

STATELESSNESS AND
THE RIGHT TO
RESPECT FOR FAMILY
AND PRIVATE LIFE









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INTRODUCTION

To be stateless is to have no nationality,¹ and for the millions of stateless people around the world, this can result in widespread denial of human rights and undermine the universal human right to a nationality. It is therefore crucial that States put in place mechanisms to protect stateless people and prevent statelessness, in line with their international obligations. However, most countries in Europe are yet to introduce a dedicated statelessness determination procedure (SDP),² and several countries that have an SDP have shortcomings in the procedure or in the protection subsequently afforded to people recognised as stateless. This results in a failure to uphold the rights of stateless people, leaving many facing years of uncertainty, poverty, social exclusion, risks of arbitrary immigration detention, lack of access to economic and social rights, and other human rights violations.

The courts play an important role at national, regional, and international level in developing and effectively implementing the right to a nationality and the human rights of stateless people. Recognising that role, this briefing outlines how statelessness interferes with the right to respect for private and family life and how the courts can uphold that right. The nexus between nationality, statelessness, and the enjoyment of private and family life has been increasingly recognised by regional courts at the European level, with the potential for this nexus to be developed further.

In Section 1, this briefing draws on the international and regional legal framework relating to statelessness, as well as its connection to the right to respect for private and family life. In Section 2, the briefing turns to consider the jurisprudence of regional courts on the right to respect for private and family life, with a focus on the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). This section is approached thematically and sets out how the jurisprudence from regional courts can reflect States obligations regarding, inter alia, the protection of stateless people, upholding children's right to a nationality and birth registration, implementing effective and accessible routes to regularisation, and preventing the arbitrary denial of nationality. In Section 3, the briefing examines the application of the right to respect for private and family life in domestic jurisprudence across European countries, illustrating the relevance of regional standards in national contexts.

Legal practitioners are encouraged to consult complementary resources and stay up to date on developments, including the Statelessness Case Law Database, the Litigation

¹ The words "national" and "nationality" have various meanings, in some contexts referring to a shared identity, sometimes based on race, ethnicity, language, religion, or affinity and connection to a particular place, people, or political identity. Nationality also has a legal meaning under international law and is often considered equivalent to the meaning of 'citizenship' in domestic law. In this briefing, except where otherwise specified, references to nationality mean nationality solely in the legal sense: the formal bond of a person to a particular State, with the rights and duties inherent in belonging to that State.

² European Network on Statelessness (ENS), Statelessness Determination and Protection in Europe, September 2021.

<u>Toolkit on Statelessness for Legal Practitioners</u>, and other resources available at https://www.statelessness.eu/.

1. ADDRESSING STATELESSNESS WITHIN THE SCOPE OF FAMILY AND PRIVATE LIFE

1.1. Definition of a stateless person

The key international legal instruments relating to the protection of stateless persons and prevention of statelessness are the <u>1954 Convention Relating to the Status of Stateless Persons</u> (1954 Convention)³ and the <u>1961 Convention on the Reduction of Statelessness</u> (1961 Convention).⁴

In determining whether a person is stateless and whether they should be entitled to protection, States must refer to the definition of a stateless person in Article 1(1) of the 1954 Convention, which defines as stateless "a person who is not considered as a national by any State under the operation of its law". This definition forms part of customary international law and is the internationally accepted definition of statelessness. It should be used in the interpretation and application of any other legal instruments referring to stateless persons, including the 1954 Convention as well as the 1961 Convention.

ARTICLE 1, 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS

Definition of the term "Stateless person"

1. For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.

The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws provides that it is for each State to determine under its own law who its nationals are, and "any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State". Likewise, UNHCR has emphasised that the determination of whether the person is recognised as a national should not be based on a Contracting State's interpretation of another State's nationality

³ UN, Convention Relating to the Status of Stateless Persons, Treaty Series, vol. 360, p. 117, 28 September 1954, entered into force 6 June 1960.

⁴ UN, *Convention on the Reduction of Statelessness*, Treaty Series, vol. 989, p. 175, 30 August 1961, entered into force 13 December 1975..

⁵ International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, Yearbook of the International Law Commission, 2006 Vol. II (Part Two): https://www.refworld.org/docid/525e7929d.html.

⁶ League of Nations, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, Treaty Series, vol. 179, p. 89, No. 4136, 13 April 1930, Articles 1 and 2.

laws, but rather be informed by consultations with and written confirmation from the State in question of the nationality status of the person concerned.⁷

A State's response to an enquiry is also not the end of that enquiry as statelessness requires an analysis of how the competent authorities apply the law in practice in a specific case (including any arbitrary discriminatory practices of the competent authority). UNHCR's guidance provides that "where the competent authorities treat an individual as a non-national even though he or she would appear to meet the criteria for automatic acquisition of nationality under the operation of a country's laws, it is their position rather than the letter of the law that is determinative in concluding that a State does not consider such an individual as a national".

A distinction between *de jure* and *de facto* statelessness is not made in this briefing, as it is not relevant for the purposes of determining whether a person is stateless under the 1954 Convention. The term '*de facto* stateless' is not defined in international law and it is recommended to avoid it. Some States have used broader interpretations of the term to unduly exclude from protection persons who are stateless under Article 1(1) of the 1954 Convention. The use of terms such as '*de facto* stateless', including to describe a person who should be considered as a national in accordance with a State's law but is not in practice recognised as a national under the operation of that law, is based on a misinterpretation of the definition of statelessness and creates a risk that States will avoid their obligations under the 1954 and 1961 Conventions. The relevant factor is whether the State recognises in practice the individual as its national, regardless of whether the authorities properly applied national legislation and complied with the rule of law. The aim and purpose of the statelessness conventions is the protection of stateless persons and prevention of statelessness, even when statelessness results from another State's violation of national or international law.

1.2. The rights of stateless persons in international law

Most European States have international obligations to protect stateless persons under core conventions they are a party to. Under the 1954 Convention, States that are Party to the Convention must ensure that stateless persons are granted access to several rights, depending on their degree of attachment to the State. This ensures that stateless persons, particularly those in migration, are granted protection by their host country. Some rights are applicable to any individual who satisfies the definition of stateless person and is either subject to the jurisdiction of a State party or present in its territory

⁷ UNHCR, *Guidelines on Statelessness No. 5* (no 11), paragraph 81. Previously, the ECtHR has placed reliance on UNHCR guidelines, as seen in ECtHR, M.S.S. v. Belgium and Greece, (application no. 30696/09), 21 January 2011, paragraph 295. ⁸ UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, paragraph 23.

⁹ UNHCR, Handbook on Protection of Stateless Persons, 30 June 2014, paragraph 37.

¹⁰ UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, paragraphs 7 and 23. *See also* e.g. de Chickera, A. and van Waas, L., 'Unpacking statelessness' in Bloom, T., Tonkiss, K. and Cole, P. (eds.) *Understanding Statelessness*, London: Routledge (2017), pp. 53-69; World Bank Group, Bronwen Manby, Identification in the Context of Forced Displacement, Identification for Development (ID4D) (June 2016), p. 28; Manby B., 'Schrödinger's Citizenship, Framing Perspectives for the Resolution of Statelessness', *The Statelessness & Citizenship Review*, *6*(1), 5-37 (2024).

(including the right to facilitated naturalisation and to receive identity papers).¹¹ Other rights, however, are conferred on stateless persons depending on whether an individual is "lawfully in", "lawfully staying in" or "habitually resident" in the territory of a State party (e.g. the right to work, economic and social rights including housing, education, and social security, freedom of movement, and protection from expulsion).¹² As States cannot meet these obligations towards stateless persons without a mechanism to identify who on their territory is stateless, the obligation to identify and determine statelessness is implicit in the 1954 Convention.¹³

The 1961 Convention obliges States to contribute to the reduction of statelessness by establishing safeguards against statelessness, including in the context of acquisition and deprivation of nationality. In addition to these instruments, several States also have obligations to prevent and reduce statelessness in line with the 1997 European Convention on Nationality, the 2006 Convention on the Avoidance of Statelessness in Relation to State Succession, and other international human rights instruments. In

This legal briefing will analyse States' obligations to protect the right to respect for private and family life of stateless persons. Interpreting that right should not be done in isolation and must take into account the regional and international instruments the State is a party to. 16 Article 53 of the Charter of Fundamental Rights of the European Union (CFR) states that "[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party". Article 53 CFR can therefore be relied upon in cases before the Court of Justice of the European Union (CJEU) to recall

 ^{11 1954} Convention, Articles 4 (freedom of religion), 12 (personal status), 13 (property), 16(1) (access to courts), 20 (rationing), 22 (public education), 25 (administrative assistance), 27 (the right to identity papers) 32 (facilitated naturalisation). See UNHCR, Handbook on Protection of Stateless Persons, 30 June 2014, paragraphs 132-133.
 12 UNHCR, Handbook on Protection of Stateless Persons, 30 June 2014, paragraphs 132-139; 1954 Convention, Chapters II-V.

¹³ <u>UNHCR, Statelessness Determination Procedures and the Status of Stateless Persons ("Geneva Conclusions") (2010);</u> 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. This obligation has been reiterated by UNHCR and the UN Human Rights Committee. The European Court of Human Rights 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 (see below).

¹⁴ Article 8 of the 1961 Convention.

¹⁵ For example, the International Covenant on Civil and Political Rights (Article 24.3), the International Covenant on Economic, Social and Cultural Rights (Articles 2.2 and 3), the Convention of the Rights of the Child (Articles 2, 3, 7 and 8), the Convention on the Elimination of All Forms of Discrimination against Women

⁽Article 9), the Convention on the Elimination of All Forms of Racial Discrimination (Article 5(d)(iii)), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of All Migrant Workers and Members of their Families, the Convention on the Rights of Persons with Disabilities (Article 18), and the Universal Declaration on Human Rights (Article 15).

¹⁶ Article 31 of the 1965 Vienna Convention on Law of Treaties stipulates that treaties need continuous contextual interpretation. Furthermore, with their initial ratification of the treaty, States accept that the treaty bodies play a key role in the interpretation of human rights treaties.

obligations under the 1954 and 1961 Statelessness Conventions¹⁷ together with other international legal instruments, including the ECtHR's interpretation of a particular provision of the European Convention on Human Rights (ECHR).

ARTICLE 8, EUROPEAN CONVENTION ON HUMAN RIGHTS

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.

Just as the CJEU may look to ECtHR standards, the ECtHR must ensure that rights and freedoms defined in the ECHR are interpreted and applied in a manner which does not diminish rights already guaranteed under other international agreements which a respondent State has ratified. This safeguard is established in Article 53 ECHR. While the ECtHR is primarily concerned with the interpretation of its own provisions, if a Council of Europe Member State is also a party to other international agreements, such as UN treaties, the 1954 Convention or the 1961 Convention, there is an opportunity to present to the ECtHR the relevant legal standards that should apply in light of the universal application of human rights, and in light of the requirements of Article 53 ECHR. Even if a State is not bound by a particular instrument (and Article 53 does not therefore directly apply), the Court may of its own accord choose to examine such international standards to assist its analysis and evaluation of the merits of the case. The Court has consistently noted in its jurisprudence that the ECHR cannot be interpreted in a vacuum and must be interpreted in harmony with the general principles of international law.¹⁹

1.3. Statelessness and the right to respect for family and private life

European Convention on Human Rights: Article 8

Article 8 ECHR protects the right to respect for private and family life, home and correspondence. Article 8 is engaged when one (or more) of the protected rights is identified and at issue, and there has been an interference or a failure to meet a positive obligation in relation to one or more of those rights. Any such interference or failure must

¹⁷ The CJEU has referred to the 1961 Convention in several cases. See e.g. <u>CJEU, JY v. Wiener Landesregierung, Case C-118/20, 18 January 2022</u>.

¹⁸ The ECtHR has referred to the 1954 Convention, see e.g. ECtHR, <u>Sudita Keita v. Hungary (application no. 42321/15)</u>, <u>13 May 2020, and to the 1961 Convention, see e.g. ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012; ECtHR, Emin Huseynov v. Azerbaijan (No. 2) (application no. 1/16), 13 July 2023, paragraphs 60-63.</u>

¹⁹ Among other cases: ECtHR, Güzelyurtlu and Others v. Cyprus and Turkey [GC] (application no. 36925/07), 29 January 2019, paragraph 236; ECtHR, Demir and Baykara v. Turkey (application no. 34503/97), 12 November 2008, paragraph 67. This principle is equally found in other international human rights agreements. For instance, see UN General Assembly, *Convention on the Rights of the Child* (UNCRC), 20 November 1989, United Nations, Treaty Series, vol. 1577, Article 41.

(i) be in accordance with a law which has the requisite "quality of law", ²⁰(ii) pursue an identified legitimate aim as outlined in Article 8(2), and (iii) be necessary in a democratic society and proportionate to the legitimate aim pursued. ²¹ Article 8(2) also places 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, which may include the adoption of specific measures and due diligence to secure this right. ²²

While the right to a nationality is not explicitly guaranteed by the ECHR or its protocols, Article 1 ECHR provides that State parties must secure the Convention's rights and freedom to everyone within their jurisdiction, and the ECtHR has confirmed that interferences with a person's nationality may engage Article 8 ECHR due to the important impact it has on the private life of an individual. For example, ECtHR jurisprudence makes it clear that private life within Article 8 ECHR extends broadly to the protection of, *inter alia*, a person's right to personal autonomy²³ and self-determination;²⁴ the right to establish and develop relationships with others,²⁵ and the right to establish other aspects of an individual's social identity.²⁶ The ECtHR has also held that nationality is an important element of personal identity.²⁷ Similarly, the ECtHR has also found that the right to respect for private life includes an individual's right to have one's birth registered, given its impact on a person's daily life and in an individual's "right to a recognised identity under Article 8" and sense of personal autonomy. The right to a recognised identity also includes, where relevant, access to other identity documents.²⁸

Statelessness and interferences with an individual's nationality have therefore been recognised to fall within the scope of Article 8, which implies that States have an obligation under the ECHR to protect the rights of stateless persons and prevent statelessness. As is elaborated on in Section 2 of this briefing, this includes providing effective and accessible procedures for enabling persons to have their statelessness or nationality status determined;²⁹ ensuring that stateless individuals have a genuine

²⁰ This requirement includes that the relevant law must be accessible and foreseeable. See ECtHR, The Sunday Times v. the United Kingdom (No. 1) (application no. 6538/74), 26 April 1979, paragraph 49.

²¹ States are often granted a certain margin of appreciation in fulfilling ECHR obligations. This margin grants the ECtHR the ability to adjust the rigor of its examination regarding States' adherence to both the negative and positive obligations derived from the ECHR. See for instance, ECtHR, Handyside v. the United Kingdom (application no. 5493/72), 7 December 1976, paragraphs 48-50.

²² ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraph 118; ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 May 2012, paragraph 358.

