

GUIDELINES TO PROTECT STATELESS PERSONS FROM ARBITRARY DETENTION

PREAMBLE

The Guidelines to Protect Stateless Persons from Arbitrary Detention (the Guidelines) address a gap in the application of international law, which has made many stateless persons vulnerable to arbitrary detention and post release destitution. The Guidelines focus primarily on the immigration detention of stateless persons (including the de facto stateless), but may also be relevant in other contexts.

At present, the immigration laws, policies and practices of most states do not sufficiently take into account the unique characteristics that set stateless persons apart from other migrants. All non-stateless migrants have an effective nationality, benefit from the protection of their state and have a country to be returned to. Stateless persons however, are not considered nationals under the operation of the law of any state, and the de facto stateless do not have an effective nationality. Both groups lack the protection of a nation state, and are unlikely to have consular or diplomatic protection and/or documentation.

The failure to recognise the particular circumstances of statelessness has created a protection gap; this is most evident in the context of immigration detention for the purpose of removal.

All stateless persons (including the de facto stateless) should enjoy the rights accorded to them by international human rights law. Their rights should be respected, protected and fulfilled at all times, including in the exercise of immigration control. Stateless persons are also protected under the 1954 Convention Relating to the Status of Stateless Persons (the 1954 Convention).

While states have a sovereign right to control their borders and if necessary to use immigration detention for these purposes, they are obligated to do so in compliance with international human rights law, which provides that detention should never be arbitrary. The increasing use of immigration detention, including for punitive purposes, and the criminalisation of irregular migration by a growing number of states, is therefore a concerning trend. These developments have largely occurred without regard to the specific circumstances of stateless persons and the implications of international human rights law on the detention of stateless persons.

The circumstances facing stateless persons are significant factors to be taken into account in determining the lawfulness of immigration detention. The process of resolving the identity of stateless persons and a stateless person's immigration status is often complex and burdensome. Lawful removal of such persons is generally subject to extensive delays and is often impossible. Stateless persons detained for these purposes are therefore vulnerable to prolonged detention. These factors in turn make stateless persons especially vulnerable to the negative impact of detention. The emotional and psychological stress of lengthy – even

indefinite – periods of detention without hope of release or removal is particularly likely to affect stateless persons. The Guidelines explain how these factual circumstances should affect decisions as to the lawfulness of detaining a stateless person.

States are obligated by international law to treat stateless persons in a way which is appropriate in light of their statelessness. States will be unable to comply with that obligation unless they take measures to identify stateless persons within their territory and subject to their jurisdiction. The Guidelines set out the minimum standards which states should apply in relation to the identification of stateless persons.

The Guidelines do not attempt to develop new legal principle. They reflect and apply the existing human rights obligations of states towards stateless persons within their territory and subject to their jurisdiction. The Guidelines also draw from international good practice, and recommend actions which go beyond the minimum obligations of international human rights law. Such recommendations provide guidance on how states could offer better protection to stateless persons within their territory and subject to their jurisdiction.

The Guidelines comprise four parts. Part One focuses on definitions, the scope and interpretation of the Guidelines and basic principles. Part Two focuses on the identification of stateless persons and Part Three on the detention of stateless persons. Part Four is a series of additional Guidelines.

PART I – INTRODUCTORY GUIDELINES

DEFINITIONS

1. A **stateless** person is defined under international law as a person “who is not considered as a national by any state under the operation of its law”.¹ A person who cannot acquire and/or prove his or her nationality due to legal, administrative, procedural and/or practical barriers may be considered stateless under international law. A migrant whose nationality is undetermined should be protected as stateless until proven otherwise.

2. A ***de facto* stateless** person has a legal nationality which is ineffective. For example, a person who does not benefit from consular or diplomatic protection from his or her country of evident nationality, or a person who with valid reason renounces the protection of his or her country, is considered to be *de facto* stateless.

