

REPRESENTING STATELESS PERSONS BEFORE U.S. IMMIGRATION AUTHORITIES



A Legal Practice Resource from the United Nations High Commissioner for Refugees

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¹ Judge Dorothy Harbeck is the Eastern District Vice President of the National Association of Immigration Judges (NAIJ). The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the participant’s personal opinions, which were formed after extensive consultation with the membership of the NAIJ.

² Judge Dana Marks is the President of the National Association of Immigration Judges (NAIJ). The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the participant’s personal opinions, which were formed after extensive consultation with the membership of the NAIJ.

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A Message from UNHCR

“Invisible is the word most commonly used to describe what it is like to be without a nationality,” said UNHCR High Commissioner Filippo Grandi. “For stateless children and youth, being ‘invisible’ can mean missing out on educational opportunities, being marginalised in the playground, being ignored by healthcare providers, being overlooked when it comes to employment opportunities, and being silenced if they question the status quo.”³

An estimated 10 million people in the world today are stateless. Through no fault of their own, they have no nationality and no fundamental tie to a country. Despite often living their entire lives in a country, they are citizens of nowhere. Without a nationality, these women, men, and children are often denied the most basic of rights. Many face obstacles to accessing education, seeing a doctor, getting a job, opening a bank account, or even getting married. They face discrimination, detention, and long-term or indefinite separation from family and loved ones.

In addition to its other responsibilities, through a series of resolutions beginning in 1995, the Office of the United Nations High Commissioner for Refugees (UNHCR) was mandated by the UN General Assembly to reduce situations of statelessness and protect the rights of stateless people. In carrying out that responsibility, UNHCR works with governments, civil society, and stateless people to identify stateless populations; reduce existing situations of statelessness; prevent new situations of statelessness from emerging; and protect the rights of stateless people.

What is Statelessness?

The 1954 Convention relating to the Status of Stateless Persons defines a stateless person as “a person who is not considered as a national by any state under the operation of its laws.”⁴

No definition of statelessness currently exists under U.S. law, nor does the law provide any specific protections to individuals by virtue of their stateless status.⁵ As such, the special circumstances of stateless people often pass undetected in their interactions with U.S. immigration authorities.⁶

The purpose of this manual is to empower immigration lawyers in the United States to recognize when a U.S.-based client is stateless and to zealously represent such clients before immigration authorities.⁷ It serves as a guide in helping understand how an individual’s inability to access a nationality creates unique challenges and potential eligibilities in the immigration context. First, a client must be screened to determine if they are stateless, which is detailed in Chapter 1. There are numerous forms of legal relief available to a stateless client: asylum, withholding of removal, cancellation of removal, and deferred action (explained in Chapter 2 of this manual). Chapter 3 discusses ways to improve the lives of stateless clients, including release from detention, reducing reporting requirements, and securing multi-year work.

³ Press Release, United Nations High Commissioner for Refugees (UNHCR), UNHCR Commemorates 2 Years of the #IBelong Campaign to Eradicate Statelessness, (Oct. 27, 2016), <http://www.unhcr.org/en-us/news/press/2016/10/5811c77e4/unhcr-commemorates-2-years-ibelong-campaign-eradicate-global-statelessness.html>.

⁴ United Nations (UN) Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175, available at <http://www.refworld.org/docid/3ae6b39620.html> [accessed Dec. 11 2016].

⁵ By contrast, the United Kingdom has a specific statelessness determination procedure. See EUROPEAN COUNCIL ON REFUGEES AND EXILES WEEKLY BULLETIN, UK INTRODUCES A STATELESSNESS DETERMINATION PROCEDURE, (Apr. 19, 2013), available at <http://www.ecre.org/uk-introduces-a-stateless-determination-procedure/>.

⁶ Additional gaps in U.S. law create a risk of statelessness for persons outside the United States. For instance, U.S. law allows for voluntary renunciation of citizenship without first requiring the acquisition of another nationality, leaving some individuals stateless. See Immigration and Nationality Act (INA) § 349 – Loss of Nationality by Native-Born or Naturalized Citizen, available at <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-10446.html>. While there may be opportunities for legal practitioners to assist individuals who have been rendered stateless under these circumstances, this edition of the manual focuses on legal assistance to stateless persons physically present in the United States.

⁷ While gaps exist in U.S. law that make it possible for a former United States citizen who has formally renounced her citizenship to be outside of the United States and stateless, this version of the manual does not address this situation, but rather, focuses on representing stateless individuals within the United States.

“Before UNHCR and my attorney recognized me as a stateless person, I felt hopeless and misunderstood. Now, I have someone who understands my situation. I am less fearful of being detained again and I am able to travel more freely within the United States than I could before they worked with the government officials. With their help, I hope to see my son Danil someday.” -- Tatianna, stateless woman living in the United States and separated from her son in Russia for more than two decades.

Across the globe, the legal community is a key partner to UNHCR in our efforts to end statelessness and protect the rights of stateless people. UNHCR appreciates the efforts of the legal community in the United States in improving protections for stateless people and hopes that the first edition of this manual serves as an effective resource to that end. Law, policy, and practice are certain to develop in this area in the years to come. We look forward to working together as this body of knowledge and law continues to grow.

*UNHCR Regional Office for the United States of America and the Caribbean
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COVER PHOTOGRAPH:

At a sewing class at a UNHCR-funded peaceful co-existence project bringing together women from different communities in Maungdaw, northern Rakhine state, Myanmar, the UN High Commissioner for Refugees Filippo Grandi meets 27-year-old Rohingya Muslim Lailya Bagum, who is learning basic literacy for the first time. © UNHCR/Roger Arnold

Chapter One: Understanding, Identifying, and Proving Statelessness

A woman comes to your office, asking for assistance in her case. She is in her mid-sixties and has been living in the United States for twenty years without lawful immigration status. Recently, immigration authorities briefly detained and released her, setting a date for her to appear in immigration court. She has one U.S. citizen daughter, and expresses concern about returning to the country of her birth – both because of the potential separation from her daughter but also because of a recent court decision in that country that denationalized many within her ethnic group. She tells you that the government has done the same to others in the past, and she has seen those people suffer discrimination and harassment, be turned away from schools and denied jobs and healthcare, and even be arrested and detained without cause. You ask for her passport, and she says it expired several years prior. How do you begin thinking about her case? Asking whether she might be stateless is a good place to start.

Section 1: Overview of Statelessness

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

- 1954 Convention relating to the Status of Stateless Persons, Article 1(1)⁸

A stateless person is a citizen of nowhere. Without a nationality, stateless persons are without the recognition or protection of any country. Today, there are an estimated 10 million stateless people worldwide. Stateless people reside in all parts of the globe—Asia, Africa, the Middle East, Europe, and the Americas—and they are children, couples, older people, and even entire communities. Their common misfortune—the lack of any nationality—often impedes their access to rights that most of the global population takes for granted. Often, they are excluded from cradle to grave, being denied a legal identity upon birth, access to education, health care, marriage, and job opportunities during their lifetime. They live under threat of detention and exploitation and often face long-term, if not indefinite, family separation. Over a third of the world’s stateless people are children, and the stigma of statelessness follows many of them for the entirety of their lives.

Statelessness results from a range of causes.⁹ These include gaps in nationality laws, state succession, the transfer of territories between states, ethnic or gender discrimination in nationality laws, and discriminatory denationalization. Entire swathes of a population may become stateless overnight due to political or legal directives or the redrawing of state boundaries. Families endure generations of statelessness despite having deep-rooted and longstanding ties to their communities. Others have become stateless due to administrative obstacles; they simply fall through the cracks of a system that ignores or has forgotten them altogether. Still others have been deprived of their nationality through changes in law that leave whole populations stateless, using discriminatory criteria like ethnicity or race. In many situations, if stateless people have children of their own, this new generation will likely also be stateless and the cycle will continue.

⁸ UN Convention on the Reduction of Statelessness, *supra* note 3.

⁹ UNHCR, *CITIZENS OF NOWHERE: SOLUTIONS FOR THE STATELESS IN THE U.S.*, Dec. 2012, pp. 13-14, available at: <http://www.refworld.org/docid/50c620f62.html>; see generally Lia Melikian, *No Country for Some Men?: Statelessness in the United States and Lessons from the European Union*, 43 GA. J. INT’L & COMP. L. 281 (2015).

Significant situations of statelessness have been identified around the world. Over 900,000 people in Myanmar's Rakhine state are stateless under the current citizenship law, which limits citizenship eligibility to members of certain ethnic groups.¹⁰ As of publication, **25 countries** the world over do not permit women to transfer nationality to their children, allowing statelessness to occur where fathers are unknown, missing or deceased. Statelessness due to the dissolution of former states also continues to affect many people, including more than 565,000 people in Europe alone.¹¹ Areas such as West Africa, which have seen large-scale forced displacement, are also highly affected by statelessness. The estimated stateless population in Côte d'Ivoire alone is 694,000, many of whom are of Burkinabé descent and were ineligible for Ivorian nationality after the country gained independence in 1960.¹²

While States have broad authority in the granting and withdrawal of nationality, this authority is balanced by the individual protections set out under international human rights law.¹³ The legal cornerstones defining the rights of stateless persons and the responsibilities of States are the 1954 Convention relating to the Status of Stateless Persons (1954 Convention) and the 1961 Convention on the Reduction of Statelessness (1961 Convention).¹⁴ These conventions complement the broader international human rights framework that upholds the right to nationality,¹⁵ particularly for children, and provides protections from denationalization on discriminatory grounds such as race or ethnicity.¹⁶

Through a series of resolutions beginning in 1995, the UN General Assembly gave UNHCR the mandate to identify, prevent and reduce situations of statelessness and to ensure the protection of stateless persons. UNHCR works together with governments, civil society organizations, and stateless people to identify, prevent, and reduce instances of statelessness and to protect stateless people. Critical to that work is ensuring that stateless people understand their rights and have access to legal processes to reduce their hardships and resolve their statelessness. The legal community is a key stakeholder in this work.

Because of protections in its *jus soli* citizenship law, U.S. law does not give rise to statelessness domestically. However, individuals who were born elsewhere and have migrated to the United States may be stateless. As citizens of nowhere, these individuals face a range of hardships as a result of their lack of a nationality.¹⁷ These hardships include detention or the threat of detention, long-term and potentially onerous immigration reporting requirements, barriers to employment, inability to travel internationally, long-term family separation, lack of access to services, and vulnerability to exploitation, among others. With the assistance of an immigration attorney knowledgeable in the area of statelessness and its implications for a stateless person's claim for relief, these hardships may be reduced, if not altogether eliminated, for a stateless client.

Section 2: Identifying the Stateless Client

The first step in legal representation is to evaluate the legal status of the individual. Who is she? Where did she last habitually reside? How did she arrive to the United States? What is her citizenship? These questions can be complicated for any individual, though more so when someone is stateless. While the answers are essential to prove that someone is stateless, they are not always straightforward. An individual might be unaware that she is stateless.

¹⁰ See UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016, at 62, available at <http://www.unhcr.org/en-us/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html> [hereinafter 2016 Global Trends Report].

¹¹ *Id.* at 64.

¹² *Id.* at 60.

¹³ See UNHCR, HANDBOOK ON PROTECTION OF STATELESS PERSONS at ¶ 55 (June 30, 2014) [hereinafter UNHCR Statelessness Handbook], available at <http://www.refworld.org/docid/53b676aa4.html>.

¹⁴ UN Convention on the Reduction of Statelessness, *supra* note 3.

¹⁵ See UNHCR, GLOBAL ACTION PLAN TO END STATELESSNESS, at 27 (Nov. 4, 2014), available at <http://www.refworld.org/docid/545b47d64.html>.

¹⁶ An example is Article 9 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which guarantees that all women have equal rights to men in their ability to confer nationality on their children and with respect to acquisition, change, or retention of their nationality (typically upon marriage to a foreigner). The U.S., however, is not a signatory to CEDAW.

¹⁷ For a comprehensive look at the causes of statelessness in the United States, the hardships facing stateless people, and solutions to end these hardships, see CITIZENS OF NOWHERE, *supra* note 8.