²³ ECtHR, Pretty v. the United Kingdom (application no. 2346/02), 29 April 2002, paragraphs 66, 82; ECtHR, Nada v. Switzerland (application no. 10593/08), 12 September 2012, paragraph 151.

²⁴ ECtHR, Pretty v. the United Kingdom (application no. 2346/02), 29 April 2002, paragraph 61; <u>ECtHR, Usmanov v.</u> Russia (application no. 43936/18), 22 December 2020, paragraph 52.

²⁵ ECtHR, Pretty v. the United Kingdom (application no. 2346/02), 29 April 2002, paragraph 61.

²⁶ ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraph 119.

²⁷ ECtHR, Genovese v. Malta (application no. 53124/09), 11 October 2011, paragraph 30; ECtHR Karassev v. Finland (application no. 31414/96), 12 January 1999; Ramadan v. Malta (application no. 76136/12), 21 June 2016, paragraph 85; ECtHR, Ghoumid and others v. France (applications nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16), 25 June 2020; ECtHR, K2 v. the United Kingdom (application no. 42387/13), 7 February 2017.

²⁸ ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023, paragraphs 118, 122.

²⁹ ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018. See section 2.1. of this briefing.

possibility of accessing measures or mechanisms to regularise their status;³⁰ fulfilling everyone's right to birth registration and identity documents;³¹ and ensuring that any denial or deprivation of nationality is justified under the ECHR and would not be arbitrary by conducting a careful and thorough assessment.³² The ECtHR has ruled on Article 8 and statelessness in a number of contexts, including regularisation, denial of nationality, deprivation of nationality, and detention, as outlined in the section below.

Stateless persons are particularly vulnerable due to the severe impact of statelessness on the enjoyment of fundamental rights.³³ They are also disproportionately impacted in their ability to enjoy private and family life due to the obstacles that statelessness imposes in their lives,³⁴ and are often denied rights such as access to employment, education, healthcare, and other civil and political rights.

An interference with Article 8 must strike a fair balance between an individual's right to protection under the ECHR and the interests of the Contracting State, ³⁵ and the margin of appreciation afforded to States "will vary in the light of the nature of the issues and the seriousness of the interests at stake". ³⁶ States' margin of appreciation in cases concerning vulnerable persons, such as stateless persons, is therefore narrower. ³⁷ The ECHR has previously recognised that statelessness is an "important element" of a case and noted the adverse consequences of statelessness. ³⁸ In Kurić and others v. Slovenia, it emphasised that the "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. ³⁹ This was also the case in Hoti v. Croatia, where the ECHR noted the adverse consequences of statelessness, ⁴⁰ particularly as it affects the prospects of securing employment, access to healthcare, and pension rights.

EU Charter of Fundamental Rights: Article 7

The right to respect for private and family life is also enshrined in EU law. Article 7 CFR provides that "everyone has the right to respect for his or her private and family life, home and communications". The CJEU has clarified that the rights guaranteed in Article 7 CFR have the same meaning and the same scope as those guaranteed in Article 8 ECHR.⁴¹

³⁰ ECtHR, Sudita Keita v. Hungary, (application no. 42321/15),12 May 2020. See section 2.1. of this briefing.

³¹ ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023. See section 2.3. of this briefing.

³² ECtHR, K2 v. the United Kingdom (application no. 42387/13), 7 February 2017. See section 2.4 of this briefing.

³³ 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.

³⁴ ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraph 122.

³⁵ ECtHR, Vavřička and Others v. the Czech Republic [GC] (application no. 47621/13), 8 April 2021, paragraphs 273-275.

³⁶ ECtHR, Strand Lobben and Others v. Norway [GC] (application no. 37283/13), 10 September 2019, paragraph 211.

³⁷ ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraph 122. See also, ECtHR, Konstatinov v. The Netherlands (application no.16351/03), 26 April 2017.

³⁸ ECtHR, Sudita Keita v. Hungary (application no. 42321/15), 12 May 2020, paragraph 35; ECtHR, Kurić and Others v. Slovenia [GC] (application no. 26828/06), 26 June 2012, paragraph 356.

³⁹ ECtHR, Kurić and Others v. Slovenia [GC] (application no. 26828/06), 26 June 2012, paragraph 302.

⁴⁰ ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraphs 117, 126.

⁴¹ See e.g. CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021, paragraph 60: "as is apparent from the Explanations relating to the Charter of Fundamental Rights [...], in accordance with Article 52(3)

ARTICLE 7, CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

While the CJEU addresses statelessness and nationality deprivation through various provisions of the EU asylum acquis⁴² and while, similarly to the ECHR, the CFR does not contain a provision ensuring the right to a nationality, it has, occasionally, addressed statelessness and nationality issues in the context of the right to respect for private and family life under Article 7 CFR, particularly as regards children's access to identity documents, free movement rights, and EU citizenship (further details in the section below).

As the CJEU emphasised in *Rottmann*, "Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law"⁴³, which includes upholding the EU's values and the rights enshrined in the EU Charter of Fundamental Rights, including Article 7.⁴⁴ The CJEU has also upheld the right of every EU citizen to reside with their family in the Member State of their origin or another Member State, and that the child's family life with their two parents is protected by Article 7 CFR read in conjunction with Article 24(2) CFR, which states that "in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration".⁴⁵ The CFR also protects a child's right to obtain identity documents without discrimination, including on the grounds of their parents sexual or gender identity. In the reasoning behind some of the CJEU's case law on this matter, the CJEU noted that according to the European Court of Human Rights, the ECHR protects the right to family life that the child enjoys with their parents.⁴⁶

The CJEU has also assessed whether Member States' decisions complied with Article 7 CFR in the context of deprivation and loss of nationality. In cases such as Tjebbes and JY, 47 the Court held that, as part of the examination of proportionality, national authorities should ensure that a decision to deprive someone of their nationality, or to refuse granting them a nationality, is consistent with the fundamental rights guaranteed

of the Charter, the rights guaranteed in Article 7 thereof have the same meaning and the same scope as those guaranteed in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950."

⁴² ENS and The AIRE Centre, Litigation Toolkit on Statelessness, Volume II: Jurisprudence, June 2024.

⁴³ CJEU, Case C-135/08, Rottmann, 2 March 2010, paragraph 45.

⁴⁴ CJEU, Case C-118/20, JY v. Wiener Landesregierung, , 18 January 2022, paragraph 61, and CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021, paragraphs 59-64. See ENS and The AIRE Centre, Litigation Toolkit on Statelessness, Volume I: Impact litigation and judicial mechanisms to effect change, June 2024, p. 25 for more information about statelessness in EU law.

⁴⁵ See e.g. <u>CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021,</u> paragraphs 59, 63.

⁴⁶ CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021, paragraph 61, which refers to ECtHR, K. and T. v. Finland (application no. 25702/94), 12 July 2001.

⁴⁷ CJEU, Case C-221/17, Tjebbes and Others v. Minister van Buitenlandse Zaken, 12 March 2019; CJEU, Case C-118/20, JY v. Wiener Landesregierung, 18 January 2022.

by the EU Charter on Fundamental Rights, in particular the right to respect for private and family life according to Article 7 CFR. Where appropriate, this should be read in conjunction with the obligation to take the best interests of the child into primary consideration.

REQUESTS FOR PRELIMINARY RULING REFERENCES TO THE CJEU

National courts may submit questions to the CJEU on the interpretation or validity of EU law. Referring a question to the CJEU is done at the initiative of national courts, whether or not the parties to proceedings have requested that a question be referred. In most cases, the national court has discretion to decide whether to refer a question to the CJEU, but there are situations where it is obliged to do so under EU law.

- **Discretionary procedure** under Article 267(2) TFEU: a national court <u>may</u> refer a question to the CJEU in cases where it considers that a decision by the CJEU on the question is necessary to give judgment. Where the necessity requirement is not established, the CJEU will declare the case inadmissible.
- Mandatory procedure under Article 267(3) TFEU: a national court <u>must</u> refer questions to the CJEU where a question of EU law is raised in a case pending before it and there is no judicial remedy against such court's decision. Where a court fails in its obligation to refer a question to the CJEU, there may be action against the State for damages¹ or an infringement procedure. A national court must give a minimum reasoning for not referring the question. Reference to the CJEU is not mandatory if the point of EU is acte clair that is obvious or has already been clarified by the Court.

The CJEU will then interpret the content of the relevant provisions of EU law and indicate whether national legislation complies with the relevant EU Law (question of interpretation) or rule on the validity of EU law provisions (question of validity). The national court is bound by the interpretation of the CJEU which similarly binds other national courts where the same problem is raised. The CJEU does not determine the outcome of the case but sends its ruling back to the national court for that court to apply it to the case before it. More information is available on the Litigation Toolkit on Statelessness.

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Private and family life in UN instruments

There are various UN instruments that broadly protect the right to a private and family life.⁴⁹ These general provisions could, in theory, offer protection in the context of statelessness. The International Covenant on Civil and Political Rights (ICCPR)⁵⁰ provides

⁴⁸ See <u>European Network on Statelessness and The AIRE Centre, Litigation Toolkit on Statelessness, Volume I: Impact litigation and judicial mechanisms to effect change, June 2024, pp. 27-29.</u>

⁴⁹ The importance of joining UN conventions from a human rights perspective lies in the fact that by ratifying human rights treaties, State Parties become bound by them under international law, whereby the implementation of treaty provisions implying the realisation of human rights standards become legally binding on State Parties. In doing so, States must comply with their human rights obligations and implement these standards, for instance, concerning the grant and loss of nationality.

⁵⁰ UN, *International Covenant on Civil and Political Rights*, Treaty Series, vol. 999, p. 171, 16 December 1966, entered into force 23 March 1976.

that the family is entitled to protection by society and State (Article 23) and that no one shall be subject to arbitrary or unlawful inference with his privacy or family (Article 17). Equally, the UN Convention on the Rights of the Child (CRC)⁵¹ provides that children should not be separated from their parents in most cases (Article 9), that children have the right to family reunification (Article 10) and that every child has a right to a private and family life which should be protected by law (Article 16). While these provisions do uphold the right to a private and family life in a general sense, they do not specifically address statelessness and nationality and how these issues interact with the right to a private and family life. There are, however, specific provisions contained in some UN instruments which are dedicated to addressing statelessness (noted below), and so the more general provisions on the right to respect for private and family life do not usually form the basis for statelessness and nationality cases under UN instruments.

For example, Article 24(3) of the ICCPR enshrines the right of every child to acquire a nationality. As noted in General Comment No. 17 of the Human Rights Committee, the purpose of this provision is to prevent a child from growing up without a nationality, but it does not convey an absolute obligation on States to grant their nationality to every child born on their territory.⁵² It does mean, however, that States are required to take every appropriate measure to ensure that every child has a nationality when they are born.⁵³ Article 24(1) provides that a child cannot be discriminated against in terms of the protection they receive from the State, including on the grounds of race or nationality.

Similarly, Article 7 of the CRC also provides that every child has a right to a nationality from birth, as well as registration immediately after birth.⁵⁴

It is under these specific provisions that claims relating to statelessness are usually considered. For example, in Communication No. 2498/2014 of the Human Rights Committee, the author argued that the Dutch authority's refusal to grant her and her stateless child the 'child budget' as she did not have a resident permit was a violation of, inter alia, Article 23 and Article 24 of the ICCPR. 55 The Committee found that there was a violation of Article 24(1). It found that the mother and her child were vulnerable due to their statelessness, the mother's inability to work, and the denial of their applications for

⁵¹ UN, *Convention on the Rights of the Child*, Treaty Series, vol. 1577, p. 3, 20 November 1989, entered into force 15 January 1992. *See also* UN Committee on the Rights of the Child, General Comment No. 14 (2013) 'on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) UN Doc CRC/C/GC/14. This General Comment elaborates on the preservation of the family environment in the context of the best interests of the child, in paragraphs 58-70, and generally. *See also* UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the UN Committee on the Rights of the Child, Joint General Comment No. 4 (2017) 'regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' UN Doc CMW/C/GC/4-CRC/C/GC/23, paragraphs 27-38. In particular, paragraph 27 notes that the right to protection of family life should be respected regardless of the child's nationality status. General comments serve as an authoritative interpretative tool of the applicable Convention.

⁵² <u>UN Human Rights Committee, General Comment No.17</u>: Article 24 (Rights of the Child), 7 April 1989, paragraph 8. ⁵³ <u>UN Human Rights Committee, General Comment No.17</u>: Article 24 (Rights of the Child), 7 April 1989, paragraph 8.

⁵⁴ See also e.g. the Convention on the Rights of Persons with Disabilities, 2006, Article 2: "Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents." See <u>ENS and The AIRE Centre, Litigation Toolkit on Statelessness, Volume I: Impact litigation and judicial mechanisms to effect change, June 2024</u>, p. 31-33 for more information about statelessness in UN treaties.

⁵⁵ UN Human Rights Committee, Communication No. 2498/2014.

various subsistence-related benefits and the Dutch authorities did not specify why the stateless claimant's circumstances did not amount to the special circumstances which, under Dutch law, would have enabled them to grant the claimant the child budget. It added that the State has an obligation under Article 24(1) to protect the physical and psychological well-being of the child, through subsistence, as the mother had no access to work or income. The Committee adopted the view that, by not doing so, the State violated the child's rights under Article 24(1), and, as the same matters were to be considered under Articles 23(1) and 26, it was not necessary to examine the author's claims under that legal basis. The Committee effectively concluded that overall Article 24(1) offered an adequate basis for the claim to be considered.

⁵⁶ UN Human Rights Committee, Communication No. 2498/2014, paragraph 7.8.

⁵⁷ UN Human Rights Committee, Communication No. 2498/2014, paragraph 7.9.

2. THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE IN REGIONAL COURTS

In this section, the briefing will reflect thematically on the jurisprudence of the ECtHR and CJEU on the right to respect for private and family life. While this section will compare and contrast such jurisprudence, it is important to emphasise that these are two distinct bodies operating within separate legal frameworks. The ECtHR is the international Court of the Council of Europe and interprets the ECHR, applicable to State Parties to the ECHR. By contrast, the CJEU interprets EU law, applicable to Member States of the European Union. Each Court may at its own discretion refer to one another's jurisprudence.

