸ UNHCR, *Statelessness: An analytical framework for prevention, reduction and protection* (UNHCR 2008) 20.

⁷⁹ *Andrei Karashev and family v Finland* App No 31414/96 (ECtHR 12 January 1999).

⁸⁰ *Ibid.* As established by the ICJ in the *Nottebohm Case*.

⁸¹ *Ibid.*

⁸² *Genovese v. Malta* App No 53124/09 (ECtHR 11 October 2011).

⁸³ *Ibid.* dictum.

⁸⁴ *Ibid.* 33.

granting the right to citizenship by descent and establishing a procedure to that end, this must be ensured without discrimination.⁸⁵ Malta failed this test, because it discriminated both on the basis of illegitimacy and of gender.⁸⁶

Through this ruling, the ECtHR offers a “broad statement on the meaning of nationality and the link to the European Convention on Human Rights will allow the court a wide margin in the exercise of its jurisdiction over questions of nationality policy in future (...)”.⁸⁷ Bearing the case of *Genovese v Malta* in mind, it is interesting to note that the nationality policies of different European countries include provisions on the prevention of statelessness, in particular concerning children born on the territory of a state who would otherwise be stateless.⁸⁸ In such cases citizenship is granted, though this is often subject to conditions. According to the database regarding protection against statelessness of the EUDO Observatory on Citizenship in cooperation with UNHCR, 32 out of the 36 European countries listed in the database have a provision in their nationality law to grant citizenship to children who would otherwise be stateless.⁸⁹ Even though this does not correspond with the number of States Parties to the ECHR, 32 out of 36 is a significant number and shows some ‘common ground’ in Europe in this regard. Indeed, this may even qualify as an emerging consensus as to the standards to be achieved that the Court has to take into account.⁹⁰ It is important to realise that in order to apply a provision regarding children who would otherwise be stateless in an effective manner, it is necessary that the statelessness of the child be acknowledged.⁹¹ This shows the need for determination of statelessness. Also, for a person who is born stateless and lives his or her entire life in a country that does not grant him or her citizenship because the statelessness of that person and/or the parent(s) has not been established, this can have a huge impact on that person’s social identity. This scenario and the findings of the Court in *Genovese v Malta* therefore clearly point to an obligation for states to determine statelessness.

Furthermore, the case demonstrated that the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual – a concept which includes aspects of a person’s social identity. Could this be construed in relation to statelessness in and of itself (i.e. having no citizenship whatsoever with substantial impact on a person’s social identity), raising an issue under Article 8? It could indeed. The Court has held that private life is a concept that cannot be defined. The interpretations of Article 8 show that the ECtHR is not afraid to bring relevant issues under it through its case law, which could in

⁸⁵ *Ibid.* 34.

⁸⁶ *Ibid.* 48-50.

⁸⁷ Laura van Waas, ‘Rottmann and Genovese: How will Europe’s nationality laws stand up to the scrutiny of it regional courts?’ (Weblog Statelessness Programme 12 March 2012), <http://statelessprog.blogspot.com/2012/03/rothmann-and-genovese-how-will-europes.html>.

⁸⁸ Caia Vlieks, ‘Statelessness – any attention at the national level?’ (Weblog Statelessness Programme 27 August 2012), <http://statelessprog.blogspot.nl/2012/08/quest-post-statelessness-any-attention.html>.

⁸⁹ EUDO Observatory on Citizenship, ‘Mode S01: born stateless’ (Protection against statelessness database 2013), <http://eudo-citizenship.eu/databases/protection-against-statelessness?p=&application=modesProtectionStatelessness&search=1&modeby=idmode&idmode=S01>.

⁹⁰ Cf. e.g. *Kuric and others v Slovenia* App No 26828/06 (ECtHR 26 June 2012) 387.