There are a number of red flags or indicators that an individual may be stateless. These include:

- An admission or statement that she lacks or has lost her citizenship or nationality;
- Being from a country that no longer exists;
- Fear of contacting the embassy of her country of last habitual residence;
- An embassy’s refusal to issue an identification or travel document with or without explicitly declaring that the person is not a national of that country;
- An inability of the U.S. government to remove the individual;
- An inability of the individual to secure travel documents from any country with which they have ties.

In some cases, the individual’s ethnicity or country of origin signals a greater likelihood that they are stateless. In other cases, a client’s gender may place her at a greater risk of statelessness.



Note: UNHCR estimates that at least 10 million people were stateless or at risk of statelessness in 2016. However, data captured by governments and reported to UNHCR were limited to 3.2 million stateless individuals in 75 countries.¹⁸

Section 3: Proving Statelessness

A. Definition of a Stateless Person¹⁹

Article 1(1)²⁰ of the 1954 Convention²¹ sets out the definition of a stateless person as follows: “The term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law.”²² Similar

¹⁸ 2016 Global Trends Report, *supra* note 9.

¹⁹ This section draws from UNHCR’s *Handbook on the Protection of Stateless Persons*. The *UNHCR Statelessness Handbook* is “intended to assist governments, policy makers, administrative adjudicators, the judiciary, NGOs, legal practitioners, UNHCR staff and other actors with interpreting and applying the 1954 Convention so as to facilitate the identification and proper treatment of its beneficiaries. In addition, this Handbook will be relevant in a range of other circumstances, such as the interpretation of other international instruments that refer to, but do not define, ‘stateless persons’, ‘statelessness’, or related terms.” See UNHCR Statelessness Handbook, *supra* note 12, at ¶ 6.

²⁰ Note that this Manual does not address Article 1(2) of the 1954 Convention, which sets out the circumstances in which persons who fall within the “stateless person” definition are nevertheless excluded from protection under the treaty.

²¹ UNHCR, 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, U.N. DOC. HCR/GS/12/01 (Feb. 20, 2012), [hereinafter Guidelines on Stateless No. 1], available at <http://www.refworld.org/docid/4f4371b82.html>.

²² *Id.* The Convention does not permit reservations to Article 1(1), thus evincing the primacy and immutability of the definition that is binding on all State Parties to the treaty. The U.S. is not a signatory to either convention.

to a refugee, an individual is a stateless person from the moment that the conditions in Article 1(1) of the 1954 Convention are met and remains so until she acquires a nationality. Thus, any finding by a State or UNHCR that an individual satisfies the definition under Article 1(1) is declaratory, rather than constitutive, in nature. While the 1954 Convention is binding only on its State parties, it is important to note that the definition embodied under Article 1(1) is customary international law.²³

Article 1(1) applies in both migration and non-migration contexts. It is possible to be stateless *in situ*, meaning that a stateless person may never have crossed an international border, having lived in the same country for his or her entire life. Other stateless persons, however, may be encountered outside their country of birth or last habitual residence. Because of *jus soli*—commonly referred to as “birthright”—citizenship, the United States does not typically create statelessness; thus, the United States does not typically face *in situ* statelessness. Rather, stateless persons in the United States typically were born elsewhere and migrated to the United States, often prior to becoming stateless.

Practice Point

It is important to remember that if the individual is still considered a citizen or national of a State, then that person has nationality and **is not stateless**. As a general rule, possession of a nationality is preferable to recognition and protection as a stateless person. Therefore, it is important to take care that individuals with a nationality are so recognized and not mistakenly identified as stateless. Those who possess a nationality, but are unable to be returned to their home country, do not fit the definition of a stateless person and are outside the scope of this manual.

B. Interpretation of the Terms

To assist adjudicators in determining when an individual is stateless, UNHCR has developed legal and procedural guidance to inform the interpretation and application of the Article 1(1) statelessness definition and corresponding protections. This guidance is embodied in the *UNHCR Handbook on the Protection of Stateless Persons (UNHCR Statelessness Handbook)*.²⁴ In particular, Part One of the *UNHCR Statelessness Handbook* sets out the substantive legal considerations for determining statelessness.

Specifically, the Article 1(1) definition is comprised of two constituent legal elements—“by any State” and “not considered as a national...under the operation of its law”—both of which must be examined to reach a determination.

1. Interpreting “by any State”

When determining whether an individual is stateless under Article 1(1), it is often most practical to look first at the matter of “by any State,” as this will not only narrow the scope of inquiry to States with which an individual has relevant ties, but might also exclude from consideration at the outset entities that do not fulfill the concept of “State” under international law. Indeed, in some instances, consideration of this element alone will be decisive, such as where the only entity to which an individual has a relevant link is not a State. Accordingly, the first step is to determine which States need to be examined and what constitutes a “State.” Regarding the former, analysis should focus only on the States to which the individual has a “relevant link, in particular by birth on the territory, descent, marriage, adoption or habitual residence.”²⁵ Regarding the latter, the analysis centers on whether the entity to which a person has links is, in fact, a “State.” Guidance for determining this can be found in the *UNHCR Statelessness Handbook*.²⁶

²³ The International Law Commission (ILC) has concluded that the definition in Article 1(1) is part of customary international law. The text of Article 1(1) of the 1954 Convention is used in the Articles on Diplomatic Protection to provide a definition of a stateless person. See ILC, ARTICLES ON DIPLOMATIC PROTECTION WITH COMMENTARIES at 49, (2006) (stating that the Article 1 definition can “no doubt be considered as having acquired a customary nature”), available at <http://www.refworld.org/docid/525e7929d.html>.

²⁴ The content of this Handbook was first published in 2012 in the form of three UNHCR Guidelines concerned, respectively, with the definition of a stateless person, procedures for determination of statelessness, and the status of stateless persons under national law. In replacing these Guidelines, the Handbook replicates their content with only minimal changes, principally to address duplication and to update references to UNHCR publications. Minor gaps identified since publication of the Guidelines have also been addressed.

²⁵ See UNHCR Statelessness Handbook, *supra* note 12, at ¶18.

²⁶ See *id.* at ¶¶19-20.

There is no requirement of a “genuine” or an “effective” link implicit in the concept of a “national” in Article 1(1). Nationality, by its nature, reflects a linkage between the State and the individual, often on the basis of birth on the territory or descent from a national and this is often evident in the criteria for acquisition of nationality in most countries. However, a person can still be a “national” for the purposes of Article 1(1) despite not being born in or a habitual resident of the State of purported nationality.

2. Interpreting “Not considered as a national ... under the operation of its law”

Once the relevant State(s) is determined, the analysis turns to whether an individual is considered a national under the operation of that State’s law. This is a mixed question of fact and law.²⁷ It requires careful examination not only of the letter of the law, but also of how that State applies its nationality laws in an individual’s case *in practice*. It further requires review of any official decisions that may have had an impact on the individual’s status.²⁸

This approach may lead to a different conclusion than one derived from an analysis purely based on the letter of the law. This is because a State may not follow the formal letter of the law in practice and may even under certain circumstances ignore it. “The reference to ‘law’ in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.”²⁹

It is important to note that the terminology used to describe a “national” varies from State to State. The statelessness definition in Article 1(1) incorporates a concept of “national” which reflects a formal link, of a political and legal character, between an individual and a State. This is distinct from the concept of “nationality,” which is concerned with membership of a religious, linguistic, or ethnic group. Moreover, a State may have various categories of “nationality” with differing names and associated rights. The fact that different categories of nationality have different rights associated with them does not prevent their holders from being a “national” for the purposes of Article 1(1).³⁰

Effect of Different Categories of Nationality

In some States, the rights associated with nationality are fewer than those enjoyed by nationals of other States, or these rights fall short of the requirements under international human rights obligations. However, this does not prevent the holders of this type of nationality from being treated as a “national” for the purposes of Article 1(1). Although diminished rights may raise questions as to the effectiveness of nationality and international human violations, this is not pertinent to the application of the stateless person definition in the 1954 Convention.³¹

Note that depending on the circumstances, the ability to access rights based on different categories of nationality *may* be relevant to an application for asylum, if it is based on race, religion, nationality, political opinion, or membership in a particular social group.

UNHCR has identified the following elements to consider in determining whether an individual is a national under the operation of a particular State’s laws:

- **Automatic and non-automatic modes of acquisition or withdrawal of nationality:** An examination of whether a State’s nationality laws convey nationality automatically, non-automatically, or through some mixture of both, and the extent to which any provision applies to the individual, will help determine if she is a national.

Practice Point

Where acquisition of nationality is not automatic and an individual has not taken those affirmative steps to become a national, the individual is not considered a national and may be stateless. In other words, a stateless person who has the possibility of becoming a citizen under operation of a state’s laws is stateless *until such time as she acquires citizenship*.

²⁷ *Id.* at ¶83.

²⁸ *Id.* at ¶ 23.

²⁹ *Id.* at ¶ 24.

³⁰ *Id.* at ¶¶ 52-56.

³¹ *Id.* at ¶ 53.

- **Identifying competent authorities for nationality matters in each State with which she has relevant links:** This refers to the authority responsible for conferring or withdrawing nationality from individuals, or for clarifying nationality status where nationality is acquired or withdrawn automatically.³²
- **Evaluating evidence of competent authorities in non-automatic modes of nationality acquisition and withdrawal:** This can be relatively straightforward. It refers to the State body on which a decision to grant or withdraw nationality depends. Evidence may include a certificate of naturalization, among other documents.³³
- **Evaluating evidence of competent authorities in automatic modes of citizenship acquisition or loss of nationality:** In the context of automatic acquisition or loss of nationality, no State action is typically required. Thus, while any State authority may make a decision to clarify nationality, which is different from granting or denying naturalization, this authority does not issue nationality documents. Instead, birth registration typically provides proof of place of birth and parentage, the usual elements to satisfy for automatic acquisition of nationality.³⁴
- **Considerations where State practice contravenes automatic modes of acquisition of nationality:** When competent State authorities treat someone as a non-national who should automatically be a national, these authorities' position controls the determination of nationality, rather than the letter of the law. This may arise in the context of discriminatory application of nationality laws.³⁵
- **Absence of evidence of the position of competent authorities:** This arises in the context of an individual who has acquired nationality automatically, but never came into contact with a State's competent authorities. In this circumstance, we look to a State's practice for recognizing similarly situated individuals.³⁶
- **Role of consular authorities:** A consulate may be the competent authority in a non-automatic acquisition of nationality. For example, some States' laws require children born to nationals abroad to register with a consulate as a prerequisite for acquiring the nationality of their parents. Where a consulate is the only competent authority to take a position on an individual's nationality status—e.g., renewing a passport—its position is typically decisive. However, if other competent authorities have taken a different position on someone's nationality, the two positions must be weighed against one another (see "inconsistent treatment by competent authorities" below).³⁷
- **Enquiries with competent authorities:** In some cases, an individual—or another State— may seek clarification of nationality status with competent authorities. Depending on the circumstances, different weight will be assigned to responses and lack of response from a competent authority.³⁸
- **Inconsistent treatment by competent authorities:** Depending on the specific facts, inconsistent treatment may be evidence of a national's rights being violated, that person never having acquired nationality of the State, or deprivation or loss of nationality. Determining whether this is an instance of the former (in which case the individual is not stateless) or the latter two (in which case the individual *may* be stateless) is critical to this element.³⁹
- **Nationality acquired in error or bad faith:** Conferrals of nationality under a non-automatic mechanism are to be considered valid even if in error or bad faith. However, in some cases, on discovering the error or bad faith, the State will subsequently deprive the individual of nationality. This will be considered in determining the individual's current status. Fraudulently acquired documents are generally not evidence of nationality, as they are not connected with any legitimate law or process for acquiring nationality.⁴⁰

³² See *id.* at ¶¶ 27-31.

³³ See *id.* at ¶¶ 31-33.

³⁴ See *id.* at ¶¶ 34-36.

³⁵ See *id.* at ¶ 37.

³⁶ See *id.* at ¶ 38.

³⁷ See *id.* at ¶¶ 39-40.