2.1. Protection of stateless persons and routes to regularisation

Many States lack effective national frameworks to put commitments under international human rights law to protect stateless persons into practice. It is important to distinguish between the solutions required to address *in situ* statelessness (impacting people who are stateless in their own country) and statelessness in a migratory context. States should resolve *in situ* statelessness by confirming or granting nationality to those who lack it, and work to identify and eliminate discriminatory laws, policies, and practices that perpetuate intergenerational (risks of) statelessness affecting minoritised and marginalised populations.⁵⁸

For stateless migrants or refugees, States should ensure procedures and mechanisms are in place to **identify and determine** who on their territory is stateless, to formally determine their statelessness, and to grant them adequate protection and rights in accordance with international human rights law. States must ensure that stateless persons 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, and protection from expulsion. As States cannot meet these obligations towards stateless persons without a mechanism to identify who on their territory is stateless, the obligation to identify and determine statelessness is implicit in the 1954 Convention.⁵⁹ 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.⁶⁰

⁵⁸ UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, paragraph 37; <u>ENS, Statelessness</u> <u>Determination and Protection in Europe, September 2021.</u>

⁵⁹ <u>UNHCR, Statelessness Determination Procedures and the Status of Stateless Persons ("Geneva Conclusions") (2010);</u> 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. This obligation has been reiterated by UNHCR, the UN Human Rights Committee, and the European Court of Human Rights 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 (see below).

⁶⁰ UNHCR, Handbook on Protection of Stateless Persons, 30 June 2014, pp. 25-44.

Although the European Court of Human Rights has not explicitly set out that States should introduce statelessness determination procedures *per se*, it has established on several occasions that the failure to provide accessible routes to regularisation for stateless people led to violations of Article 8 ECHR.⁶¹

In **Hoti v. Croatia**, the applicant was a stateless migrant who complained that his situation was uncertain due to the impossibility to regularise his residence status in Croatia. It was argued that the lack of possibility to regularise his status interfered with his right to private life under Article 8 ECHR.

A similar case was brought before the Court a few years later. In **Sudita Keita v. Hungary**, the applicant faced difficulties regularising his legal status for 15 years, which adversely affected his ability to access healthcare and employment and the right to get married. This was mainly due to a requirement under Hungarian

HOTI V CROATIA

A stateless person of Albanian origin, whose parents had been granted refugee status in the former SFRY, had lived in Croatia for nearly 40 years, but his repeated attempts to regularise his residence were largely unsuccessful, apart from short term permits that were granted and withdrawn sporadically. The Court determined that the applicant was stateless and emphasised that statelessness was a relevant factor towards establishing Croatia's violation of Article 8 ECHR.

law that a person should be lawfully staying in the country in order to apply for statelessness status, a condition that was impossible for the applicant to fulfil due to his statelessness.

In both cases, the ECtHR assessed the interpretation and application of Article 8 ECHR in the context of regularisation of the status of stateless persons. In determining whether an interference with a person's right to respect for private life had occurred, the Court conducted an assessment that included (i) assessing the social ties established by the applicant, including the length of their stay and links with other countries or places of residence; (ii) establishing that the uncertainty of personal status had adverse repercussions on the applicant's private life; (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; (iv) whether any

⁶¹ See also ENS, 'An Obligation for Statelessness Determination under the European Convention on Human Rights?' Discussion Paper (September 2014).

⁶² ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraphs 125, 127; ECtHR, Sudita Keita v. Hungary (application no. 42321/15), 13 May 2020, paragraphs 33-34.

⁶³ ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraphs 126, 127; ECtHR, Sudita Keita v. Hungary (application no. 42321/15), 13 May 2020, paragraph 34.

⁶⁴ ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraph 131; ECtHR, Sudita Keita v. Hungary (application no. 42321/15), 13 May 2020, paragraph 36.

requirement had been imposed that the applicant was unable to fulfil by virtue of their statelessness.⁶⁵

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. As such, the ECtHR has found that the inability of 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. The Court found that Croatia and Hungary failed to comply with their positive obligation to provide an effective and accessible procedure or a combination of procedures enabling the applicants to have the issues of their further stay and status determined, amounting to a violation of the right to respect for private and family life under Article 8 ECHR.

KURIC AND OTHERS V SLOVENIA

Eight applicants, some of whom were stateless and others were nationals of former Yugoslavia, failed to request Slovenian citizenship within the six months' deadline provided for permanent residents to apply for citizenship following Slovenia's independence. Two months after the deadline, their names were erased from the Register of Permanent Residents, resulting in them becoming stateless together with approximately 25,671 other people in Slovenia, who became known as "the erased". The Court held that the domestic legal system had failed to clearly regulate the consequences of the "erasure", resulting in a violation of Articles 8(2), 13, and 14 ECHR. In Kurić and Others v. Slovenia,68 the Court held that the domestic legal system had failed to clearly regulate the consequences of the "erasure" of the applicants from the Slovenian register. The Court held that the applicants some of whom were stateless and did not have any Slovenian identity documents were "left for several years in a state of legal limbo, and therefore in a situation of vulnerability and legal insecurity".69 The held also that Court even circumstances where there exists a procedure for stateless persons to regularise their status, Article 8(2) requires that this procedure must be sufficiently foreseeable and accessible to the person concerned. 70 In this case, the applicants could not expect that their status would become irregular

following their 'erasure' and that regularisation through the subsequent Legal Status Act was found not to be expansive enough. The Court has further noted that persons who cannot access routes to regularisation are subject to continuous violations under the Convention. As such, the four-month time limit to apply to the European Court of Human Rights (at the time of the Kurić judgment, this time limit was six months) does not apply

⁶⁵ ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraphs 126, 128, 136-137; ECtHR, Sudita Keita v. Hungary (application no. 42321/15), 13 May 2020, paragraphs 35, 39.

⁶⁶ ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraph 126; ECtHR, Sudita Keita v. Hungary (application no. 42321/15), 13 May 2020, paragraph 34.

⁶⁷ ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraphs 126, 141; ECtHR, Sudita Keita v. Hungary (application no. 42321/15), 13 May 2020, paragraph 41.

⁶⁸ ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 May 2012.

⁶⁹ ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012, paragraph 302.

⁷⁰ ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012, paragraphs 343, 348-349.

where the alleged violations have a continuous character. This was affirmed by the Grand Chamber in *Kurić* as the repercussions of 'erasure' had continued to adversely affect the applicants for more than fifteen years.⁷¹

In the groundbreaking case Ghadamian v. Switzerland, 72 the ECtHR held that States had a positive obligation to regularise foreign nationals who are unlawfully present on their territory.⁷³ In that case, Switzerland refused to issue a residence permit to an elderly foreign national from Iran, who had been living in the country for over 50 years and cited strong family and social ties in Switzerland. The applicant was residing unlawfully because a deportation decision issued against him had not been enforced due to the lack of an Iranian passport.74 The Court found that the arguments put forward by the national authorities (i.e. relating to the applicant's previous decisions to leave the country, his unlawful residence since 2002 and his previous convictions for criminal offences⁷⁵) were relevant but not sufficient grounds, considering the applicant's situation. The Court considered the applicant's extremely long stay in Switzerland, his close ties to the country, his advanced age, the lack of relationships still existing in Iran, and the lack of serious criminal offences since 2005.76 Therefore, the Court found that Switzerland breached its positive obligation under Article 8 ECHR to regularise a foreign national who was unlawfully present, and found that a fair balance had not been struck between the public interest in immigration control and the applicant's right to respect for private life and interests in continuing to reside in Switzerland.⁷⁷ While the applicant in this case was not stateless, the Court's findings are relevant to stateless persons irregularly present within a country. In such a case, the individual's statelessness would also likely be a relevant consideration when striking a fair balance between public interests and the right to respect for private and family life.⁷⁸

The protection of stateless persons and routes to regularisation were also addressed in the cases of **Sisojeva and Others v. Latvia**⁷⁹ and **Konstatinov v. The Netherlands**.⁸⁰ However, in both cases, no violations of Article 8 ECHR were found. In *Sisojeva and Others v. Latvia*, the Court affirmed that Article 8 ECHR cannot be construed as guaranteeing the right to a particular type of residence permit.⁸¹ In this case, the Government's measures would allow one applicant to obtain an identity document for a person with

⁷¹ ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012, paragraphs 240-241.

⁷² ECtHR, Ghadamian v. Switzerland (application no. 21768/19), 9 May 2023.

⁷³ This applies under the ECHR. For a contrast in EU law, see CJEU, Case C-352/23, LF v. Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite, 12 September 2024. In this case, the CJEU held that Member States are not required to grant, on compelling humanitarian grounds, a right to stay to third-country nationals who currently reside unlawfully in its territory, irrespective of the duration of their stay in that Member State.

⁷⁴ ECtHR, Ghadamian v. Switzerland (application no. 21768/19), 9 May 2023, paragraph 53.

⁷⁵ ECtHR, Ghadamian v. Switzerland (application no. 21768/19), 9 May 2023, paragraphs 47-49, 52.

⁷⁶ ECtHR, Ghadamian v. Switzerland (application no. 21768/19), 9 May 2023, paragraphs 55-59.

The ECtHR, Ghadamian v. Switzerland (application no. 21768/19), 9 May 2023, paragraphs 60-64. See also Strasbourg Observers, Eva Sevrin, 'The exceptional case of Ghadamian v. Switzerland: Private life and the obligation to regularize migrants' (August 2023).

⁷⁸ See ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraphs 110, 128.

⁷⁹ ECtHR, Sisojeva v. Latvia (application no. 60654/00), 15 June 2007.

⁸⁰ ECtHR, Konstatinov v. The Netherlands (application no. 16351/03), 26 April 2007.

⁸¹ ECtHR, Sisojeva v. Latvia (application no. 60654/00), 15 June 2007, paragraph 91; See also ECtHR, Kaftailova v. Latvia (application no. 59643/00), 7 December 2007 (struck out), paragraph 51.

statelessness status and a permanent residence permit, and the other two applicants to obtain a five-year temporary residence permit and subsequently apply for long-term permanent residence permits. The Court found that such measures would enable the applicants to remain in Latvia and to exercise their right to respect for private and family life. In *Konstatinov*, the ECtHR affirmed that Article 8 ECHR requires that a balancing exercise be carried out in immigration cases between the competing rights of individuals and the community of the country in question. Becaulty The ECtHR referred to, *inter alia*, the applicant's precarious immigration status, noting that the applicant's family life (the relationship of the applicant and her husband and the birth of their child) was created at a time when they were aware of their precarious immigration status. It also found that the applicant's criminal convictions further rendered her immigration status precarious. Overall the ECtHR was satisfied that the national authorities had struck a fair balance between the applicant's interests of enjoying the right to family life and the wider interests of controlling immigration and in the prevention of crime and disorder.

Finally, in **Dabetic v. Italy**,⁸⁴ the applicant was unable to regularise his status as a stateless person in Italy for over seven years due to shortcomings and delays in the statelessness determination procedure. The ECtHR declared the application inadmissible as it found that the applicant was not a victim of a violation of the ECHR because, after the application was submitted, the Italian court recognised his statelessness status.

Summary and analysis

While the ECtHR case law mandating Contracting States to offer an effective, accessible and foreseeable route to regularisation is promising, the Court has not gone so far as obligating States to establish a statelessness determination procedure. Yet, there is scope for the Court to further develop positive obligations for States to ensure more certainty for stateless persons and determine statelessness. The ECtHR itself may have opened the door to this development, as it stated in Sudita Keita 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". So

As case law shows, stateless persons who remain unidentified are left in an uncertain status that prevents them from leading a normal private life. Therefore, the lack of statelessness determination by the State often interferes with their private and family life, in which case identification and determination of statelessness becomes a necessity for the person to access solutions. The requirement to establish a procedure to

⁸² ECtHR, Konstatinov v. The Netherlands (application no. 16351/03), 26 April 2007, paragraph 46. See also ECtHR, Tuquabo-Tekle and Others v. the Netherlands (application no. 60665/00), paragraph 42.

⁸³ ECtHR, Konstatinov v. The Netherlands (application no. 16351/03), 26 April 2007, paragraphs 48-49, 51. See also ECtHR, Üner v. the Netherlands (application no. 46410/99), 18 October 2006, paragraph 54.

⁸⁴ ECtHR, Dabetic v. Italy (application no. 31149/12), 18 October 2022. See also AIRE Centre and ENS Third Party Intervention, 24 January 2022.

⁸⁵ The principle of subsidiarity underpinning the ECHR system, see e.g. ECtHR, Handyside v. The United Kingdom (application no. 5493/72), 7 December 1976, paragraphs 48-49 should be taken into consideration, as well as the principle of effectiveness, which provides the ECtHR with important guidance on ensuring that rights are practical and effective. See e.g. ECtHR, Airey v. Ireland (application no. 6289/73), 9 October 1979, paragraph 24.

⁸⁶ ECtHR, Sudita Keita v. Hungary (application no. 42321/15), 13 May 2020, paragraph 36.

determine statelessness would therefore enable the State to fulfil its obligations under Article 8 ECHR, and, in accordance with Article 53 ECHR, its obligations under international human rights law, in particular the 1954 Convention.

2.2. Family reunification

The ECtHR has previously found that the meaning of family life under Article 8 includes a right to family reunification for refugees, imposing corresponding obligations on States, 87 which is a standard that applies to all refugees regardless of their nationality status, including stateless refugees. 88 In *Tanda-Muzinga v. France*, the Court also emphasised the importance of the family unit for the enjoyment of private life, stating also that "family reunion was an essential element in enabling persons who have fled persecution to resume a normal life". 89 The Court also held that States are under certain procedural obligations when processing requests for family reunification, namely that decision-making must guarantee "flexibility, promptness and effectiveness" 90 and "give due consideration to the applicant's specific situation". 91

The ECtHR has determined that while States have a certain margin of appreciation regarding family reunification, refugees should benefit from "a family reunification procedure that is more favourable than that foreseen for other [non-nationals]" and the margin of appreciation is narrower in cases concerning vulnerable persons, such as stateless persons and refugees.

Difficulties evidencing statelessness, and the fact that stateless persons often lack documentation to demonstrate their family links by nature of their status, must be taken into account. Denying stateless persons and refugees the right to family reunification solely on the basis that they are not able to provide the documentation required, would be an interference which may be disproportionate and not justified under Article 8(2), in which case would amount to a violation of the ECHR. The ECtHR is currently considering this question in a pending case, *Suji v. Greece*. Suji v. Greece.

The right of stateless persons to family reunification can also be inferred from Article 32 of the 1954 Convention, requiring Contracting States to facilitate "as far as possible [...] the assimilation and naturalization of stateless persons", which implies family reunification given the importance of the family unit. 96 Similarly, the travaux

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⁸⁷ ECtHR, M.A. v. Denmark (application no. 6697/18), 9 July 2021, paragraph 135.

⁸⁸ The Court is yet to rule in a case specifically concerning family reunification in the context of statelessness. See ECtHR, Suji v. Greece (application no. 13250/23), communicated 20 September 2023; see also AIRE Centre, Dutch Refugee Council, ECRE and ENS joint third-party intervention before the ECtHR (23 February 2024), available at:

https://www.statelessness.eu/updates/news/ens-aire-centre-ecre-and-dcr-intervene-ecthr-suji-v-greece.

⁸⁹ ECtHR, Tanda-Muzinga v. France (application no. 2260/10), 10 July 2014, paragraph 75.

