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Project “Stateless Persons in Detention”

Research Working Paper: The Protection of Stateless Persons in Detention

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The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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The Equal Rights Trust is a company limited by guarantee incorporated in England. Company number 5559173. It is also a registered charity, number 1113288.

This is one of two working papers produced by The Equal Rights Trust in the preliminary phase of the project, “Stateless Persons in Detention”. This two-year project seeks to strengthen the protection of stateless persons who are in any kind of detention or restriction of liberty due at least in part to their being stateless, and to promote their right to be free from arbitrary detention without discrimination. It pursues two interrelated objectives: to document the detention, or other forms of physical restriction, of stateless persons (*de jure* and *de facto*) around the world; and to use this information to develop detailed legal analysis as a basis for international and national advocacy against the arbitrary detention of stateless people.

Paper 1. (Legal Working Paper: The Protection of Stateless Persons in Detention under International Law), explores the protection of stateless persons under international law and the legal definitions to be adopted in the course of the project.

Paper 2. (Research Working Paper: The Protection of Stateless Persons in Detention) summarises initial research and documentation conducted by The Equal Rights Trust to highlight some trends for further research and documentation.

This paper is available at: www.equalrightstrust.org

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Executive Summary

This paper has been produced as part of an Equal Rights Trust (ERT) project to document the detention or restriction of stateless persons. Its purpose is to explore how a lack of effective nationality can impact on the right to be free from arbitrary detention or restriction of liberty. It is a preliminary mapping paper which intends to identify some key trends and draw on individual cases to highlight where potential gaps in protection arise.

UNHCR has found that despite regional variations, the problem of detention for those without an effective nationality appears to be a global one. Of the broad range of human rights violations suffered by stateless people the right to be free from arbitrary detention has received little attention: the extent and scale of the problem is not fully known and further research is needed.

The paper highlights how stateless persons in a number of countries appear at risk of arbitrary detention. Stateless persons in their countries of birth or habitual residence, including Rohingya in Myanmar, Bidoons in Kuwait, Palestinians in Egypt, Kurds in Syria and Somalis in Kenya appear to be at risk of detention owing to the discriminatory administration of justice, due at least in part to their statelessness and often compounded by a lack of documentation or discriminatory access to documentation that can render them vulnerable to harassment.

Whilst addressing the arbitrary detention of stateless persons in their countries of birth and habitual residence, the paper has a focus on stateless migrants and in particular, non-refugee stateless migrants as a group with distinct protection needs.

The paper highlights a risk of long term detention and repeated detention for those stateless migrants who find themselves in a legal limbo, where they cannot acquire a legal status in the country in which they are physically present and the country of birth or habitual residence will not take them back. Stateless persons in this situation may be detained for breach of immigration regulations, or pending “removal”, with little prospect of return or release. In some countries stateless persons may be released from detention with their economic and social rights severely restricted, rendering them to a state of economic destitution. Case examples are drawn from the UK and Australia to illustrate the risk of prolonged detention or release to destitution in those countries.

Also highlighted is the plight of other migrants who may have formal nationality, but their nationality is not effective. It is asserted that persons without effective nationality can have

similar protection needs to legally stateless persons when they are in detention or when their liberty is restricted in some way and they cannot return to their country of nationality for practical, humanitarian or legal reasons. The paper explores the concept of *de facto* statelessness in this context.

Introduction

1. The UN High Commissioner for Refugees (UNHCR) has found that despite regional variations, the problem of detention for those without an effective nationality appears to be a global one.¹ ERT's information suggests that in a number of countries stateless persons are vulnerable to arbitrary detention and restriction, including not only those outside their country of residence (stateless refugees, asylum-seekers and migrants) but also stateless persons within the borders of a state in which they were born or habitually reside.
2. This paper addresses the detention or restriction of liberty of stateless persons in their country of birth or habitual residence as well as in the context of migration. In drafting the paper, ERT consulted a wide range of practitioners to identify information on individual cases or groups of stateless persons in detention or restriction. The paper draws on individual cases and key concerns raised by others, and highlights some trends.
3. Although they have unique protection needs, there is very little published information on the detention or physical restriction of stateless persons. The limited information that is available comes primarily from persons monitoring immigration and asylum detention practices. The lack of information concerning the detention of stateless persons *generally* can be contrasted with the relative abundance of information and attention that has been paid to the detention of refugees and asylum seekers.² Owing to this, and given their distinct protection concerns, this paper includes a special focus on non-refugee stateless persons in detention, and issue which has to date received relatively little attention.
4. A review of available information suggests that three very broad generalisations may be made about detention practices related to stateless persons:

¹ UN High Commissioner for Refugees. *UNHCR Brief on Statelessness and Detention Issues*, 27 November 1997.

² See for example The International Coalition on Detention of Refugees, Asylum Seekers and Migrants (IDC), a coalition of non-governmental organisations, faith based groups, academics and individuals established to "raise awareness of detention policies and practices and promote the use of international and regional human rights standards and principles as they relate the detention of refugees, asylum seekers and migrants", see <http://idco.sauceopen.com/portal/index.php> (last accessed 6 January 2009). UNHCR has developed guidelines on the Detention of Refugees and Asylum Seekers. See *inter alia*, UN High Commissioner for Refugees. *Detention of Refugees and Asylum-Seekers*, Executive Committee Conclusion No. 44 (XXXVII), 13 October 1986 and *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999.

- Stateless persons resident in their countries of birth or habitual residence are most likely to be exposed to the risk of criminal detention through the arbitrary and discriminatory administration of justice in some countries. The freedom of movement of stateless persons is also restricted in some countries.
- Stateless migrants appear more vulnerable to a range of forms of detention and restriction of liberty in the country of transit or destination. In particular, they face increased risk of administrative detention for purposes of status determination or pending deportation as well as criminal detention in relation to breach of immigration regulations. Where stronger safeguards against arbitrary detention are in place, research indicates stateless persons may be subject to other forms of restriction including electronic tagging and control orders.³

Stateless persons and others without an effective nationality may also be detained for long periods in security detention outside of their country of habitual residence.

5. **Part one** of this paper briefly outlines the broader human rights concerns related to stateless persons and the multiple patterns of discrimination stateless persons may face. **Part two** considers the detention and other forms of restriction of stateless persons in their country of birth or habitual residence, highlighting in particular detention arising from the discriminatory administration of justice, owing at least in part to statelessness. **Part three** describes patterns of detention that affect stateless migrants as well as refugees and asylum seekers. It focuses in particular on the legal “limbo” that non-refugee stateless migrants experience in many countries. It highlights some trends, in particular the apparent risk of long-term or indefinite detention as well as repeated detention. **Part four** describes circumstances in which other individuals can find themselves in detention and in the same kind of legal “limbo” as legally stateless migrants where they are without the protection of their country of legal nationality, and discusses the parameters of the concept of *de facto* statelessness. **Part five** considers the case of a stateless person in security detention.