⁹¹ Which does not mean that all children born stateless need to go through a statelessness determination procedure; the simple act of recognition of the statelessness of the child is necessary for the child to acquire a nationality. See also UNHCR, ‘Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness’ (UNHCR 2012) HCR/GS/12/04, <http://www.refworld.org/docid/50d460c72.html>.

future include statelessness. That being the case, lack of determination of statelessness might raise an issue under Article 8 of the Convention, which indicates the necessity to identify who is in fact stateless.

5. Article 13: The Right to an Effective Remedy

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

The aim of Article 13 is to provide a mechanism at the national level whereby individuals can obtain relief for violations of their rights under the ECHR before having to complain to the ECtHR.⁹² Article 13 is not an independent provision and when this Article is under consideration, the Court will examine whether the applicant has an ‘arguable complaint’ under a substantive article of the Convention. This means that Article 13 can be violated even where there is no violation of another ECHR right, as long as there is an arguable violation of another right in the Convention.⁹³ Keeping this in mind, some of the cases considered by the Court will be linked to statelessness determination again below.

5.1. Expulsion

The case of *Al-Nashif v Bulgaria*⁹⁴ concerned a stateless person of Palestinian origin (in possession of a Syrian stateless person’s identity document) and his family, who lived in Bulgaria. His residence permit was withdrawn and he was to be deported because he allegedly posed a threat to national security. The applicants claimed, *inter alia*, that his deportation had infringed the right of all three applicants to respect for their family life, as guaranteed by Article 8 ECHR, and that they did not have an effective remedy in this respect pursuant to Article 13 of the Convention. The Court was therefore able to deal with the extent to which considerations of national security can impose limitations on the right to an effective remedy. While holding that there might be some limitations, the ECtHR clarified that there are minimum requirements to an effective remedy:

“Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive’s assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance. Furthermore, the question whether the impugned measure would interfere with the individual’s right to respect for family life and, if

⁹² *Kudla v Poland* App No 30210/96 (ECtHR 26 October 2000).

⁹³ *Klass and others v Germany* App No 5029/71 (ECtHR 6 September 1978).

⁹⁴ *Al-Nashif and others v Bulgaria* App No 50963/99 (ECtHR 20 June 2002).

*so, whether a fair balance is struck between the public interest involved and the individual's rights must be examined.*⁹⁵

As there was no such remedy available to the applicants, the Court found a violation of Article 13 ECHR.

With a focus on statelessness and statelessness determination, this case shows us several things. First of all, it may be inferred from this case that stateless persons, like any other person in Europe, have a right to an effective remedy under Article 13 to enforce the substance of their ECHR rights and freedoms. Second, the case shows us a minimum standard for national remedies in view of Article 13 of the Convention. However, it should be recalled that the scope of the obligation of the state under Article 13 varies depending on the nature of the applicant's complaint.⁹⁶ Third, it demonstrates how Article 13 works within the ECHR framework. The applicants had an arguable complaint under Article 8 of the Convention, and were therefore entitled to an effective remedy, which had to be – even given the particular circumstances of the case – guaranteed in some manner. The ECtHR put it as follows: “[t]here is no doubt that the applicants' complaint that the deportation of Mr. Al-Nashif infringed their right to respect for their family life was arguable. They were entitled, therefore, to an effective complaints procedure in Bulgarian law.”⁹⁷ This demonstrates the ancillary nature of Article 13 ECHR compared to substantive provisions in the Convention. For statelessness determination to play a role under Article 13, it seems that statelessness has to be an issue in some way, for example in the substantive complaint or when weighing the violation. This was not the case here: even though the applicant was stateless, this remained uncontested; the real issue was the way in which the Court dealt with the applicant's family life and the threat to national security by the state.

The case of *Auad v Bulgaria*,⁹⁸ which was discussed earlier, also involved a stateless person. Here, the statelessness of the person in question was a factor of some interest under a substantive article. The expulsion to Lebanon as such was not an issue that could amount to violation of Article 3 of the Convention, but the fact that the applicant was a stateless person of Palestinian origin, and that it was therefore likely he would have to return to a Palestinian refugee camp where violent clashes persisted, did. With regard to Article 13 ECHR, the Court, after finding that the applicant had an arguable complaint, spelled out the two components of an effective remedy in an Article 3-situation:

*“Firstly, it imperatively requires close, independent and rigorous scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 [...]. That scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State [...]. The second requirement is that the person concerned should have access to a remedy with automatic suspensive effect.”*⁹⁹

⁹⁵ *Ibid.* 137.