⁹⁰ ECtHR, M.A. v. Denmark (application no. 6697/18), 9 July 2021, paragraph 138.

⁹¹ ECtHR, Tanda-Muzinga v. France (application no. 2260/10), 10 July 2014, paragraph 82.

⁹² ECtHR, Tanda-Muzinga v. France (application no. 2260/10), 10 July 2014, paragraph 75.

⁹³ ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraph 122.

⁹⁴ Fisher, B. (2022) 'The Travaux Préparatoires of the 1954 Convention Relating to the Status of Stateless Persons', p. 119. *See also*, ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraphs 126, 136-137.

⁹⁵ ECtHR, Suji v. Greece (application no. 13250/23), communicated 20 September 2023. *See also AIRE Centre*, Dutch Refugee Council, ECRE and ENS joint third-party intervention before the ECtHR (23 February 2024).

⁹⁶ 1954 Convention relating to the Status of Stateless Persons, Article 32.

préparatoires of the 1954 Convention explicitly refer to the purpose of outlining which of the rights given to refugees would extend to stateless persons. This position is supported by UNHCR statements, suggesting that no difference in treatment should exist between refugees with a nationality and stateless persons (including stateless refugees) in their access to family reunification, both in law and in practice.

The failure to provide family reunification for stateless individuals could therefore result in an interference with the right to respect for private and family life. Under Article 8 ECHR, any interference must be in accordance with the law, meaning interference must have "some basis in domestic law", 99 be "compatible with the rule of law", 100 and include "adequate safeguards". 101

This also relates to the inability of stateless persons to obtain necessary documentation to facilitate family reunification, such as identification documents and proof of family ties. Where stateless refugees are denied the opportunity to benefit from family reunification by being imposed requirements they are unable to fulfil, this would amount to a violation of Article 8(2).¹⁰² This is further supported by ECtHR case law in *B.F. and Others v. Switzerland* which stated that "refugees [...] should not be required to 'do the impossible' in order to be granted family reunification."¹⁰³ These principles can be applied to all cases concerning family reunification for stateless people.

By comparison, under EU law, the inability to provide documents is not a justified reason for denying access to family reunification. The CJEU has also found that national authorities must take into account the "specific difficulties faced by [refugees] as regards to obtaining evidence in their countries of origin". While these findings are not directly applicable to the ECHR given its separate legal framework, the ECtHR has found EU law to be relevant in its previous cases concerning family reunification and may at its own discretion consider this in future cases.

⁹⁷ Fisher, B. (2022) 'The Travaux Préparatoires of the 1954 Convention Relating to the Status of Stateless Persons'. See pp. 25-27 for discussion of *mutatis mutandis* application of the 1951 Convention to stateless persons in the 1954 Convention (paragraphs 9-18). To view the original intention to create a Protocol to the 1951 Convention, see discussion on p. viii.

⁹⁸ UNHCR, 'The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation' (2003), paragraph 159.

⁹⁹ ECtHR, Vavřička and Others v. the Czech Republic (applications nos. 47621/13 and 5 others), 8 April 2021, paragraphs 266-269.

 $^{^{100}}$ ECtHR, Big Brother Watch and Others v. the United Kingdom (applications nos. 58170/13, 62322/14 and 24960/15), 25 May 2021, paragraph 332.

¹⁰¹ ECtHR, Bykov v. Russia (application no. 4378/02), 10 March 2009, paragraph 81.

¹⁰² ECtHR, Hoti v. Croatia (application no. 63311/14), 26 July 2018, paragraph 126. See also the discussion on this case earlier in this section.

¹⁰³ ECtHR, B.F. and Others v. Switzerland (application no. 13258/18) 4 July 2023, paragraph 105. For similarities in EU law, see CJEU, Case C-1/23 PPU, 18 April 2023, paragraphs 51-52. The CJEU held that Member States must show flexibility to enable family reunification for applicants who may have issues, for a variety of reasons, in fulfilling the ordinary requirements.

¹⁰⁴ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Article 11(2).

¹⁰⁵ CJEU, Case C-519/18, TB v. Bevándorlási és Menekültügyi Hivatal, 12 December 2019, paragraph 75.

¹⁰⁶ ECtHR, Tanda-Muzinga v. France (application no. 2260/10), 10 July 2014, paragraphs 75-76. The ECtHR referred to Council Directive 2003/86/EC of 22 September 2003, specifically its requirement for national authorities to consider 'other evidence' of the existence of family ties if a refugee is unable to provide official supporting documents.

2.3. Nationality as an element of personal identity: legal parentage, identity documents, birth registration and the right to a nationality

The right to a nationality is not explicitly guaranteed by the ECHR or its protocols. However, through its case law, the ECtHR has recognised that, due to its impact on private and family life, nationality is an element of personal identity and as such may fall within the scope of Article 8 ECHR and attract procedural safeguards inherent in that article. ¹⁰⁷ In the context of denial of nationality, the ECtHR found that this "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". ¹⁰⁸ The ECtHR further held that "[w]hilst Article 8 of the Convention does not guarantee a right to acquire a particular nationality, the fact remains that nationality is an element of a person's identity". ¹⁰⁹

This led the ECtHR to develop its jurisprudence and apply this understanding of nationality into several aspects of an individual's life, thereby building up on the importance of nationality for private and family life. The CJEU has also recognised the importance of nationality, and proof thereof, in the context of children's access to identity documents, linked to the fundamental importance of family life.

Recognition of parent-child relationships

For example, the ECtHR has built on the importance of nationality for personal identity in the context of recognition of parent-child relationship. In the case of Mennesson v. France, the Court recognised that children's uncertainty concerning the possibility of obtaining recognition of a certain nationality is "worrying" and "is liable to have negative repercussions on the definition of their personal identity". 110 This case concerns the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy treatment and couples who had had the treatment. In this case, the French authorities maintained that the surrogacy agreements entered into were unlawful. While the Court concluded that there had been no violation of Article 8 ECHR in respect of the applicants' right to respect for family life, there had been a violation of the applicant children's right to respect for private life as they had been denied status as children of their parents in the French legal system.¹¹¹ The restriction under national law had therefore prevented the recognition and establishment of legal relationships between the children and their biological parents and, as a consequence, it had led to uncertainty about recognition of nationality. As a result, the children were prevented from establishing an element of part of their identity.¹¹² The ECtHR further added that the best interests of the child should

¹⁰⁷ ECtHR, Mennesson v. France (application no. 65192/11), 26 June 2014, paragraph 97.

¹⁰⁸ ECtHR, Genovese v. Malta (application no. 53124/09), 11 October 2011, paragraph 33.

¹⁰⁹ ECtHR, Mennesson v. France (application no. 65192/11), 26 June 2014, paragraph 97.

¹¹⁰ ECtHR, Mennesson v. France (application no. 65192/11), 26 June 2014, paragraph 97.

¹¹¹ ECtHR, Mennesson v. France (application no. 65192/11), 26 June 2014, paragraph 102.

¹¹² ECtHR, Mennesson v. France (application no. 65192/11), 26 June 2014, paragraphs 97, 99.

guide decisions concerning them and be a consideration in their right to acquire nationality.¹¹³

The ECtHR followed a similar reasoning in the recent judgment of *D.B. and Others v. Switzerland* concerning a same-sex couple.¹¹⁴ The relevant domestic law did not afford the child the possibility to recognise the parent-children relationship. For over seven years, it was impossible to obtain recognition of the relationship between the child and the first applicant and there were no alternative means of recognising this relationship. Moreover, because of the non-recognition of the parent-child relationship with the first applicant, the child was in legal uncertainty with regard to his second nationality (American). The ECtHR concluded that this amounted to a disproportionate interference with the child's right to respect for private life and did not serve the child's best interests, insofar as it may place the child in legal uncertainty about their identity in society and deprive them of the possibility of living and developing in a stable environment.¹¹⁵

Building on this jurisprudence, in C v. Italy, the ECtHR reiterated that States must offer a possibility to recognise the parent-child relationship between a child born through gestational surrogacy abroad and their intended biological father. 116 The case concerns the Italian authorities' refusal to transcribe the Ukrainian birth certificate of the applicant, who was born through surrogacy in Ukraine. The Court acknowledged that there was an interference with the applicant's right to private and family life by depriving the legal parent-child relationship with her biological father, causing prolonged legal uncertainty and rendering her stateless. The Court noted that while the nature of the procedure to recognise this relationship remains within the margin of appreciation of each State, the procedure shall (i) be focused on the best interest of the child and exempt from excessive formalism and (ii) ensure the active cooperation of the system to indicate to the parties the best solution available to them in such jurisdiction, independent of the actual request submitted by the parties. 117 In this case, the Court held that by not offering an alternative procedure to recognise the parent-child relationship with her biological father, the Italian authorities failed in their positive obligation to quarantee the applicant's right to respect for her private life. The Court ruled that there was no violation regarding the parent-child relationship with the intended mother, based on the availability of an adoption procedure under Italian law, which would legally recognise this relationship. The Court determined that this situation fell within the acceptable margin of appreciation. 118

¹¹³ ECtHR, Mennesson v. France (application no. 65192/11), 26 June 2014, paragraph 100. See also ECtHR, Labassee v. France (application no. 65941/11), 26 June 2014.

¹¹⁴ ECtHR, D.B. and Others v. Switzerland (applications nos. 58817/15 et 58252/15), 22 November 2022. See also ECtHR, Press release, 22 November 2022; and Nikos Koumoutzis, D.B. and Others v. Switzerland: Tracing the Origins of the Right to Recognition of Same-Sex Parentage in International Surrogacy, Strasbourg Observers, 23 December 2022.

¹¹⁵ ECtHR, D.B. and Others v. Switzerland (applications nos. 58817/15 et 58252/15), 22 November 2022, paragraphs 87-90.

¹¹⁶ ECtHR, C v. Italy (application no. 47196/21), 31 August 2023, paragraph 56.

¹¹⁷ ECtHR, C v. Italy (application no. 47196/21), 31 August 2023, paragraph 68.

¹¹⁸ ECtHR, C v. Italy (application no. 47196/21), 31 August 2023, paragraphs 75-79.

G.T.B. V. SPAIN

The Court found a violation of Article 8, in a groundbreaking case regarding children's right to a birth certificate. The applicant was born in Mexico and repatriated to Spain after an earthquake. Despite his mother's attempts, his birth was not registered upon arrival in Spain as the necessary documentation had been destroyed by the earthquake in Mexico, and he was issued with an ID card only at 21. The Court found that, upon becoming aware of the situation, Spanish authorities were under a positive obligation to assist the applicant in obtaining documentation and the failure to do so resulted in a violation of Article 8 ECHR.

The right to birth registration

In the landmark *G.T.B. v. Spain* case, the ECtHR found that the right to respect for private life includes a right to birth registration. Birth registration is key to preventing statelessness and ensuring every child can acquire a nationality, establishing their legal identity and family links. Yet, some children in Europe still face the risk of statelessness due to persisting barriers to birth registration. The case concerns the consequences of a nine-year delay in processing a request to obtain a birth certificate and its impact on the applicant's private life. The Court found that "the lack of birth registration"

and valid documents can cause significant problems in a person's daily life" 121 and that Spanish authorities failed to carry out their positive obligations to assist the applicant in obtaining documentation, resulting in a violation of Article 8 ECHR. 122

While recognising States' discretion in determining registration procedures, ¹²³ the Court emphasised the positive obligation of authorities to ensure a fair balance between competing interests and to facilitate birth registration to effectively protect individuals' rights. ¹²⁴ Accordingly, the Court went beyond considering whether the procedure to register births had been adequate, stating that public authorities must act diligently to assist individuals in obtaining birth certificates and identity documents in cases where they face obstacles beyond their control. ¹²⁵ The Court also relied on the best interest of the child to have their births registered. ¹²⁶

Importantly, the ECtHR not only established a connection between birth registration and Article 8 but constructed birth registration as an intrinsic feature of the right to respect for private life. Consequently, the scope of its evaluation broadened to include the applicant's "right to a recognised identity" in addition to assessing the repercussions of lacking a birth certificate on the applicant's education and employment prospects. The Court also explicitly noted that the right to respect for private life includes "where

¹¹⁹ ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023, para 118.

¹²⁰ See generally ENS, Birth Registration and the Prevention of Statelessness in Europe (July 2020).

¹²¹ ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023, paragraph 118.

¹²² ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023, paragraph 131.

¹²³ ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023, paragraph 119.

¹²⁴ ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023, paragraph 122.

¹²⁵ ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023, paragraph 124.

¹²⁶ ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023, paragraph 124.

¹²⁷ ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023, paragraph 122.

relevant, [...] access to other identity documents" beyond birth certificates, 128 but has not considered any subsequent cases on that explicitly emphasise a right to identity.

Similarly, the ECtHR is yet to develop a more general obligation to assist individuals and their parents in registering births. In *G.T.B.*, the Court stated that the obligation arose when it became clear that the applicant's mother would not be able to produce the necessary documents, noting the role of authorities "to compensate for the mother's failings". ¹²⁹ As a result, while it took nine years for the authorities to approve the birth registration, the Court found Spanish authorities responsible only for the following four years of delay, for which there was no justification.

Children of LGBTIQ⁺ parents

The CJEU has recognised the importance of nationality - and proof thereof – in the context of children's access to identity documents and right to free movement, linked to the fundamental importance of family life. The 2022 case of **Rzecznik**¹³⁰ concerns the refusal to transcribe into the Polish register of civil status the birth certificate of a child issued by the Spanish authorities which later impacted the child's freedom of movement and ability to obtain a passport. The case raised a number of issues under EU law. One question asked by the referring national court of Krakow was whether Article 7 CFR must be interpreted to mean that, in the case of a minor child who is a citizen of the Union and whose birth certificate issued by a Member State identifies a same sex couple as the child's parents, the Member State of which that child is a national is obliged to transcribe such a birth certificate in order to enable the child to obtain an identity document.¹³¹

The CJEU interpreted Articles 20 and 21 of the Treaty on the Functioning of the European¹³² Union, in conjunction with Articles 7, 21(1) and 24(2) CFR and Article 4(3) of Directive 2004/38/EC¹³³, to mean that Member States are obliged to issue children of same-sex couples identity cards or passports without requiring transcription of birth certificates and also to recognise documents from other Member States that permit the right to move freely and reside within the territory of other Member States.¹³⁴ The CJEU noted that Article 7 CFR, as well as Article 24 CFR guaranteeing the right of the child to have their best interests taken as a primary consideration, and a child's right to maintain a regular and personal relationship and direct contact with their parents, are fundamental considerations.¹³⁵

¹²⁸ ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023, paragraph 118.

¹²⁹ ECtHR, G.T.B. v. Spain (application no. 3041/19), 16 November 2023, paragraph 124.

¹³⁰ CJEU, Case C-2/21, Rzecznik Praw Obywatelskich, 24 June 2022.

