EUROPEAN COURT OF HUMAN RIGHTS

Application No. 31149/12

BETWEEN:

Dabetić

Applicant

v.

Italy

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

The AIRE Centre (Advice on Individual Rights in Europe) and ENS (The European Network on Statelessness)

pursuant to the Registrar's notification dated 17 December 2021 of the Court's permission to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

24 January 2022

Executive Summary

I. The interveners submit that Contracting States have obligations to protect stateless persons and reduce statelessness under the ECHR, including:

   a. Contracting States have a positive obligation under Article 8 to provide an effective and accessible procedure enabling persons to have their statelessness or nationality status determined. The lack of an accessible and effective route to regularisation for stateless persons will not be justified under Article 8 § 2 ECHR if it is a disproportionate interference with an individual's right to respect for private and family life. Individuals must have a genuine possibility of accessing measures or mechanisms to regularise their status as stateless persons.

   b. Denying stateless persons the possibility to regularise their status, in the same manner as asylum-seekers have an opportunity to claim protection as refugees, does not pursue a legitimate aim within the spirit of the ECHR. Such difference in treatment results in a disproportionate interference with stateless persons' right to respect for private and family life and contravenes Article 14 taken together with Article 8 ECHR.

   c. Contracting States have a positive obligation to ensure access to an effective remedy for arguable violations of the Convention under Article 13.

II. The interveners invite the Court to consider the international and European legal standards relating to the rights of stateless persons in accordance with Article 53 of the Convention. In particular, the Court is invited to consider the relevant provisions of the Convention Relating to the Status of Stateless Persons (1954 Convention) and the Convention on the Reduction of Statelessness (1961 Convention). The interveners submit that without an accessible and effective procedure to identify stateless persons and determine statelessness Contracting States risk violating their obligations under the ECHR.

III. The Court is invited to consider the general background information regarding law, policy, and practice on statelessness determination and the protection of stateless persons in Italy including, *inter alia,* the barriers to accessing statelessness determination procedures. The Court is also invited to consider common barriers faced by stateless persons across Contracting States in accessing effective statelessness determination procedures. These barriers may severely hinder their access to protection guaranteed under the 1954 Convention and under the ECHR.

I. The obligations of Contracting States to protect stateless persons

Article 8

1. The Court will recall that it has previously considered cases where the lack of adequate procedures for stateless persons to regularise their status and to protect the right to a nationality as an element of personal identity have resulted in interferences with Article 8 of the European Convention on Human Rights (ECHR), particularly where the available information indicates that the applicant is at present a stateless person.[1]

2. For the European Court of Human Rights (the Court) to find a violation of Article 8 ECHR, there are two limbs to satisfy. Firstly, there must be an interference with a person's rights under one or more of the rubrics of Article 8 § 1, which protects the right to respect for private and family life; secondly, an interference with such right may be justified only where it is in accordance with the law, in pursuit of an identified legitimate aim, necessary in a democratic society and proportionate to the aim pursued, under § 2. This provision also entails a positive obligation on Contracting States to ensure the effective enjoyment of the right to respect for private and family life and protection from arbitrary acts or omissions by public authorities.[2] This positive obligation may include the adoption of specific measures to secure this right.[3]

3. This Court's jurisprudence makes it clear that the meaning of private life under Article 8 extends broadly to the protection of, *inter alia,* a person's right to personal autonomy[4] and self-determination;[5] the right to establish and develop relationships with others;[6] the right to establish other aspects of an individual's social

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[1] *Hoti v. Croatia,* application no. 63311/14, judgment of 26 April 2018, § 109-110; *Sudita Keita v. Hungary,* application no. 42321/15, judgment of 12 May 2020; *Kurić and Others v. Slovenia* [GC], application no. 26828/06, judgment of 26 June 2012.
[2] *Hoti v. Croatia* (n 1), § 118; *Kurić and Others v. Slovenia* [GC] (n 1), § 358.
[3] For example, see *M. and M. v. Croatia*, application no. 10161/13, judgment of 3 September 2015, § 176.
[4] *Pretty v. the United Kingdom*, application no. 2346/02, judgment of 29 April 2002, §§ 66, 82; *Nada v. Switzerland,* application no. 10593/08, judgment of 12 September 2012, § 151.
[5] *Usmanov v. Russia,* application no. 43936/18, judgment of 22 December 2020, § 52.
[6] *Pretty v. the United Kingdom* (n 4) § 61.

identity,[7] and the right to a nationality as an important element of personal identity.[8] In the migration context, the Court has commented that "*the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8*".[9] In the cases of *Usmanov*[10] and *Smirnova,*[11] this Court has found that depriving a person of their passport or national identity documents may interfere with that person's social and private life. This interference may manifest itself in daily challenges where a person may frequently be required to prove their identity for administrative purposes, both for mundane tasks and for reasons deemed crucial to a person's needs, such as having access to employment or accessing health care. These challenges and impediments to the enjoyment of private life may be further exacerbated through the use of fines for the failure to carry identification documents.[12]

4. Measures restricting the right to reside in a country may also entail a violation of Article 8 ECHR if they create disproportionate consequences for the private and/or family life of the individuals concerned.[13] This Court has previously recognised that persons at risk of statelessness are particularly vulnerable due to the severe impact of statelessness on the enjoyment of fundamental rights, including economic and social rights.[14] It has considered statelessness to be an 'important element' of a case[15], and in the case of *Sudita Keita* it decided that it "*cannot subscribe to the Government's arguments revolving around the consideration that Article 8 of the Convention cannot be interpreted as requiring the State to grant stateless status to a person*".[16]

5. The Court has previously accepted that the inability for stateless persons to regularise their status may prevent them from leading a normal private life and therefore amount to an interference with the right for respect for private and family life guaranteed by Article 8.[17] This is further supported by the Court's view that social ties that exist between a person and the community in which they live will fall within the scope of the private life rubric of Article 8 § 1.[18]