3. **Detention** is understood to mean deprivation of liberty in a confined place. When considering whether a stateless person is in detention, “the cumulative impact of multiple restrictions as well as the degree and intensity of each of them should be assessed.”²

1 Convention Relating to the Status of Stateless Persons, ECOSOC RES/526 A(XVII) (1954), Article 1(1). For authoritative guidance on the interpretation of Article 1(1), see UN High Commissioner for Refugees, Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, 20 February 2012, HCR/GS/12/01, available at: <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

2 UN High Commissioner for Refugees, UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, adapted from Guideline 1, available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html>.

4. **Immigration detention** is a form of administrative detention used as a last resort when necessary for the sole purpose of achieving a legitimate administrative objective such as removal or the prevention of unlawful entry.

5. An **alternative to detention** is any legislation, policy or practice that imposes a less coercive or intrusive deprivation of liberty or restriction on movement than detention.

6. **Protected characteristics** are those characteristics which, according to international human rights law, must not be the basis of discrimination. Protected characteristics include “race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness”.³

SCOPE

7. The Guidelines generally apply to stateless and *de facto* stateless persons. Unless the Guidelines state otherwise, they should be understood to be equally applicable to both groups. Consequently, hereafter in the Guidelines, the term “stateless” is generally intended to include the *de facto* stateless as well.

8. The Guidelines apply to the immigration detention of, and decisions to detain all stateless persons

3 The Equal Rights Trust, Declaration of Principles on Equality, 2008, Principle 5, available at: <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>.

within the territory or subject to the jurisdiction of states. They also address the identification of stateless persons, which is a necessary pre-requisite for their adequate protection; and the treatment of persons released from detention.

INTERPRETATION

9. In all circumstances, the Guidelines should be interpreted in a manner which provides the greatest protection for stateless persons; promotes their human rights and protects them from arbitrary detention. Under no circumstances should the Guidelines be interpreted in a manner which limits the enjoyment of human rights by stateless persons.

10. Any exceptions to the protections stated in the Guidelines should be interpreted in the narrowest possible manner.

11. The Guidelines are primarily a reflection of the existing human rights obligations of states towards stateless persons within their territory or subject to their jurisdiction. Such Guidelines use directive language – i.e. “states should”, “states shall”, “states have a duty”, etc. Where the Guidelines contain good practice recommendations this is reflected through the use of more persuasive language – i.e. “it is desirable that” etc.

BASIC PRINCIPLES

12. States have a duty to respect, protect and fulfil the human rights of all stateless persons within their territory or subject to their jurisdiction, including the right to be free from arbitrary detention. The human

rights obligations of states in respect of stateless persons apply at all times, including in the exercise of immigration control.

13. States have an obligation to identify stateless persons within their territory or subject to their jurisdiction as a first step towards ensuring the protection of their human rights.

14. All persons, including stateless persons, are equal before the law and are entitled without any discrimination to the equal benefit and protection of the law, including equal and effective access to justice.

- (i) National laws, policies and practices pertaining to immigration detention should not discriminate against stateless persons and should not be applied in a discriminatory way.
- (ii) Immigration detention regimes should be designed and implemented in a manner which takes due consideration of the specific circumstances of statelessness and of the obligations of the state in respect of stateless persons. States should refrain from both direct and indirect discrimination on grounds of statelessness and should ensure that they reasonably accommodate the particular circumstances of all stateless persons.

It is highly desirable that national immigration laws, policies and practices are made compliant with the principles of equality and non-discrimination, and with national equality and non-discrimination laws and policies.

15. States party to the 1954 Convention have a legal obligation to treat stateless persons within their territory or subject to their jurisdiction in accordance with the provisions of that Convention.

16. States have the right to provide diplomatic protection and a duty to provide consular services to nationals outside their territory. States should exercise these rights and duties with due regard to their international human rights obligations; the failure to provide such protection or services can create *de facto* statelessness.