¹³¹ CJEU, Case C-2/21, Rzecznik Praw Obywatelskich, 24 June 2022, paragraph 25.

¹³² CJEU, Case C-2/21, Rzecznik Praw Obywatelskich, 24 June 2022, paragraphs 33-40. The Court interpreted the Consolidated version of the Treaty on European Union (2012) OJ C326/13, Articles 20(2)(a) and 21(1), read in conjunction with the Charter of Fundamental Rights of the European Union, Articles 7, 21(1) and 24(2).

¹³³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigendum OJ 2004 L 229, p. 35).

¹³⁴ CJEU, Case C-2/21, Rzecznik Praw Obywatelskich, 24 June 2022, paragraphs 38-40.

¹³⁵ CJEU, Case C-2/21, Rzecznik Praw Obywatelskich, 24 June 2022, paragraph 47.

Similarly, in the case of V.M.A., ¹³⁶ the Bulgarian authorities refused to issue a birth certificate to the daughter of a Bulgarian mother and a British mother, who was born in Spain and issued a Spanish birth certificate with the names of both mothers, on the basis that it could only recognise parents of different genders. The questions referred to the Court included whether it is permissible under Article 20 and 21 TFEU, as well as Articles 7, 24, and 45 of the CFR for the Bulgarian authorities to refuse to issue a birth certificate given the women's refusal to indicate which one is the biological mother. ¹³⁷

Member States must have due regard for EU law when establishing national rules regarding the acquisition of citizenship.¹³⁸ In this case, the national authorities were required to issue the child with a passport or ID card regardless of whether the authorities decided to issue a national birth certificate.¹³⁹ The CJEU referred to, *inter alia*, the right of every EU citizen to reside with their family in the Member State of their origin or other host Member States. It also observed that the child's family life with their two parents is protected by Article 7 CFR read in conjunction with Article 24 CFR on the best interests of the child. According to the CFR, a child's right to obtain immediate registration and identity documents without discrimination as to the sex of the parents is protected.¹⁴⁰ In reaching this conclusion, the CJEU also noted that case law of the ECtHR protects the right to family life that the child leads with their parents.

In addition to referring to the jurisprudence of the ECtHR on the right to private and family life,¹⁴¹ the CJEU observed, *inter alia*, that every EU citizen has the right to reside with their family in their Member State of origin or any other host Member State.¹⁴² It further noted that the obligation for States to recognise birth certificates of other EU Member States does not represent a significant threat to social policy.¹⁴³ Moreover, it held that children whose nationality is not well established, but who are designated as EU citizens via their birth certificates, have the right for their parent-child relationships to be respected by all Member States.

Summary and analysis

The ECtHR and the CJEU have both recognised the importance of nationality in fulfilling the right to respect for private and family life. The significance of nationality for private and family life results from the fact that it is an element of personal identity, as recognised by the ECtHR. Likewise, the CJEU has considered that interferences with nationality, and proof thereof, may compromise the fundamental rights of EU citizens. These Courts have built on this significance in several aspects of private and family life, thereby acknowledging the impact of recognising legal parentage on nationality, birth

¹³⁶ See CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021.

¹³⁷ CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021, paragraph 32.

¹³⁸ CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021, paragraph 38. See also CJEU, Case C-369/90, Micheletti, 7 July 1992, paragraph 10.

¹³⁹ CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021, paragraph 45.

¹⁴⁰ CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021, paragraphs 64-65.

¹⁴¹ The CJEU referenced ECtHR, K. and T. v. Finland, (application no. 25702/94), 12 July 2001, paragraphs 150, 151.

¹⁴² CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021, paragraph 42; See also CJEU, Case C-673/16, Coman and Others, 5 June 2018, paragraph 31.

¹⁴³ CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021, paragraph 56.

registration, and the importance of nationality, and proof thereof, for children to be able to have a family life and reside and travel with their parents.

While States retain a certain sovereignty to define the exact contours of who is entitled to their nationality, they are increasingly restricted by such growing jurisprudence, which requires respect for private and family life, understood to its full extent and including important elements of personal identity such as nationality, when making decisions on nationality. ECtHR case law could further develop the notion of nationality as an element of personal identity and how nationality issues impact an individual's private and family life. It could also expand its case law to additional aspects of such private and family life. These developments could also enrich the concepts discussed in the above sections, such as the need to have an effective route to regularisation of status and how personal identity is affected by the uncertainty of legal status. 144 There is also potential for the CJEU to further develop its jurisprudence and expressly recognise that nationality forms part of an individual's personal identity, to fully explore how nationality issues may be encompassed under the right to respect for private and family life under Article 7 CFR. Considering the importance of nationality as recognised by jurisprudence, the existing case law, and some positive developments in recent jurisprudence, there is scope for litigators to develop further arguments in favour of recognising the right to a nationality in regional instruments.

2.4. Acquisition, denial and deprivation of nationality

There is no explicit right to a nationality in the ECHR. However, the ECtHR has confirmed on several occasions that interferences with a person's access to a nationality may engage Article 8 ECHR, and the procedural safeguards inherent in that Article, because of the impact on the private life of the individual. However, the ECHR acquisition of nationality, as well as situations whereby authorities deny applies to the acquisition of nationality, as also found violations of Article 8 ECHR concerning the deprivation of nationality, which for the purposes of this briefing refers to any loss or withdrawal of nationality that was not voluntarily requested by the individual.

¹⁴⁴ For a comparative analysis with other regional courts, see e.g. Inter-American Court of Human Rights (IACtHR), Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, 19August 2014, where the IACtHR stated that States must ensure immigration laws and practices do not lead to family separation, regardless of the legal status of those involved; and IACtHR, Vélez Loor v. Panama, 23 November 2010, where the IACtHR found that the detention and deportation of a migrant without considering his family ties violated his right to family life.

¹⁴⁵ ECtHR, Petropavlovskis v. Latvia (application no. 44230/06), 13 January 2015, paragraph 73.

 ¹⁴⁶ ECtHR, Ghoumid and others v. France (applications no. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16), 25
 June 2020, paragraphs 43-44; ECtHR, Mennesson v. France (application no. 65192/11), 26 June 2014, paragraph 97.
 147 UN Human Rights Council, Human rights and arbitrary deprivation of nationality: Report of the Secretary-General, 14
 December 2009, UN Doc A/HRC/13/34, paragraph 23. See also ENS, Deprivation of nationality and the prevention of statelessness in Europe, July 2021.

Denial of nationality

In cases such as *Genovese v. Malta*¹⁴⁸, *Karassev v. Finland*, ¹⁴⁹ and *Hashemi and Others v. Azerbaijan*, ¹⁵⁰ the ECtHR confirmed that a denial of nationality can result in a violation of Article 8, including in conjunction with Article 14. ¹⁵¹ In *Genovese*, Maltese authorities denied Maltese nationality to a child on the basis that they were born out of wedlock to a Maltese father and a British mother. Domestic legislation only conferred nationality to children born out of wedlock if the mother was Maltese. The ECtHR rejected the argument advanced by the Maltese Government that this differential treatment was justified on the basis that the

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Maltese authorities denied Maltese nationality to a child on the basis that they were born out of wedlock to a Maltese father and a British mother. Domestic legislation only conferred nationality to children born out of wedlock if the mother was Maltese. The Court rejected the argument advanced by the Maltese Government that this case was justified on the basis that a mother is always certain, whereas a father is not. It concluded that no reasonable grounds were adduced to justify such a difference in the treatment of the applicant and found a violation of Article 14 in conjunction with Article 8 ECHR.

parenthood of a mother is always certain, whereas a father's parenthood is not. Rather, the ECtHR found that the distinguishing factor in this case was that the applicant was born to parents out of wedlock and was thus rendered a non-citizen. Such a distinction is contrary to Article 14 ECHR and the principle of non-discrimination. It concluded that no reasonable grounds were adduced to justify such a difference in the treatment of the applicant and found a violation of Article 14 in conjunction with Article 8 ECHR.

In *Hashemi*, Azerbaijani authorities refused to issue an identity card to children born in Azerbaijan to foreign parents, thereby denying them Azerbaijani nationality, while domestic law applicable at the time of their birth provided that a person born on the territory of Azerbaijan would acquire Azerbaijani nationality. The Court held that the refusal by the national authorities to deliver an identity card to the children is tantamount to a refusal to recognise their Azerbaijani nationality. ¹⁵⁴ It found that the decision of the Azerbaijani authorities had considerable negative consequences for the children and therefore constituted an interference with the exercise by the children of their right to a private life in violation of Article 8. ¹⁵⁵ The Court confirmed that in the case of the denial of nationality, a violation of Article 8 can be found irrespective of whether the applicant

¹⁴⁸ ECtHR, Genovese v. Malta (application no. 53124/09), 11 October 2011.

¹⁴⁹ ECtHR, Karassev v. Finland (application no. 31414/96), 12 January 1999.

¹⁵⁰ ECtHR, Hashemi and Others v Azerbaijan (applications nos 1480/16 and 6 others), 13 January 2022. See also ECtHR, Fariz Ahmadov v. Azerbaijan (application no 32538/10), 30 January 2020, where the ECtHR found that the authorities' refusal to recognise as Azerbaijani national the applicant who possessed official papers attesting to his nationality was in breach of Article 8 ECHR, as this refusal had considerable adverse consequences for his enjoyment of rights in his everyday life and created an uncertainty regarding the legal status of his stay in Azerbaijan, directly affecting his social identity. The Court found that this refusal amounted to an interference with the applicant's right to respect for private life under Article 8.

¹⁵¹ ECtHR, Genovese v. Malta (application no. 53124/09), 11 October 2011, paragraph 30.

¹⁵² ECtHR, Genovese v. Malta (application no. 53124/09), 11 October 2011, paragraph 45.

¹⁵³ ECtHR, Genovese v. Malta (application no. 53124/09), 11 October 2011, paragraphs 46-50.

¹⁵⁴ ECtHR, Hashemi and Others v Azerbaijan (applications nos 1480/16 and 6 others), 13 January 2022, paragraph 46.

¹⁵⁵ ECtHR, Hashemi and Others v Azerbaijan (applications nos 1480/16 and 6 others), 13 January 2022, paragraphs 48-49.

was made stateless or not, based on the considerable negative consequences for the individual's enjoyment of various rights in their daily life. 156

These cases build upon the ECtHR's holdings in the earlier Karassev v. Finland case, which, although rendered inadmissible, stated that an arbitrary denial of nationality may raise an issue under Article 8 ECHR.¹⁵⁷ In *Karassev*, the applicant claimed that Finland violated Articles 8 and 14 ECHR when Finnish authorities allegedly arbitrarily denied him Finnish nationality, thereby delaying the regularisation of his stay. The applicant was born in Finland to parents born in the former Soviet Union. Finnish authorities refused to recognise the applicant as a Finnish national, which recognition was required if the applicant had not acquired another nationality. Finnish authorities believed that the applicant had acquired his parent's Russian nationality at birth, despite Russian authorities issuing statements on the contrary. 158 The Court found the application manifestly ill-founded and therefore inadmissible, as it held that the Finnish authorities' decision was not arbitrary. The Court held that the Russian authorities' statements on the applicant's nationality status, while ambiguous, could imply that he had acquired Russian nationality at the time of his birth. Unfortunately, this case failed to consider key international guidance on the interpretation of the definition of a stateless person, including the need to consider how the authorities treat the individual in practice.

Deprivation of nationality

Having accepted that the acquisition or denial of nationality may raise an issue under Article 8 ECHR, in *Ramadan v. Malta* the Court then accepted that the same principles must apply to the deprivation of a nationality already acquired. ¹⁵⁹ An analysis of whether Article 8 has been breached requires consideration of the consequences of deprivation for the applicant. In *Ghoumid and Others v. France* and *K2 v. the United Kingdom*, ¹⁶¹ the Court once again stated that although the right to nationality is not as such guaranteed by the ECHR, arbitrary deprivation of nationality may engage Article 8 ECHR because of its impact on the private life of the person concerned.

Decisions to deprive a person of their nationality must comply with substantive and procedural standards. A deprivation decision would be arbitrary if it is not prescribed by law, is not the least intrusive means to achieving a legitimate aim and proportionate to the aim pursued, or if adequate procedural safeguards are not in place. Compliance with the principle of proportionality, including ensuring that deprivation is the least

¹⁵⁶ ECtHR, Hashemi and Others v. Azerbaijan (application nos. 1480/16 and 6 others) 13 January 2022, paragraph 48. See also ECtHR, Ahmadov v. Azerbaijan (application no. 32538/10), 30 January 2020, paragraph 46.

¹⁵⁷ ECtHR, Karassev v. Finland (application no. 31414/96), 12 January 1999, p. 10.

¹⁵⁸ ECtHR, Karassev v. Finland (application no. 31414/96), 12 January 1999, pp. 2-7.

¹⁵⁹ ECtHR, Ramadan v. Malta (application no. 76136/12), 21 June 2016, paragraph 85.

¹⁶⁰ ECtHR, Ghoumid and Others v. France (applications no. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16), 25 June 2020.

¹⁶¹ ECtHR, K2 v. the United Kingdom (application no. 42387/13), 7 February 2017, paragraph 49.

¹⁶² UN High Commissioner for Refugees (UNHCR), Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, May 2020, HCR/GS/20/05, paragraphs 62, 91-95; and UN Human Rights Council, Human rights and arbitrary deprivation of nationality: Report of the Secretary-General, 19 December 2013, A/HRC/25/28, §4. See also Brandvoll, J. (2014), 'Deprivation of nationality: Limitations on rendering persons stateless under international law', in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014), pp. 194–216.

restrictive measure, is an integral part of the assessment on whether the decision is arbitrary.