6. The Court has also noted the adverse consequences of statelessness in several cases and accepted that the uncertainty of residence status has adverse repercussions on a person's private life.[19] It has found that a State's failure to regularise a person's residence status may hamper their prospects of employment and the ability to secure and access health care or health insurance.[20] The Court has emphasised in *Kurić and others v. Slovenia*[21] that the applicants' "erasure" from the Slovenian registration system left the stateless applicants in a state of legal limbo, and therefore in a situation of vulnerability and insecurity.[22]

7. The Court has also found that the scope of Article 8 in relation to an individual's physical and moral integrity may extend to situations of deprivations of liberty.[23] Article 8 ECHR is also intended to protect persons from any arbitrary interference by public authorities and, in this respect, the interveners invite the Court to consider routine arbitrary arrests, the threat of detention and expulsion, criminal prosecution and punishment for mere presence in the territory as an undocumented person, and recurrent identity checks as falling within the scope of Article 8 § 1. Stateless persons also face a heightened risk of arbitrary detention particularly where procedural safeguards to identify and determine statelessness and related barriers to removal are lacking, as they typically face obstacles in accessing documentation, providing evidence and demonstrating ties to a country.[24] Moreover, arbitrary and disproportionately lengthy detention can ensue when the particular vulnerabilities of stateless people are not addressed.[25] The interveners note that such harassment also falls within the concept of moral and physical integrity.

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[7] *Hoti v. Croatia* (n 1), § 119.
[8] *Genovese v. Malta*, application no. 53124/09, judgment of 11 October 2011; *Karassev v. Finland*, application no. 31414/96, decision of 12 January 1999; *Ramadan v. Malta*, application no. 76136/12, judgment of 21 June 2016, § 85; *Ghoumid and others v. France*, applications no. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16, judgment of 25 June 2020; *K2 v. the United Kingdom*, application no. 42387/13, decision of 7 February 2017.
[9] *Maslov v. Austria*, application no. 1638/03, judgment of 23 June 2008, § 63.
[10] *Usmanov v. Russia* (n 5), § 60.
[11] *Smirnova v. Russia,* application no. 46133/99 and 48183/99, judgment of 24 July 2003.
[12] *Alpeyeva and Dzhalagoniya v. Russia*, application no. 7549/09 and 3330/11, judgment of 12 June 2018, §§ 70, 114.
[13] *Hoti v. Croatia* (n 1), § 122.
[14] A detailed report of the impact of deprivation of nationality on the enjoyment of human rights is contained in UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General* A/HRC/19/43 (19 December 2011) available at: https://www.refworld.org/docid/4f181ef92.html.
[15] *Sudita Keita v. Hungary* (n 1), § 35.
[16] Ibid., § 36.
[17] *Hoti v. Croatia* (n 1), §§ 126, 132.
[18] Ibid., § 119.
[19] Ibid., § 126; *Sudita Keita v. Hungary* (n 1), § 34.
[20] Ibid., § 117, 126; *Sudita Keita v. Hungary* (n 1), § 34.
[21] *Kurić and others v. Slovenia* [GC] (n 1).
[22] Ibid., § 302.
[23] *El-Masri v. the Former Yugoslav Republic of Macedonia*, application no. 39630/09, judgment of 13 December 2012, § 248.
[24] European Network on Statelessness, Protecting Stateless Persons from Arbitrary Detention: An Agenda for Change (2017), available at: https://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS_LockeInLimbo_Detention_Agenda_online.pdf.
[25] Ibid.

8. The Human Rights Council has commented that stateless individuals are both unable to fully enjoy their basic rights and freedoms and are more vulnerable to human rights violations. Specifically, stateless persons "may be affected by poverty, social exclusion and limited legal capacity, which have an adverse impact on their enjoyment of relevant civil, political, economic, social and cultural rights, in particular in the areas of education, housing, employment, health and social security".[26] Additionally, statelessness causes individual to be vulnerable to further human rights violations, such as extradition and arbitrary detention as a result of their marginalised status and inability to access effective remedies.[27]

9. **The interveners submit that Contracting States have a positive obligation to provide an effective and accessible procedure enabling the person to have their statelessness or nationality status determined and to receive protection with due regard to their fundamental rights. Considering the frequent adverse consequences of statelessness, the lack of an accessible and effective route to regularisation for stateless persons will not be justified under Article 8 § 2 ECHR if it is a disproportionate interference with an individual's right to respect for private and family life, even when it pursues a legitimate aim (see § 12 below).[28]**

10. The Court has assessed the interpretation and application of Article 8 in the context of regularisation of the status of stateless persons in *Hoti*[29] and *Sudita Keita.*[30] In determining whether an interference with a person's right to respect for private life had occurred, the Court has conducted an assessment that includes (i) assessing the social ties established by the applicant, including the length of their stay and links with other countries or places of residence;[31] (ii) establishing that the uncertainty of personal status had adverse repercussions on the applicant' private life;[32] (iii) examining whether the applicant had effective and accessible means through which to regularise their personal status, including a domestic remedy allowing the competent authority to deal with the substance of a complaint under the ECHR and grant adequate relief;[33] (iv) whether any requirement had been imposed that the applicant was unable to fulfil by virtue of their statelessness.[34]

11. In *Kurić and Others,* this Court affirmed that to be in accordance with the law a restriction must have a basis in law - both domestic and international - be accessible, and be foreseeable as to its consequences.[35] Even in circumstances where there exists a procedure for stateless persons to regularise their status, Article 8 § 2 requires that this procedure **must be accessible** to the person concerned.[36]