17. The United Nations High Commissioner for Refugees (UNHCR) has a special mandate to prevent and reduce statelessness and to protect stateless persons. The UNHCR has an obligation to fulfil this mandate to the best of its ability and states should at all times fully cooperate with the UNHCR in the fulfilment of this mandate.

18. It is recommended that states review their immigration policies and immigration detention regimes and take all necessary steps to bring them into adherence with the state's human rights obligations to protect stateless persons within their territory or subject to their jurisdiction and to reduce and prevent statelessness.

PART II - IDENTIFYING STATELESS PERSONS

IDENTIFYING STATELESS PERSONS

19. All immigration regimes should have efficient, effective, objective, fair and accessible procedures in place for the identification of stateless persons. It is highly desir-

able that such procedures comply with the standards and principles stated in relevant UNHCR Guidance.⁴

20. It is highly desirable that additionally, such procedures take into consideration the full range of factors which can undermine the effectiveness of a person's nationality, including:

- (i) the failure of the state to provide diplomatic protection;
- (ii) the failure of the state to provide consular services;
- (iii) the lack of a practical route of return; and/or
- (iv) the inability to guarantee safe return.

It is recommended that states maintain reliable and up-to-date information on countries which are likely to generate *de facto* statelessness.

21. All statelessness identification procedures should be non-discriminatory, and be applied without discrimination, including by reasonable accommodation of the needs of persons vulnerable to discrimination such as women, children, the elderly, lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, disabled persons and persons who may have particular needs and vulnerabilities, such as victims of torture and victims of trafficking.

22. Stateless persons should be identified in accordance with Guidelines 19 – 21 prior to being detained or sub-

4 UN High Commissioner for Refugees, Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, 5 April 2012, HCR/GS/12/02, available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html>.

ject to removal proceedings. All persons subject to such procedures should be allowed to remain in the country pending final decision.

PART III – THE DETENTION OF STATELESS PERSONS

DECISION TO DETAIN

23. The immigration detention of stateless persons is undesirable and there should be a presumption against their detention.

24. The detention of stateless persons should never be arbitrary.

25. Detention will be arbitrary unless it is *inter alia*:

- (i) provided for by national law;
- (ii) carried out in pursuit of a legitimate objective;
- (iii) non-discriminatory;
- (iv) necessary;
- (v) proportionate and reasonable; and
- (vi) carried out in accordance with the procedural and substantive safeguards of international law.

26. The mandatory immigration detention of irregular migrants is arbitrary and therefore unlawful under international human rights law.

27. Immigration detention should solely be for the administrative purposes of preventing unlawful entry or removal. The following do not constitute legitimate objectives for immigration detention:

- (i) The imposition of detention as a deterrent against irregular migration is not lawful under international law.
- (ii) The imposition of detention as a direct or indirect punishment for irregular immigration is not lawful under international law.
- (iii) The imposition of detention as a direct or indirect punishment for those who do not cooperate with immigration proceedings is not lawful under international law.
- (iv) The imposition of detention for the purpose of status determination is not lawful under international law.
- (v) The imposition of detention solely to protect public safety or national security is not lawful under international law.
- (vi) The imposition of detention solely for the purpose of administrative expediency is not lawful under international law.

28. Removal will not be a legitimate objective and detention pending removal will therefore be arbitrary in instances where removal:

- (i) is not practicable within a reasonable period of time;
- (ii) violates international law obligations of *non-refoulement*;
- (iii) violates the individual's right to remain in his or her own country;
- (iv) violates the individual's right to respect for private and family life; or
- (v) violates other international human rights law standards.

29. In order for detention to be lawful, domestic law should prescribe the substantive and procedural safeguards which must be satisfied in order to detain a person and the detention must be carried out strictly in accordance with both national and international law by persons legally authorised for that purpose.