An Article 8 assessment of the consequences of deprivation of nationality must take into account whether the applicant will be rendered stateless or at risk of statelessness. ¹⁶³ It requires an assessment of the applicant's circumstances which should be conducted by the State before imposing measures which may affect the applicant's rights. ¹⁶⁴

In *Usmanov* and subsequent judgments, the ECtHR has developed a two-pronged approach to evaluate whether the deprivation of nationality interferes with an individual's right to private and family life.165 Firstly, the Court examines the consequences of the impugned measure for the applicant. This entails assessing whether the practical effects of the deprivation amount to an interference with the applicant's private life as protected in Article 8, such as loss of legal status, identity documents, or social identity. Secondly, the Court evaluates whether the measure was arbitrary. This involves scrutinising whether the measure was in accordance with domestic law, accompanied by necessary procedural safeguards, and implemented diligently and swiftly by the authorities. In Usmanov, there were three major consequences for the applicant: he was deprived of legal status in Russia; he was left without valid identity documents; and the annulment was a precondition for an entry ban and the decision to remove the applicant from Russia.¹⁶⁶ These consequences were found to interfere with Article 8 ECHR. On arbitrariness, the ECtHR noted, inter alia, that the authorities were not required by domestic law to provide a reasoned decision on the grounds for the annulment decision. As such, it found that the legal framework failed to give adequate protection against arbitrary interference.¹⁶⁷

In *Hashemi and Others v. Azerbaijan*, the ECtHR clarified that the two-pronged approach is the preferred methodology to determine interference with Article 8 as it relates to nationality, ¹⁶⁸ applying to both the deprivation and denial of nationality thereinafter. In determining arbitrariness, the Court also recalled that the notion of 'in accordance with the law' includes the quality of the law in question, requiring it to be accessible to the person concerned and foreseeable as to its effects. ¹⁶⁹ It also reiterated that judicial review is a necessary procedural safeguard against arbitrariness. ¹⁷⁰ In *Emin Huseynov v. Azerbaijan (No. 2)*, a case concerning the termination of the nationality of an Azeri

¹⁶³ ECtHR, Emin Huseynov v. Azerbaijan (No. 2) (application no. 1/16), 13 July 2023, paragraphs 60-66; ECtHR, Ghoumid and others v. France (applications no. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16), 25 June 2020, paragraph 50; ECtHR, K2 v. the United Kingdom (application no. 42387/13), 7 February 2017, paragraph 62.

¹⁶⁴ See ECtHR, K2 v. the United Kingdom (application no. 42387/13), 7 February 2017, paragraph 49.

¹⁶⁵ ECtHR, Usmanov v. Russia (application no. 43936/18), 22 December 2020, paragraph 60.

¹⁶⁶ ECtHR, Usmanov v. Russia (application no. 43936/18), 22 December 2020, paragraph 60. For further engagement, see generally, ECtHR, Usmanov v. Russia (application no. 43936/18), 22 December 2020, Joint Concurring Opinion of Judges Lemmens and Ravarani.

¹⁶⁷ ECtHR, Usmanov v. Russia (application no. 43936/18), 22 December 2020, paragraph 70.

¹⁶⁸ ECtHR, Hashemi and Others v. Azerbaijan (application nos. 1480/16, 3936/16, 15835/16, 28034/16, 34491/16, 51348/16 and 15904/17) 13 January 2022, paragraph 47.

¹⁶⁹ ECtHR, Hashemi and Others v. Azerbaijan (application nos. 1480/16, 3936/16, 15835/16, 28034/16, 34491/16, 51348/16 and 15904/17) 13 January 2022, paragraph 51.

¹⁷⁰ ECtHR, Hashemi and Others v. Azerbaijan (application nos. 1480/16, 3936/16, 15835/16, 28034/16, 34491/16, 51348/16 and 15904/17) 13 January 2022, paragraph 50.

journalist, the ECtHR added that domestic law must indicate the scope of discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.¹⁷¹

The ECtHR also reached relevant conclusions in the case *Johansen v. Denmark*, ruling on the Danish authorities' decision to deprive a dual national of his Danish nationality and to deport him following his conviction for receiving training with ISIS. The Court found no violation of Article 8 ECHR as it held that the deprivation decision was not arbitrary, and that the punishment was proportionate. In its assessment of the consequences of the revocation, the ECtHR took into account the fact that this decision did not render the applicant stateless.¹⁷²

Related to these findings, the ECtHR has also found that Article 8 ECHR may be engaged when an individual is deprived of documents proving their nationality. In the cases of Usmanov¹⁷³ and Smirnova,¹⁷⁴ the ECtHR held that depriving a person of their passport or national identity documents interfered 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.¹⁷⁵

At EU level, the CJEU has also developed case law on deprivation of nationality and the need for decisions to be proportionate and consistent with the right to respect for private and family life in accordance with Article 7 CFR.

In the cases of $Tjebbes^{176}$ and JY^{77} , the CJEU held that, as part of the examination of proportionality, national authorities should ensure that a decision to deprive someone of their nationality or deny granting them nationality is consistent with Article 7 CFR, particularly where this leads to statelessness.¹⁷⁸

In JY, the applicant renounced her Estonian nationality to acquire Austrian nationality as required due to Austria's 'single nationality' approach. Austria retracted the assurance

¹⁷¹ ECtHR, Emin Huseynov v. Azerbaijan (no. 2) (application no. 1/16), 13 July 2023, paragraph 58.

¹⁷² ECtHR, Johansen v Denmark (application no 27801/19), 3 March 2022, paragraphs 52-60. For additional cases where the ECtHR has considered whether the revocation of nationality rendered the applicant stateless, see ECtHR, Alpeyeva and Dzhalagoniya v. Russia (applications nos. 7549/09 and 3330/11), 12 June 2018, paragraph 112; Mansour Said Abdul Salam Mubarak v. Denmark (application no. 74411/16), 22 January 2019, paragraph 69. For additional information on the Court case law and legal argument on this topic, see The United Kingdom, Application no. 37478/20, 19 April 2021.

¹⁷³ ECtHR, Usmanov v. Russia (application no. 43936/18), 22 December 2020, paragraph 60.

¹⁷⁴ ECtHR, Smirnova v. Russia (applications nos. 46133/99 and 48183/99), 24 July 2003, paragraph 97.

¹⁷⁵ ECtHR, Alpeyeva and Dzhalagoniya v. Russia (applications nos. 7549/09 and 3330/11), 12 June 2018, paragraphs 70, 114.

¹⁷⁶ CJEU, Case C-221/17, Tjebbes and Others v. Minister van Buitenlandse Zaken, 12 March 2019, paragraph 45.

¹⁷⁷ CJEU, Case C-118/20, JY v. Wiener Landesregierung, 18 January 2022, paragraph 61.

¹⁷⁸ For an additional case of the CJEU concerning a stateless person and Article 7 CFR, see also CJEU, Case C-720/17, Bilali, 23 May 2019.

that the applicant would be granted Austrian nationality on the grounds that she had committed road traffic offences, thereby rendering the applicant stateless. The CJEU confirmed that this situation falls within the scope of EU law, and held that, as part of the examination of proportionality, national authorities should ensure that the decision to revoke an assurance is consistent with the fundamental rights guaranteed by the EU Charter on Fundamental Rights, in particular the right to respect for family life according to Article 7 CFR, where appropriate read in conjunction with the obligation to take into consideration the best interests of the child. The Court found that the decision was not proportionate to the gravity of the offences, "in the light of [its] significant consequences for [the applicant's] situation, as regards, in particular, the normal development of her family and professional life". The applicant's permanent loss of their EU citizenship was not justified.¹⁷⁹

In *Tjebbes*, Dutch authorities refused to examine the applications of Dutch nationals, with dual nationality of a non-EU country, for renewal of their Dutch passports. The decision was based on the fact that they had lost their Dutch nationality because they possessed a foreign nationality and had their principal residence for an uninterrupted period of 10 years outside the Netherlands and the EU. As in *JY*, the CJEU held that the loss of nationality must respect the principle of proportionality, which includes consistency with Article 7 CFR, and found that national authorities must perform an individual assessment of the consequences of that loss for the applicants, including difficulties in traveling to the EU to retain genuine and regular links with family members and pursuing their professional activity.¹⁸⁰

Summary and analysis

The CJEU has developed promising case law that confirms that certain nationality issues fall within the scope of EU law and has required the proportionality assessment of decisions of deprivation of nationality to take into account the impact of deprivation on private and family life. The CJEU could further explicitly require consideration of the consequences of statelessness as part of the Member States' deprivation decision. This would also ensure that, in accordance with Article 53 CFR, Member States also fulfil their obligations under international human rights law, in particular the 1961 Convention, which strictly limits the possibility of deprivation that would result in statelessness.¹⁸¹

ECtHR case law has interpreted the issue of nationality as falling under the scope of Article 8 ECHR, acknowledging its impact on an individual's private life. With regard to deprivation of nationality, it has established the obligation for States to assess the consequences of this decision for the individual and, in so doing, to take into account whether the applicant would be rendered stateless or at risk of statelessness. The Court has therefore recognised that deprivation has particularly severe consequences where this renders the individual stateless. There is potential to further develop this case law to

¹⁷⁹ CJEU, JY v. Wiener Landesregierung, Case C-118/20, 18 January 2022, paragraphs 61, 73.

¹⁸⁰ CJEU, Case C-221/17, Tjebbes and Others v. Minister van Buitenlandse Zaken, 12 March 2019, paragraphs 45-46.

¹⁸¹ 1961 Convention, Article 8(1). The provision in domestic law to allow for the deprivation of an individual's nationality if that person would thereby become stateless is also prohibited by Article 7(3) of the European Convention on Nationality. This applies to all States that have ratified this Convention.

ensure that, in accordance with Article 53 ECHR, States fully comply with their obligations under international human rights law, in particular the 1961 Convention.

2.5. Deprivation of liberty and removal procedures

Both the CJEU and the ECtHR have established limits on the detention of stateless people especially when there is no reasonable prospect of removal, but these have been mostly assessed through either Article 5 ECHR (right to liberty and security) or EU law relating to return and removal procedures. However, the ECtHR has occasionally found that situations of deprivation of liberty may also come within the scope of Article 8 in relation to an individual's physical and moral integrity. 183

Article 8 ECHR is intended to protect persons from any arbitrary interference by public authorities with their right to respect for private and family life, home and correspondence. In the context of stateless persons, this may include 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. Stateless persons 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. Moreover, arbitrary and disproportionately lengthy detention can ensue when the particular vulnerabilities of stateless people are not addressed. 185

Detention of stateless persons as an interference with private and family life was addressed by the ECtHR in the case of Al-Nashif v. Bulgaria. The case concerned a stateless person of Palestinian origin born in Kuwait, who resided in Bulgaria with his two children who were both born in Bulgaria and hold Bulgarian nationality. His residence permit was withdrawn on the basis that he had engaged in alleged religious extremism. He was later detained and deported to Syria. The Court found violations of Articles 8 and 13 (right to an effective remedy) ECHR, as well as Article 5(4) (right to liberty and security). In relation to Article 8 ECHR, the ECtHR noted that the applicant and his first wife arrived in Bulgaria as a married couple before having children and continued living in the country until the day of his arrest. While the applicant had a separate Islamic marriage to his second wife, there had been no interruption to the family link between the applicant and his first wife. The applicant had also argued that the family had not developed strong links in Syria: they had never lived there, nor had they developed any

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¹⁸² The cases that engage Article 5 ECHR are not addressed in this briefing. For further information, see <u>ENS and The AIRE Centre</u>, <u>Litigation Toolkit on Statelessness</u>, <u>Volume II: Jurisprudence</u>, June 2024, pp. 14-16. See also (recast) EU Council Directive 2024/1346 of 14 May 2024 ('Reception Conditions Directive') for EU law relating to return and removal procedures.

¹⁸³ ECtHR, El-Masri v. the Former Yugoslav Republic of Macedonia (application no. 39630/09), 13 December 2012, paragraph 248.

¹⁸⁴ See generally, ENS, Protecting Stateless Persons from Arbitrary Detention: An Agenda for Change (2017).

¹⁸⁵ ENS, Protecting Stateless Persons from Arbitrary Detention: An Agenda for Change (2017), pp. 9-11.

¹⁸⁶ ECtHR, Al-Nashif v. Bulgaria (application no. 50963/99), 20 June 2002. See also ECtHR, Amie and Others v. Bulgaria (application no. 58149/08), 12 February 2013, paragraphs 88-102.

¹⁸⁷ ECtHR, Al-Nashif v. Bulgaria (application no. 50963/99), 20 June 2002, paragraph 113.

real connection in the country. It was further argued that Mr Al-Nashif's deportation and economic and legal obstacles prevented the family establishing a home in Syria. However, this was not addressed by the Court in the context of its Article 8 examination. 189

In respect of the interference with Article 8(1), the applicant was recognised as a lawful resident in Bulgaria at the time of his arrest. It was also noted that his children were born in Bulgaria, had acquired Bulgarian nationality, had started school and were raised in Bulgaria. The deportation of the applicant therefore interfered with the right to family life. Where national security is balanced against family life, measures affecting fundamental human rights must be subject to adversarial proceedings before an independent body to review the reasons for the decision. The ECtHR therefore concluded that the applicant's deportation order did not provide the necessary safeguards against arbitrariness and was not based on legal provisions meeting ECHR requirements of lawfulness. The such, there had been a violation of Article 8.

In **Slivenko v. Latvia**,¹⁹² the applicants were a mother and daughter of Russian origin. After Latvia's independence, the applicants were added to the register of Latvian residents. Deportation orders were made to both applicants, the mother and daughter, as well as the applicant's husband who was a Soviet officer discharged from the army. They were later arrested and detained, and subsequently moved to Russia and acquired Russian citizenship.

The ECtHR found that the applicants' removal from Latvia, the country where they had developed since birth and formed their personal, social networks, constituted an interference with their right to private life and home. Although the Court found that the removal had been in accordance with the law, and that it was imposed to protect national security, which is a legitimate aim, it nevertheless held that the interference was not justified as it was not necessary in a democratic society. The ECtHR stated that while the scheme for the withdrawal of foreign troops and their families was not contrary as such to Article 8 ECHR, individual circumstances need to be taken into account. In this case, the Court found that the applicants were sufficiently integrated into Latvian society, and that they did not develop personal, social, and economic ties in Russia similar to those they developed in Latvia. The Court therefore held that Latvia did not strike a fair balance between the legitimate aim of the protection of national security and the applicants' right to respect for private life and found that there had been a violation of Article 8 ECHR.

¹⁸⁸ ECtHR, Al-Nashif v. Bulgaria (application no. 50963/99), 20 June 2002, paragraph 103.

¹⁸⁹ This point was addressed in the Joint partly dissenting opinion of judges Makarczyk, Butkevych and Botoucharova where it was noted that Mr Al-Nashif had close relatives in Syria and had previously declared Syria as his country of residence.

¹⁹⁰ ECtHR, Al-Nashif v. Bulgaria (application no. 50963/99), 20 June 2002, paragraphs 122-124.

¹⁹¹ ECtHR, Al-Nashif v. Bulgaria (application no. 50963/99), 20 June 2002, paragraph 128.

¹⁹² ECtHR, Slivenko v. Latvia (application no. 48321/99), 9 October 2003.

¹⁹³ ECtHR, Slivenko v. Latvia (application no. 48321/99), 9 October 2003, paragraphs 113-129.

¹⁹⁴ ECtHR, Slivenko v. Latvia (application no. 48321/99), 9 October 2003, paragraph 122.

¹⁹⁵ ECtHR, Slivenko v. Latvia (application no. 48321/99), 9 October 2003, paragraphs 93-129.