⁹⁶ See, *inter alia*, *A. v The Netherlands* App No 4900/06 (ECtHR 20 July 2010).

⁹⁷ *Al-Nashif and others v Bulgaria* App No 50963/99 (ECtHR 20 June 2002) 134.

⁹⁸ *Auad v Bulgaria* App No 46390/10 (ECtHR 11 October 2011). This case was discussed in paragraph 2.2. as well.

⁹⁹ *Ibid.* 120.

However, the Bulgarian courts had explicitly refused to deal with the question of risk and they had no power to suspend the enforcement of expulsion orders. Therefore, the applicant did not have an effective remedy in relation to his complaint related to the risk of ill treatment, in violation of Article 13 of the Convention. Does this point to the importance of statelessness being taken into account, and consequently, to the necessity to determine statelessness for a state to fulfil the obligations under Article 13? The risk of being subjected to ill treatment in this case involved the status of the applicant as a stateless Palestinian, because this meant that he would probably have to return to a Palestinian refugee camp in Lebanon. In the particular refugee camp that the applicant would have to return to, a risk of being subjected to treatment contrary to Article 3 ECHR existed. In this case, the statelessness of the applicant was thus linked – albeit indirectly – to the risk, which had to be part of the considerations of the Bulgarian courts. The determination of statelessness was therefore relevant, even though it was not at the heart of the case. The ECtHR remains silent on how the risk should generally be considered and what should be taken into account, thus making it unclear to what extent the personal situation of the applicant, which could include statelessness, can be an issue. The conclusion may be that statelessness in this case was an issue under Article 3, and *therefore* may be a factor of interest under Article 13.

5.2. Vulnerability and uncertainty

In *Kuric and others v Slovenia*,¹⁰⁰ considered earlier as well, the state was found to be breaching – *inter alia* – Article 13 of the Convention. The Court assessed Article 13 by looking at the remedies that applicants had at their disposal and what their effect was. It was noted that the fact that the applicants, who did not have any Slovenian identity documents, were left in a state of legal limbo for several years, and therefore in a situation of vulnerability and legal insecurity could not be overlooked.¹⁰¹ Also, the duration of proceedings was considered to be an issue.¹⁰² Stateless persons are often confronted with issues of vulnerability and legal insecurity, as well as lengthy proceedings,¹⁰³ in this case the ‘erased’ applicants contended to be (factually) in the same position as stateless persons. If such issues present themselves in a case, they could influence the (nature of the) effective remedy required by Article 13 of the Convention. In what manner is not explained by the ECtHR, but the fact that these circumstances are mentioned as something that cannot be overlooked does mean that they were relevant. The determination of statelessness, or at least of its consequences, can therefore be considered to be of importance to the effective remedy that needs to be provided at the national level.¹⁰⁴

¹⁰⁰ *Kuric and others v Slovenia* App No 26828/06 (ECtHR 26 June 2012). See also paragraph 4.2.

¹⁰¹ *Ibid.* 302.

¹⁰² *Ibid.* 303.

¹⁰³ E.g. UNHCR, *Mapping Statelessness in the Netherlands* (UNHCR 2011).

¹⁰⁴ A case that may clarify the importance of determining statelessness to Article 13, is again that of *Velimir Dabetić v Italy*. In the application it is maintained that no effective remedy was provided to the applicant as regards the unjustified interference with his private life or discriminatory procedure used against him – he cannot access the administrative procedure for determination of his statelessness because he has no residence permit. The application also explicitly mentions the case of *Kuric and others v Slovenia*, as the applicant was also one of the applicants in that case. See *Velimir Dabetić v Italy* File No 31149/12 (Application) 125 & 131.