12. Any interference with rights under Article 8 must respond to a pressing social need and be proportionate to the aim pursued. This requires the Court to consider whether the interference strikes a fair balance between an individual's right to protection under the ECHR and the community's interests.[37] The interveners observe that when striking this balance, Contracting States are afforded a certain margin of appreciation. However, this margin is narrower in cases concerning vulnerable persons, such as asylum seekers or stateless persons.[38] Omissions interfering with a person's right to respect for private life will violate Article 8 where their impact on the individual's private life is disproportionate.[39] For instance, in *Sudita Keita* and *Hoti,* the requirements demanded of stateless persons in connection with obtaining particular official documents in order to regularise their status were found to be "practically impossible" as the applicants were "required to fulfil requirements which by virtue of their status they are unable to fulfil".[40] **The interveners submit that individuals must have a genuine possibility of accessing measures or mechanisms to regularise their status as stateless persons. Individuals must be provided with clear information about how to access the procedure and eligibility requirements, application procedures must be flexible and accessible (e.g., oral submissions permitted, simple forms and no language restrictions etc.), there must be safeguards in law permitting authorities to initiate a procedure *ex officio*, there should be no restriction on access based on 'lawful' stay or residence and no time limit. There should be no**

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[26] Human Rights Council, Human rights and arbitrary deprivation of nationality A/HRC/20/L.9 (28 June 2012), available at: https://bit.ly/3HjjpVz, 6; UNHCR, Handbook on Protection of Stateless Persons Under the 1954 Convention Relating to the Status of Stateless Persons (2014), available at: https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf.
[27] UNGA, Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities A/73/205 (20 July 2018), available at: https://digitallibrary.un.org/record/1639161?ln=en.
[28] *Hoti v. Croatia* (n 1), § 122; *Maslov v. Austria* (n 9), § 100.
[29] *Hoti v. Croatia* (n 1).
[30] *Sudita Keita v. Hungary* (n 1).
[31] *Hoti v. Croatia* (n 1), § 125-126; *Sudita Keita v. Hungary* (n 1), §§ 33-34.
[32] *Hoti v. Croatia* (n 1), § 124, 126; *Sudita Keita v. Hungary* (n 1), § 34
[33] *Hoti v. Croatia* (n 1), § 124, 131; *Sudita Keita v. Hungary* (n 1), §§ 36, 123.
[34] *Hoti v. Croatia* (n 1), § 126, 137; *Sudita Keita v. Hungary* (n 1), § 39.
[35] *Kurić and Others v. Slovenia* [GC] (n 1), § 341-350.
[36] Ibid., §§ 343, 348-350.
[37] Ibid., § 355; *Nunez v. Norway*, application no. 55597/09, judgment of 28 June 2011, § 68. See also *Ramadan v Malta* (n 8); *Konstatinov v. The Netherlands*, application no. 16351/03, judgment of 26 April 2007.
[38] *Hoti v. Croatia* (n 1), § 122. See also: *Konstatinov v. The Netherlands* (n 37).
[39] *Kurić and Others v. Slovenia* [GC] (n 1), § 355.
[40] *Hoti v. Croatia* (n 1), § 136-137; *Sudita Keita v. Hungary* (n 1), § 39.

stringent requirements that would impose barriers to access the procedure (and applicants should have access to legal assistance.[41]

13. In relation to a State's prolonged failure to regularise statelessness status, the interveners invite the Court to consider whether the necessary procedural safeguards were in place and whether the authorities acted diligently and expeditiously.[42] In particular, the Court will recall that the fact that domestic authorities took over 19 months to reach a final decision regarding an application for statelessness status contributed to its finding that a Contracting State had failed to comply with its positive obligation to provide an effective and accessible procedure enabling the applicant to have the issue of his status determined, resulting in a violation of Article 8.[43] The interveners also note that delays in granting a residence permit may result in delays in an applicant's ability to fulfil naturalisation requirements and therefore further interfere with the right to respect for private and family life .[44] In this context, **the interveners invite the Court to consider whether administrative or judicial delays to determine a person's statelessness status placed that individual at a further and prolonged disadvantage.**[45] **Significant delays may also delay naturalisation procedures and constitute an arbitrary denial of nationality, which may also engage Article 8.**[46]

Article 14 taken together with Article 8 ECHR

14. Discrimination is defined by the Court as *"treating differently, without an objective and reasonable justification, persons in relevantly similar situations".*[47] Article 14 must be applied in relation to another substantive right protected by the ECHR and provides a non-exhaustive list of grounds for finding discrimination.[48] For unjustified discrimination in conjunction with Article 8 § 1 to be found, this Court must be satisfied that said different treatment places individuals at a disadvantage or has a disproportionately prejudicial effect on their private and family life.[49] This Court has previously ruled that a difference in treatment between stateless individuals and either nationals[50] or other non-national residents[51] might amount to discrimination, as well as different treatment in relation to nationality[52] and migration status.[53] It has also found that the concept of Article 8, in the context of Article 14 discriminatory treatment, is wide enough to include individuals' social identity.[54]

15. For a violation to be found, there must be a disproportionate interference which is prejudicial to a particular group, regardless of whether the impact is aimed at that group.[55] For example, the Court has found that circumstances in which an individual was excluded from accessing a public service solely on the basis of their nationality, while satisfying all other substantive requirements, amounted to discrimination.[56] In the Article 8 context specifically, where persons are denied access to, *inter alia,* public services, employment, or healthcare, this may fall within the scope of Article 8 due to the impact such a denial may have on said person's private life.[57] This applies similarly for persons discriminated against on the basis of their nationality status, i.e., stateless persons.

16. Where stateless persons are denied the opportunity or mechanism to regularise their status by having imposed requirements they are unable to fulfil, or where this mechanism is not effective and accessible, this constitutes a difference in treatment relative to other persons in a similar situation, such as asylum seekers or other foreigners,[58] within the meaning of Article 14 in conjunction with Article 8. In circumstances where individuals have shown a difference of treatment, the burden is on the Government of a Contracting State to show that it was justified.[59] This difference in treatment will not be in breach of Article 14 if it can be

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[41] European Network on Statelessness (ENS), Statelessness Index Thematic briefing on Statelessness determination and protection in Europe: good practice, challenges, and risks (September 2021), available at: https://www.statelessness.eu/sites/default/files/2021-09/ENS-Statelessness_determination_and_protection_in_Europe-Sep_2021.pdf; UNHCR, Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons (2016), available at: http://www.refworld.org/docid/57836cff4.html; UNHCR, 'Handbook' (n 26)

[42] *Ramadan v Malta* (n 8), §§ 86-88.