Summary and analysis

The ECtHR has found violations of the right to respect for private and family life of stateless applicants facing removal proceedings, particularly due to the interference with the private life and home that the applicants had established in the country from which they would be deported. However, the Court could further take into consideration that statelessness constitutes a relevant individual circumstance in removal decisions. Statelessness should also be considered a juridically relevant fact in detention and removal decisions to prevent unlawful and arbitrary detention when there is no reasonable prospect of removal. This should extend to decisions concerning alternatives to detention for stateless persons. The jurisprudence could also go a step further in noting that States should take into account the consequences of statelessness and provide routes to regularisation for people who do not have a reasonable prospect of removal, particularly due to their statelessness.

2.6. Right to respect for private and family life in conjunction with other ECHR provisions

Prohibition of discrimination

Discrimination is defined by the ECtHR as "treating differently, without an objective and reasonable justification, persons in relevantly similar situations". Article 14 ECHR provides a non-exhaustive list of grounds for finding discrimination and must be applied in relation to another substantive right protected by the ECHR. 198

ARTICLE 14. EUROPEAN CONVENTION ON HUMAN RIGHTS

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.

For unjustified discrimination in conjunction with Article 8(1) to amount to a violation, a difference in treatment must be found to place individuals at a disadvantage or to have a disproportionately prejudicial effect on their private and family life.¹⁹⁹ For example, a difference in treatment between stateless individuals and either nationals²⁰⁰ or other

¹⁹⁶ See ENS, Protecting Stateless Persons from Arbitrary Detention: An Agenda for Change (2017), p. 14.

¹⁹⁷ ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012, paragraph 386; ECtHR, Andrejeva v. Latvia (application no. 55707/00), 18 February 2009, paragraph 81.

¹⁹⁸ ECtHR, Genovese v. Malta (application no. 53124/09), 11 October 2011, paragraph 31.

¹⁹⁹ ECtHR, Biao v. Denmark (application no. 38590/10), 24 May 2016, paragraph 130.

²⁰⁰ ECtHR, K2 v. the United Kingdom (application no. 42387/13), 7 February 2017, paragraph 69.

non-national residents²⁰¹ of a country may amount to discrimination, as can different treatment due to nationality²⁰² or migration status.²⁰³

A disproportionate interference with private and family life must be prejudicial to a particular group, regardless of whether the impact is aimed at that group. ²⁰⁴ For example, where an individual is excluded from accessing a public service *solely* on the basis of their nationality, while satisfying all other substantive requirements, it will amount to discrimination. ²⁰⁵ Denying individuals access to public services, employment, or healthcare may fall within the scope of Article 8 due to the impact such an interference may have on said person's ability to lead a normal private life. ²⁰⁶ These points apply similarly for persons discriminated against on the basis of their nationality status, i.e., stateless persons.

The principle of non-discrimination has also been addressed in the context of stateless persons being denied the opportunity to regularise their status. This is particularly the case where imposed requirements are difficult or challenging to fulfil or where the regularisation mechanism is not effective or accessible. In such cases, this amounts to a difference in treatment relative to other persons in similar situations, such as asylum seekers or other foreigners.²⁰⁷ Where there is a difference in treatment, the relevant State must show that it was justified.²⁰⁸ In this respect, the ECtHR will examine whether the difference in treatment pursues a legitimate aim under Article 14 ECHR²⁰⁹ and whether there is a reasonable relationship of proportionality between the means employed and the aims pursued.²¹⁰

Stateless persons may also face discrimination in conjunction with the right to private and family life in accessing a route to naturalisation; through the use of arbitrary detention and expulsion; as well as restrictions to their economic and social rights and civil and political rights.

²⁰¹ ECtHR, K2 v. the United Kingdom (application no. 42387/13), 7 February 2017, paragraph 71.

²⁰² ECtHR, Gaygusuz v. Austria (application no. 17371/90), 16 September 1996, paragraph 42; ECtHR, Koua Poirrez v. France, application no. 40892/98, 30 September 2003, paragraph 46; ECtHR, <u>Andrejeva v. Latvia (application no. 55707/00)</u>, 18 February 2009, paragraph 87.

²⁰³ ECtHR, Hode and Abdi v. the United Kingdom (application no. 22341/09), 6 November 2012, paragraph 47; ECtHR, Bah v. the United Kingdom (application no. 56328/07), 27 December 2011, paragraph 43.

²⁰⁴ ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012, paragraph 388.

²⁰⁵ ECtHR, Andrejeva v. Latvia (application no. 55707/00), 18 February 2009, paragraph 88; ECtHR, Gaygusuz v. Austria (application no. 17371/90), 16 September 1996, paragraph 47.

²⁰⁶ ECtHR, Genovese v. Malta (application no. 53124/09), 11 October 2011, paragraph 30.

²⁰⁷ ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012, paragraph 392. See also ECtHR, Suji v. Greece (application no. 13250/23), communicated 20 September 2023; see also AIRE Centre, Dutch Refugee Council, ECRE and ENS joint third-party intervention before the ECtHR (23 February 2024).

²⁰⁸ ECtHR, Biao v. Denmark (application no. 38590/10), 24 May 2016, paragraph 92; <u>ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012</u>, paragraph, 389.

²⁰⁹ For example, see <u>Council of Europe</u>, <u>Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention</u>, <u>Updated 31 August 2021</u>, pp.18-19.

²¹⁰ ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012, paragraph 386; ECtHR, Gaygusuz v. Austria (application no. 17371/90), 16 September 1996, paragraph 42.

The right to an effective remedy

The right to an effective remedy must similarly be applied in relation to another substantive provision of the ECHR. Article 13 ECHR imposes a positive obligation on Contracting States to ensure access to effective remedies for any arguable violation of a Convention protected right.²¹¹ Any remedy must be available in practice and in law and the ability to exercise the remedy "must not be unjustifiably hindered by the acts or omissions of the authorities".²¹²

ARTICLE 13, EUROPEAN CONVENTION ON HUMAN RIGHTS

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 effects of delays or lengthy proceedings may be compounded by, for example, periods of legal uncertainty and the vulnerability of stateless persons.²¹³ As such, the 'speediness' of a remedy is also a relevant consideration.²¹⁴ The fact that individuals may be able to *eventually* access a remedy may still result in a violation of Article 13 ECHR if it cannot be accessed and executed within a reasonable time.

Due to the vulnerability and precarious status of stateless persons, the failure to provide effective and accessible mechanism to regularise status and obtain residence permits may effectively deny stateless persons of legal personality.²¹⁵ Stateless persons may therefore be routinely denied access to effective remedies to challenge unjustified interferences with the right to private and family life.

²¹¹ ECtHR, Silver and Others v. the United Kingdom (applications nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75), 25 March 1983, paragraph 113.

²¹² ECtHR, M.S.S. v. Belgium and Greece (application no. 30696/09), 21 January 2011, paragraph 290.

²¹³ ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012, paragraph 267.

²¹⁴ ECtHR, M.S.S. v. Belgium and Greece (application no. 30696/09), 21 January 2011, paragraph 292.

²¹⁵ <u>ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012,</u> Partly Concurring, Partly dissenting opinion of Judge Vučinić. *See also* paragraph 356.

3. THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE IN DOMESTIC COURTS

The right to respect for private and family life may also be raised at domestic level, either by directly invoking the application of Article 8 ECHR or Article 7 CFR before the national courts, or by relying on an equivalent provision in national law. There are several examples of cases where national courts have clarified the scope and application of provisions of national law in the context of statelessness, while making reference to Article 8 ECHR.²¹⁶

Routes to regularisation and protection

Some domestic courts have made findings which recognise that the absence of routes for stateless people to regularise their stay, or barriers to accessing existing routes, constitute an interference with the right to respect for private and family life.

According to the Supreme Administrative Court of **Czechia**,²¹⁷ the failure of the State to grant a right to stay on the territory while awaiting the outcome of a statelessness determination procedure is a violation of the right to respect for private and family life. The Court held that applicants for statelessness status should be issued documentation pending their application in the same way that is issued to asylum-seekers.

Stateless people may also remain in a state of 'legal limbo' if they are unable to access routes to protection due to requirements they cannot fulfil. Until 2015, **Hungary** only allowed people who were "lawfully staying" in the country to apply for statelessness status, which made it practically impossible for people to be recognised as stateless. The Constitutional Court²¹⁸ concluded that stateless persons were not provided under national law with an effective and accessible procedure to determine statelessness status in Hungary, which was later confirmed by the ECtHR in the same case (*Sudita Keita v. Hungary*²¹⁹).

Article 8 ECHR has also been argued as the basis to require registration of a person as stateless, particularly in the **Netherlands**. However, the Dutch Council of State²²⁰ confirmed the decision of the authorities not to register the statelessness status of a Palestinian refugee in the municipal civil records, despite the argument that this constituted an interference with the right to respect for private and family life. The decision in this case was made on the grounds that an original UNRWA document and an

²¹⁶ Examples of cases in this section are intended to illustrate the relevance of the right to respect for private and family life within domestic contexts and are detailed further on the Statelessness Case Law Database. The list of cases in this section is not intended to be exhaustive.

²¹⁷ Czechia, Supreme Administrative Court, H. A. A. v Ministry of Interior, 4 Azs 365/2018-74, 12 March 2019.

²¹⁸ Hungary, Constitutional Court, Az Alkotmánybíróság 6/2015. (III. 25.) AB Határozata, 25 March 2015. See a similar case in Bulgaria, Supreme Administrative Court, Ruling No. 2481, Case No. 1377/2020, 17 February 2020.

²¹⁹ ECtHR, Sudita Keita v. Hungary (application no. 42321/15), 13 May 2020.

²²⁰ Netherlands, Council of State (Raad van State), ECLI:NL:RBDHA:2018:9575, 27 November 2019.

identification document from Lebanon were insufficient proof of identity and statelessness status.

Article 8 ECHR was also used in **Slovenia**,²²¹ in a similar context as *Kurić v. Slovenia*.²²² In a case where the applicant lived for 52 years in Slovenia, in the middle of which he was 'erased' from the register of permanent residents, and appealed against the rejection of this application for permission to stay following a return decision, the Administrative Court found that specific circumstances must be taken into account when considering the applicant's stay in Slovenia. In particular, the length of his residence, his social status, and statelessness were necessary considerations to ensure that the applicant's right to respect for his private life was respected.

The Luxembourg Administrative Court of Appeal²²³ ruled that a family reunification application should be assessed taking into consideration the right to respect for private and family life. In a case concerning Palestinian applicants from Syria without Syrian nationality, where a minor child was granted international protection in Luxembourg and applied for family reunification for her parents, the Court found that the authorities should have taken into account the family life in Syria between the child and her parents, considering her young age, vulnerability, psychological distress since her separation from her parents. By failing to do so, the decision refusing family reunification disproportionately infringed the child's right under Article 8 ECHR and disregarded the best interests of the child.

In **Italy**, the Court of Cassation²²⁴ held that a comparative assessment between the objective and subjective conditions in the country of origin of the applicant and the level of integration in the host country must be carried out to determine if there is a right to humanitarian protection. When a significant level of integration has been reached in the host country, humanitarian protection shall be granted if return to the country of origin is likely to result in a considerable deterioration of the private and/or family life conditions of the applicant, in violation of Article 8 ECHR.

Acquisition of nationality

Although regional and international case law has consistently noted that nationality is an element of personal identity and that its denial may lead to an interference with a person's right to respect for private and family life, national courts have at times been more reluctant to rely on this right to protect the right to a nationality.

An example from an administrative court in **Luxembourg** relates to a naturalisation request made by a stateless person who had resided in Luxembourg for decades, which was denied due to a criminal record. Even though the applicant was stateless, the court

²²¹ Slovenia, Administrative Court, Judgment no. II U 503/2016-9, 22 August 2018.

²²² ECtHR, Kurić and others v. Slovenia (application no. 26828/06), 26 June 2012.

²²³ Luxembourg, Administrative Court, judgement no. 46806C.

²²⁴ Italy, Court of Cassation, case no 24413/2021. <u>It should be noted that a new regime for humanitarian protection has now been adopted since this judgment was delivered, therefore this case might not be fully applicable in this new framework.</u>

found that the applicant failed to explain how exactly the refusal of access to a nationality impacted his personal and family life, thus the claim was not sufficiently substantiated in order to find a violation of Article 8 ECHR.²²⁵

Also in the **Netherlands**, the Council of State addressed the right to respect for private and family life in a case concerning the mother of a stateless child born in the Netherlands and who applied for confirmation of Dutch nationality. The authorities neither considered it established that the child was stateless nor that he fulfilled the residence requirements to acquire Dutch nationality. The applicant argued that the lack of a statelessness determination procedure in the Netherlands prevents the acquisition of Dutch nationality by stateless children born there, in violation of Article 8 ECHR, as well as Article 7 of the UNCRC and Article 24 ICCPR (both provisions protect the right to a nationality and to be registered immediately after birth). The Council of State referred to case law of the ECHR, in particular the judgment in *Genovese v Malta*, but noted that Article 8 ECHR would only apply if the naturalisation request had been arbitrary, which the applicant did not be relevant where the rejection of a nationality request is made arbitrarily. It further noted that Article 7 UNCRC and Article 24(3) ICCPR do not impose an obligation on authorities to investigate whether the person is stateless and to subsequently determine statelessness status.

The imposition of such burdensome requirements in order to evidence the impact of statelessness on an individual's private and family life are not aligned with human rights law and regional and international jurisprudence on the topic. This was evidenced in a Human Rights Committee's decision from 2021, where it condemned the Netherlands on the same case mentioned above. The Committee held that the Netherlands had violated the child's rights under Article 24(3) ICCPR has the child was effectively unable to acquire a nationality, including due to the lack of a residence permit, a burden of proof placed on the applicant that meant he could not be registered as stateless, and the lack of a procedure to determine statelessness.²²⁷

Protection of LGBTIQ⁺ families and children born through surrogacy arrangements

In various European jurisdictions, Article 8 ECHR has been invoked in cases concerning the nationality rights of children of LGBTIQ+ parents. These cases relate primarily to documentation issues of children born abroad to parents whose country of nationality does not recognise same-sex marriage or parenthood, or if it outlaws surrogacy. This causes a conflict with the child's right to acquire nationality. Due to the construction of legal parenthood within specific jurisdictions, children born in such circumstances are at risk of statelessness. In most cases at the national and regional level, Article 8 was invoked in conjunction with arguments such as the best interests of the child.

In **Poland**, the Supreme Administrative Court has handled various cases concerning the refusal to transcribe foreign birth certifications due to incompatibility with Polish

²²⁵ Luxembourg, Administrative Court, judgment no. 29401C, 14 February 2012.

²²⁶ Netherlands, Council of State (Raad van State), ECLI:NL:RVS:2016:2912, 2 November 2016.