³⁸ See *id.* at ¶ 41.

³⁹ See *id.* at ¶¶ 42-44.

⁴⁰ See *id.* at ¶¶ 45-46.

- **Impact of appeal/review proceedings:** When an individual's nationality status is the subject of review or appeal proceedings by a judicial or other body, the decision on such proceedings must be considered. However, any evidence of the executive ignoring such decisions in practice is relevant for consideration as well.⁴¹
- **Temporal issues:** Nationality is to be assessed as it is *at the time of determination*. If a process for acquiring or depriving nationality is incomplete at the time, it should not be considered.⁴² Moreover, the fact that an individual can apply to be naturalized in a particular State is also irrelevant to determining whether the individual is at that moment stateless.
- **Voluntary renunciation of nationality:** Voluntary renunciation is an act of free will whereby an individual gives up his or her nationality status. The subsequent withdrawal of nationality may be automatic or at the discretion of the authorities. The question of an individual's free choice is not relevant when determining whether the individual is stateless; however, it may be pertinent to the matter of the treatment received thereafter.⁴³

**Note that the above-mentioned elements are explained in greater detail in Part One of the *UNHCR Statelessness Handbook*.

C. Evidentiary Considerations

The *UNHCR Statelessness Handbook* also provides detailed information regarding assessing evidence, including types of evidence and issues, as well as burden and standard of proof. Importantly, the *UNHCR Statelessness Handbook* delineates weighing of the evidence and how to treat passports, responses from foreign authorities, and other relevant evidentiary matters.

The *UNHCR Statelessness Handbook* also includes the following non-exhaustive list of types of evidence that may be relevant to proving that an individual is stateless:

- Testimony of the applicant (e.g., written application, interview);
- Response(s) from a foreign authority to an enquiry regarding nationality status of an individual;
- Identity documents (e.g., birth certificate, extract from civil register, national identity card, voter registration document);
- Travel documents (including expired ones);
- Documents regarding applications to acquire nationality or obtain proof of nationality;
- Certificate of naturalization;
- Certificate of renunciation of nationality;
- Previous responses by States to enquiries on the nationality of the applicant;
- Marriage certificates;
- Military service records/discharge certificates;
- School certificates;
- Medical certificates/records (e.g., attestations issued from hospital upon birth, vaccination booklets);
- Identity and travel documents of parents, spouse, and children;
- Immigration documents, such as residence permits of country(ies) of habitual residence;
- Other documents pertaining to countries of residence (e.g., employment documents, property deeds, tenancy agreements, school records, baptismal certificates); and
- Record of sworn oral testimony of neighbors and community members.

⁴¹ See *id.* at ¶¶ 47-49.

⁴² See *id.* at ¶ 50.

⁴³ See *id.* at ¶ 51.

D. UNHCR and Statelessness Determinations in the United States

The protection of stateless persons is within UNHCR's mandate. In this regard, UNHCR can perform a statelessness determination when a State does not have a mechanism for making a statelessness determination itself. Currently, the United States has no formal mechanisms to determine an individual's status as a stateless person. As such, UNHCR can, under certain circumstances, conduct statelessness status determinations in the United States.⁴⁴

Practice Point

UNHCR's Regional Office for the United States of America and the Caribbean will consider requests to conduct statelessness status determinations on a case-by-case basis. The request should clearly articulate an assessment of the individual's claim of statelessness and provide legal and evidentiary support for that finding. In addition, these requests should address any complex legal or factual aspects of the case and how a UNHCR status determination is uniquely likely to resolve these; the impact that a UNHCR determination will have on the outcome of the individual's case; and any unique and compelling circumstances of the individual. Please direct all queries/requests to the following:

*UNHCR Regional Office for the U.S.A. and the Caribbean, ATTN: U.S. Protection Unit
1800 Massachusetts Ave. NW, Suite 500, Washington, DC 20036
202-296-5191, usawainq@unhcr.org*

While statelessness determinations issued by UNHCR are not legally binding in the U.S. context, they can assist a lawyer in proving that an individual is stateless. Absent an official government, UNHCR represents an independent and authoritative position on the matter. In addition, a stateless status determination from UNHCR may help in explaining what statelessness is, the circumstances underlying their client's lack of nationality, and the possible consequences of being stateless.

At present, few UNHCR statelessness determinations have been used before U.S. immigration authorities or U.S. courts. Therefore, how they may impact a case is a question ripe with opportunity for lawyers representing stateless clients. A statelessness determination by UNHCR may help demonstrate that a person is not, in fact, a citizen of any State. Moreover, an individual client's statelessness might be a key element to a claim for international protection, for cancellation of removal, or for a form of prosecutorial discretion. Statelessness determinations issued by UNHCR may also be useful in addressing conditions post-removal with Immigration and Customs Enforcement (ICE) officers, including release from detention and reducing any reporting requirement given the low likelihood of removal. Each of these areas is explored in more detail below.⁴⁵

⁴⁴ These circumstances may include, but are not limited to, the following: cases presenting an immediate risk of *refoulement*, cases of prolonged detention, cases presenting uniquely complex legal or factual issues, and/or cases where a UNHCR statelessness status determination is essential to resolve extreme hardship, such as the individual's ability to access services or reunite with family.

⁴⁵ A statelessness determination may be of use in other, non-immigration contexts. However, the scope of this manual is limited to the immigration context, and those contexts are not explored here.

Practice Point**Preparing a Request to Authorities (U.S. Government or UNHCR)
For a Stateless Determination**

Whether preparing a statelessness determination request for UNHCR or for U.S. immigration authorities to recognize an individual as stateless, consider including both factual support and a legal brief, or at a minimum, a legal summary explaining why the individual meets the definition of a stateless person using the criteria set out by the *UNHCR Statelessness Handbook*. This includes a summary of the facts of the person's immigration proceedings in the United States, as well as the factual events that led to their statelessness. Where possible, include:

- An affidavit attesting to these facts;
- Letters or documents supporting these facts;
- A birth certificate or some sort of identity document;
- Birth certificates of the parents;
- Where the individual has travel documents, address how the documents either do not establish that they have nationality, or how the documents have become void as a form of proof of citizenship;
- Any other forms of documentary evidence listed above

The request would also benefit from a discussion of the various considerations/elements relevant to proving an individual's nationality (or lack thereof), including (a) the State(s) to which the individual has relevant ties and how they are formed; (b) the automatic and non-automatic means by which an individual obtains nationality in each State to which the individual has ties, and why she does not have either (perhaps including copies of the relevant nationality laws); (c) any consular response to an individual's request for recognition of nationality or request for travel documents, including any written response of the consulate that states that the individual is not a citizen, or an affidavit including information on the individual's outreach to the consulate and the response; (d) the State(s)' general attitude toward nationality status of persons who are similarly situated.

Chapter Two: Avenues of Relief for the Stateless Client

Section 1: Preparing an Asylum Petition for a Stateless Client

A. Overview

A stateless person in the United States may be eligible for an immigration benefit or relief from removal by virtue of, or in conjunction with, her lack of a nationality.⁴⁶ One form of potential benefit or relief from removal is asylum. In order to receive a grant of asylum, the individual must demonstrate that she meets the definition of a refugee under U.S. domestic immigration law. U.S. law defines a refugee as:

“any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁴⁷

⁴⁶ See generally Maryellen Fullerton, *The Intersection of Statelessness and Refugee Protection in U.S. Asylum Policy*, 2 J. ON MIGRATION AND HUM. SECURITY 144-64 (2014).

⁴⁷ INA §101(a)(42)(A).

In asylum cases, the way a person became stateless is critical to determining how to approach the case. U.S. courts have generally held that the fact of statelessness alone does not warrant asylum protection.⁴⁸ However, the fact of statelessness, depending on the underlying reasons, can be a central part of a claim for asylum. This section discusses key areas of asylum law and eligibility of particular relevance to stateless persons.

B. Country of Last Habitual Residence

1. Determining the Country of Last Habitual Residence

In order to establish eligibility for asylum, stateless individuals must show that they cannot return to their country of “last habitual residence.”⁴⁹ Determination of the asylum applicant’s last habitual residence controls the analysis of where the alleged persecution occurred. Thus, a court’s decision to grant or deny asylum or other forms of relief may often turn on the determination of the individual’s last habitual residence.

Per the international refugee definition, a stateless individual’s claim for protection must be examined in relation to her country of “former habitual residence.”⁵⁰ According to the *UNCHR RSD Handbook*, the definition of a country of “former habitual residence” is somewhat vague: “[T]he country in which [s]he had resided and where [s]he had suffered or fears [s]he would suffer persecution if [s]he returned.”⁵¹ Moreover, if the individual has multiple countries of former habitual residence, she is not required to fear return to all of them.⁵²

Under U.S. law, the term “last habitual residence” is similarly ambiguous. It is not defined by statute and courts have applied the term inconsistently. Looking to the INA definition of the term “residence,” the Board of Immigration Appeals (BIA) has adopted the meaning to be “a place of general abode” or an individual’s “principal, actual dwelling place in fact, without regard to intent.”⁵³ At least one court reached the conclusion that *either* an individual’s birth country *or* a country where the individual resided for a certain period of time could constitute his or her last habitual residence.⁵⁴ In *Paripovic v. Gonzales*,⁵⁵ the Third Circuit took a quantitative approach, focusing on the length of time the individual resided in a country and determined that two years was sufficient to meet the definition of “habitual.” Alternatively, proponents of a more qualitative approach have argued that an individual’s intent to remain in a certain country should be considered under the last habitual residence analysis.⁵⁶ It is important to note that while a stateless individual may have last habitually resided in a country, it does not necessarily mean that she was firmly resettled there.⁵⁷

⁴⁸ In one case, for example, the court rejected a Latvian applicant’s asylum and withholding of removal application. The fact that she had been rendered stateless due to the fall of the Soviet Union was deemed irrelevant. See *Fedosseeva v. Gonzales*, 492 F.3d 840, 845 (7th Cir. 2007). Another court found that a denial of reentry to Saudi Arabia for two stateless Palestinians did not constitute persecution. See *Najjar v. Ashcroft*, 257 F.3d 1262, 1291 (11th Cir. 2001). In a final example, the applicant, a resident of Jordan who lived in the West Bank before arriving in the U.S., argued “that the IJ’s refusal to cancel his removal ha[d] resulted in unequal treatment on the basis of national origin in violation of the Fifth and Fourteenth Amendments because, as a stateless Palestinian, he c[ould] neither depart the United States nor work or live here legally.” Nonetheless, the court rejected the equal protection violation claim and noted that “statelessness alone is an insufficient basis on which to grant a petition for asylum or withholding of removal without additional factors present.” See *Abusheikh v. Attorney General of United States*, 225 Fed.Appx. 56, 58 (3d Cir. 2007).

⁴⁹ 8 U.S.C. §1101(a)(42)(A)(2012).

⁵⁰ See United Nations 1951 Refugee Convention Relating to the Status of Refugees, art. 1A(2), July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention], available at <http://www.refworld.org/docid/3be01b964.html>.

⁵¹ UNHCR, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES at ¶103, U.N. DOC. HCR/1P/4/ENG/REV.3 (Dec. 2011) [hereinafter UNHCR Refugee Handbook], available at: <http://www.refworld.org/docid/4f33c8d92.html>.

⁵² *Id.* at ¶104.

⁵³ See INA §101 (a)(33).

⁵⁴ *Ouda v. INS*, 324 F.3d 445, 447 (6th Cir. 2003); see also *Elian v. Ashcroft*, 370 F.3d 897, 897-901 (9th Cir. 2004) (considering a stateless asylum applicant’s claim in the context of both his birthplace and his country of last habitual residence).

⁵⁵ 418 F. 3d 240, 242 (3d Cir. 2005).

⁵⁶ See, e.g., Sarah B. Fenn, *Paripovic v. Gonzales: Defining Last Habitual Residence for Stateless Asylum Applicants*, 40 UC DAVIS L. REV. 1545 (2007).