³ Stateless refugees and asylum seekers are often deprived of their liberty in settings other than the formal penal institutions of the state and for example can be subject to *de facto* detention in closed camps or have their freedom of movement severely restricted under various “containment” policies. This possibility is acknowledged but the focus of this paper deliberately avoids discussion of detention or restriction of refugees and asylum seekers, given the comparatively abundant information and analysis on this issue. See for example, on the issue of camps, the U.S. Committee for Refugees and Immigrants (USCRI) “Campaign to end refugee warehousing”, available at: <http://www.refugees.org/article.aspx?id=1109&rid=1179&subm=33&area>About%20Refugees&> (last accessed 6 January 2009).

Detention of stateless persons: the wider context

Discriminatory deprivation of citizenship

6. Available information and documentation concerning systematic restrictions of the economic, social, cultural, civil and political rights of stateless persons in many countries reveals that the denial of the right to nationality⁴ is both a cause and a consequence of discrimination and inequality. Gay MacDougall, the United Nations independent expert on minority issues, has reported that “[t]he reasons for which States discriminatorily deny or deprive persons of their right to citizenship are often rooted in racist ideologies.”⁵ Denial of nationality or citizenship can in turn provide the basis for further discriminatory restriction of rights.

Arbitrary detention in the context of widespread human rights violations

7. A review of existing documentation on human rights in some countries with stateless populations reveals the increased vulnerability to rights violations that accompanies statelessness. Concerns raised by UN bodies and international NGOs monitoring the human rights of stateless persons cover the entire spectrum of economic, social, cultural, civil and political rights. The UN Human Rights Committee for example, in concluding observations to Thailand has expressed concern that a significant number of persons in Thailand remain stateless and that their statelessness renders them vulnerable to abuse and exploitation. The Committee has noted the negative consequences that statelessness has on the full enjoyment of rights enshrined in the International Covenant on Civil and Political Rights, as well as the right to work and their access to basic services, including health care and education.⁶ The Committee has also expressed concern regarding the treatment of Bidoons in Kuwait, in particular the risk of deportation, and a lack of information on conditions of

⁴ Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948, Article 15.

⁵ UN Human Rights Council. *Report of the independent expert on minority issues, Gay McDougall*, 28 February 2008, A/HRC/7/23, para.15.

⁶ UN Human Rights Committee. *Concluding Observations: Thailand*, CCPR/CO/84/THA, 8 July 2005, para.22. In her 2008 report to the Human Rights Council, the UN independent expert on minority issues described how states continue to engage in practices that discriminatorily deny or deprive persons of citizenship and how citizenship still matters when it comes to the practical aspects of accessing many fundamental rights, including minority rights. The independent expert provides an overview of “exclusionary citizenship practices” in a number of countries and highlights associated human rights concerns. See *Ibid*, paras.44-70.

detention for those awaiting deportation.⁷ Other UN bodies have expressed concern regarding access to rights for stateless populations including a lack of adequate access by stateless Palestinian refugee children in Lebanon to many basic rights such as health, education and an adequate standard of living,⁸ and the mandatory and long-term detention of illegal immigrants, including stateless migrants in Australia.⁹

8. For many stateless persons in their country of birth or habitual residence, discrimination in the administration of justice, including arbitrary detention, occurs within a context of widespread and systematic human rights violations. Arbitrary detention of stateless persons may be seen as part of a process of marginalisation, directly associated with - and a continuation of - the discriminatory law, policy or practice that denies citizenship and renders the individual or group without effective nationality.¹⁰ According to Refugees International, an estimated 300,000 stateless Kurds in Syria, including those denationalised in 1962 and their descendants¹¹ are prevented from regular access to education, health care, livelihoods, travel, property ownership, participation in judicial and political systems, and registration of businesses, marriages, and children. In addition, they are denied the right to speak their language in public places, purchase or enjoy Kurdish music in the marketplace, or to participate in Kurdish cultural activities.¹² Refugees International reports that some Kurds have been subjected to arbitrary detention and torture as a consequence of their efforts to rally for the political and legal recognition of stateless Kurds in Syria.¹³

⁷ The Committee expressed particular concern at statements made by the Government of Kuwait's delegation referring to Bidoons generally as "illegal residents", see UN Human Rights Committee. *Concluding Observations: Kuwait*, CCPR/CO/69/KWT, 27 July 2000, para.26.

⁸ UN Committee on the Rights of the Child. *Concluding Observations: Lebanon*, CRC/C/15/Add.169, 21 March 2002, para.54.

⁹ UN Committee on the Elimination of Racial Discrimination. *Concluding Observations: Australia*, CERD/C/AUS/CO/14, 14 April 2005, para.23.

¹⁰ See for example the discussion of the plight of the Rohingya in Myanmar, below. One report by Refugees International details how stateless Palestinians in Libya, Roma in Europe, Kurds in Syria and unregistered Kazakhs in Kazakhstan are vulnerable to arrests in the context of widespread violations. For example unregistered Kazakhs are reported to face "employer abuse, arrest, poverty, poor education and social exclusion", see Lynch, M. *Lives on Hold: The Human Cost of Statelessness*, Refugees International, 14 February 2005.

¹¹ In Syria, a day-long census conducted in 1962 which aimed to distinguish between Kurds who had a right to live in the Syrian Arab Republic and those who had illegally entered from Turkey or Iraq after 1945 stripped thousands of Kurds of Syrian citizenship. Little notice of the census was given and insufficient information was distributed regarding the consequences of not participating. Thousands were unable to provide the required documentation proving their residency before 1945. See above, McDougall, n.5, para.63.

¹² Refugees International. *Buried Alive: Stateless Kurds in Syria*, 13 February 2006.

¹³ *Ibid.* See also discussion below concerning the arbitrary arrest and detention of Rohingya in Myanmar, in the context of discriminatory denial of citizenship and widespread human rights violations. Refugees International has also documented how unregistered Kazakhs in Kazakhstan are vulnerable to arrests in the context of widespread denial of rights and poverty, poor education and social exclusion. See above, Lynch, n.10.

Minority groups

9. It appears that a significant number of stateless persons, whether within their country of habitual residence or otherwise, are members of minority groups.¹⁴ In the context of detention in the country of birth or habitual residence, stateless persons appear likely to face discrimination in the administration of justice on grounds such as ethnic, linguistic, cultural, political or other affiliation, as well as discrimination on grounds of statelessness.
10. In her survey of stateless populations in 2008, the United Nations independent expert on minority issues described how minorities, once denied or deprived of citizenship are “inevitably denied protection of their basic rights and freedoms, including minority rights, as established in the Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.”¹⁵ This lack of access to minority rights further compounds the experience of marginalisation and exclusion. Stateless migrants, refugees and asylum seekers can also face discrimination in the administration of justice on a number of grounds. One UN expert has reported that over recent years they have become a prime target for racism and xenophobia in a number of countries.¹⁶
11. Where stateless populations face discrimination on multiple grounds, it may be difficult to separate or distinguish between those persons who are detained owing in whole or in part to their statelessness and those detained owing to particular political, ethnic, linguistic or other minority status. This is an issue that has been raised through consultation with various actors and should be addressed in research.

¹⁴ See above, McDougall, n.5, p.2.

¹⁵ *Ibid*, p.6.

¹⁶ UN Human Rights Council. *Report submitted by Mr. Doudou Diène, Special Rapporteur on contemporary forms of racism, racial discrimination*, A/HRC/7/19, 20 February 2008, para.5.