30. The following considerations should be taken into account in determining whether detention is non-discriminatory, necessary, proportionate and reasonable:

- (i) Any decision to detain must be based on an individual assessment.
- (ii) A person should not be detained solely by reason of his or her statelessness.
- (iii) The length of time it is likely to be necessary to detain a person in order to achieve the objective pursued will be an important factor in the assessment of the proportionality and reasonableness of detention.
- (iv) Stateless persons are particularly vulnerable to the negative impact of detention, including the psychological impact, owing to their unique vulnerability to prolonged and indefinite detention. This could render their detention discriminatory, disproportionate and unreasonable.
- (v) Any outstanding applications for protection should be exhausted before any decision to detain a stateless person is taken.
- (vi) The inability of a stateless person to cooperate with removal proceedings should not be treated as non-cooperation.

ALTERNATIVES TO DETENTION

31. Detention should only be used as a measure of last resort. Whenever a restriction of liberty is deemed necessary to fulfil a legitimate administrative objective, states have an obligation in the first instance to consider and apply appropriate and viable alternatives to immigration detention that are less coercive and intrusive than detention, ensure the greatest possible freedom of movement and that respect the human rights of the individual.

32. It is preferable that states have a range of alternatives available, so that the best alternative for a particular individual and/or context can be applied in keeping with the principle of proportionality and the right to equal treatment before the law.

33. The choice of an alternative should be influenced by an individual assessment of the needs and circumstances of the stateless person concerned and prevailing local conditions.⁵ In designing and applying alternatives to detention, states should observe the principle of minimum intervention.

34. The imposition of alternatives to detention which restrict a stateless person's human rights including the right to liberty should be subject to the same procedural and substantive safeguards as detention. States should therefore, apply all the relevant standards specified in the Guidelines and under international law to ensure that alternatives to detention pursue a legitimate objec-

5 See above, note 2, adapted from Guideline 4.

tive, are lawful, non-discriminatory, necessary, proportionate and reasonable.

35. Where stateless persons are subject to alternatives to detention which restrict their human rights including the right to liberty, they should be subject to automatic, regular, periodic review before an independent judicial body to ensure that they continue at all times to pursue a legitimate objective, be lawful, non-discriminatory, necessary, proportionate and reasonable.

36. Alternatives to detention should be applied for the shortest time necessary within which the administrative objective can be achieved. If there is evidence to demonstrate that the administrative objective pursued cannot be achieved within a reasonable period of time, the person concerned should not be subject to such alternatives to detention and should instead be released in conformity with Guidelines 55 – 60 below.

ONGOING DETENTION

37. In instances where the detention of stateless persons complies with the safeguards and procedures established in Guidelines 23 - 30 above, stateless detainees should be entitled to the following minimum procedural guarantees:

- (i) Detention shall be ordered by and/or be subject to the prompt and effective control of a judicial authority.
- (ii) The individual shall receive prompt and full written communication in a language and in terms that they understand, of any order of detention, together with the reasons for their deprivation of liberty.

- (iii) The individual shall be informed of their rights in connection with the detention order, including the right to legal advice, the right to apply for bail, seek judicial review and/or appeal the legality of the detention. Where appropriate, they should receive free legal assistance.
- (iv) The individual should be informed of the maximum time-limit of their detention.
- (v) All detaining authorities are urged to provide stateless detainees with a handbook in a language and terms they understand, containing information on all their rights and entitlements, contact details of organisations which are mandated to protect them, NGOs and visiting groups and advice on how to challenge the legality of their detention and their treatment as detainees.

38. Detention shall never be indefinite. Statelessness should never lead to indefinite detention and statelessness should never be a bar to release.

39. Detention should always be for the shortest time possible. There should be a reasonable maximum time-limit for detention. It is highly desirable that states do not detain stateless persons for more than six months. States which at present have a lower than six month maximum time-limit for detention are urged not to increase it, and all states are urged to review and reduce their maximum time-limit for detention.

40. When calculating the total time spent by an individual in detention, it is highly desirable that time spent in detention on previous occasions is taken into consideration unless the material reasons for detention have changed.