[43] *Sudita Keita v. Hungary* (n 1), § 40.

[44] *Hoti v. Croatia* (n 1), § 71. See also *Ramadan v Malta* (n 8), Dissenting opinion of Judge Pinto de Albuquerque at § 3.

[45] *Ramadan v Malta* (n 8) § 88.

[46] *Genovese v. Malta* (n 8), § 30; *Karassev v. Finland* (n 8).

[47] *Kurić and Others v. Slovenia* [GC] (n 1), § 386; *Andrejeva v. Latvia,* application no. 55707/00, judgment of 18 February 2009, § 81.

[48] *Genovese v Malta* (n 8), § 31.

[49] *Biao v. Denmark,* application no. 38590/10, judgment of 24 May 2016, § 130.

[50] *K2 v. the United Kingdom* (n 8) § 69.

[51] Ibid., § 71.

[52] *Gaygusuz v. Austria*, application no. 17371/90, judgment of 16 September 1996, § 42; *Koua Poirrez v. France*, application no. 40892/98, judgment of 30 September 2003, § 46; *Andrejeva v. Latvia* (n 47) § 87.

[53] *Hode and Abdi v. the United Kingdom,* application no. 22341/09, judgment of 6 November 2012, § 47; *Bah v. the United Kingdom*, application no. 56328/07, judgment of 27 December 2011, § 43.

[54] *Genovese v Malta* (n 8), § 33.

[55] *Kurić and Others v. Slovenia* [GC] (n 1), § 388.

[56] *Andrejeva v. Latvia* (n 47), § 88; *Gaygusuz v. Austria* (n 52), § 47.

[57] *Genovese v Malta* (n 8), § 30.

[58] *Kurić and Others v. Slovenia* [GC] (n 1), § 392.

[59] *Biao v. Denmark* (n 49) § 92; *Kurić and Others v. Slovenia* [GC] (n 1), § 389.

justified as objective and reasonable. In this respect, the Court will examine whether the difference in treatment pursues a legitimate aim under Article 14 ECHR[60] and whether there is a reasonable relationship of proportionality between the means employed and the aims pursued.[61] The proportionality limb requires that any difference in treatment strikes a fair balance between the interests of a community and respect for Convention rights.[62]

17. **The interveners submit that denying stateless persons the possibility to regularise their status, in the same manner as asylum-seekers have an opportunity to claim protection as refugees, does not pursue a legitimate aim within the spirit of the ECHR. Should this Court be satisfied that such a difference in treatment *does* pursue a legitimate aim, it must also be satisfied that the difference is proportionate. In this respect, the interveners invite the Court to consider the vulnerability and legal insecurity of stateless persons and refer this Court to the disproportionate interference with stateless persons' right to respect for private and family life outlined in § 4 of this intervention.**

18. In addition to this, stateless persons may face discrimination in accessing a route to naturalisation because the period of residence only starts to count from the point that a person has a right of residence. Furthermore, stateless persons are at risk of arbitrary detention and expulsion and may be unable to access their economic and social rights as well as their civil and political rights. In this respect, the interveners further emphasise that the lack of right to stay or reside in the territory for applicants for statelessness status may place applicants at an increased risk of expulsion and arbitrary detention as well as interferences with other economic and social rights.

19. **The interveners consider that the cumulative impact of such interferences as a result of a difference in treatment without objective and reasonable justification, is disproportionate and contravenes Article 14 taken together with Article 8 ECHR.**

Article 13 taken together with Article 8 ECHR and Article 14 ECHR

20. The general principles of Article 13 have been set out by the Court in numerous immigration related cases.[63] Article 13 imposes a positive obligation on Contracting States to ensure access to effective remedies for any arguable violation of a Convention protected right.[64] **To be effective, a remedy must be available in practice and in law and an individual's ability to exercise this remedy "*must not be unjustifiably hindered by the acts or omissions of the authorities*".[65]**

21. The availability of an adequate remedy requires it to be accessible, with due consideration of the applicant's circumstances (see § 12). The imposition of requirements such as having a right to reside, submitting applications in writing or in a certain language, or in a manner which require an applicant to have legal representation even in the absence of legal aid being available, may prevent a person from effectively accessing the available remedy (see Section III of this intervention).

22. The interveners further invite the Court to give particular attention to the speediness of a remedy. It has previously concluded that an "adequate" remedy may be undermined by lengthy procedures or delays.[66] The effects of delays or unduly lengthy proceedings to regularise status may be further compounded by long periods of legal uncertainty, the disproportionate interference with the right to private and family life, as well as the vulnerability and insecurity of stateless persons.[67] In such circumstances, this Court has found that the eventual regularisation of residence "*did not constitute 'appropriate' and 'sufficient' redress at the national level*".[68] **The interveners submit that irrespective of whether an individual is *eventually* able to access an effective remedy, that person may nevertheless suffer a violation of Article 13 in conjunction with another provision of the ECHR due to the excessively long nature of judicial procedures. As such, access to an effective national remedy must include that Contracting States ensure that this remedy can be accessed and executed within a reasonable time.**

23. The interveners further invite the Court to refer to the partly concurring, partly dissenting opinion of Judge Vučinić in the case of *Kurić*. In this opinion, it was argued that the absence of effective legal mechanisms created a "legal vacuum" and consequently denied individuals of the right to a legal personality, something which "is a fundamental precondition for the enjoyment not only of the basic human rights and freedoms,

[60] For examples, see Council of Europe, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Updated 31 August 2021, p.18-19.
[61] *Kurić and Others v. Slovenia* [GC] (n 1), § 386; *Gaygusuz v. Austria* (n 52), § 42.
[62] Council of Europe Guide on Article 14 ECHR (n 60), p.19-20.
[63] *M.S.S. v. Belgium and Greece*, application no. 30696/09, judgment of 21 January 2011, §§ 288-292.
[64] *Silver and Others v. the United Kingdom*, application no. 5947/72, judgment of 25 March 1983, § 113.
[65] *M.S.S. v. Belgium and Greece* (n 63) § 290.
[66] Ibid., § 292.
[67] *Kurić and Others v. Slovenia* [GC] (n 1), § 267.
[68] Ibid.

but also of the whole range of different substantive and procedural rights".[69] The failure to provide an effective and accessible mechanism for stateless persons to regularise their status, obtain temporary residence permits or another right to stay or reside results in those persons being denied legal personality.[70] By denying persons of legal personality, they are consequently denied access to an effective legal remedy to challenge unjustified interferences with their rights under Article 8 and Article 14 in conjunction with Article 8.