Detention of stateless persons in their country of habitual residence

12. Our initial consultations have indicated that human rights advocates and researchers often overlook or fail to document the nationality status of individuals in detention in their countries of habitual residence because they focus on national and international human rights law of a general character, which applies regardless of nationality or citizenship status. Furthermore, where discriminatory patterns are reported with respect to detention practices that affect stateless populations within a state, the focus is often on grounds other than statelessness, for example minority status, political affiliation etc. During our consultations, various reasons were given for this including: that the issue of statelessness has been overlooked in the face of more “pressing” concerns such as fear of ill-treatment and torture; that stateless persons are not offered a special regime of rights protection in the country of concern and therefore reference to statelessness will offer little in terms of strengthened rights protection; or, significantly, that to highlight the nationality or citizenship problems could expose the individual to further rights violations.

Discrimination in the administration of justice

13. Whilst the discriminatory administration of justice is seen as an increasingly common problem in many countries¹⁷ and is not of unique concern to stateless persons, research suggests that stateless persons in a number of countries are particularly subject to restrictions of their right to be free from arbitrary deprivation of liberty and to freedom of movement.
14. It seems that in many cases, the arbitrary detention or restriction of stateless persons in their country of birth or habitual residence should be seen in the context of wider rights denials and as a continuation of the discriminatory laws, policies and practices that rendered the individual or group stateless in the first place. Further research is needed in this area.
15. Examples of stateless groups that appear at risk of arbitrary detention in their country of habitual residence include: Rohingya in Myanmar, ethnic Russians in Estonia, Palestinians

¹⁷ UN Commission on Human Rights. *Report of the Working Group on Arbitrary Detention*, E/CN.4/2004/3, 15 December 2003, para.72.

throughout the Middle East,¹⁸ Bidoon in Kuwait,¹⁹ and people from mixed Eritrean-Ethiopian families in Eritrea and Ethiopia.²⁰

16. One well documented situation is that of the Muslim ethnic minority, generally known as the Rohingya, who live in Northern Rakhine State, western Myanmar. The majority of Rohingya have been denied citizenship under the 1982 citizenship law.²¹ Numerous reports point to the real risk of arbitrary harassment, arrest and detention of Rohingya on the basis of group identity in Myanmar.²² Furthermore, their freedom of movement is severely restricted. Amnesty International for example has documented how “Rohingyas in northern Rakhine State must routinely apply for permission to leave their village, even if it is just to go to another nearby village.”²³ The United Nations Special Rapporteur on the Situation of Human Rights in Myanmar has described the systematic discrimination that Rohingya face including “restriction of movement, arbitrary taxation, forced labour, confiscation, forced eviction and arbitrary arrest (including harassment and violence by police forces, death in custody and sexual violence).”²⁴ As a result of the widespread and systematic violations perpetrated against Rohingya in Myanmar, many have fled to other countries, where they also face restriction of liberty and detention.
17. Striking figures on the prison population in Estonia have been highlighted by the United Nations Committee Against Torture, where it is thought that approximately 33 per cent of the prison population is composed of stateless persons, although they represent

¹⁸ See concerns regarding the presence of some 800 Palestinian “administrative detainees” (that is, persons not convicted for any offence, held for renewable periods of up to six months) in Israel in: UN Human Rights Council. *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard*, A/HRC/7/17, 21 January 2008, para.45. In 2008 the UN independent expert on minority issues highlighted the impact of the Israeli Citizenship and Entry into Israel Law (Temporary Order) of 31 May 2003, which “suspends the possibility of Palestinians from the Occupied Palestinian Territory from obtaining Israeli citizenship and residence permits in Israel, including through family reunification... [the reported] effect of this discriminatory law is that thousands of Palestinian families must separate, emigrate or live illegally in Israel under constant risk of arrest and deportation.” See above, McDougall, n.5, para.62. See also discussion below concerning Palestinians in Egypt.

¹⁹ See for example, Refugees International. *Refugee Voices: Detained Stateless People in Kuwait*, September 2007.

²⁰ See for example, review of available information in: Thomas, Louise. *Refugees and Asylum Seekers From Mixed Eritrean-Ethiopian Families in Cairo: ‘The son of a snake is a snake’*, an FMRS Report, June 2006.

²¹ Amnesty International. Myanmar. *The Rohingya Minority: Fundamental Rights Denied*, May 2004. See also, UN Human Rights Council. *Report of the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro*, A/HRC/7/18, 7 March 2008, para.78.

²² See for example, above, McDougall, n.5, para.59; Pinheiro, *Ibid*, paras.78-9; Amnesty International, *Ibid*.

²³ See above, Amnesty International, n.21, p.13.

²⁴ See above, Pinheiro, n.21, para.78.

approximately 8 per cent of the overall population.²⁵ There are 112,049 stateless persons in Estonia, the majority of whom (around 52 per cent) were born in Estonia and are predominantly from the Russian-speaking minority.²⁶ The stateless Russian speaking minority face increased vulnerability to numerous other rights violations. For example, as non-citizens they cannot access minority rights provided in the Law on cultural autonomy of national minorities.²⁷ Whilst the high representation of stateless persons in prisons in Estonia is not an immediate indication of arbitrary deprivation of liberty or discrimination in the administration of justice, it is a situation that warrants further investigation.

Harassment, arbitrary arrest and detention associated with a lack of documentation

18. One important issue common to many stateless persons in their country of birth or habitual residence is a lack of documentation which can expose them to increased risk of harassment (in particular, extortion), arbitrary arrest and detention.
19. In his study of the situation of Palestinians in Egypt, El-Abed described what he calls the “humiliating illegal status that many Palestinians endure in exile”.²⁸ According to his study, “being stateless and only holding an Egyptian travel document is problematic for many reasons and stateless Palestinians may be detained for indeterminate periods of time....[W]hen arrested, Palestinians may be sentenced or deported, regardless of the grounds for arrest. In some cases, state security officials require the family of the person arrested to apply for visas to countries that may accept him or her.”²⁹
20. The problem of lack of documentation and exposure to harassment affects not only *de jure* stateless populations but also *de facto* stateless persons, who may qualify for citizenship under the laws of the country in which they were born or reside, but whose birth has never been registered and/or who have severe difficulties obtaining appropriate documentation.³⁰

²⁵ UN Committee Against Torture. *Conclusions and recommendations of the Committee against Torture: Estonia*, CAT/C/EST/CO/4, 19 February 2008, para.22.

²⁶ UN Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, Addendum: Mission to Estonia*, A/HRC/7/19/Add.2, 17 March 2008, para.12.

²⁷ *Ibid.*

²⁸ El-Abed, Oroub. “Palestinian Refugees of Egypt: What Exit Options Are Left for Them?”, *Refuge*, Volume 22, Number 2.