Such measures would protect the individual from being a victim of cycles of detention.

41. The administrative purpose behind the detention should be pursued with due diligence throughout the detention period, in order to ensure that detention does not become arbitrary at any stage. Detention should be subject to automatic, regular and periodic review throughout the period of detention, before a judicial body independent of the detaining authorities. If at any stage, it is determined that the administrative purpose can be achieved without detaining the person, the person should be released in conformity with Guidelines 55 – 60 below or subject to a suitable and proportionate alternative to detention in conformity with Guidelines 31 - 36.

42. As soon as it becomes evident that the administrative purpose cannot be achieved within a reasonable period of time, or that the detention otherwise becomes incompatible with the tests set out in Guidelines 23 - 30, or upon the expiration of the maximum time-limit for detention, the detainee should be released in conformity with Guidelines 55 – 60 below.

43. Conditions of detention should be prescribed by law and should comply with international human rights law and standards. While all international standards on conditions of detention should be complied with, the following are emphasised in particular:

- (i) Conditions of detention for stateless persons should be humane, with respect shown at all times for the inherent dignity of the person. No detainees should be subject to torture, cruel, inhuman or degrading treatment or punishment.

- (ii) Stateless persons in detention should be protected from discrimination and harassment and should be entitled to detention conditions which are not inferior to those provided to national detainees.
- (iii) Stateless persons in detention should be subject to treatment that is appropriate to the administrative purpose of their detention. Under no circumstances should stateless detainees be housed in the same facilities as remand prisoners or convicted prisoners serving criminal sentences.
- (iv) Immigration detention facilities should be designed and built in compliance with the principle that there is no punitive element to immigration detention. As such, detention centres should facilitate the living of a normal life to the greatest extent possible.
- (v) Women and men should be detained separately unless they belong to the same family.
- (vi) Reasonable accommodation should be provided to ensure that disabled persons in detention are treated in accordance with principles of international human rights law.
- (vii) All stateless detainees should be allowed free and frequent access to: (i) their families, friends, communities and religious groups; (ii) their legal counsel; (iii) the UNHCR; (iv) the consulate of any state in order to establish nationality or the lack thereof; (v) medical and psychological care; and (vi) civil society organisations and visitors groups.
- (viii) The human rights of stateless persons in detention – including the right to a nationality, the rights to respect for private and family life, freedom of thought, conscience and religion, freedom of expression and the rights to health, education,

shelter and food - should be respected, protected and fulfilled at all times.

44. There should be effective and open access to, and independent and regular monitoring of detention centres, by National Human Rights Institutions, civil society organisations and UN bodies, to ensure that they comply with national and international legal requirements. States are urged to ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

VULNERABLE GROUPS

45. Stateless persons are vulnerable and should be protected at all times. It is highly desirable that “statelessness” is recognised as a protected characteristic.

46. It is highly desirable that individual vulnerability assessments of all stateless detainees are carried out periodically by qualified persons, to determine whether detention has had a negative impact on their health and wellbeing. If this is determined to be so, there should be a reassessment of the proportionality of the detention, which may result in the person being released in conformity with Guidelines 55 - 60 below or subject to a suitable and proportionate alternative to detention in conformity with Guidelines 31 - 36.

47. Statelessness identification procedures should identify persons who are additionally vulnerable to discrimination or the negative effects of detention due to their specific characteristics, context and/or experience. Such persons include disabled persons, those with specific physical and mental health conditions and needs, victims of traffick-

ing, victims of torture, cruel, inhuman or degrading treatment or punishment, LGBTI persons, the elderly, pregnant women, nursing mothers and those belonging to minorities which are at heightened risk of discrimination in detention.