24. Moreover, the denial of a legal personality, and therefore the ability to access services on a daily basis as well as to establish long-term private life, is an affront to the spirit of the ECHR and runs counter to inherent human dignity.[71] **The combination of interferences with a person's rights under Articles 8 and 14 as established above, and the inability to challenge those interferences through an accessible and effective remedy, deprives stateless persons of a realist possibility of accessing a remedy.**

II. International and European legal standards relating to the rights of stateless persons applicable under Article 53

25. The interveners invite the Court to recall that the ECHR is a living instrument and should be considered in light of present day circumstances and the evolving norms of society.[72] Indeed, the Grand Chamber of this Court has made clear that it has "*never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein".*[73]

26. The Court has made it clear that where there may be protection gaps or where the ECHR is silent, such as the protection of stateless persons and statelessness prevention, it will consider other international instruments to which a Contracting State is party.[74] Although neither evolutive jurisprudence nor the provisions of Article 53 can introduce new rights which are absent from the articles of the ECHR, the Court regularly refers to general principles of international law to inform its approach in the interpretation of existing rights and clarify the scope of protection afforded by the ECHR.

27. Article 53 ECHR requires Contracting States to uphold international standards of instruments to which they are a party when carrying out their substantive and procedural obligations under the ECHR. Italy has acceded to both the Convention Relating to the Status of Stateless Persons (1954 Convention) and the Convention on the Reduction of Statelessness (1961 Convention), which have also been widely ratified by Council of Europe Member States.[75] Through a series of resolutions, the UN General Assembly gave the United Nations High Commissioner for Refugees (UNHCR) the formal mandate to protect the rights of stateless people, as well as to prevent and reduce statelessness, and its guidance should be taken into consideration in the implementation of Contracting States' obligations under the 1954 Convention.[76]

28. In determining whether a person is stateless and should be entitled to protection, States must refer to the definition of a stateless person in Article 1 § 1 of the 1954 Convention.[77] This defines "a person who is not considered a national by any State under the operation of its law" and this definition forms part of customary international law.[78] Under the 1954 Convention and international human rights law, States must ensure that stateless people on their territory have access to juridical rights, the right to work, economic and social rights including housing, education and social security, freedom of movement, identity and travel documents, facilitated naturalisation, and protection from expulsion.[79]

29. As States cannot meet these obligations towards stateless people without a mechanism to identify who on their territory is stateless, the obligation to identify and determine statelessness is implicit in the 1954

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[69] Ibid., Partly Concurring, partly dissenting opinion of Judge Vučinić. See also § 356.
[70] Ibid.
[71] Ibid.
[72] *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989, § 102.
[73] *Demir and Baykara v. Turkey* [GC], application no. 34503/97, judgment of 12 November 2008, § 67.
[74] Ibid.
[75] At the time of writing, of the 47 Council of Europe Members States, 43 are party to the 1954 Convention (Cyprus, Estonia, Poland, and the Russian Federation are not yet party to the 1954 Convention), and 38 are party to the 1961 Convention (Cyprus, Estonia, Poland, the Russian Federation, Turkey, Greece, France, Slovenia, and Switzerland have not yet acceded to the 1961 Convention).
[76] See Executive Committee of the High Commissioner's Programme, Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII) – 2006 (6 October 2006), No. 106 (LVII), available at: https://www.refworld.org/docid/453497302.html. See also UNHCR, 'Handbook' (n 26).
[77] Article 1 § 1 of the 1954 Convention.
[78] International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, Yearbook of the International Law Commission, 2006 Vol. II (Part Two), available at: https://www.refworld.org/docid/525e7929d.html.
[79] Chapters II-V of the 1954 Convention.

Convention.[80] This obligation has been reiterated by UNHCR[81] and the Human Rights Committee.[82] This Court has also noted that Contracting States have an obligation to provide an effective and accessible procedure enabling the applicant to have the issue of their status determined with due regard to their private-life interests under Article 8 ECHR, as noted in *Hoti* and *Sudita Keita*.[83]

30. In line with UNHCR guidelines, the determination of statelessness is best fulfilled through a dedicated statelessness determination procedure (SDP) that is fair, efficient, and easily accessible.[84] Statelessness is an issue which goes to the core of a person's identity, autonomy and ability to integrate into society. Stateless persons, particularly (but not only) those with no status or recognition, face multiple barriers to developing a private and family life, such as lack of access to employment, education and family reunion, and the inability to marry. **The interveners submit that without an accessible and effective procedure to identify stateless persons and determine statelessness, leading to a protection status (see § 35), Contracting States risk violating their obligations under Article 8 to ensure respect for private and family life.**

31. To identify stateless individuals, an effective SDP must be fair, efficient and non-discriminatory, as well as accessible and transparent.[85] Access must be facilitated through clear means with measures in place to support language barriers, availability of free legal aid and the right to an individual interview, with necessary assistance to ensure clarity and transparency of the information provided to applicants. Information about the procedure must be available to potential applicants in a language they understand, and this should be widely disseminated (for example online, through information campaigns, and/or individual counselling). There should be cooperation between agencies that may have contact with stateless people so potential applicants can be referred to the procedure. Safeguards in law permitting State authorities to initiate the procedure *ex officio* are also recommended.[86] In *Sudita Keita*, the Court noted that the authorities failed to inform the applicant of the possibility of applying for statelessness status, despite strong indications that the applicant was stateless.[87] **The interveners submit that for an SDP to be accessible and effective, applicants must be provided with clear information. If there are several procedures available for applicants, information about the eligibility requirements and application process should be provided, particularly where it has become obvious that the person is stateless or at risk of statelessness.**