⁵⁷ See ASYLUM OFFICE BASIC TRAINING COURSE (AOBTC), LESSON: DEFINITION OF REFUGEE; DEFINITION OF PERSECUTION; ELIGIBILITY BASED ON PAST PERSECUTION 13 (Mar. 6, 2009), available at <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Definition-Refugee-Persecution-Eligibility-31aug10.pdf>.

2. National Protection and the Country of Last Habitual Residence

Under the 1951 Refugee Convention, the refugee definition takes into consideration the particular situation of stateless refugees in terms of the relationship with the government of last habitual residence. Specifically, whereas refugees generally must show that they are “unable or . . . unwilling to avail himself of the protection of” the country of her nationality, *stateless* refugees must show that

*“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is . . . outside the country of his former habitual residence . . . [and] is unable or, owing to such fear, is unwilling to return to it.”*⁵⁸

As noted in the *UNHCR RSD Handbook*, the question of whether a stateless refugee can avail herself of the national protection of the “country of former habitual residence does not, of course, arise.”⁵⁹ This is because by nature, stateless persons, due to their lack of a nationality, do not enjoy national protection of any State. It is also worth noting that “once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the [refugee] definition, he is usually unable to return.”⁶⁰

While the definition of a refugee under U.S. law also includes stateless refugees, the provision does not specifically take into account the lack of national protection for stateless persons in their country of last habitual residence. Instead, U.S. law requires that all refugees, stateless or not, prove that they are both “unable or unwilling to return to . . . and . . . unable or unwilling to avail himself or herself of the protection of,” their country of nationality or, in the case of stateless people, country of last habitual residence.⁶¹ As such, stateless refugees in the United States must meet a different – perhaps higher – burden in proving eligibility for international protection than is contemplated under the 1951 Convention. In the context of an asylum claim based on statelessness, the fact that the 1951 Convention definition does not require stateless refugees to prove lack of national protection may itself be useful to support a finding of lack of national protection under U.S. asylum law.

C. Persecution

There is no universal definition of persecution under international law. Generally speaking, persecution involves threats to life or freedom, as well as other serious human rights violations, when on account of race, religion, nationality, political opinion, or membership in a particular social group.⁶² For purposes of asylum, the individual needs to prove past persecution or a “well-founded fear” of future persecution.⁶³ Moreover, an individual may have been subject to measures that, taken on their own, do not rise to the level of persecution; however, when considered in a broader sociopolitical context, or even alongside other measures to which she was subjected, the cumulative circumstances may rise to the level of persecution.⁶⁴

Under U.S. law, persecution has been broadly defined as the “infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim.”⁶⁵ Such harm need not be physical or psychological, but can also include “the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life,” as long as the harm inflicted is so severe that it rises to the level of persecution.⁶⁶ Moreover, some courts have recognized the cumulative effect of circumstances that by themselves are not persecution but may, when considered collectively, rise to the level of persecution.⁶⁷

⁵⁸ 1951 Refugee Convention, *supra* note 49, at Art. 1(A)(2).

⁵⁹ UNHCR Refugee Handbook, *supra* note 50, at ¶101.

⁶⁰ *Id.*

⁶¹ INA §101(a)(42)(A) (emphasis added).

⁶² UNHCR Refugee Handbook, *supra* note 50, at ¶¶51-52.

⁶³ See INA 101(a)(42)(A); 8 C.F.R. § 208.13(b).

⁶⁴ UNHCR Refugee Handbook, *supra* note 50, at ¶53.

⁶⁵ *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).

⁶⁶ *Matter of T-Z*, 24 I&N Dec. 163, 169-71 (BIA 2007).

⁶⁷ See, e.g., *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (finding that the cumulative effect of a series of abuses rose to the level of persecution).

While courts do not consider statelessness persecution *per se*, the circumstances under which someone was rendered stateless, as well as the effects of statelessness, are relevant to the persecution element of the asylum claim. This is particularly true in the context of arbitrary deprivation of nationality. According to the UN Human Rights Council, statelessness that results from the arbitrary deprivation of nationality, “especially on discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, is a violation of human rights and fundamental freedoms.”⁶⁸ In this context, discrimination is both the cause and effect of statelessness, and both are relevant to meeting the refugee definition.⁶⁹

1. Persecution and Statelessness as Reflected in Existing Case Law

In the context of statelessness, in determining whether the condition of statelessness rises to the level of persecution, one must examine the impact that the lack of nationality has on the individual. Some authorities “accept as persecution the denial of nationality together with the social and economic problems faced by a stateless person provided these problems are sufficiently intolerable or causing unbearable suffering.”⁷⁰ In other cases, arbitrary deprivation of nationality, particularly on discriminatory grounds, can rise to the level of persecution.⁷¹

For example, in *Ouda v. INS*, a stateless Palestinian fled Kuwait and Bulgaria. The Immigration Judge (IJ) and the BIA found the requisite persecution where stateless Palestinians were forced to leave the country because they were perceived as enemies; however, the court rejected her well-founded fear of return to Kuwait because it did not believe she would likely be granted re-entry.⁷² The Circuit Court of Appeals, however, found that there was “no support for the proposition that an asylum applicant is precluded from seeking asylum in the United States should it prove to be the case that the country from which she seeks asylum will not take her back if the INS tries to deport her.”⁷³ The court found the applicant proved a fear of future persecution and ordered the BIA to take into consideration that she was expelled from Kuwait, the State from which she was seeking asylum.⁷⁴

More recently, three Circuit Courts of Appeals have found that denationalization on account of a protected ground does rise to the level of persecution.⁷⁵ In *Stserba v. Holder*, the asylum applicant, who was ethnically Russian, had her Estonian citizenship revoked for two years after Estonia gained its independence. The Court found that denationalization that results in statelessness may constitute *per se* persecution when it occurs on account of a protected status such as ethnicity.⁷⁶ Further, a person who is made stateless due to membership in a protected group may have demonstrated persecution, even without providing evidence that she suffered collateral damage from the act.

In *Haile v. Holder*, the court found that while loss of citizenship as a result of a change in national boundaries was not persecution *per se*, this did not preclude a finding of persecution where a State denationalized an individual because of his religion or ethnicity.⁷⁷ Based on the facts of the case, the court held that if Ethiopia denationalized the applicant because of his Eritrean ethnicity, it did so because of hostility to Eritreans. In so finding, the court found that the BIA’s conclusion that the petitioner has to prove “denationalization plus” does not follow from its premise, and that it had to provide a reasoned justification for its rulings.

⁶⁸ Human Rights Council Res. 20/5, Human Rights and Arbitrary Deprivation of Nationality, 20th Sess., A/HRC/RES/20/5, at ¶ 3 (July 16, 2012), available at <http://www.unhcr.org/refworld/docid/5016631b2.html>.

⁶⁹ HELENE LAMBERT, REFUGEE STATUS, ARBITRARY DEPRIVATION OF NATIONALITY, AND STATELESSNESS WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. DOC. PPLA/2014/01 (Oct. 2014), at 74-75, available at <http://www.refworld.org/docid/543525834.html> (provides extensive research and analysis of the intersection of arbitrary deprivation of nationality and refugee status).

⁷⁰ *Id.* at p. 56.

⁷¹ See *Giday v. Gonzalez*, 434 F.3d 543, 553-56 (7th Cir. 2006).

⁷² *Ouda v. INS*, 324 F.3d 445, 450 (6th Cir. 2003).

⁷³ *Id.* at 452.

⁷⁴ *Id.* at 456.

⁷⁵ *Jourbina v. Holder*, 532 F. App’x 1 (2d Cir. 2013); *Stserba v. Holder*, 646 F.3d 964 (6th Cir. 2011); *Haile v. Holder*, 591 F.3d 572 (7th Cir. 2010); see also UNHCR, REFUGEE STATUS, ARBITRARY DEPRIVATION OF NATIONALITY, AND STATELESSNESS WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, PPLA/2014/01 (Oct. 2014), available at <http://www.refworld.org/docid/543525834.html>.

⁷⁶ *Stserba*, 646 F.3d 964.

⁷⁷ *Haile*, 591 F.3d 572.

In *Jourbina v. Holder*, the court found that the BIA abused its discretion in denying an untimely motion to reopen.⁷⁸ In so finding, the court held that the BIA did not consider the applicant’s argument that the revocation of their citizenship by Kazakhstan constituted a changed country condition. The BIA also did not consider the applicant’s argument that lack of citizenship would subject them to future persecution upon return to Kazakhstan because Kazakhstan discriminates against non-Kazak nationals.

Practice Point

This kind of denationalization can occur before or after a person has fled her State of last habitual residence, and thus, may arise as the primary asylum claim or after an order of removal has been issued. For these claims, a statelessness argument may be made at all stages of an asylum process, including affirmative, defensive, appeals, and motions to reopen.

2. Additional Circumstances of Persecution and Statelessness

If returned to their country of last habitual residence, some stateless persons face almost insurmountable obstacles to securing access to their rights, including birth certificates and other identity documents, education, worker rights, health care, freedom from arbitrary detention, family unity, and freedom of movement. Many also face severe discrimination, threat of detention, and vulnerability to exploitation. In presenting an asylum claim based on statelessness, in the absence of overt acts of violence, the following factors should be given due consideration in proving persecution.

a. Mental or Psychological Harm

As stated above, in order to support a finding of persecution, physical harm is not required.⁷⁹ Severe forms of mental harm may rise to the level of persecution.⁸⁰ Being born without a nationality or otherwise being rendered stateless, whether due to specific discrimination or gaps in nationality laws, has profound consequences for stateless people. Moreover, the discrimination that many stateless people face because of their statelessness can have similarly deep consequences. Any mental, emotional, and psychological harm suffered due to statelessness may arguably rise to the level of persecution if fully demonstrated through documentary evidence.

b. Severe Economic Deprivation

According to the BIA, the “deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution.”⁸¹ However, under other circumstances, courts have held that the deprivation must be “so severe that [it] constitute[s] a threat to an individual’s life or freedom.”⁸² In the context of statelessness, these types of deprivation may be the only tangible evidence of persecution suffered by stateless people. The fact of their marginalization—from education and livelihood, as well as restrictions on movement—may constitute the worst of the daily persecution they suffer, because they may create intergenerational, extreme poverty and prevent stateless people from achieving any sort of economic stability. It is critical to document and present how marginalization may severely curtail the ability to provide for self and family, particularly in the absence of specific violence and restrictions on liberty.

c. Discrimination and Harassment

Discrimination and harassment, in combination with other harms, may be sufficient to establish persecution. According to the BIA, in extraordinary circumstances, severe and pervasive discrimination can constitute

⁷⁸ *Jourbina*, 532 Fed. Appx. 1.

⁷⁹ See *Kovac v. INS*, 407 F.2d 102, 106-07 (9th Cir. 1969) (finding that in removing the word “physical” from the definition of persecution evinced intent to encompass more than just physical harm).

⁸⁰ *Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004); see, e.g., *Sumolang v. Holder*, 723 F.3d 1080 (9th Cir. 2013) (finding that the suffering inflicted on parents after their child was refused medical care on the basis of her religion and subsequently died was persecution, as the harm to the child resulted in harm to the parents).

⁸¹ *Masieh v. INS*, 73 F.3d 579, 583 (5th Cir. 1996) (quoting *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983)), *rev’d on other grounds*, 750 F.2d 1427 (9th Cir. 1985).

⁸² *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).

persecution.⁸³ In many States, stateless populations may be prohibited from attending school, accessing health and social services, and availing themselves of protection and justice systems because of their statelessness. As highlighted above, they often have difficulty accessing even their most basic rights. Moreover, stateless persons are often members of ethnic or religious minority communities already vulnerable to discrimination. These are important factors that should be documented and presented, as they may cumulatively rise to the level of persecution.⁸⁴ It is also important to note that discrimination is often at once the cause and effect, in the case of statelessness resulting from arbitrary deprivation of nationality.⁸⁵

D. Nexus to a Protected Ground

Once persecution is established, proving eligibility for asylum under U.S. law requires a showing that the entity that carried out the persecution did so because of—or “on account of”—one of the five protected grounds for asylum: race, religion, nationality, political opinion, or membership in a particular social group.⁸⁶ This element, “nexus requirement,” requires an examination of the motivation of the persecutor.