6. Article 14: The Prohibition of Discrimination

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The prohibition of discrimination, as laid down in Article 14 of the ECHR, does not prohibit discrimination in any situation, but only in conjunction with the enjoyment of the rights and freedoms set forth in the ECHR. This does however not require that another article of the Convention be breached in order to find a violation of Article 14 of the ECHR.¹⁰⁵ That Article 14 can be very relevant in the context of statelessness and determination thereof, is already evidenced by the fact that statelessness has attached to it specific vulnerabilities – which have been mentioned earlier – and the failure of a state to address them could amount to discriminatory treatment. In order to ensure that stateless persons are not discriminated against, it can therefore be argued that they must be identified.

When considering Article 14 it is noteworthy that Article 1 of Protocol No. 12 to the Convention introduced a general prohibition of discrimination. However, it does not replace Article 14 ECHR and the relation between the two articles is supposed to be harmonious. Article 14 ECHR remains important. It binds more Council of Europe states than Article 1 of Protocol 12, and thus is the focus here. Article 1 of Protocol No. 12 shall not be considered further as it is of limited relevance due to the low number of ratifications so far. Nonetheless, Article 1 of Protocol No. 12 may play a role similar to that of Article 14 ECHR in the future, and has the potential to be of greater influence due to its general application.

6.1. Discrimination based on (non-)nationality

The case of *Andrejeva v Latvia*¹⁰⁶ presents an important feature of discrimination based on nationality. This case concerned a stateless applicant, a non-national of Latvia, who had a permanent residence status. Her complaint under Article 14 of the Convention¹⁰⁷ was directed at the fact that her pension was not calculated the same way as it was for Latvian citizens, which resulted in her receiving a significantly lower pension. Nationality was, according to her, the sole criterion on which the differential treatment was based. The Court agreed with her, finding a violation of Article 14 ECHR (in conjunction with Article 1 of Protocol No. 1) as the respondent state could not provide the “very weighty reasons” necessary to justify a difference in treatment based on nationality. It is important to note that the Court took into account here that the applicant was not a national of any state (she

¹⁰⁵ In the *Belgian Linguistic Case*, the ECtHR already clarified that – even though there can be no breach of Article 14 when it is considered in isolation – Article 14 can be violated when it is considered together with another article of the ECHR, even in cases where the latter article alone would not be breached. It is thus possible that a violation of Article 14 is found when another article of the Convention is breached as well, but it is also possible that only Article 14 read in conjunction with that article is violated. See *Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v Belgium* App Nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (ECtHR 23 July 1968) 9.

¹⁰⁶ *Andrejeva v Latvia* App No 55707/00 (ECtHR 18 February 2009).

¹⁰⁷ In this case, Art. 14 was invoked in conjunction with Art. 1 of Protocol No. 1 to the ECHR (the protection of property).

was stateless), thus making her situation different from both nationals and non-nationals.¹⁰⁸ This demonstrates that, in the field of social security, and possibly beyond, differential treatment of stateless persons – or the failure to treat stateless persons differently from other non-nationals even where their different situation demands it – requires very weighty reasons. Furthermore, the statelessness of the person is something that seems to affect the very weighty reasons- and proportionality test. Under Article 14 of the Convention, statelessness can thus be a relevant factor when deciding on cases involving discrimination based on nationality.¹⁰⁹ In this sense, Article 14 points to an obligation for states to determine statelessness when confronted by discrimination in the enjoyment of Convention rights.