32. Contracting States should not impose any condition requiring applicants to have a regularised stay in the territory to apply for protection, including requirements such as being 'lawful[ly]' residing in the country to apply for statelessness status (see § 38 below). Such conditions are extremely difficult to meet as stateless migrants often lack the documentation required to apply for entry or residence permits and may prevent or hinder access to protection.[88]

33. Applicants for statelessness status should be entitled to protection while their statelessness determination is pending. For the purposes of the 1954 Convention, applicants should be considered "lawfully [with]in" the Contracting State and be entitled to all rights based on jurisdiction, presence in the territory and lawful stay,[89] which includes access to identity documents, the right to engage in wage earning and self-employment, access to health/education and social security, the right to enjoy freedom of movement and protection from expulsion or arbitrary detention. **The interveners submit that Contracting States should grant a temporary right to reside to applicants for statelessness status, essential in preventing repeated and arbitrary detention of stateless persons in violation of the ECHR and other international obligations.**

34. The assessment of SDP applications must be fair and non-discriminatory. This means ensuring fair evidentiary requirements (a shared burden of proof and an appropriate standard of proof)[90], implementing measures to prevent discrimination against disadvantaged groups, and providing clear guidance to support high-quality decision-making. There should be procedural safeguards in place in an SDP, including free legal aid, interpreting and translation services, the right to an individual interview an adaptation of procedures for applicants with particular needs, including children. The determination should be carried out expeditiously

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[80] UNHCR, Statelessness Determination Procedures and the Status of Stateless Persons ("Geneva Conclusions"), (2010), available at: https://www.refworld.org/docid/4d9022762.html; Gyulai, G. 'The determination of statelessness and the establishment of a statelessness-specific protection regime', in Edwards, A. & Waas, L. (eds) Nationality and Statelessness under International Law, Cambridge: Cambridge University Press (2014), pp. 116-117.
[81] UNCHR, 'Handbook' (n 26), § 144; UNHCR 'Good Practices Paper - Action 6' (n 41), p. 4.
[82] *Zhao v. the Netherlands*, CCPR/C/130/D/2918/2016 (UN Human Rights Committee, 28 December 2020), § 10.
[83] *Hoti v. Croatia* (n 1), *Sudita Keita v. Hungary* (n 1).
[84] UNHCR, 'Handbook' (n 26).
[85] ENS, 'Statelessness Index Thematic Briefing'; ENS, Statelessness Determination and the Protection Status of Stateless Persons (2013), available at: https://www.statelessness.eu/updates/publication/ens-good-practice-guide-statelessness-determination-and-protection-status.
[86] UNHCR, 'Handbook' (n 26), § 68; ENS, 'Statelessness Determination' (n 85).
[87] *Sudita Keita v. Hungary* (n 1), §§ 11, 38.
[88] UNHCR, 'Handbook' (n 26), § 69; ENS, 'Statelessness Determination' (n 85).
[89] UNHCR, 'Handbook' (n 26), § 135.
[90] ENS, 'Statelessness Index Thematic briefing', UNHCR, 'Handbook', § 91; See also UNHCR, Submission by the United Nations High Commissioner for Refugees in the case of AS (Guinea) v. Secretary of State for the Home Department before the Court of Appeal (Civil Division), C5/2016/3473/A (2018), available at: https://www.refworld.org/docid/5a9d54884.html

and decisions issued in writing within an established, reasonable time limit of no longer than six months (or twelve months in exceptional circumstances).[91] There should be a mechanism for cross-referral between the SDP and asylum procedures (giving primacy to the asylum claim), and procedures to recognise or grant nationality, should an entitlement to nationality become apparent during the procedure. There should be an effective right of appeal to an independent body against a negative first instance decision in an SDP.[92]

35. Persons recognised as stateless should be automatically granted a renewable right to reside in the territory for a minimum two years, with good practise entailing up to five years, to facilitate access to all rights protected by the 1954 Convention, including the right to family reunification, work, education, social security, and healthcare. The 1954 Convention also requires Contracting States to facilitate naturalisation for stateless people on their territory as far as possible, providing preferential treatment compared to the general rules for foreign nationals.[93] This is essential to ensure that stateless people can acquire a nationality and resolve their statelessness.

III. **General background information regarding the law, policy and practice on statelessness determination and the protection of stateless persons in Italy**

36. International instruments have automatic legal effect in Italy on accession and ratification, therefore the 1954 Convention has direct effect.[94] Italian law provides for two possibilities for identifying and determining statelessness: an administrative procedure and a judicial procedure.[95] The responsible body for the administrative determination of statelessness is the Ministry of Interior, and a specialised section of the Civil Court in the applicant's place of residence is responsible for the judicial procedure. Statelessness determination is the specific objective of both the administrative and judicial procedures and the authorities are obliged to consider an application in both cases.

37. There are, however, several barriers in accessing the SDP which may result in some stateless applicants being unable to regularise their status and receive the protection afforded by the 1954 Convention. There is no provision in law for either procedure to be initiated *ex officio*, even when there are clear indications of statelessness. There is no referral mechanism between the asylum procedure or entities that may come into contact with stateless persons and the determining authorities, and there is limited information available on how to make a claim of statelessness under either the administrative or the judicial statelessness determination procedures. Whilst there is no time limit for accessing either procedure, applications for both procedures must be made in writing.[96]

38. The main barrier to accessing the administrative procedure is that the Ministry of Interior interprets the 'residence' requirement in the law to mean 'lawful residence' and requires applicants to hold a residence permit and a birth certificate. A similar requirement has been deemed unconstitutional and contrary to international law in Hungary, and this Court has found that imposing such a requirement resulted in a violation of Article 8 ECHR.[97] The requirement to be 'lawful[ly]' staying in the country to apply for statelessness status makes it practically impossible for a person to be recognised as stateless, unless they have acquired a right to stay or reside in the country on another ground (e.g. if they have refugee status. It perpetuates a situation of uncertainty, contravening the principles of the 1954 Convention according to which requirements should not be imposed on stateless persons that they are unable to fulfil by virtue of their status.[98] The exhaustive list of exclusion grounds under the 1954 Convention does not allow States to establish further material conditions or limitations for stateless persons to access protection, including imposing a requirement that the person already has a right to reside in the country in order to apply for statelessness status, nor would such an interpretation be aligned with the aim of the 1954 Convention.[99]

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[91] UNHCR, 'Handbook' (n 26), § 75.