Practice Point

Another element of the claim that must be defined is the identity of the persecutor who has committed the act. For asylum law purposes, the persecutor must be either the government entity or, in the case of a non-state actor, someone who the government is unwilling or unable to control. In the context of statelessness, because the question of deciding nationality is inherently a State function, the persecutor will often be the government. However, some cases may involve abuse or discrimination on account of an individual’s stateless status, in which case the persecutor may be a non-state actor.

To meet the nexus requirement, the persecutor’s motivation need not be solely based on a protected ground, recognizing that the persecutor may have various or “mixed” motives. With respect to asylum applications filed before 11 May 2005, the applicant must make a reasonable showing that the persecutor’s action was motivated, at least in part, by a protected ground in order to be eligible for asylum. For applications filed on or after 11 May 2005, § 101(a)(3) of the REAL ID Act provides that an applicant must establish that “race, religion, nationality, membership in a particular social group, or political opinion, was or will be *at least one central reason* for persecuting the applicant.”⁸⁷

The persecutor’s motivation may be established by direct or circumstantial evidence.⁸⁸ The following section discusses various types of evidence that may emerge in the context of a statelessness-based asylum claim to demonstrate persecutorial motive.

1. Direct Evidence

Direct evidence of a persecutor’s motivation may be testimony as to statements made by the persecutor to the victim or by the victim to persecutor.⁸⁹ Direct evidence may also include statutory wording or legislative history or even the wording of a judicial judgment. In a claim turning on statelessness, a nationality law (or interpretation thereof) that is facially discriminatory based on a protected ground may be sufficient to demonstrate the nexus.

⁸³ See *Matter of Salama*, 11 I&N Dec. 536 (BIA 1966) (finding that a government campaign of harassment urging the boycott of Jewish doctors and other marginalization constituted persecution).

⁸⁴ *But see Ahmed v. Ashcroft*, 341 F.3d 214, 218 (2003) (finding that a stateless individual who suffered discrimination in the enjoyment of his rights as compared to the rest of the population was not sufficient to establish persecution).

⁸⁵ See LAMBERT, *supra* note 61, at 14.

⁸⁶ Note that some jurisdictions incorporate the persecutorial motive analysis into the persecution element of the claim.

⁸⁷ 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added); see also *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009) (“[A] motive is a ‘central reason’ if that motive, standing alone, would have led the persecutor to harm the applicant. ... [P]ersecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant. Nevertheless, to demonstrate that a protected ground was ‘at least one central reason’ for persecution, an applicant must prove that such ground was a cause of the persecutors’ acts.”).

⁸⁸ See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

⁸⁹ See, e.g., *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004).

2. Circumstantial Evidence

In the absence of direct evidence of a persecutor’s motivation, circumstantial evidence can also prove motivation.⁹⁰ Circumstantial evidence is particularly important given that persecutors do not always announce or clearly articulate their motivations in harming applicants. Examples of circumstantial evidence include country of origin information; severe or disproportionate punishment for violations of laws, or other evidence that the persecutor generally regards those who resist as political enemies;⁹¹ or closeness in time between a specific event and the persecutory act.⁹²

Circumstantial evidence can be critical to proving asylum cases involving statelessness where the decision to deny nationality to certain populations, or to denationalize them, may be facially neutral, but in practice apply only to specific populations based on personal attributes or imputed political opinions. This may be particularly true absent officials’ direct statements to this issue. For example, the Bihari were a stateless minority in Bangladesh denied citizenship upon independence of the nation in 1971 for the perceived support of West Pakistan during the war for independence. After a nationwide movement led by the Bihari and their allies, in 2008, the Bangladeshi election commission began to register the Bihari as citizens.⁹³

E. Proving “Well-Founded Fear” of Persecution in the Absence of Individual Harm

Because statelessness can arise out of actions attached to entire groups (e.g., the Rohingya), or due to state succession (e.g., the former Soviet Union), it can be difficult to demonstrate the requisite nexus. This subsection explores ways to demonstrate that fear of persecution is well-founded when a stateless person may not have experienced individualized harm.

1. Pattern or Practice of Persecution

In general, an applicant for asylum does not need to demonstrate individualized harm when she or he can show a “reasonable possibility” of being “singled out individually for persecution” by showing:

- [A] pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
- The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.⁹⁴

Note that evidence of changed circumstances may be insufficient to undermine an applicant’s claim when there is a strong and well-rooted “pattern or practice” of persecution.⁹⁵

2. Membership in Disfavored Group

In many circumstances, a stateless person may not experience individualized persecution; rather, the harm, including discrimination, barriers to the realization of basic rights, and even exploitation, may extend to her entire

⁹⁰ *Elias-Zacarias*, 502 U.S. at 483.

⁹¹ See, e.g., *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996) (severe punishment for illegal departure).

⁹² See, e.g., *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1089 (9th Cir. 2005).

⁹³ See Khalid Hussain, *The End of Bihari Statelessness*, 32 FORCED MIGRATION REV. 30 (Apr. 2009), available at www.fmreview.org/statelessness.

⁹⁴ 8 C.F.R. § 1208.13(b)(2)(iii); see, e.g., *Eduard v. Ashcroft*, 379 F.3d 182, 192 (5th Cir.2004) (finding that the IJ erred in requiring Indonesian Christians to prove that they were singled out when the evidence indicated a pattern and practice of persecution of Christians); see also *Rusak v. Holder*, 734 F.3d 894, 896 (9th Cir. 2013) (finding that “[w]hile Ms. Rusak’s own direct experiences in Belarus may not rise to the level of persecution on this ground as well, she is not required to demonstrate that she individually suffered persecution if she can establish a ‘pattern or practice ... of persecution of groups of persons similarly situated’ and that she is a member of the group ‘such that [her] fear of persecution upon return is reasonable.’” (citation omitted)).

⁹⁵ See *Sael v. Ashcroft*, 386 F.3d 922, 929 (9th Cir. 2004).

community. This type of group-based persecution can be used to demonstrate persecution more broadly if an individual shows that she belongs to this group.⁹⁶

At least one court has recognized that absent a showing of individualized harm or a pattern or practice of harm, a member of a “disfavored group” may also demonstrate a well-founded fear of persecution.⁹⁷ In determining whether an applicant has established a well-founded fear of persecution based on membership in a disfavored group, the “court will look to (1) the risk level of membership in the group (*i.e.*, the extent and the severity of persecution suffered by the group) and (2) the alien’s individual risk level (*i.e.*, whether the alien has a special role in the group or is more likely to come to the attention of the persecutors making him a more likely target for persecution).”⁹⁸ The more widespread and well-documented the harm, the less evidence the individual must present to prove that she would suffer harm.⁹⁹ In the context of statelessness, where groups as a whole often experience the harm, it may be easiest to demonstrate that the group itself is highly disfavored and that it is likely to suffer harm. For example, the Rohingya, a religious and ethnic minority in Myanmar, have been frequently denied citizenship and face severe restrictions on their freedom of movement, religion and access to education, as well as other forms of severe treatment.

F. Statelessness and the Five Protected Grounds

As with any claim to refugee status, it is necessary to establish whether the individual’s well-founded fear of persecution is linked to one or more of the five protected grounds: race, religion, nationality, political opinion or membership in a particular social group. As discussed above, U.S. law requires that the Convention ground be “at least one central reason” for the persecution in order for the individual to qualify for asylum.¹⁰⁰ The following provides practical considerations for each protected ground in the context of an asylum claim based on statelessness.

1. Race and nationality or ethnicity

In many contexts, race and nationality or ethnicity is at the source of a stateless individual’s claim to asylum. Race and nationality are two separate, but often interrelated, grounds for protection. Ethnicity is generally a sub-category of either or both of these. Policies that deny individuals of a particular race or ethnicity the right to a nationality or to be registered at birth would fall into this category. This Convention ground would apply similarly to cases of forced denationalization carried out on the basis of the individual’s race, nationality, or ethnicity. At least two circuit courts, the Seventh Circuit and the Sixth Circuit, have recognized that ethnically motivated citizenship revocation that results in statelessness is persecution and may give rise to a claim for asylum.¹⁰¹

2. Religion

Forced denationalization carried out on the basis of an individual’s religious beliefs or practices, or those attributed to her, may amount to persecution. In *Haile v. Holder*, the Seventh Circuit acknowledged this argument, stating, “[f]rom the correct premise that a change of citizenship incident to a change in national boundaries is not persecution per se, it does not follow that taking away a person’s citizenship because of his religion or ethnicity is not persecution.”¹⁰²

3. Political Opinion

A claim based on political opinion presupposes that the applicant holds, or is assumed to hold, opinions not tolerated by the authorities or society and that are critical of generally accepted policies, traditions, or methods.¹⁰³ An

⁹⁶ See, e.g., *Tampubolon v. Holder*, 610 F.3d 1056 (9th Cir. 2010) (finding that Christianity is a disfavored group in Indonesia and membership in that group, in conjunction with individualized risk of persecution, could give rise to a refugee claim).

⁹⁷ See, e.g., *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004) (as amended) (stateless Palestinians born in Kuwait); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182-83 (9th Cir. 2003) (ethnic Albanians in Kosovo); *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996) (Indo-Fijians).

⁹⁸ *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999).

⁹⁹ *Id.*

¹⁰⁰ INA § 208(b)(1)(B)(i); 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

¹⁰¹ *Stserba*, 646 F.3d 964; *Haile*, 591 F.3d 572.

¹⁰² *Haile*, 591 F.3d 572 (emphasis added).

¹⁰³ UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION NO. 8: CHILD ASYLUM CLAIMS UNDER ARTICLES 1(A)2 AND 1(F) OF THE 1951 CONVENTION AND/OR 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES at ¶45 (Dec. 2009).

individual may have his citizenship revoked and become stateless due to his political (or imputed political) opinion, or may face harm in his place of last habitual residence for the same reason. For instance, in *Ahmed v. Kesiler*, the petitioner was a native of Bangladesh and a Bihari. The Biharis consider themselves to be citizens of Pakistan. After the Biharis refused Bengali citizenship, the Bengali government removed them from their homes, confiscated their property, and relocated them to resettlement camps. The Ninth Circuit held that the record compelled “the finding that Ahmed was targeted and persecuted on account of his political opinion.”¹⁰⁴

4. Membership in a Particular Social Group

As defined in UNHCR’s Particular Social Group Guidelines, “[a] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.”¹⁰⁵ U.S. law has taken a more restrictive approach to this definition. Not only does a particular social group refer to those who share a “common, immutable characteristic...that the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences,”¹⁰⁶ but the group itself must also be “defined with particularity” and be “socially distinct,” meaning that society perceives it to be a group.¹⁰⁷

In the case of statelessness, social group claims frequently overlap with claims on other grounds, such as race, religion, or ethnicity. Moreover, statelessness itself can be a defining characteristic.¹⁰⁸ Importantly, though, a social group cannot be defined *exclusively* by the fact that it is targeted for persecution.¹⁰⁹

G. Practical Considerations

1. Posture of the Claim: Affirmative, Defensive, or Motion to Reopen

Claims for asylum based on statelessness may be raised either affirmatively before U.S. Citizenship and Immigration Services (USCIS) or defensively before the Executive Office for Immigration Review (EOIR). However, where a person became stateless after the adjudication of her original claim, or there was otherwise a failure to raise the issue of statelessness in a prior claim for asylum, the fact of statelessness may be raised for the first time in support of a motion to reopen the underlying asylum claim. Motions to reopen are discussed in detail in Section 8.

2. Verifying Statelessness and Asylum Procedures

The *UNHCR Statelessness Handbook* contains detailed considerations for statelessness determinations for those seeking international protection.¹¹⁰ One key consideration is that if an individual at once claims to be stateless and also presents a refugee claim, as a matter of principal, the asylum-seeker’s confidentiality must be respected. Whereas inquiries with the government authorities of the country to which she fears return might assist in resolving the question of statelessness, such contact could reveal her identity and must be avoided as a matter of principle. As the *UNHCR Statelessness Handbook* states, “Under no circumstances is contact to be made with authorities of a States against which an individual alleges a well-founded fear of persecution unless it has definitively been concluded that he or she is neither a refugee nor entitled to a complimentary form of protection.”¹¹¹

3. Completing the Asylum Application (Form I-589)

Like any immigration form, the Application for Asylum (Form I-589) is a key piece of an asylum-seeker’s administrative record. The Form I-589 requires the applicant to note “Present Nationality (Citizenship)” and

¹⁰⁴ *Ahmed v. Kesiler*, 504 F.3d 1183 (9th Cir. 2007).