As such, Article 14 offers good prospects for cases where a statelessness determination would be required. However, it is always important to isolate where statelessness or nationality is the relevant difference, such as in *Andrejeva v Latvia* (where the applicant had permanent residence), rather than e.g. a person's immigration status (or lack of status or lawful residence). Stateless persons can be undocumented or irregularly present. Discrimination where the relevant difference is a lack of immigration status as 'other status' may not require the same level of justification of 'very weighty reasons' as that which is applicable where discrimination takes place on grounds of nationality. Instead, a wide margin of appreciation may be given to a state.¹¹⁰

6.2. Treating different cases differently

In the case of *Stec and others v the United Kingdom*, the Court has held that state authorities are allowed to treat men and women differently for the purposes of positive discrimination, in order to correct factual inequalities between them. The case concerned a difference between men and women in their state pensionable age. However, this was justified according to the ECtHR by the fact that women generally spend longer periods out of paid employment than men, for taking care of children, for example. However, the difference is only justified as long as social conditions do not change. This change was seen to be a gradual one. The Court therefore found:

“That the difference in State pensionable age between men and women in the United Kingdom was originally intended to correct the disadvantaged economic position of women. It continued to be reasonably and objectively justified on this ground until such time as social and economic changes removed the need for special treatment for women. The respondent State's decisions as to the precise timing and means of putting right the inequality were not so manifestly unreasonable as to exceed the wide margin of appreciation allowed it in such a field [...]. Similarly, the decision to link eligibility for [Reduced Earnings Allowance] to the pension system was reasonably and objectively justified, given that this benefit is intended to

¹⁰⁸ *Andrejeva v Latvia* App No 55707/00 (ECtHR 18 February 2009) 88.

¹⁰⁹ A case that may clarify discrimination based on non-nationality and the relevance for statelessness determination further, is that of *Velimir Dabetić v Italy*. In the application it is said that the respondent state has treated the applicant – a stateless person who lost his regular legal status in this state before recognition of his statelessness – differently from asylum seekers, without the difference in treatment being objectively and reasonably justified. See *Velimir Dabetić v Italy* File No 31149/12 (Application) 104.

¹¹⁰ See *Bah v the United Kingdom* App No 56328/07 (ECtHR 27 September 2011).

compensate for reduced earning capacity during a person's working life. There has not, therefore, been a violation of Article 14 of the Convention [...] in this case."¹¹¹

This shows that positive obligations to protect against discrimination exist for groups who are in a materially different position. States may therefore take measures in order to protect or help vulnerable groups within their territory. This could include stateless persons. The importance of this is also noted in the UNCHR Guidelines on Statelessness where it concerns the status of stateless persons at the national level in relation to international human rights law. The Guidelines encourage states to explore affirmative action measures to help particularly vulnerable groups of stateless persons within their territory.¹¹²

However, could this point to an obligation to determine statelessness? An argument can certainly be made for this. In the past, the Court has found a violation of Article 14 of the Convention because the state failed to treat persons differently whose situations are significantly different, without justification.¹¹³ Stateless persons are, compared to nationals of a state definitely in a different situation, as nationals of a state enjoy a number of rights that non-nationals do not, including a right to vote for example. Also, compared to other non-nationals that may be present in a country, stateless persons can be identified as significantly different because of their lack of any nationality and consequent issues such as access to health care, social benefits, education.¹¹⁴ In order to identify stateless persons as a group being fundamentally different from another group, the state will have to determine who is stateless in order to treat these people differently and in line with their needs. Interpreted in this way, Article 14 of the Convention can oblige states to determine statelessness.¹¹⁵

6.3. Minorities

In the case law of the ECtHR regarding minorities and Article 14 ECHR, a new development can be seen: treating a problem, that is embodied by the individual applicants in the case under consideration, as a collective or systematic issue affecting a certain minority in general.¹¹⁶ This was the case in *D.H. and others v Czech Republic*.¹¹⁷ The application concerned the establishment of special schools as an answer to the question of education of Roma children, who, due to these schooling arrangements, were indirectly racially discriminated against. Accordingly, the Court found violation of Article 14 in conjunction

¹¹¹ *Stec and others v the United Kingdom* App Nos 65731/01 and 65900/01 (ECtHR 12 April 2006) 66.

¹¹² UNHCR, 'Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level' (UNHCR 2012) HCR/GS/12/03, 21, <http://www.refworld.org/docid/5005520f2.html>.