²⁹ *Ibid.*

³⁰ The problem of increased vulnerability to rights violations associated with difficulties in accessing essential documentation is not unique to stateless populations and has been highlighted with respect to other vulnerable and marginalised groups who have never crossed an international boundary. For example, IDPs can often lack essential documentation that enables official interaction with the state such as in the case of undocumented ethnic Tamil IDPs in Sri Lanka. See UN Human Rights Council. *Report of*

21. Discriminatory access to citizenship documents and potential vulnerability to harassment and arbitrary detention appears to affect ethnic Somalis in Kenya, many of whom are eligible for citizenship but in practice cannot access the documentation process and thus can be rendered *de facto* stateless.³¹ Available research and ERT consultations concerning Somalis in Kenya indicates that undocumented ethnic Somalis are highly vulnerable to harassment, extortion and threats of detention when they come into contact with the police.³²

The link between statelessness, inequality, poverty and illegality

22. In countries where stateless persons lack formal status or documentation, or where they are barred either through legal or *de facto* mechanisms from legal or “regular” employment, their ability to support themselves can be severely restricted. In this context, the possibility that stateless persons will engage in illegal or “irregular” income generating activities in order to meet their subsistence needs is high, raising the possibility of criminal conviction and detention. This link between statelessness, inequality, poverty and illegality is one that could be explored further.

the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, Addendum: Mission to Sri Lanka (14 to 21 December 2007), A/HRC/8/6/Add.4, 21 May 2008, para.59.

³¹ For example, according to Refugees International, “citizenship of those Somalis who are nationals is not fully recognized by the government, especially in disputed border areas.” See above, Lynch, n.10.

³² Information obtained through ERT consultations with human rights advocates in Kenya, October 2008. According to Refugees International, the government of Kenya “imposes strict registration processes on Kenyan Somalis” and the process for registration is reportedly “inconsistent and burdened with suspicion, harassment, and corruption.... [I]ndividuals have obtained national ID through bribery. One person said, “As long as I have cash in my pocket, that’s my ID.”...Appeals have been reportedly met with police harassment or threats of detention. See Refugees International. *Kenya: National Registration Processes Leave Minorities on the Edge of Statelessness*, 23 May 2008.

Detention and restriction of stateless migrants, refugees, and asylum seekers

Global trends and practices: detention and restriction of refugees, asylum seekers and migrants

23. A growing body of information suggests that migrants, refugees and asylum seekers are extremely vulnerable to arbitrary detention and other forms of restriction including criminal and administrative detention. An unknown number of stateless persons are detained with other non-citizens in criminal or administrative detention, on account of breach of immigration rules, whilst their status is being determined, or “pending removal” under immigration regulations. This section will briefly describe some trends before discussing specific concerns as they apply to stateless persons.

Criminal detention

24. The Office of the High Commissioner for Human Rights (OHCHR) has found that “[m]igrants are particularly vulnerable to deprivation of liberty... immigration regulations are often criminalized and punished severely, in an attempt to discourage irregular migration. Undocumented and irregular migrants therefore become particularly vulnerable to criminal detention, which is punitive in nature, for such infractions as irregularly crossing the State border, using false documents, leaving their residence without authorization, irregular stay, breaching or overstaying their conditions of stay.”³³

Administrative detention

25. Aside from criminal detention, many countries hold irregular migrants in administrative detention in connection with violations of immigration laws and regulations, in order to ensure that another measure such as deportation or expulsion can be implemented.³⁴ Administrative detention is also sometimes used on grounds of public security and public order.
26. The United Nations Working Group on Arbitrary Detention has found that “a straight analysis of the statistics indicates that in some countries the numbers of non-citizens in

³³ OHCHR. *Administrative Detention of Migrants*, available at: <http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf> (last accessed 6 January 2009).

³⁴ *Ibid.*

administrative detention exceeds the number of sentenced prisoners or detainees, who have or are suspected of having committed a crime.”³⁵

In focus: detention of non-refugee stateless persons

27. This paper focuses on the protection concerns related to the detention of non-refugee stateless persons, an area that is currently under-explored.
28. Refugees fit squarely within the discourse on statelessness, first because some refugees are *de jure* stateless (for example the majority of Palestinian refugees) and second, because even though most refugees retain their legal nationality and are not *de jure* stateless,³⁶ they lack the protection of their country of nationality and are thus *de facto* stateless (i.e. without *effective* nationality).³⁷
29. However, most stateless persons in need of international protection are not refugees and have no claim to asylum.³⁸ Further, stateless refugees and non-refugee stateless persons have different protection needs. For example, in the case of a refugee, UNHCR and state authorities must never contact the authorities in the country of origin,³⁹ but in the case of a non-refugee stateless person, it may be necessary to contact the authorities in the country of origin or other countries where the individual has links in order to determine whether someone is in fact stateless and in order to find a solution.
30. Further, non-refugee stateless persons face a number of gaps in protection, as compared to stateless refugees. When a stateless person is a refugee, he or she may not be penalised for illegal entry or presence.⁴⁰ Stateless persons who are not refugees on the other hand do not enjoy such protection under the 1954 Convention Related to the Status of Stateless Persons,

³⁵ Human Rights Council. *Report of the Working Group on Arbitrary Detention*, A/HRC/7/4, 10 January 2008, para.45.

³⁶ See UNHCR. “Special Report: The strange, hidden world of the stateless”, *Refugees*, Number 147, Issue 3, 2007, p.7.

³⁷ Indeed, the drafters of the 1954 Convention Related to the Status of Stateless Persons “presumed that all persons without an effective nationality – that is, all *de facto* stateless persons – were refugees” and thus protected under the 1951 Convention Relating to the Status of Refugees. See UN High Commissioner for Refugees. *Nationality and Statelessness: A Handbook for Parliamentarians*, 20 October 2005, p.12.

³⁸ See UNHCR concern regarding the detention of stateless persons in: UN High Commissioner for Refugees. *UNHCR Brief on Statelessness and Detention Issues*, 27 November 1997.

³⁹ See *inter alia*, UN High Commissioner for Refugees. *Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information*, 31 March 2005.

⁴⁰ Convention Relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954, Article 31.

or under other treaty law. Furthermore, refugees must not be subject to *refoulement*.⁴¹ While there is no bar to *refoulement* in the 1954 Convention, stateless persons are protected under customary international law and other international and regional human rights treaties.⁴²

Specific protection requirements of non-refugee stateless persons caught in immigration detention practices

31. The situation of a stateless person detained with other non-citizens in criminal or administrative detention, on account of breach of immigration rules, whilst their status is being determined, or “pending removal” under immigration regulations, can often differ fundamentally from that of other detainees.
32. First, *de jure* and *de facto* stateless persons often have severe difficulties in obtaining identity documentation and are likely to travel without appropriate documents, thereby entering countries of transit or destination irregularly.⁴³ This renders them highly vulnerable to immigration detention practices described above. In Syria, approximately 300,000 denationalised Kurds are denied the right to travel. It has been reported by Refugees International that “many stateless Kurds seek opportunities abroad by leaving the country illegally on their own, paying money to contacts in government, or by enlisting the services of human smuggling operations....While no official statistics are available, it is said that most families have had at least one member smuggled to another country.”⁴⁴
33. Second, legally stateless persons detained alongside other non-citizens whilst their status is being determined are often vulnerable to lengthy detention, owing to the delays inherent in attempting to prove a negative – that they are not a national of any state.
34. Third, a legally stateless person who is refused asylum or otherwise deemed not qualified to remain lawfully, and detained or restricted “pending deportation”, often cannot be removed

⁴¹ *Ibid*, Article 33.