¹⁰⁵ UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION NO. 2: “MEMBERSHIP OF A PARTICULAR SOCIAL GROUP” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES at ¶11 (May 7, 2002).

¹⁰⁶ *Matter of Acosta*, 19 I&N Dec. at 233-34.

¹⁰⁷ *Matter of M-E-V-G-*, 26 I&N Dec. 277 (BIA 2014).

¹⁰⁸ In *BA and Others*, the UK Asylum and Immigration Tribunal acknowledged that “stateless Kuwaiti Bidoons” constitute a particular social group as “a collection of (mainly) stateless persons.” *BA and Others (Kuwait) CG v. SSHD* [2004] UK AIT 00256 (recognizing the particular social group but finding ‘race’ to be a more relevant option); see also LAMBERT, *supra* note 61.

¹⁰⁹ UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 104, at ¶¶ 2, 7 (May 7, 2002).

¹¹⁰ UNHCR Statelessness Handbook, *supra* note 12, at ¶¶78-82.

¹¹¹ *Id.* at ¶96.

“Nationality at Birth.”¹¹² An individual who is stateless by definition has no present nationality, and may or may not have had a nationality at birth, depending on the circumstances that rendered her stateless. Thus, when preparing the Form I-589, it is critical that the applicant’s circumstances as a stateless person be accurately reflected in all representations. For instance, “Present Nationality” could be listed as “Stateless.”

Resources

UNHCR HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATES UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES U.N. DOC. HCR/1P/4/ENG/REV.3 (Dec. 2011), *available at* <http://www.refworld.org/docid/4f33c8d92>.

UNHCR, REFUGEE STATUS, ARBITRARY DEPRIVATION OF NATIONALITY, AND STATELESSNESS WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. DOC. PPLA/2014/01 (Oct. 2014), at 74-75, *available at* <http://www.refworld.org/docid/543525834.html>.

USCIS Asylum Officer Basic Training Manuals: “Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution” and “Asylum Eligibility Part III: Nexus and the Five Protected Characteristics.”

Sarah B. Fenn, *Paripovic v. Gonzales: Defining Last Habitual Residence for Stateless Asylum Applicants*, 40 U. CAL. DAVIS L. REV. 1545 (2007).

AILA’s Asylum Primer, 7th Ed.: (for purchase: <http://agora.aila.org/product/detail/2521>)

USCIS forms and offices: www.uscis.gov

EOIR forms, BIA Practitioners Manual and local rules: www.justice.gov/eoir

Section 2: Deferred Action: An Affirmative Form of Relief

A. Overview

Deferred action (DA) is a form of administrative prosecutorial discretion. ICE and USCIS officials have the authority to use prosecutorial discretion under discrete circumstances in a particular case.¹¹³ DA is a determination to delay or defer action in the case, rather than to terminate action.¹¹⁴

Because it is administrative in nature, USCIS or ICE can grant deferred action at any stage of a case, including before an individual is in removal proceedings or after a final order of removal has been issued.¹¹⁵ DA grants are typically for specific periods of time and require a petition for renewal before the period expires. There is little published material on DA from immigration officials, there are no formal appeals, and there is often little transparency behind how the decision to grant or deny a request is made.

¹¹² See USCIS, Form I-589, Application for Asylum and for Withholding of Removal, Boxes 13 and 14, *available at* <https://www.uscis.gov/sites/default/files/files/form/i-589.pdf>.

¹¹³ Available to both individuals and groups, DA is described by ICE as “the decision-making authority of ICE to allocate resources in the best possible manner to focus on high priority cases, potentially deferring action on cases with a lower priority.” ICE has identified two different forms of DA, where it is (i) based on sympathetic factors and low-enforcement priorities and (ii) based on the individual as a witness in an investigation or prosecution. This memo will only look at the first form. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), PROTECTING THE HOMELAND: TOOL KIT FOR PROSECUTORS (2011) [hereinafter ICE Tool Kit for Prosecutors] *available at* <http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf>. Similarly, USCIS defines deferred action as “a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion.” See CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS - FREQUENTLY ASKED QUESTIONS, USCIS, <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (last updated Apr. 25, 2017).

¹¹⁴ KATE M. MANUEL & TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES 17 (Jan. 17, 2013).

¹¹⁵ JOHN P. TORRES, INTRODUCTION TO DETENTION AND REMOVAL OPERATIONS POLICY AND PROCEDURE MANUAL: CHAPTER 1, §§ 13, 20 (Mar. 27, 2006), *available at* https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf [hereinafter ICE Detention and Removal Manual].

DA could be a positive option for stateless clients. Stateless individuals often face significant hardships, both before and after immigration proceedings are initiated against them. This includes lack of work authorization, threat of detention, and in the case of those with removal orders, potentially onerous order of supervision (OSUP) requirements, including in-person visits and demonstration of contacts with embassies with which the individual has no ties, to attempt to secure admission for removal. These individuals face these hardships despite the fact that as stateless persons, their eventual removal from the United States is extremely unlikely, if not impossible. Thus, given the discretionary nature of DA, and the fact that it allows U.S. immigration authorities to prioritize their use of limited resources,¹¹⁶ stateless individuals can be strong candidates for DA.

A DA grant could allow a stateless person who has not been placed into proceedings, lawful presence and eligibility to apply for an employment authorization document (EAD). Similarly, for a stateless person under a final removal order, DA would allow her not to be subject to burdensome conditions of an ICE OSUP, while still remaining eligible for employment authorization. In some instances, individuals with DA have been granted a multi-year EAD which is particularly helpful to stateless persons, who are often required to renew EADs annually. Furthermore, it allows an individual to be considered lawfully present—though it does not confer lawful status—and U.S. immigration authorities generally will not take action against individuals who have DA. The individual may also be eligible to receive social security benefits to which she is entitled.

Practice Point

In counseling a stateless client, consider that DA is not a solution to statelessness, and it presents several challenges: It does not confer a specific permanent legal status in the United States and does not open a pathway to citizenship; the DA grant is only for a limited time, after which the individual must seek a new grant of DA;¹¹⁷ and it can be subject to review and termination at any time, with no guidelines on how frequent or how invasive this review can be. Moreover, there is no requirement that an individual be informed as to why she is being reviewed or why her deferred action grant is being terminated.

B. Requesting Deferred Action

1. Preparing the DA Request

There is no specific form to be filed for a DA request. Rather, a written request—usually in the form of a letter or a short brief—is the preferred means of pursuing this form of relief. This letter may be sent to a local ICE Field Office or local USCIS office. The following provides a non-exhaustive list of guidance in preparing a request for deferred action on behalf of a stateless individual:

- **Bio-data:** List the individual's full name, alien number, and the place and date of birth.¹¹⁸
- **Information on statelessness:** Provide an overview of why the individual is stateless (including legal arguments) and what it means to be stateless in the United States, including that the individual is not stateless due to his or her own actions or inactions. Explain that it is not possible for this individual to be removed from the United States.
- **Immigration history:** Summarize how the individual entered the United States and the individual's procedural history and current status. Explain if the individual has or does not have another form of relief. In the case of stateless persons with final removal orders, the request should address any reporting requirements and summarize the individual's history of compliance with the reporting requirements. If the person is on OSUP, this should emphasize the cost of reporting, while if the person has no work authorization, the letter should emphasize the individual's inability to work and pay taxes. This section can emphasize that the individual does not have any other options available and that as a stateless person, she remains in this limbo indefinitely.

¹¹⁶ See *id.* (noting that “the deferred action category recognizes that the Service has limited enforcement resources and that every attempt should be made administratively to utilize these resources in a manner which will achieve the greatest impact under the immigration laws.”).

¹¹⁷ NICOLE COMSTOCK, LINNEA IGNATIUS, SHOBA SIVAPRASAD WADHIA, ANNA GALLAGHER, & DENYSE SABAGH, PRIVATE BILLS AND DEFERRED ACTION TOOLKIT 5 (2011), available at https://www.informedimmigrant.com/wp-content/uploads/2017/03/PBDA_Toolkit.pdf.

¹¹⁸ ICE Tool Kit for Prosecutors, *supra* note 112.

- **Connection to other States:** Where relevant, emphasize that by virtue of having no nationality, a stateless person has no formal ties to another State.
- **Life in the United States:** The letter should emphasize any ties to the community, including marriage, U.S. citizen or lawful permanent resident family, length of stay in the United States (with a special focus on if they have resided in and been a contributing member of their community), and involvement in community programs. The letter should also address any education that the individual has achieved in the United States, lawful work, taxes paid, and other contributions.
- **Criminal history:** Where relevant, include information on any criminal convictions the individual has. The applicant's age at the time of conviction and any sentences or fines that resulted from a conviction may also be included as evidence of the seriousness, or lack thereof, of the crime.¹¹⁹
- **Deferred action request:** The letter should be explicit in the DA request. It should set out that the stateless individual is seeking a long-term DA grant, and that she will not benefit from DA without work authorization. It may be helpful to include a reminder of the requirement for a notice if DA is approved and ask that the work authorization be spelled out in the letter granting DA.
- **Supporting publications:** Consider including any memoranda or other publications that will inform the process.
- **Letters of support:** If possible, obtain letters from the community, church, government officials such as a deportation officer, and organizations working on statelessness issues that express support for a DA grant and explain why it is especially critical in this stateless individual's case.
- **Supporting evidence:** Provide documentation to support factual assertions. This could include prior work authorization, statelessness determination letters, country of origin information, proof of consistently filing taxes, history of donations or volunteerism in the community, photos of the individual with family in the United States, and education history. Additionally, if the stateless individual has a statelessness status determination by UNHCR, this should be included.

Practice Point

Because there are no appeals, it is helpful to address every aspect of the client's documented history –both the negative factors, such as a criminal conviction and any equities for DA including rehabilitation since a criminal conviction, as well as the positive. It can be useful to call the field office to which the DA has been sent on a periodic basis to see if a decision has been reached.

2. Submitting the DA Request to USCIS or ICE

The following provides basic procedural guidance for submitting a request for DA to USCIS or ICE, depending on the posture of a stateless person's case. Two documents listed below provide particular insight into these procedures and processes: a 2011 USCIS Ombudsman's report on DA and a 2006 update to the ICE Detention and Removal Operations Policy and Procedure Manual.

a. USCIS Ombudsman, "Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process," July 2011¹²⁰

According to the report, USCIS will receive and process DA requests by two groups of people:

¹¹⁹ See U.S. DEP'T OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, DORIS MEISSNER, EXERCISING PROSECUTORIAL DISCRETION, (Nov. 17, 2000), available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view>. Please note that the validity of this memorandum is uncertain at the time of this writing. This memorandum may have been rescinded by the January 25, 2017 Executive Order "Border Security and Immigration Enforcement Improvements" and its February 20, 2017 implementing memorandum. EXEC. ORDER No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); U.S. DEP'T OF HOMELAND SECURITY, JOHN KELLY, ENFORCEMENT OF THE IMMIGRATION LAWS TO SERVE THE NATIONAL INTEREST, (Feb. 20, 2017) [hereinafter FEB. 20 IMPLEMENTING MEMORANDUM].

¹²⁰ USCIS OMBUDSMAN, DEFERRED ACTION: RECOMMENDATION TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS (July 11, 2011), available at <https://www.dhs.gov/sites/default/files/publications/cisomb-combined-dar.pdf>.