[92] ENS, 'Statelessness Index Thematic briefing' (n 90).

[93] Articles 17-19, 22-24, 32 of the 1954 Convention.

[94] Articles 80 and 87 of the Italian Constitution.

[95] Decreto del Presidente della Repubblica 12 ottobre 1993, n. 572, Regolamento di esecuzione della legge 5 febbraio 1992, n. 91, recante nuove norme sulla cittadinanza, Article 17 (IT); Decreto-Legge 17 febbraio 2017, n. 13 Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonche' per il contrasto dell'immigrazione illegale (IT); As converted into, Legge 13 aprile 2017 n. 46 (GU n.90 del 18-4-2017), Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto all'immigrazione illegal (IT). More information at https://index.statelessness.eu/country/italy.

[96] Bianchini K., Protecting Stateless Persons, International Refugee Law Series, V. II, 2018, pp. 170-171. More information at https://index.statelessness.eu/country/italy.

[97] Constitutional Court of Hungary, Case No. III/01664/2014 (2015); *Sudita Keita v. Hungary* (n 1). For an analysis see Patricia Cabral, '*Sudita Keita v Hungary* – European Court of Human Rights Decision on the Right to Private Life of Stateless Persons', *Statelessness & Citizenship Review*, Vol. 2, Issue 2, 2020, pp. 324-330; Tamás Molnár, 'The Sudita Keita Versus Hungary Ruling of the ECtHR and the Right to Private Life of Stateless Persons: A Long Saga Comes to an End', *Hungarian Yearbook of International Law and European Law* 2021 (9) 1, pp. 279-289.

[98] *Sudita Keita v. Hungary* (n 1), § 39.

[99] Gábor Gyulai, 'The Determination of Statelessness and the Establishment of a Statelessness-Specific Protection Regime' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 130–31; UNHCR, 'Handbook' (n 26), §§ 69–70.

39. According to UNHCR, the determination should be carried out expeditiously and decisions issued in writing within an established, reasonable time limit of no longer than six months (or twelve months in exceptional circumstances).[100] However, the timeframe for the administrative procedure is a maximum of 895 days. This is already an already excessively lengthy duration, much beyond UNHCR recommendations and the parameters established by this Court's case-law (see § 13 above), and in practise it is rarely met, with cases taking years to decide.[101]

40. In the judicial procedure, there is no requirement to demonstrate lawful stay to access the judicial procedure. However, the application must be made in Italian and with the assistance of a lawyer. Free legal aid may be obtained for the judicial procedure subject to eligibility (i.e., low income), but if the applicant does not qualify for legal aid they must pay a fee for the judicial procedure, which is usually 259 EUR for the initial procedure. The main issue concerns the availability and quality of legal aid, which vary considerably depending on the region where an applicant resides.[102]

41. The lack of clarity and information about the different possibilities to apply for statelessness status in Italy may result in applicants being unable to access effective protection, remaining in limbo for several years. Applicants who fail the 'lawful residence' requirement under the administrative procedure and face challenges in accessing adequate legal advice, do not speak the local language or have special procedural needs, may be unable to access the judicial procedure to determine statelessness due to the absence of referral mechanisms and the authorities' inability to initiate procedures *ex officio*.

42. In both the administrative and judicial procedure, decisions are given in writing with reasoning and may be appealed. However, if the application under the administrative procedure is refused by the Ministry of the Interior, including on the grounds that the 'lawful residence' requirement is not met, the applicant will not be referred to the judicial procedure nor informed about the possibility of applying for it.[103]

43. Applicants to either procedure receive limited to no protection pending their application, sometimes remaining at risk of detention and expulsion, and unable to work or access economic and social rights. Italian law does not specify the right to work pending the procedure.[104] Applicants may apply for a temporary residence permit, which is generally granted within the administrative procedure. In the judicial procedure, applicants have to additionally apply to the police for a temporary residence permit and the police has discretion to refuse it. Applicants are only protected against detention if they have a temporary residence permit, and Italy's inconsistent practice in granting residence permits fails to guarantee transparency and certainty to applicants. Following a 2019 judgment of the Court of Cassation, no person should be detained for the purpose of removal while awaiting determination of stateless status,[105] but legislation has not yet been amended to reflect the Court of Cassation's ruling.

44. A person recognised as stateless under either the administrative or judicial procedure is entitled to apply for a renewable residence permit, which is normally granted for two years but practice varies considerably ranging from one to five years and is not consistent across the country. During this time, stateless people can also apply for a travel document, and have permission to work, access to primary, secondary, and higher education, healthcare, and social security, but do not have the right to vote in national elections. While some stateless persons can access some of these rights, depending on the protection afforded in the country where they reside and the determination of their status leading to adequate protection, they may still not be able to enjoy respect for private and family life within the full scope of Article 8.

45. Persons granted statelessness status in Italy may apply for naturalisation after five years, which is reduced from the standard 10 years for third country nationals. However, the period of residence only starts counting as of the moment that the person was granted a residence permit. Any period of residence prior to the applicant regularising their stay will not count towards the period of residence required for naturalisation, which is particularly concerning when there is a practice that prevents persons from applying for statelessness status if they do not meet the 'lawful residence' requirement, or a consistent practice of

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[100] UNHCR, 'Handbook' (n 26), § 75.