48. Vulnerable persons should not be detained. In exceptional circumstances where a decision to detain vulnerable persons fulfils all criteria stated in the Guidelines:

- (i) detention should only be permitted after the completion of a welfare assessment;
- (ii) detention should only be permitted after it has been medically certified that the experience of detention would not adversely impact their health and wellbeing;
- (iii) special steps should be taken to ensure that such persons are not subject to discrimination, harassment or abuse at the hands of other detainees or officers; and
- (iv) such persons should have regular and timely access to all appropriate services, such as hospitalisation, medication and counselling to ensure that continuous care is provided.

49. Stateless children should not be detained. Stateless children should at all times be treated in accordance with the UN Convention on the Rights of the Child, including the principle of the best interests of the child. Children should not be detained because they or their parents, families or guardians do not have legal status in the country concerned. Families with stateless children should not be detained and the parents of stateless children should not be separated from their children for purposes of detention. In exceptional circumstances where children are detained because it is in their best interest, they should not be detained with adults unless it is in their best interest to do so.

50. There should be a presumption of release of children born in detention. Such children should have their births registered and their right to a nationality respected and protected in accordance with the provisions of international law.

51. As a general rule, stateless asylum-seekers should not be detained. The detention of asylum-seekers may exceptionally be resorted to for limited purposes as set out by the UNHCR, as long as detention is clearly prescribed by national law and conforms to general norms and principles of international human rights law.⁶

NON-NATIONAL PRISONERS AND EX-OFFENDERS

52. Non-national prisoners and ex-offenders shall benefit from all rights, procedural and substantive, stated in the Guidelines.

- (i) It is highly desirable that non-national prisoners who may be stateless or who are at risk of statelessness are subject to statelessness determination procedures before completing their prison sentence. Where there is evidence to suggest that a non-national prisoner is stateless, any further detention after the completion of their sentence for purposes of removal is likely to be unnecessary, disproportionate and arbitrary.
- (ii) It is highly desirable that removal proceedings against non-national prisoners who are to be removed from the country, begin a minimum of six months prior to the completion of their prison sentence, or at the beginning of their prison sen-

6 Ibid., adapted from Guidelines 2 and 3.

tence if it is six months or shorter. Where there is no reasonable likelihood of removal at the time their sentence is complete, non-national ex-offenders should not be automatically subject to further detention pending removal.

- (iii) Protecting public safety and national security do not constitute legitimate objectives for the imposition of immigration detention. Under no circumstances should non-national ex-offenders be held in immigration detention solely for these reasons.

PART IV – ADDITIONAL GUIDELINES

DATA AND STATISTICAL INFORMATION

53. It is highly desirable that states maintain reliable data, disaggregated by protected characteristic and by type of statelessness, showing:

- (i) the number of persons who have been subject to statelessness identification procedures; and
- (ii) the number of persons who have been recognised as stateless.

54. It is highly desirable that states maintain reliable data, disaggregated by protected characteristic and by type of statelessness, showing:

- (i) the number of stateless detainees;
- (ii) the reasons for their detention;
- (iii) the length of their detention; and
- (iv) the outcomes of their detention.

THE TREATMENT OF RELEASED STATELESS PERSONS

55. State obligations towards stateless persons do not cease after release from detention or alternatives to detention. Special care should be taken to address the vulnerabilities of stateless persons who are released from detention and to ensure that they enjoy all human rights which they are entitled to under international law.

56. Released stateless detainees should be provided with appropriate documentation and stay rights suitable to their situation.

57. Released stateless detainees should be protected from destitution.

58. Released stateless detainees should have access to healthcare, social welfare, shelter and primary education on an equal basis with nationals.

59. It is highly desirable that released stateless detainees are allowed to work. Such persons are entitled to equal work place rights as nationals.

60. It is most desirable that durable solutions are found for statelessness, including the facilitated naturalisation of stateless migrants.

COMPENSATION

61. All stateless persons who have been subject to arbitrary detention should be compensated in a fair and non-discriminatory manner.

62. Such compensation should take into account the length of detention, the impact of detention on the individual and the nature of treatment to which the detainee was subject.