- 1) Individuals who qualify for DA based on a USCIS decision to use DA as a pre-adjudication form of temporary relief for those who have filed certain petitions or applications; and
- 2) Individuals who qualify for DA due to exigent circumstances (e.g., extreme medical cases, victims of the September 11 terrorist attacks), who may, or may not, have an application for immigration benefits pending.¹²¹

According to the report, “there are no official, national standard operating procedures for how to process a deferred action request.”¹²² Typically, an individual submits a DA request in-person or by mail to a local USCIS office. There is no specific form to submit and there is no filing fee to request DA on an individualized basis. Depending on the USCIS location, the individual may, or may not, receive written confirmation of receipt. The request is reviewed at the local office level, with the District Director making a recommendation and the Regional Director making a final decision, which is in turn delivered by the District Director. Once granted DA, the individual is eligible to apply for employment authorization, usually valid for one to two years.¹²³

b. ICE Detention and Removal Operations Policy and Procedure Manual (2006)¹²⁴

The ICE Detention and Removal Operations Policy and Procedure Manual offers guidance on DA for ICE ERO Field Office Directors.¹²⁵ The manual provides a range of factors for ICE to consider in deciding whether to grant deferred action, including factors particularly relevant to stateless persons, including (a) the likelihood of eventual removal and (b) additional sympathetic factors.¹²⁶ Both of these elements are particularly relevant in the context of statelessness, given the extremely low likelihood—or indeed, impossibility—of removal, and the unique hardship stateless people face through no fault of their own.

According to the manual, “any request . . . for deferred action should be considered in the same manner as other correspondence. The alien should be advised that he or she may not apply for deferred action, but that the Service will review the facts presented and consider deferred action as well as any other appropriate course of action.”¹²⁷ The DA decision-making process originates with the District Director, who will review facts in the case, and if DA is warranted, will make a recommendation as such to a Regional Director using the Form G-312, *Deferred Action Case Summary*. The Regional Director then reviews the form and issues the final decision on whether to grant the DA. The individual in question is only notified of a positive decision, not of a denial, in the form of a letter from the District Director. Once granted, DA allows the individual to apply for work authorization pursuant to 8 C.F.R. 274a.12(c)(14).¹²⁸

Practice Point

When submitting a request for DA for a stateless individual to the ICE District Director, consider submitting a copy to the corresponding ICE Field Office Liaison.

Resources

NICOLE COMSTOCK, LINNEA IGNATIUS, SHOBA SIVAPRASAD WADHIA, ANNA GALLAGHER, & DENYSE SABAGH, PRIVATE BILLS AND DEFERRED ACTION TOOLKIT 5 (2011), *available at* https://pennstatelaw.psu.edu/_file/PBDA_Toolkit.pdf.

AMERICAN IMMIGRATION COUNCIL, PRACTICE ADVISORY: PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT, (Mar. 18, 2015), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/pd_overview_final.pdf.

¹²¹ *Id.* at 3.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ ICE Detention and Removal Manual, *supra* note 114.

¹²⁵ *Id.* at ICE.000113.09-684 - ICE.000115.09-684.

¹²⁶ *Id.* at ICE.000114.09-684.

¹²⁷ *Id.* at ICE.000113.09-684.

¹²⁸ 8 C.F.R. 274a.12(c)(14); see *also* ICE Detention and Removal Operations Manual, *supra* note 114, at §20.8(b).

Section 3: Removal Proceedings: Addressing Statelessness during the Master Calendar Hearing

Many stateless individuals will not seek legal support until they are in removal proceedings. In fact, some may not realize that they are stateless until they are placed into proceedings and begin to unpack their experiences and the legal situation they find themselves in. Ensuring that the fact of their statelessness is identified and reflected in removal proceedings as early as possible will better ensure their rights are protected and their circumstances fully represented.

The following sections examine some of the key ways in which statelessness may be considered and reflected on the record in a client’s case during the various stages of removal proceedings: the master calendar hearing(s), and hearing on the merits.

A. The Charging Document: Notice to Appear

A Notice to Appear (an “NTA,” Form I-862), is the charging document that signals the initiation of removal proceedings. The NTA lists the factual allegations against the respondent. Typically, the allegations will be:

1. You are not a U.S. citizen or national of the United States.
2. You are a native and citizen of [identifies country of origin or last habitual residence].
3. You entered the country on a certain date and through a certain city and whether or not your entry was authorized and if so, for what period of time.
4. [The alleged reason(s) why the respondent is removable.]

These factual allegations will form the basis for the charge of removability in the next section of the NTA. During a Master Calendar Hearing in Immigration Court, the respondent will need to either admit or deny each of these factual allegations.

Given that the pleadings to the NTA form a key basis to the record moving forward, the fact of statelessness will factor into a stateless person’s pleadings to the charges in the document. For instance, when responding to the second charge (“You are a native and citizen of”) a stateless person would want to indicate her lack of citizenship.

Practice Point

Resolution of a claim to statelessness in response to the charge of a respondent being a “native and citizen of” a particular State may require a legal finding on the issue of statelessness. As such, having prepared legal arguments based on Section 2 of this manual, “Identifying and Proving Statelessness,” would be valuable at this stage.

B. Designating a Country of Removal¹²⁹

3. Overview

Another critical consideration for stateless individuals during the Master Calendar – or pleadings – phase of hearings is the designation of a country of removal. Being stateless affects the practicality of eventual removal; however, when designating a country of removal, neither the immigration courts nor the BIA systematically consider a respondent’s statelessness. In fact, it is often the case that neither the respondent (in pro se proceedings) nor respondent’s counsel have made nationality/statelessness a substantive issue through pleadings to the factual allegations. Moreover, in the context of asylum claims, an individual respondent or counsel may as a matter of legal strategy decline to designate a country of removal.

¹²⁹ This sub-section on Designating a Country of Removal draws significantly from Adam L. Fleming, *Around the World in the INA: Designating a Country of Removal in Immigration Proceedings*, IMMIGR. L. ADVISOR, (May 2013), at 1-4, 10-14, available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/03/vol7no5.pdf>.

Practice Point

With regard to cases of arriving individuals, in actual practice, there is often no “designation” of a country of removal. In these cases, the IJ does not ask for a designation, and the order of removal may state only that the noncitizen is “ordered removed,” without naming a country of removal because, as noted in the statutory language, it is the Department of Homeland Security (DHS) that determines the country of removal, not the court.

This is a critical step in removal proceedings. On the one hand, this is an opportunity to form the record by asserting statelessness. On the other hand, failure of a stateless respondent to timely designate a country of removal may lead to ICE designating the country of removal. This may in turn impact discussion of the stateless respondent’s claim on the merits. It can also have consequences if the IJ orders removal, as the stateless person may be subject to prolonged, perhaps even indefinite, detention.

The process of designating a country of removal is different for “arriving aliens”¹³⁰—i.e., non-U.S. citizens who are found inadmissible at an official port of entry to the United States—than it is for all other respondents.¹³¹

4. Designation for “Arriving” Individuals

Designation of the country of removal for an individual categorized as an “arriving alien” occurs in three steps. The first country that is designated is “the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.”¹³² If that country is unwilling to accept her, DHS is required to designate one of three countries:

- (1) The individual’s country of citizenship or nationality;
- (2) The individual’s country of nativity; or
- (3) The individual’s country of residence.¹³³

As with all other respondents, as detailed below, if removal to the enumerated countries is “impracticable, inadvisable, or impossible,” DHS ultimately must seek removal to any “country with a government that will accept the [individual] into the country’s territory.”¹³⁴ It is important to note that the individual has no say in designating the country of removal if she is categorized as “arriving.” Implications of this process for stateless individuals and strategic considerations for them and their counsel are discussed in detail below.

Practice Point

Given that stateless persons do not have national passports and frequently lack other kinds of travel documents, and are thus often unable to travel, it is less likely that a stateless person would be categorized as an “arriving alien.” However, for those stateless people who either are able to secure some form of lawful travel document—for instance, stateless Bidoon from Kuwait who have secured an Article 17 passport for travel¹³⁵—or who utilize fraudulent documents, a finding of inadmissibility at a port of entry and categorization as an “arriving alien” may occur.

Note that it would be rare to find a stateless person classified as “arriving” during removal proceedings unless she was requesting asylum.

¹³⁰ See INA § 241(b)(1).

¹³¹ INA §241(b)(2); 8 U.S.C. §§ 1231(b)(2).

¹³² INA §241(b)(1)(A). *But see* INA §241(b)(1)(B) (applying the limitation that only natives, citizens, subjects, and nationals of foreign territory contiguous to the United States or adjacent islands may be removed to those countries or territories).

¹³³ INA §241(b)(1)(C)(i)-(iii); see also 8 C.F.R. §§ 241.15(e), 1240.10(f) (stating that acceptance of the receiving country is not required under these sections).

¹³⁴ INA §241(b)(1)(C)(iv).

¹³⁵ See IMMIGRATION AND REFUGEE BOARD OF CANADA, KWT37021.E, KUWAIT: INFORMATION ON ARTICLE 17 PASSPORTS (June 11, 2001), available at <http://www.refworld.org/docid/3df4be5914.html>.

5. Designation for Non-“Arriving” Individuals

For those individuals not taken into custody at a port of entry, and thus not designated as “arriving aliens,” INA §241(b)(2) governs the designation of the country of removal and is read as a series of four directives:

- (1) The individual shall be removed to the country of her choice, unless one of the conditions eliminating that command is satisfied;
- (2) Otherwise she shall be removed to the country of which she is a citizen, subject to conditions;
- (3) Otherwise she shall be removed to one of the countries with which she has a lesser connection; or
- (4) If that is “impracticable, inadvisable or impossible,” she shall be removed to “another country whose government will accept the [individual] into that country.”¹³⁶

The order and impact of each of these approaches is critical to the approach taken when a respondent is stateless. While identifying a country of removal may permit the individual to present a case against a country for which she has a fear of persecution, torture, or other serious human rights violations, declining to designate a country of removal may be more consistent with the assertion that a person is stateless. These are strategies that must be considered by the stateless person and her advocate before entering pleadings.

Both the non-arriving respondent and DHS have the authority, subject to certain conditions, to decide the country of removal.

a. The Respondent’s Opportunity to Designate

During removal proceedings, all respondents—with the exception of those classified as “arriving aliens”—have the right to “designate one country to which [she] wants to be removed.”¹³⁷ Note that in general, there is no requirement that the respondent prove that she or he is a citizen or national of the designated country.¹³⁸ However, there is one exception: the respondent cannot designate a foreign territory contiguous to the United States or its territories unless she has some connection to that territory.¹³⁹ Moreover, as discussed below, the IJ or DHS may disregard the respondent’s choice in one of four circumstances,¹⁴⁰ with a showing of good cause.¹⁴¹

Specifically, the IJ may disregard a noncitizen’s choice of country for failure to designate promptly or if removal to the designated country would be prejudicial to the United States.¹⁴² DHS may disregard the noncitizen’s designated country (and the country stated in the IJ’s order of removal) if the designated country does not respond or refuses to accept the noncitizen. Each of these circumstances is discussed in detail below.

Practice Point

Where the respondent is detained, the respondent’s attorney may want to verify whether the designated country will accept the respondent if she is ordered removed there. Otherwise, as discussed in detail below, the respondent may spend an extended period in detention following the removal order while DHS unsuccessfully attempts to arrange removal.

i. Failure to Designate Promptly

If “the alien fails to designate a country promptly,” the IJ may disregard the respondent’s designated country.¹⁴³ Again, this is a critical point for the stateless person. If the person declines to designate a country of removal and

¹³⁶ *Jama v. Immigration & Customs Enft*, 543 U.S. 335, 341 (2005) (citations omitted).

¹³⁷ INA §241(b)(2)(A).

¹³⁸ See *Matter of Laurenzano*, 13 I&N Dec. 636, 638 (BIA 1970).

¹³⁹ See INA § 241(b)(2)(B).

¹⁴⁰ See INA § 241(b)(2)(C).

¹⁴¹ See *Navarrete-Paredes v. Ashcroft*, 96 F. App’x 348, 350 (6th Cir. 2004) (remanding to resolve an inconsistency between the Immigration Judge’s designation of Peru and the alien’s designation of Spain); see also *United States ex rel. Scala Di Felice v. Shaughnessy*, 114 F. Supp. 791, 794 (S.D.N.Y. 1953) (“While it is abundantly clear that [the alien’s] right of choice . . . no longer exists without qualifications . . . the [Government] may not completely ignore a properly made choice merely as a matter of whim or caprice.”).