⁴² See De Chickera, Amal. *Legal Working Paper: The Protection of Stateless Persons in Detention under International Law*, The Equal Rights Trust, paras.101-8.

⁴³ Note also comments made below at para.46 concerning lack of documentation, including owing to deliberate destruction of documents.

⁴⁴ Refugees International. *Desperate Moves: Stateless Syrian Kurds Entrust Lives to Human Smugglers and Traffickers*, 28 November 2005.

because they have no state of nationality to be “removed” to and the country of birth or habitual residence will not take them back.⁴⁵ This scenario is considered further below.

Two key trends related to the detention of stateless persons

Risk of long-term and indefinite detention

35. Non-refugee stateless persons who cannot acquire a legal status in the country where they are physically present may be subject to removal from the country and may be detained pending removal. However, because removal is often impossible, what should be short-term detention in preparation for removal can become long-term, as officials try to convince the country of habitual residence or another country to accept the stateless person. In extreme cases, for example in countries where there is no time limit to detention, stateless persons may face a risk of indefinite detention.
36. One illustration is the Australian case of *Al-Kateb v. Godwin* of 2003.⁴⁶ In that case, the High Court of Australia upheld the legality of detaining a stateless Palestinian man who was held in administrative detention as an unlawful non-citizen under Australia’s Migration Act 1958, having had his claim for asylum rejected. With no grounds to remain in Australia, yet with no country willing to receive him, Al-Kateb was detained indefinitely. In March 2005, following considerable pressure from advocacy groups, the Australian government introduced a new class of bridging visa (Removal Pending Bridging Visa) which applies to all detainees for whom it is not reasonably practicable to remove for the time being and who have done everything possible to facilitate their removal from Australia. Whilst this visa improves the actual situation of some stateless individuals, it does not address the long term need for protection of those who are stateless.
37. In Ecuador, “foreigners who are stateless, who cannot prove their identity or nationality or who do not have the funds to return to their countries of origin once their status becomes

⁴⁵ Stateless Bidoon from a number of countries in the Middle East face difficulties returning to their country of habitual residence. Human Rights Watch has reported for example that “Kuwait refuses to acknowledge the right of return of, and arbitrarily denies re-entry to, many Bidun who can claim Kuwait as their “own country.” See Human Rights Watch. *Kuwait: Promises Betrayed, Denial of Rights of Bidun, Women, and Freedom of Expression*, October 2000, available at: <http://www.hrw.org/reports/2000/kuwait/kuwait-04.htm> (last accessed 6 January 2009). See also the case of Mr. S, a stateless Bidoon in the UK, below.

⁴⁶ *Al-Kateb v Godwin* [2004] HCA 37.

illegal may be held in detention for up to three years. After the three years in detention, they are permitted to remain in the country on a temporary basis.”⁴⁷

Repeated Detention and stateless persons in “orbit”

38. Available information also suggests that in some situations stateless persons may be at risk of repeated or “cycles” of detention: detained for entering a country illegally, they have no other country to legally travel to upon being released. If they remain in the country, they risk being returned to detention upon next contact with law enforcement officials.⁴⁸
39. Closely associated with the risk of detention is that of expulsion or *refoulement*. Stateless persons who are removed to another country (either the country of habitual residence or a third country) can face detention in that country, and possibly expulsion. For example, it appears that stateless Kurds who are returned to Syria are vulnerable to criminal detention. In 2005, Refugees International found that the average length of detention in Syria for seeking political asylum abroad was reported to be three to six months.⁴⁹
40. David Weissbrodt has highlighted the possibility that some states, “having failed to resolve the question of where to send a particular stateless person, nonetheless attempt to rid themselves of the stateless person by deporting him or her to another State that is also unwilling to receive the person.”⁵⁰ Such a situation can render an individual to a state of “orbit” – vulnerable to detention and expulsion in each country they are sent to. This possibility is illustrated by the case of Eidreiss al Salah, who was born in Kuwait to Sudanese immigrant parents and refused asylum in Australia (see text box below).

⁴⁷ UN Human Rights Council. *Report of the Working Group on Arbitrary Detention, Addendum: Mission to Ecuador*, A/HRC/4/40/Add.2, 26 October 2006, para.94.

⁴⁸ See Grant, Stefanie. “The legal protection of stranded migrants” in Cholewinski *et al.*, *International Migration Law: developing paradigms and key challenges*, Asser Press, June 2007.

⁴⁹ See above, Refugees International, n.44.

⁵⁰ Weissbrodt, David. *The Human Rights of Non-Citizens*, Oxford University Press, 2008, p.99.

Cycles of detention and expulsion: the case of a stateless person in “orbit”

Eidreiss al Salah

“Twenty-nine year-old Eidreiss al Salih arrived in Australia in 2000 to seek asylum. He was born in Kuwait to Sudanese immigrant parents, but Kuwait refused to accept his family as citizens. He spent three years in detention before the Australian government tried unsuccessfully to deport him to Sudan on December 13.

[The Australian Government] made no attempt to independently verify his nationality before they tried to deport him to Sudan, issuing him with a document stating his nationality as Sudanese.

Australian officials claimed that the Sudanese embassy in Tanzania was waiting for Salih. However, his [Australian-issued] identity papers were rejected by embassy officials on December 14.

[A] South African security firm contracted by [the Australian Government] to ‘accompany’ deportees, falsely informed Tanzanian officials that Salih was deported from Australia for committing a criminal act. As a result, he was transferred from immigration detention at the Dar es Salaam airport to a police station cell, according to a lawyer who was present, where he was kept for a further five days.

He was then transferred back to South Africa, where he spent six nights at Johannesburg airport, in a room with no windows or bed, and denied visitors. He was flown back to Perth [Australia,] on December 24[2003].”⁵¹

⁵¹*Ibid*, pp.99-100, quoting material from Stephen, Sarah. “Government Risks Refugees’ Lives”, *Green Left Weekly*, 24 March 2004.

***De facto* stateless migrants: the problem of definition**

41. This section of the paper seeks to inform discussion around the concept of *de facto* statelessness. Our research indicates that many of the protection concerns highlighted above in respect to legally stateless persons can also arise where an individual may have formal nationality, but their nationality is not effective. They can therefore find themselves in the same kind of legal limbo as a legally stateless person: without the protection of either the country where they are present, or their country of legal nationality. Non-refugee migrants in this situation fall through gaps in protection as they do not qualify for protection as refugees or as *de jure* stateless persons and therefore can rely only on human rights norms of a general character.
42. Whilst there is a strict legal distinction between *de jure* and *de facto* stateless persons, both groups can have similar protection needs in detention or when their liberty is restricted in some way,⁵² including detention whilst a state attempts to ascertain or verify their identity and obtain appropriate documents for the purposes of removal. This process can be severely delayed or may prove impossible for a number of practical, humanitarian or legal reasons. These include circumstances where :
- a. Deportation would violate the principle of *refoulement* or where return is not allowed on humanitarian grounds;
 - b. The country of origin refuses to issue identity documents or to cooperate with deportation proceedings;
 - c. There is no safe means of transportation to the country of origin.⁵³

⁵² Whilst highlighting the common protection concerns that *de facto* stateless persons may face in detention, it is recognised that the two groups are clearly distinct in law, and that they can have distinct protection concerns. For example, for a *de facto* stateless person in immigration detention outside the country of nationality, the first approach would be to focus on the enjoyment of rights that flow from nationality, e.g. consular assistance and readmission to the country of nationality. Although formal nationality might not extend much support to a *de facto* stateless person, this option would not even be a possibility for a *de jure* stateless person.