¹¹³ *Thlimmenos v Greece* App No 34369/97 (ECtHR 6 April 2000).

¹¹⁴ The right to education is, for example, included in Art. 2 of Protocol No. 1 to the ECHR. This is of importance, because Art. 14 will have to be invoked together with another article of the ECHR. If a stateless person would be unable to access education because the general arrangement thereof does not allow a stateless person to begin or finish his or her education, while it does ensure access to education for nationals and other non-nationals, the state may be found of failing to treat persons who are different differently and should have taken affirmative action to guarantee the right to access to education for all persons equally within its jurisdiction.

¹¹⁵ Again, when deciding on the case of *Velimir Dabetić v Italy*, the ECtHR might shed some more light on the issue of 'positive discrimination' for stateless persons (and the necessity to determine statelessness in this regard). The application mentions that "the Italian authorities have failed to treat the applicant differently on account of his vulnerable status as a stateless person and a victim of the 'erasure' in Slovenia". See *Velimir Dabetić v Italy* File No 31149/12 (Application) 104.

¹¹⁶ Robin White & Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) 564-565.

¹¹⁷ *D.H. and others v Czech Republic* App No 57325/00 (ECtHR 13 November 2007).

with Article 2 of Protocol No. 1 that related to the applicants in general as members of the Roma community. The Court, in *Horváth and Kiss v Hungary*,¹¹⁸ recently decided upon a similar case of two young Roma men who were misdiagnosed with a mental disability, placed in remedial schools and discriminated against. The Court held that the respondent state violated of Article 14 in conjunction with Article 2 of Protocol No. 1 after finding that the schooling arrangements for Roma with an alleged mental disability did not offer adequate safeguards that paid attention to their special needs as members of a disadvantaged and vulnerable group. According to the ECtHR, this led to isolation and an education that was likely to compromise the personal development of the applicants. Again, the Court considers the applicants as members of the Roma community, thus showing a developing approach to systematic problems of discrimination, including indirect discrimination, by addressing the wider issue at hand rather than the individual complaints. There is academic authority that this “collective rather than individual approach could have implications for many areas of the Court’s caseload”.¹¹⁹

If stateless persons could be considered under this line of reasoning of the Court, stateless persons as a group could be better protected. It is likely that stateless persons can qualify as a collective that faces a general issue, in much the same way as the ECtHR found in the aforementioned Roma cases. In this regard, it should first be noted that many Roma are in fact stateless.¹²⁰ This already indicates that (individual) stateless persons can definitely be confronted with the systematic discrimination that minorities face. Furthermore, stateless persons have often been identified as vulnerable and requiring special attention and protection, for instance with a dedicated UN regime. Stateless persons also have an important feature that distinguishes them, as a group, from any other group: they lack *any* nationality. As such, it might be possible that they can qualify as a collective that faces systematic discrimination. The form that discrimination takes will depend on the circumstances, but one can again conceive of discrimination in access to education, discrimination on the basis of nationality or lack thereof, *etcetera*. Discrimination on the basis of (no) nationality can also clearly be of a systematic nature, as the lack of a nationality of a stateless person will only disappear when he or she naturalises – and then no longer is a stateless person, but a citizen of a state. For many stateless persons, access to nationality is a significant problem – especially where they have not been recognised as stateless and lack access to more favourable naturalisation regimes. Stateless persons, when following this line of reasoning, thus might be a collective facing systematic discrimination that is in need of protection against discrimination. If statelessness is generally perceived as a discrimination issue, then the identification of stateless persons in order to prevent discrimination in the enjoyment of Convention rights, including the Articles discussed earlier, could be an (implicit) positive obligation resting on the States Parties to the ECHR.

¹¹⁸ *Horváth and Kiss v Hungary* App No 11146/11 (ECtHR 29 January 2013).

¹¹⁹ Robin White & Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) 565.