²²⁷ Human Rights Committee, Zhao v. Netherlands, CCPR/C/130/D/2918/2016, 19 December 2020.

domestic law. In a case regarding a child born abroad to two Polish mothers, ²²⁸ the Court ruled in favour of the applicant's right to receive the transcription of their birth certificate necessary to obtain identity documents, due to the overarching best interest of the child in receiving a recognised legal identity. In another case, in response to a general legal question regarding the transcription of foreign birth certificates for children of same-sex parents, ²²⁹ the Court clarified that while Polish law prohibits such transcription, it should not hinder the child's access to necessary documents like passports, affirming the child's unquestionable Polish nationality. Similarly, in a case where the birth certificate listed a Polish father and an unknown surrogate mother, ²³⁰ the Court overturned the refusal to confirm the child's Polish nationality based on surrogacy prohibition. It stressed that nationality confirmation should not be denied solely due to circumstances of birth, citing the prioritisation of the child's best interests established by the ECtHR in *Labassee v France*. ²³¹

In **Austria**, the Constitutional Court decided that the best interests of the child prevailed over the prohibition of surrogacy under domestic law in a case regarding children born in Ukraine through suspected surrogacy to Austrian nationals.²³² The Court established that the application of the prohibition on surrogacy was unacceptable and violated Article 8 ECHR, reasoning that protection of family life also includes the child's right to a nationality based on descent from the parents.

Despite these rulings at national level and the judgments of the CJEU mentioned above, ²³³ challenges with implementation remain²³⁴ and the refusal in various jurisdictions to recognise the parent-child relationship within families identifying as LGBTIQ+ can cause further issues regarding the rights of the child to access fundamental services, and their enjoyment of the right to private and family life.

Deportation and removal proceedings

Article 8 ECHR has also been raised in domestic judgments in the context of deportation or removal orders, and several courts have required consideration of the impact of deportation on the private and family life of the individual.

The **Ukraine** Supreme Administrative Court²³⁵ ruled on a case concerning the deportation to Moldova of a person who lived in Ukraine for 14 years with his partner and children. The applicant disputed this decision on the basis that he did not have a connection with Moldova and was in fact stateless, and that his family life in Ukraine was protected under Article 8 ECHR. While the Supreme Administrative Court did not address the Article 8 ECHR

²²⁸ Poland, Supreme Administrative Court, Case II OSK 2552/16, 10 October 2018.

²²⁹ Poland, Supreme Administrative Court, Case II OPS 1/19, 2 December 2019.

²³⁰ Poland, Supreme Administrative Court, Case II OSK 3362/17, 10 September 2020.

²³¹ ECtHR, Labassee v France (application no. 65941/11), 26 June 2014.

²³² Austria, Constitutional Court, Case B99/12 ua, 11 October 2012.

²³³ See section 2.2. above. <u>CJEU, Case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', 14 December 2021</u> and CJEU, Case C-2/21, Rzecznik Praw Obywatelskich, 24 June 2022.

²³⁴ ENS Blog, 'Celebrating progress in the protection of rainbow families, but more needs to be done' (November 2022).

²³⁵ Ukraine, Supreme Administrative Court, No. K/9901/8478/20, 9 November 2020.

arguments, it concluded that the lower instance courts had not effectively assessed evidence indicating that the applicant was not a national of Moldova.

In the **United Kingdom**, the courts have applied a four-stage test to assess whether leaving an individual in a state of legal 'limbo' due to the lack of prospect of deportation amounts to a disproportionate interference with the right to respect for private and family life. This includes i) assessing whether a deportation order has yet been made ('prospective' or 'actual' limbo), ii) determining whether the prospect of effecting deportation is remote, iii) a fact-specific analysis²³⁶, and iv) a balancing exercise between the public interests and an individual's right to respect for private and family life and other ECHR rights.

The Supreme Court of the **Russian Federation**²³⁷ has ruled that an expulsion order would interfere with the right to private and family life where a stateless applicant had lived in Russia since childhood in the same municipality as his mother. The Supreme Court found that authorities should not interfere with the right to private and family life, save for cases where the interference is prescribed by law and deemed necessary in a democratic society. As such, the expulsion of the applicant was found to amount to a disproportionate interference with the right to respect for private and family life. However, the Fourth Cassation Court of Russia²³⁸ has subsequently considered, in a different case, that the fact that an applicant had relatives and family in Russia was not sufficient to conclude that a deportation order against him breached his right to respect for private and family life where the applicant's criminal convictions were taken into consideration. The Court found that while the right to family life is protected under the Russian Constitution, those interests do not take precedence over other constitutionally significant values, such as the control of migration polices balanced against the risk of public danger in light of past criminal conduct.

In **France**,²³⁹ the Council of State ruled that, even where it is rendered after the refusal of a residence permit and the issuance of a removal order, a decision recognising statelessness status of a minor child can be invoked to request the annulment of a removal order issued against their parent. The applicant sought the annulment of the removal order issued against her three months before the national authorities recognised statelessness status to her minor child. The Council of State recalled that, according to Article 31 of the 1954 Convention, a stateless person may not be removed, except on grounds of national security or public order. It further held that a removal order cannot be taken against the parent of a child recognised as stateless who lives with them, since

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²³⁶ The fact-specific (stage three) analysis includes: (i) an assessment of the time already spent by the individual in the UK, their status, immigration history and family circumstances; (ii) the nature and seriousness of any offences of which they had been convicted; (iii) an assessment of the time elapsed since the decision or order to deport; (iv) an assessment of the prospects of deportation ever being achieved; and (v) whether the impossibility of achieving deportation was due in part to their conduct. See United Kingdom, RA (Iraq) v Secretary of State for the Home Department [2019], EWCA Civ 850, 17 May 2019, paragraphs 61-72. See also (now overturned) United Kingdom, R (on the application of AM) v. Secretary of State for the Home Department, 17 March 2021, paragraphs 120-150.

²³⁷ Russia, Supreme Court of Russian Federation, judgment №57-АД15, 16 February 2015.

²³⁸ Russia, Fourth Cassation Court of General Jurisdiction Judgment No. 88a-10287/2020, 19 May 2020.

²³⁹ France, Council of State, judgment no 261305, 9 November 2007.

it would have the effect of depriving the child from their rights under the 1954 Convention, if the child leaves with their parents, or of disproportionately infringing the right to respect for family life of the parents, contrary to Article 8 ECHR, if the child remains in France separated from their parents.

In **Austria**,²⁴⁰ the Supreme Administrative Court ruled that the deportation of a mother and her two daughters from Austria to Georgia was disproportionate. It held that the lawfulness of the deportation must be carried out at the time it is executed, so the return decision, which is the basis of the deportation, may lose its effectiveness if, in the meantime, the weighing of interests under Article 8 ECHR is in favour of the applicants. The court found that the twelve-year-old daughter had continued to integrate in the 16 months between the issuance of the return decision and the deportation and, taking the best interests of the child into consideration, the factual situation had therefore changed to such an extent that the deportation was to be considered disproportionate.

In **Bulgaria**,²⁴¹ the Sofia City Administrative Court ruled that the issuance of a return order to a stateless person from the former Yugoslavia disproportionately affected the applicant's right to private and family life under Article 8 ECHR. The Court established that the administrative authorities did not consider the fact that the applicant was legally married to a Bulgarian national, had a child who was also a Bulgarian national, and had been residing in Bulgaria for the past 25 years. The Court concluded that the national authorities shall take due account of the best interests of the child and family life when issuing return orders, as well as the fact that the applicant has cut all ties with his country of origin, where he does not appear in the civil registry system.

Deprivation, denial and renunciation of nationality

The deprivation, denial, and renunciation of nationality has been addressed in several domestic contexts in relation to Article 8 ECHR.

In the context of loss of nationality, the Constitutional Court of **Austria**²⁴² found that an applicant who automatically lost her Austrian nationality due to voluntarily re-acquiring another nationality interfered with Article 8 ECHR. The applicant had renounced her Turkish nationality in 1996 in order to acquire Austrian nationality, as Austria has a single-nationality rule, but she later re-acquired Turkish nationality. The Court concluded that, in determining if the applicant had lost Austrian nationality and in addition to the conditions established in national law, the authorities should have conducted a proportionality test to consider the consequences of losing EU citizenship (in line with the CJEU's decision in *Tjebbes*).

The balance between an individual's private and family life and the public interest of the State is often addressed by national courts in decisions to withdraw or deny the granting

²⁴⁰ Austria, Supreme Administrative Court, Ra 2022/21/0093, 26 July 2022.

²⁴¹ Bulgaria, Sofia City Administrative Court, Case No 5935/2020, Judgement No.5136, 6 October 2020.

²⁴² Austria, Constitutional Court, Ra 2018/01/0477, 30 September 2019.

of nationality. In several cases, including in the **Netherlands**,²⁴³ **Ukraine**,²⁴⁴ and **Poland**, the courts have found that the applicant's private and family life did not outweigh the interest of the State and reasoned in line with a near-absolute sovereignty of States in nationality matters. In **Poland**, a child's Polish nationality was withdrawn eight years after it had been confirmed by a local authority, due to no fault of the applicant and regardless of whether that would render the child stateless.²⁴⁵ As it relates to the denial of nationality, in **Germany**,²⁴⁶ a court has even rejected a naturalisation application in relation to a stateless Palestinian on the grounds that he would be unable to sustain himself and his relatives once his family would join him in Germany, although the applicant had not mentioned an intention for his family to relocate. The Court did not consider statelessness as a relevant factor in the case.

This interpretation of international law is concerning, particularly in cases resulting in a person remaining or being rendered stateless as a result of the decision, given the tremendous impact that statelessness has on a person's private and family life as well as other fundamental rights.

In **France**, the Council of State has noted that decisions to deprive individuals of their nationality should take into account Article 8 ECHR.²⁴⁷ In 2021, it issued a judgment in a case concerning an applicant who acquired French nationality in 2007, but was later deprived of it after he was convicted for participation in terrorism activities. The Council of State noted, *inter alia*, that depriving an individual of French nationality did not necessarily prevent that person from residing or visiting France or affect their connections with their family members, therefore it did not interfere with the right to family life. However, it found that a deprivation decision did interfere with a fundamental aspect of the individual's identity and therefore on the right to respect for one's private life. In this particular case, the Council of State concluded that deprivation did not impose a disproportionate burden or punishment on the applicant in light of the crimes he was convicted for and given that he would not be rendered stateless as he held Algerian nationality since birth, thus it did not amount to a violation of Article 8 ECHR.

The **United Kingdom** Court of Appeal²⁴⁸ ruled on a decision to deprive the appellant, KV, of their British citizenship on the grounds that they had deliberately concealed that they had earlier obtained a grant of British citizenship using false details. The Court of Appeal found, *inter alia*, that the Upper Tribunal was correct to hold that the burden of proving statelessness in this context lay on KV, and the Secretary of State for the Home Department (SSHD) should not be required to investigate whether a person has or previously had another nationality before depriving a person of citizenship on the grounds that naturalisation was obtained by fraud. Accordingly, KV would be required to show that he would not automatically re-acquire Sri Lankan nationality, and therefore

Netherlands, Court of North-Holland, ECLI:NL:RBNHO:2019:1727, 5 March 2019; Council of State (Raad van State), ECLI:NL:RVS:2013:1575. 16 October 2013.

²⁴⁴ Ukraine, Supreme Administrative Court, judgment no. 813/1774/18, 17 July 2019.

²⁴⁵ Poland, Supreme Administrative Court, case II OSK 189/07, 8 August 2008.

²⁴⁶ Germany, Federal Administrative Court, judgment 1 C 23.14, 28 May 2015.

²⁴⁷ France, Conseil d'État, Second Chamber, Judgement No. 450553, 30 November 2021.

²⁴⁸ United Kingdom, KV v Secretary of State for the Home Department, [2018] EWCA Civ 2483, 8 November 2018.

become stateless, if deprived of British citizenship. However, the Court of Appeal held that the Upper Tribunal, in finding that KV had not proved this fact, had misread the Sri Lankan Citizenship Act, and there was in fact a reasonable inference that the appellant had ceased to be a citizen of Sri Lanka when granted British citizenship. The deprivation of British citizenship would therefore leave the applicant stateless. As such, it found that the Upper Tribunal had erred in treating the First Tier Tribunal's failure on the question of statelessness as immaterial.

The Council of State of the **Netherlands**²⁴⁹ ruled on decisions to declare a Dutch national associated with ISIS undesirable and to withdraw her Dutch nationality. The Council of State held that the withdrawal of nationality should be assessed together with Article 8 ECHR, because this decision could breach her right to family and private life. Referring to ECtHR case law, the Council of State held the authorities should have struck a fair balance between the interests of the applicant and her family and the Dutch public interest, taking into consideration the severity of the crime committed, the length of the residence in the Netherlands, the family life of the applicant, and the interest and welfare of the applicant's children, in particular the seriousness of the problems the children might encounter in the country of deportation, in accordance with their best interests. The Council of State found that the decisions should be annulled on the grounds that they did not sufficiently take into consideration the best interests of her minor children and her right to family life.

²⁴⁹ Netherlands, AB Council of State (Raad van State), 202006910/1/V1 & 202006913/1/V6, 29 June 2022.

CONCLUSION

Stateless people are often disproportionately impacted in their enjoyment of private and family life, due to the obstacles that statelessness imposes in their lives. While the right to a nationality is not explicitly guaranteed in the ECHR and EU law, the ECtHR and the CJEU have both recognised the importance of nationality in fulfilling the right to respect for private and family life, and have found on several instances statelessness issues may engage the right to respect for private and family life. They have developed their case law in a number of areas, including regularisation of status, acquisition, denial, and deprivation of nationality, birth registration, and deprivation of liberty. Moreover, they built on the significance of nationality as an element of personal identity, and acknowledged the impact of recognising legal parentage and proof thereof, for children to be able to have a family life with their parents.

This briefing has analysed some of the positive jurisprudential developments as well as areas where there is potential for courts and litigators to advance the right for respect for private and family life in the context of statelessness and nationality issues.

While regional case law is promising, there is scope for courts to further develop States' obligations under the ECHR and the CFR. For example, the ECHR could note the importance of establishing dedicated statelessness determination procedures to allow States to identify stateless people in their territory and provide them routes to regularisation. With regards to detention, jurisprudence could note that statelessness is a juridically relevant fact in detention and removal decisions when there is no reasonable prospect of removal, and that statelessness may lead to arbitrary detention if not adequately identified.

Domestically, some national courts made reference to the right to respect for private and family life when applying national law in the context of statelessness. For example, some found that the absence of routes of regularisation for stateless people, or obstacles in accessing existing routes, constitutes an interference with their right to respect for private and family life. However, there is limited jurisprudence available at national level on the application of the right to respect for private and family life in the context of statelessness and nationality, and domestic courts do not consistently apply provisions of the ECHR or the CFR in these cases.

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jurisprudence addressing statelessness. The database covers jurisprudence from any jurisdiction in Europe, the European Court of Human Rights, the Court of Justice of the European Union and UN human rights treaty bodies. It is managed by the **European** Network on Statelessness (ENS) with contributions and support from ENS members and partners.