⁵³ The United Nations Working group on Arbitrary Detention has highlighted that “instances of excessive administrative custody of illegal immigrants may occur even in countries with strong safeguards against arbitrary detention, particularly if the expulsion of an illegal immigrant cannot be carried out for legal, logistical or other reasons; for example, if deportation would violate the principle of *non-refoulement*, or if means of transportation to the country of origin are simply not available.” See above, Working Group on Arbitrary Detention, n.35, para.47.

a. Prohibition of refoulement and restrictions to return on humanitarian grounds

43. Individuals may be subject to detention when they have no right to remain in the country but there are bars on return because deportation would violate the principle of *refoulement* or where return is not allowed on humanitarian grounds. In countries where there is no complementary protection in place for individuals in such circumstances, there is a possibility in extreme cases that an individual could be detained until circumstances in the country of nationality or habitual residence change.
44. This situation may arise where an individual does not qualify for protection under the Convention Relating to the Status of Refugees but is protected by the principle of *non-refoulement* found in general customary international law, or international and regional human rights treaties.⁵⁴
45. Other humanitarian grounds which can place a bar on return include general insecurity and violence in the country of origin. If an individual is protected from return on humanitarian grounds yet not granted permission to remain in the country they are in, they can face the risk of long-term and indefinite detention. One case from the United Kingdom illustrative of problems that can arise in such a scenario was considered by the United Nations Working Group on Arbitrary Detention. In that case, the Working Group declared arbitrary, *inter alia* on the grounds of its excessive length, the detention in the United Kingdom of “a Somali citizen liable for removal which could not be carried out because of security concerns regarding his country of origin. The person concerned had been detained for four and a half years under immigration powers after having served a criminal sentence.”⁵⁵

b. Where the country of origin refuses to cooperate or issue identity documents

46. Migrants may travel without appropriate identity for a variety of reasons including where the individual has never been issued with identification or travel documents; where an individual has lost or had their documents stolen; or where an individual has deliberately destroyed documents in order to conceal their identity or nationality.

⁵⁴ See De Chickera, Amal. *The Protection of Stateless Persons in Detention under International Law: Legal Mapping Paper*, The Equal Rights Trust, paras.101-8.

⁵⁵ See above, Working Group on Arbitrary Detention, n.35, para.48.

47. The delays inherent in not having appropriate documentation can be compounded by delays or outright refusal, of the country of nationality to cooperate in proceedings to identify or readmit their national. This is by far the most widespread problem that emerges through analysis of available information. The case of Ms. C, an Eritrean national of mixed Eritrean and Ethiopian parentage in the United Kingdom demonstrates the complex and convoluted procedures that some persons outside their own country can face when attempting to establish nationality.

Ms C, an Eritrean national of mixed Eritrean and Ethiopian parentage refused asylum in the United Kingdom

“Ms C had been interviewed twice by the Eritrean embassy. The purpose of these visits was to establish her identity and to apply for a passport. After six months she was verbally informed by the embassy that they were not satisfied that she was Eritrean and therefore had no right to live in Eritrea.

The guidelines issued by the Eritrean embassy state ‘a person who is with (sic) an Eritrean father/mother WOULD BE ELIGIBLE for Eritrean nationality as long as the person provides 3 Eritrean witnesses’.

....

[T]his requirement causes serious problems for many undocumented Eritreans in the UK. In Ms C’s case she was unable to locate anyone in the UK who knew her from Eritrea. The second time she visited the embassy she was accompanied by two friends, both of whom she met in the UK. The embassy staff had refused to accept their evidence as sufficient because they could not confirm her origins in Eritrea, having only met her in the UK. The other problem Ms C experienced, and which is common to many undocumented refused asylum seekers, is that few embassies are willing to provide formal letters confirming that the person has either visited them or, more importantly, has been refused a travel document.”⁵⁶

⁵⁶ Case study taken from: Hickey, Gerry. *Unreasonably Destitute? How UKBA is failing to support refused asylum seekers unable to leave the UK through no fault of their own*, Asylum Support Appeals Project (ASAP), June 2008, p.12.

48. Examples from Mexico, the United Kingdom (UK), Ukraine, Turkey and Bangladesh demonstrate how a lack of documentation, and delays or the absence of effective consular protection can affect the rights of individuals in detention:

- In **Mexico**, a recent UNHCR study pointed to cases that have been reported of “migrants who appeared to possess a nationality, but who were refused consular assistance and were therefore unable to exercise the right to a passport and/or to return to their country of nationality.”⁵⁷ According to the study, Mexican law provides for penalties of up to 10 years imprisonment for migrants who are undocumented or have an illegal status. A migrant can be detained indefinitely where they provide false information regarding their general details, there is no diplomatic representation from his/her country of origin in Mexico, it is not possible to obtain identity and travel documents, there is no available travel itinerary for deportation or the transit of aliens in third countries is forbidden.⁵⁸
- In the **UK**, refused asylum seekers who are transferred to administrative detention upon completion of criminal sentences are at risk of long-term and indefinite detention in immigration detention facilities, pending deportation. Available information suggests that Iranian and Algerian nationals are at particular risk of long-term detention owing to a lack of cooperation from the Iranian and Algerian embassies in identifying their nationals and issuing appropriate documentation for travel.⁵⁹ The legality of long-term detention of Algerian nationals pending their deportation was the subject of a case before the England and Wales High Court in January 2008. In that case, the High Court found that the indefinite detention of three Algerian nationals was unlawful because of the “complete uncertainty” about when detention might be brought to an end by way of deportation.⁶⁰
- In **Ukraine**, it has been reported that migrants from a number of countries are held in detention and face delays in being identified and in obtaining new documents due either

⁵⁷ Dowd, Rebecca. *Trapped in transit: the plight and human rights of stranded migrants*, UNHCR Research Paper No.156, June 2008, available at: <http://www.unhcr.org/research/RESEARCH/486c92d12.pdf> (last accessed 6 January 2009).

⁵⁸ *Ibid.*

⁵⁹ London Detainee Support Group. *Difficulties in removal of undocumented Algerian nationals*, March 2008 and *Difficulties in removal of undocumented Iranian nationals*, September 2007.