¹²⁰ Thomas Hammarberg, ‘Many Roma in Europe are Stateless and Live Outside Social Protection’, Viewpoint by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, 6 July 2009, <http://www.refworld.org/docid/4a7023c72.html>; Jessica Parra, ‘Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws with International Agreements to Reduce and Avoid Statelessness’ (2011) 34 *Fordham International Law Journal* 6, pp. 1666-1694.

7. Conclusion

By analysing five different articles of the Convention, this study has shed some light on the question “does the ECHR oblige European states to determine statelessness?” The answer to this question is an, albeit cautious, ‘yes’. The analysis of the ECHR articles addressed in this paper shows that the failure to determine statelessness – or at least, identify a person as being stateless – is very likely to play a role in the ECtHR’s interpretations of the relevant provisions of the Convention. This demonstrates that statelessness, and therefore, the determination thereof, is an issue that should concern all States Parties to the ECHR in order to fulfil their obligations under – at least – Articles 3, 5, 8, 13 and 14 of the Convention. The likelihood that the Court will rule that a state has violated its obligations where it has not taken steps to determine a person’s statelessness will vary depending on the circumstances of the case.

To litigate successfully, creativity is obviously needed to connect the case at hand to the ECHR and its interpretations, as the ECtHR has not explicitly dealt with statelessness determination in its case law to date. In this regard, it is important to bear in mind that the Convention is considered to be a ‘living instrument’ and that the Court interprets it in line with its object and purpose. It is therefore foreseeable that the Court, at some point, will rule more directly about the need to determine statelessness under the ECHR.

The analysis in this paper shows that the Court already gives consideration to statelessness in its judgements. With regard to statelessness determination, some issues seem to be more straightforward than others in the current rulings of the Court. For instance, a situation in which a (possibly) stateless person has not been given any legal status by the respondent state, causing uncertainty and an extended period of time spent in a limbo, might persuade the Court to refer to the importance of statelessness determination to avoid this kind of situation. If, in addition, arbitrary detention, non-removability and issues concerning discrimination play a role in a case, it is similarly possible that the ECtHR may be moved to affirm the need for statelessness determination.

Indeed, the recent case of *Kim v Russia* on the detention of a stateless person with a view to expulsion set an important precedent on measures that states need to take to prevent situations of arbitrary detention of stateless persons in order to comply with the Convention, and which is clearly connected with the importance of statelessness determination and procedures to this end.

An array of issues could potentially be pursued through litigation to improve the situation of stateless persons in Europe. This paper concentrates on one very important issue: statelessness determination. Currently, many European countries do not (yet) have a statelessness determination procedure, but do have international obligations towards stateless persons. Therefore, it is important to explore how these obligations can be fulfilled in the absence of a procedure that determines statelessness. In this context as regards a state that lacks such a procedure, if the case can be made under the European Convention on Human Rights for an obligation to determine statelessness in order to avoid a violation of protected rights or provide just satisfaction where a violation of such rights occurs, the Convention would constitute an important tool to help ensure better protection for stateless persons in Europe. It would also promote the benefits of the introduction of a formal statelessness determination procedure in the state concerned.

This paper examines some important articles of the ECHR in order to assess whether an obligation to determine statelessness can be construed, namely: the prohibition of torture and inhuman or degrading treatment or punishment (Article 3), the right to liberty and security (Article 5), the right to respect for private and family life (Article 8), the right to an effective remedy (Article 13) and the prohibition of discrimination (Article 14). For each Article, selected issues that have been considered by the Court, and that can be linked to statelessness determination, are discussed. The paper considers the existing case law of the Court, the link to statelessness determination and the feasibility of pursuing the issue of statelessness determination through further strategic litigation. Among those issues with an evident link to statelessness and statelessness determination are, for example, expulsion, (arbitrary) detention, the right to a nationality and the mental suffering caused by uncertainty. The paper demonstrates that statelessness can play a role in legal proceedings relating to each of the Articles discussed. This shows that statelessness, as well as the determination of statelessness, is an issue that is of concern to all State Parties to the ECHR in the fulfilment of the obligations flowing from this instrument.