[101] Decreto Ministeriale 18 aprile 2000 n.142, p.46; Bianchini K., The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States, PhD thesis, University of York, 2015, p. 100 http://etheses.whiterose.ac.uk/11243/1/PhD%20thesis%20-%20Katia%20Bianchini.pdf. More information at https://index.statelessness.eu/country/italy.

[102] D.P.R., testo coordinato 30/05/2002 n.115, Testo unico in materia di spese di giustizia, Gazzetta Ufficiale N. 139 del 15 Giugno 2002; Corte Costituzionale, ordinanza n. 144 del 14/05/2004; Decreto del Presidente della Repubblica 12 ottobre 1993, n. 572, Regolamento di esecuzione della legge 5 febbraio 1992, n. 91, recante nuove norme sulla cittadinanza, Article 17. See also Bianchini K., The Implementation of the Convention Relating to the Status of Stateless Persons: Procedures and Practice in Selected EU States, PhD thesis, University of York, 2015, pp. 101-102 http://etheses.whiterose.ac.uk/11243/1/PhD%20thesis%20-%20Katia%20Bianchini.pdf.

[103] Ibid. See also Bianchini K., Protecting Stateless Persons. The Implementation of the Convention Relating to the Status of Stateless Persons Across Europe (Brill 2018), pp. 171-172.

[104] Perin G., La Tutela degli apolidi in Italia, Scheda Pratica, June 2017: https://www.asgi.it/wpcontent/uploads/2017/07/2017_sched a-apolidia.pdf; Bianchini K., Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons Across Europe (Brill 2018), pp. 166-167. More information at https://index.statelessness.eu/country/italy.

[105] Court of Cassation, no. 16489 (19 June 2019).

delaying decisions. To obtain nationality through naturalisation in Italy there are language, integration and income requirements, with no exemptions for stateless persons, and applicants must pay for costs.[106]

IV. Overview of similar issues of general interest faced by stateless persons in other Contracting States

46. There are similar and further barriers to accessing an effective SDP in most Contracting States, severely hindering the access to protection that stateless persons are entitled to under the ECHR and the 1954 Convention.[107] Although 43 Council of Europe Member States are party to the 1954 Convention,[108] there continues to be a gap between accession and implementation of these obligations in domestic law and practice. Only thirteen Council of Europe Member States have established dedicated procedures to identify and determine statelessness (SDPs), which lead to a statelessness status.[109]

47. Where SDPs exist, common barriers in the SDP across several Contracting States severely hinder the access to protection to which stateless persons are entitled under the 1954 Convention. These include stringent documentation requirements, lack of information about how to access and apply for statelessness status, language barriers and complex procedures.[110] In most countries, it is left to affected individuals to initiate the SDP on their own behalf, which is particularly problematic considering the lack of information about procedures and how to apply. Many stateless people are unaware of the existence of an SDP or may fear approaching public authorities. Stateless women, children, people with disabilities, older people, marginalised and minoritized groups are particularly disadvantaged in such circumstances if State authorities do not put measures in place to guarantee substantive equality of access to procedures and protection.[111]

48. Few Contracting States provide protection to applicants for statelessness status pending the determination procedure, although an interpretation of the 1954 Convention in line with its object and purpose requires applicants for statelessness status to be considered 'lawfully in' the State for the purposes of the 1954 Convention.[112] The 1954 Convention grants a number of rights to stateless persons who are 'lawfully staying' in a State party, including the right to work (Articles 17 and 19), housing (Article 21), access healthcare and social security (Article 23), and protection from expulsion and detention (Article 31). As this is similar to the protection granted to asylum-seekers under the 1951 Convention Relating to the Status of Refugees, it is recommended that applicants under an SDP are granted the same rights as asylum-seekers. Residence rights for applicants during SDPs vary considerably between countries. In some cases, applicants are not granted any residence rights, in others these are discretionary, which leaves applicants at risk of expulsion and/or detention and facing barriers in accessing social and economic rights.[113]

49. The only way to resolve statelessness is to acquire a nationality. To reduce statelessness in the migratory context, the 1954 Convention requires that States parties facilitate naturalisation for stateless people on their territory as far as possible.[114] States should expedite naturalisation procedures for stateless people, providing preferential treatment compared to the general rules for foreign nationals.[115] However, stateless people face significant barriers to naturalisation in all countries with lengthy residence requirements, citizenship or language testing, high application fees and 'good character' requirements.[116]

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[106] Legge 5 febbraio 1992, n. 91, Nuove norme sulla cittadinanza, Legge 132/18, Art. 6 & Art. 14(1)(e); Sentenza n. 5544 del 11 novembre 2014 Consiglio di Stato: Cons. Stato, sez. III, sent. n. 5262 del 06.11.2018 and Cons. Stato, sez. III, Sent. n. 3121 del 14.05.2019. More information at https://index.statelessness.eu/country/italy.
[107] For more information, see Statelessness Index: https://index.statelessness.eu/; ENS, 'Statelessness Index Thematic briefing'.
[108] Only four Council of Europe Members States are not yet party to the 1954 Convention: Cyprus, Estonia, Poland, and the Russian Federation.
[109] The Council of Europe Member States that have established in law an SDP leading to a dedicated statelessness status are Albania, Bulgaria, France, Georgia, Hungary, Iceland, Italy, Latvia, Moldova, Spain, Turkey, Ukraine, and the United Kingdom, albeit some lack detailed procedural rules in law. More information at: https://index.statelessness.eu/themes/statelessness-determination-and-status.
[110] ENS, 'Statelessness Index Thematic briefing' (n 90).
[111] Ibid.
[112] UNHCR, 'Handbook' (n 26), § 135-136.
[113] Ibid.
[114] Article 32 of the 1954 Convention. UNHCR, 'Good Practices Papers – Action 6'.
[115] ENS, 'Statelessness Index Thematic briefing' (n 90).
[116] Ibid.