⁶⁰ *A & Ors, R (on the application of) v Secretary of State for the Home Department*, [2008] EWHC 142 (Admin), 21 January 2008.

to the absence of embassies or the unwillingness of the embassy staff to travel to some locations where migrants are stranded in detention.⁶¹

- In **Turkey**, there is no remedy available to foreigners awaiting expulsion to challenge their detention. Detainees who face difficulties obtaining valid travel documents – which appears to be the case for many African migrants – can spend months or more than a year in detention.⁶²
- In **Bangladesh** in 2007, the government reportedly “kept more than 400 Myanmarese and 200 Indians in jail beyond their sentences—on charges ranging from drug smuggling to illegal entry—citing their countries’ refusal to accept their repatriation.”⁶³

49. Victims of trafficking may be rendered *de facto* stateless owing, *inter alia*, to a lack of documentation, for example where traffickers destroy their identity documents.⁶⁴

c. Lack of transport to the country of origin or habitual residence

50. A lack of transport to the country of origin or habitual residence can also expose an individual who is detained “pending deportation” to a risk of long-term and indefinite detention. In one UK case, the Appeal Court of England and Wales upheld the legality of detention, pending deportation, of a Somali man during a particular period in which there were no airline carriers willing to undertake “enforced returns” from the UK to Somalia.⁶⁵

⁶¹ See above, Dowd, n.57.

⁶² Human Rights Council. *Report of the Working Group on Arbitrary Detention, Addendum: Mission to Turkey*, A/HRC/4/40/Add.5, 7 February 2007, para.90.

⁶³ U.S. Committee for Refugees and Immigrants. *World Refugee Survey 2008*, available at: <http://www.refugees.org/countryreports.aspx?id=2119> (last accessed 6 January 2009).

⁶⁴ Stateless persons are often amongst the most vulnerable populations in their country of habitual residence and most desperate to leave and are “at most risk of finding themselves in the hands of smugglers and traffickers”, who may also destroy their documents. See discussion in: “Migration in an Interconnected World: New Directions for Action”, *Report of the Global Commission on International Migration*, October 2005. See also discussion on trafficking in: Amnesty International. *Living in the Shadows: A primer on the human rights of migrants*, September 2006, p.33. Victims of trafficking are also exposed to other serious violations as highlighted by OHCHR, because they “involuntarily commit administrative infractions, such as irregular entry, use of false documents and other violations of immigration laws and regulations, which make them liable to detention. Furthermore, the law of some countries punishes as criminal offences irregular entry, entry without valid documents or engaging in prostitution, including forced prostitution.” See above, OHCHR, n.33.

⁶⁵ Appeal Court of England and Wales, *A, R (on the application of) the Secretary of State for the Home Department* [2007] EWCA Civ 804 (30 July 2007). This particular case concerned a Somali man who had been transferred to immigration detention following completion of an eight year sentence for a serious criminal offence.

1. Stateless Persons held in security and military detention

51. Another aspect of detention of persons without effective nationality is the prolonged or indefinite detention of persons held under security powers. Very similar issues arise in this context as those that have been described in the preceding section concerning stateless migrants, refugees and asylum seekers. One extreme (and well documented) case is the situation of detainees who have been held at Guantánamo Bay.
52. Reprieve has reported the case of one Palestinian man, Ayman Al Shurafa, who was cleared for release from Guantánamo Bay, subject to the process for making appropriate diplomatic arrangements for his departure, but remains in detention because there is no country willing to accept him. As described by Reprieve, Ayman Al Shurafa “has slipped through the diplomatic cracks”, between Palestine and Saudi Arabia. He was born and has lived in Saudi Arabia for twenty years but his extended family live in Palestine and his most recent passport is Palestinian. “The Palestinian Authority has yet to take up his case, although he has a Palestinian passport and the Saudi Government refuses to take him back, as he is a Palestinian national. His only option is to wait for someone to welcome him home.”⁶⁶

⁶⁶ Reprieve. *Ayman Al Shurafa: Palestinian National and Saudi Resident, Cleared for Release from Guantánamo Bay*, available from Reprieve.

Palestinian National and Saudi Resident, Cleared for Release from Guantánamo Bay

Ayman Al Shurafa

"With each day that passes in his concrete cell, Ayman Mohammed Al Shurafa has little to do but reflect on how strange his tragedy is. From the viewpoint of the US military officers who have held him in Guantánamo Bay for six years, Ayman could be released tomorrow—and yet in prison he sits.

Ayman is stranded for the simple reason that he has slipped through the diplomatic cracks: between Palestine, the ancestral homeland of his people and the entity from which he holds a passport, and Saudi Arabia, the country where he was born and called home for over twenty years.

Ayman was born in 1975 in Jeddah, Saudi Arabia. His father and mother raised him and his three brothers there. His extended family, however, come from Palestine and still live there. His most recent passport is Palestinian.

During college, Ayman decided it would be easier to finish his business degree in Gaza, so he enrolled in university there. But he had chosen a bad time to relocate: the intifada broke out, danger clouded his prospects for graduation, and Ayman began searching for other options. He returned to Saudi Arabia, but was denied educational opportunities because of his nationality. Lacking choices, when a Saudi sheikh issued a fatwa that said he needed to be "prepared" to defend Muslim countries, Ayman decided to take up the call. He travelled to Afghanistan in summer 2001, but never once raised arms against US forces or anyone else. He fled the region after war broke out, got swept up, and finally landed in Guantánamo Bay.

.....

Critically, the US military has already decided Ayman is no threat. Ayman testified at length before a panel of US military officers at his first "Administrative Review Board." After that hearing, the military panel decided that Ayman was "approved to leave Guantánamo Bay, subject to the process for making appropriate diplomatic arrangements for his departure." The US military specifically found that he posed no danger to the United States or its allies, and that he had no intelligence to give. He could leave Guantánamo tomorrow, were another country to accept him.

But the "appropriate diplomatic arrangements" have proven elusive for Ayman. The Palestinian Authority has yet to take up his case, although he has a Palestinian passport. The Saudi Government refuses to take him back, as he is a Palestinian national. His only option is to wait for someone to welcome him home."⁶⁷

⁶⁷ Ibid.

Expulsion and Destitution

53. Whilst the purpose of this paper is to highlight protection concerns related to the detention or otherwise restriction of stateless persons, two additional issues should be noted. One involves extreme violation of the security of the person through mass expulsion. The other involves extreme violation of economic and social rights through release into destitution.

Expulsion and *refoulement*

54. There have been well-documented mass expulsions of stateless persons, for example in the case of the thousands of stateless black Mauritians who were expelled from Mauritania in 1989.⁶⁸ The Dominican Republic provides a more recent illustration. Stateless Dominicans of Haitian descent born in the Dominican Republic have experienced severe racial discrimination, heightened vulnerability to deportation and obstacles to their access to economic and social services.⁶⁹ According to one UN report:

Dominican citizens of Haitian descent and long-settled Haitians are as likely as recent migrants to be deported without adequate opportunity to argue any distinctions. Deportations occur so rapidly that family members are not informed. Parents are deported leaving children unaccompanied. Ill-treatment and abuse during deportation is reportedly common. Legitimate identification documents, including cédulas and birth certificates are confiscated by authorities conducting deportation “sweeps” and deportees are generally not given opportunities to secure their housing and property. Accounts are given of deportations being arranged between employers and authorities to enable employers to avoid paying wages. Particular concern was expressed at the practice of collective or mass expulsions.⁷⁰

Release to destitution

55. In some countries stateless persons may be released from detention with their economic and social rights severely restricted. In the absence of protection mechanisms that apply to

⁶⁸ See *inter alia*, Human Rights Watch. *Mauritania's Campaign of Terror: State-Sponsored Repression of Black Africans*, April 1994.

⁶⁹ See Above, McDougall, n.5, para.70.

⁷⁰ Human Rights Council. *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall, Addendum: Mission to the Dominican Republic*, A/HRC/7/19/Add.5 and A/HRC/7/23/Add.3, 18 March 2008, para. 79.

legally stateless persons and other *de facto* stateless persons for whom removal is not a possibility, the alternative to detention can be economic destitution. The UN Committee on the Elimination of Racial Discrimination (CERD) in 2007 expressed concern that in Canada, “undocumented migrants and stateless persons, particularly those whose application for refugee status is rejected but who cannot be removed from Canada, are excluded from eligibility for social security and health care, as it requires proof of residence in one of the provinces [of Canada]”. The Committee further urged the government of Canada to “take necessary legal and policy measures to ensure that undocumented migrants and stateless persons whose asylum applications have been rejected are provided with access to social security, health care and education”⁷¹ The case of Mr. S., a stateless Bidoon and refused asylum seeker in the United Kingdom who was born in Kuwait and has lived in Iran, illustrates the difficulties stateless persons may face in the absence of distinct protection mechanisms.

56. Similar concerns arise in relation to others who are not legally stateless but who face difficulties returning to their country of nationality. In the United Kingdom, the Asylum Support Appeals Project (ASAP) has highlighted the extreme vulnerability of refused asylum seekers who face problems returning voluntarily to their country of nationality. A refused asylum seeker can access a minimal amount of support in the form of vouchers⁷² if they are considered to be “taking all reasonable steps to leave the UK”.⁷³ ASAP has highlighted the difficulties some nationals encounter when trying to meet the criteria, including difficulties proving their nationality or obtaining travel documentation from their embassies. Individuals deemed not to be taking all reasonable steps can be left destitute, without basic support. This is reported to affect nationals from Eritrea, Ethiopia (where there is mixed parentage), Iranians, Algerians, Chinese, Palestinians and Somalis in particular.⁷⁴ Consider the case of Mr. S, a stateless Bidoon and refused asylum seeker in the United Kingdom, who was born in Kuwait and has lived in Iran.

⁷¹ UN Committee on the Elimination of Racial Discrimination, Seventieth Session, *Concluding Recommendations: Canada*, 19 February - 9 March 2007, para.23. Article 5(e) of the International Convention on the Elimination of All forms of Racial Discrimination guarantees the right of everyone, without distinction, to equality before the law in the enjoyment of economic, social and cultural rights.

⁷² This is often referred to as “Section 4 support”, which corresponds to Section 4 of the Immigration and Asylum Act, 1999, and includes housing and a small amount of financial support in the form of vouchers for essential items such as food and toiletries.

⁷³ Steps to leave the UK that are considered reasonable include application to the International Organisation for Migration’s (IOM) Assisted Voluntary Return programme and compliance with the re-documentation process. See above, Hickey, n.56, p.7.

⁷⁴ *Ibid*, p.9.

Nowhere to turn: the case of a stateless Bidoon in the United Kingdom

"Mr S is Bidoon. He was born in Kuwait but moved to Iran when he was a teenager. He held neither residency rights nor nationality of either country, which effectively rendered him stateless. Bidoons originate from Iran, Iraq, Syria and other Gulf states. They are people who were 'left without a nationality' when Kuwait become independent in 1961, followed by Bahrain and Qatar and the formation of the United Arab Emirates in 1971. Mr S was awarded Section 4 [short term] support [in the form of vouchers] in November 2006 on the grounds that he was taking reasonable steps to leave the UK.

Over the course of the next two years he made several applications to return with [International Organisation for Migration] IOM but due to the lack of travel documentation, all of these applications were unsuccessful. Desperate to return, Mr S had also approached both the Iranian and Kuwaiti Embassies on a number of occasions for assistance obtaining travel documents. Both of the embassies refused his requests on the grounds that he was not one of their nationals.

One of the embassies even threatened to call the police if he approached them again. As a last resort, his local advice centre contacted the Immigration Services on his behalf to see if they could assist. They wrote back saying that without a passport or birth certificate there was little they could do. His MP also intervened and wrote to the Home Office outlining the Mr S' predicament. This letter included a request that in light of the client's inability to leave the UK either voluntarily or forcibly, he should be awarded leave to remain in the UK outside of the immigration rules.

In July 2007 [UK Border Agency] UKBA wrote to Mr S informing him that his support was to be withdrawn as he no longer met the criteria. They noted that on 24 July 2007 his application to return with IOM had effectively lapsed as over three months had passed without progress since he submitted the application.[...] They also noted that the client had stated that he was unable to obtain a travel document from the Iranian embassy, but informed him that there were alternative procedures he could follow to facilitate his departure from the UK. These included:

- *Approaching the IOM for assistance in obtaining an emergency travel document from the Iranian embassy*
- *Approaching the Home Office for help in obtaining an Emergency Travel Document on his behalf*
- *Approach the immigration service in relation to an enforced departure from the UK*

These instructions had been issued to the client despite UKBA having been provided with a wealth of evidence from the Mr S' representatives and MP showing he was doing everything in his power to leave the UK."⁷⁵

⁷⁵ *Ibid*, p.10.

Concluding remarks

57. This paper provides an initial overview of available information and documentation concerning the detention of stateless persons and should be considered as a work in progress. ERT consultations and research have revealed that there is relatively little information concerning the detention and physical restriction of stateless persons, and in particular non-refugee stateless persons, as category of non-citizens with distinct protection needs. Despite this, some key issues can be identified for further research.
58. In a number of countries, stateless persons who were born or are habitually resident in that country are vulnerable to the discriminatory administration of justice. This vulnerability may be due at least in part to their statelessness, a factor which can be compounded by membership of a minority group. In many countries, arbitrary detention and restrictions on stateless persons can and should be seen in the context of wider rights denials.
59. Particular attention has been paid to non-refugee stateless migrants who do not have legal status in the country in which they are present but cannot return to their country of birth or habitual residence. Two trends – a risk of prolonged detention – and a risk of repeated detention – have been identified for further inquiry. Attention has also been paid to the situation of other migrants who may not be legally stateless but who do not enjoy an effective nationality, or cannot return to their country of nationality for a number of practical, humanitarian or legal reasons.
60. The distinct protection requirements, in particular vulnerability to prolonged detention, faced by stateless migrants and others who, whilst not legally stateless, may be considered *de facto* stateless should be explored further.
61. Further research is needed to assess the scale of the problem of detention of stateless persons and in particular to address protection concerns related to *de jure* and *de facto* stateless persons who are not refugees. A number of questions which may be explored further through documentation of individual cases of stateless persons in detention include:
- Are there gaps in protection for non-refugee stateless persons in international law?
 - How might human rights law address these gaps?
 - What is the practical scope of the concept of *de facto* statelessness?

- What mechanisms are best placed to secure the rights of stateless persons, including *de facto* stateless persons in detention or other forms of restriction?