¹⁴² IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 568-71 (Am. Immigration Lawyers Ass’n ed., 14th ed. 2014).

¹⁴³ See INA § 241(b)(2)(C)(i).

DHS enters one instead, this may make an application for asylum or other protection more difficult to pursue. In the case of a removal order, declining to designate may make it more difficult to demonstrate that the person cannot be removed to that country, resulting in prolonged detention and other restrictions on their liberty. Stateless individuals and their counsel must consider the possible consequences of designating a country of removal, which may make applications for relief more difficult, versus not designating one and having different challenges if and when an order of removal is issued.

ii. Failure of Designated Country to Respond

If a country designated by the respondent for removal fails to respond and approve removal within 30 days, DHS may disregard and designate another country.¹⁴⁴ This is a likely scenario in the case of a stateless person and, again, should be considered as a legal and strategic decision early in proceedings, because the decision of whether and where to designate could have profound consequences in terms of detention and the ability to be removed.

iii. Refusal of Designated Country to Accept Respondent

If “the government of the country [designated by a respondent] is not willing to accept the alien into the country,” DHS may attempt to remove the respondent to another country.¹⁴⁵ As detailed in the following sections, DHS’s decision to attempt to remove to one country or another will greatly impact the stateless respondent’s asylum case, detention, and ability to be removed.

iv. Removal to the Designated Country Would Be Prejudicial To the United States

If removal of the respondent “to the country [designated by the individual] is prejudicial to the United States,” the respondent’s choice may be disregarded. Notably, the authority for this decision lies with the U.S. Department of State.¹⁴⁶ This subsection applies equally to stateless respondents and those who are not stateless.

b. DHS’s Opportunity to Designate

If a respondent is unable to designate a country that will accept her, the ability to designate a country of removal shifts to DHS. DHS must progress through the statute’s three options in the order that they appear in the statute.¹⁴⁷ These are discussed in order below.

i. Country Where Respondent is Subject, National, or Citizen

First, DHS may order removal to any country where the respondent is a subject, national, or citizen—even if this is more than one country.¹⁴⁸ Where it is not possible to determine the respondent’s nationality, or if the respondent is stateless, this section may be unenforceable, and it would be necessary to move on to the next options.

ii. Additional Options for Country of Removal

If removal to the respondent’s country of citizenship or nationality is not possible, the law designates additional countries to which removal can be directed.¹⁴⁹ These steps are not carried out in any particular order¹⁵⁰ and include:

- (1) The country from which the individual was admitted to the United States;
- (2) The country that contains the foreign port from which the individual left for the United States;
- (3) The country in which the individual last resided;
- (4) The country in which the individual was born;
- (5) The country that had sovereignty over the individual’s birthplace when she was born; or

¹⁴⁴ See INA § 241(b)(2)(C)(ii).

¹⁴⁵ See INA § 241(b)(2)(C)(iii). *But see Matter of Maccaud*, 14 I&N Dec. 429, 431 (BIA 1973) (noting that an affirmative refusal is not required if the time period specified by the statute has already passed).

¹⁴⁶ See *Matter of Linnas*, 19 I&N Dec. 302, 309 (BIA 1985).

¹⁴⁷ See INA § 241(b)(2)(D), (E); *Jama*, 543 U.S. at 341.

¹⁴⁸ *Matter of B-R-*, 26 I&N Dec. 119, 122 (BIA 2013).

¹⁴⁹ See INA §241(b)(2)(E)(i)-(vi).

¹⁵⁰ *Matter of Fwu*, 17 I&N Dec. 354, 356 (BIA 1980).

(6) The country in which the individual's birthplace is located at the time of removal.¹⁵¹

The authority here is quite broad. As long as the IJ designates a country of removal within the guidelines provided, the respondent does not have to be a citizen, national, or subject of the designated country, nor does the designated country have to provide prior consent for the removal.¹⁵² A functioning government is not required in the designated country,¹⁵³ and multiple countries may be designated.¹⁵⁴

For the stateless individual, if eventually ordered removed, this government authority could have a profound impact on the individual's ability to exercise basic civil and political rights, take up work, and to access education and social services in the country of eventual removal. It may also result in the individual being subject to extended detention following an order of removal, as DHS may attempt to justify continued detention on the basis of one of these ongoing options. Any stateless individual subjected to this provision should challenge the removal if it would place her at risk of persecution, torture, or other serious human rights violations. She should also nonetheless challenge post-order detention, an issue which is discussed in further detail below.

iii. Any Country Willing To Accept the Individual

When the respondent cannot be removed to any of the countries mentioned above, DHS is permitted to seek removal to "another country whose government will accept the alien into that country."¹⁵⁵ This is the only potential country of removal where it is required that the government of the country of removal be willing to accept the individual.¹⁵⁶

For the stateless individual, this broad Government removal authority is not without limit. Any stateless person subjected to this provision should have the opportunity to challenge removal to the country if it would place them at risk of persecution, torture, or other serious human rights violations.

Resources

Adam L. Fleming, *Around the World in the INA: Designating a Country of Removal in Immigration Proceedings*, IMMIGR. L. ADVISOR, (May 2013), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/03/vol7no5.pdf>.

Section 4: Removal Proceedings: Addressing Statelessness during Merits Hearing

Once a stateless person passes the master calendar stage of removal proceedings, if she qualifies, she can present a claim for relief from removal, mostly based on humanitarian considerations. In order to do so, she must present her case for consideration on the full merits of her claim. Existing remedies for a stateless individual in removal proceedings currently include asylum (in a defensive posture), withholding of removal under INA §241(b)(3), withholding and deferral of removal under Article 3 of the UN Convention Against Torture, and for certain non-lawful permanent residents, cancellation of removal. For an asylum claim, the same elements, burden of proof, and analytical considerations as discussed in Section 3 above generally apply. As such, this section focuses only on the other forms of relief from removal.

¹⁵¹ INA § 241(b)(2)(E).

¹⁵² *Bejet-Viali Al-Jojo v. Gonzales*, 424 F.3d 823, 828 (8th Cir. 2005) (citing *Jama*, 543 U.S. 335); see also 8 C.F.R. § 241.15(e).

¹⁵³ 8 C.F.R. § 1240.10(f).

¹⁵⁴ *El Himri*, 378 F.3d at 938 (citing 8 C.F.R. § 1240.12(c)).

¹⁵⁵ See INA § 241(b)(2)(E)(vii).

¹⁵⁶ See Execution of Removal Orders; Countries to Which Aliens May Be Removed, 70 Fed. Reg. 661, 666 (Jan. 5, 2005); see also *Wangchuck v. DHS*, 448 F.3d 524, 531 (2d Cir. 2006) (holding that the Board erred in ordering a non-U.S. citizen—who was born in India to Tibetan parents—removed to China without evidence that China would accept him); *El Himri*, 378 F.3d at 934, 939 (holding that "stateless Palestinians who fled Kuwait" could not be removed to Jordan unless that country was willing to accept them).

A. Withholding of Removal under INA §241(b)(3)

A claim for withholding of removal (Withholding) under INA §241(b)(3) is similar to an asylum claim in that the individual must show she fears persecution due to one of five protected grounds and that the government is unable or unwilling to protect her. However, the individual subject to removal proceedings (the “respondent”) carries a heavier burden of proof to merit relief for Withholding under INA §241(b)(3): she must demonstrate a “clear probability” of persecution, meaning that it is “more likely than not” that she will be subject to persecution on account of a protected ground.¹⁵⁷ There is no discretionary element. So, if the respondent proves eligibility, the Immigration Judge must grant withholding of removal.¹⁵⁸ Additionally, unlike asylum, there is no statutory time limit for bringing a withholding of removal claim.

While a grant of withholding of removal under INA §241(b)(3) provides some protections, a grant of Withholding without a grant of asylum¹⁵⁹ includes an order of removal.¹⁶⁰ As such, Withholding does not prevent DHS from attempting to remove an individual to another country other than the one to which removal is withheld.¹⁶¹ This is a critical legal and strategic consideration for the stateless person. A grant of withholding neither resolves the underlying issue of statelessness nor provides permanent stability, the ability to petition for reunification with family members, or to travel internationally to visit them. The absence of a permanent resolution of legal status may be particularly difficult for a stateless person who will remain in legal limbo even after successfully completing removal proceedings.

B. Withholding or Deferral of Removal under the Convention Against Torture

The United States is a State Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁶² The CAT, and its U.S. implementing regulations, place an absolute prohibition on removal to a country where it is “more likely than not” that the person will be subject to torture.¹⁶³ CAT protection can be a critical humanitarian protection for those who do not secure a grant of asylum or withholding of removal under INA 241(b)(3).

Trop v. Dulles

“We believe . . . that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is, instead, the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights and, presumably, as long as he remained in this country, he would enjoy the limited rights of an alien, no country need do so, because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.”¹⁶⁴

“Torture” is defined, in part, as the intentional infliction of severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of, a public official.¹⁶⁵ Courts have adopted a range of interpretations of the term “acquiescence,” some of them requiring that a public official have awareness of or remain “willfully blind” to the activity constituting torture, prior to its commission, and thereafter breaches his or her legal responsibility to

¹⁵⁷ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421(1987).

¹⁵⁸ INA § 241(b)(3).

¹⁵⁹ An immigration judge may find that the respondent has met both the burden for a grant of asylum, as well as withholding of removal under INA§241(b)(3) and may grant both forms of protection.

¹⁶⁰ *Matter of I-S- & C-S-*, 24 I&N Dec. 432 (BIA 2008).

¹⁶¹ 8 C.F.R. § 1208.16(f).

¹⁶² United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, G.A. Res. 39/46, U.N. Doc. A/39/51, available at <http://www.refworld.org/docid/3ae6b3a94.html>.

¹⁶³ See *id.*; Pub. L. No. 105-277 (1998); 8 C.F.R. §§ 1208.16, 1208.17, 1208.18; see also *Matter of M-B-A-*, 23 I&N Dec. 474, 477-78 (BIA 2002).

¹⁶⁴ *Trop v. Dulles*, 356 U.S. 86, 101-02 (1957).

¹⁶⁵ 8 C.F.R. § 1208.18(a)(1).

intervene to prevent such activity.¹⁶⁶ Other courts require that the official have specific intent that the torture occur.¹⁶⁷ There is no statutory time limit for filing a protection claim under CAT.

In applying for CAT protection, a respondent bears the burden of proof.¹⁶⁸ To meet this burden, the respondent must show that she, or someone in the same circumstances, is more likely than not to be tortured in the designated country of removal.¹⁶⁹ In meeting this burden, the respondent must present, and the IJ must assess, evidence showing the possibility of future torture, including evidence of past torture; any gross, flagrant or mass violations of human rights within the country of removal; and other relevant country of origin information.¹⁷⁰ A pattern of human rights violations alone is not sufficient to show that a particular person would be in danger of being subjected to torture upon his return to that State; specific grounds must exist to indicate that the respondent will be personally at risk of torture.¹⁷¹ She must also prove that she could not safely relocate to another area within the State where she fears torture.

Practice Point

For stateless people who have suffered severe social exclusion and the denial of access to basic civil, political, economic, and social rights because of their statelessness, but have not been the subject of direct physical violence or detention by government actors, it may be necessary to document and describe the experience of being without a nationality as akin to torture.

Similar to withholding of removal under INA §241(b)(3), once a respondent establishes CAT, the IJ must grant withholding of removal under CAT *unless* she is subject to one of the mandatory bars to CAT withholding protection. These bars include participation in the persecution of others; conviction for a particularly serious crime; “serious reasons to believe he or she committed a serious nonpolitical crime outside of the United States;” or “reasonable grounds to believe [the respondent] is a danger to the security of the United States.”¹⁷² Importantly, as the prohibition on the return to torture is absolute, a respondent’s criminal convictions, no matter how serious, are not a complete bar to protection under the Convention against Torture.¹⁷³ Instead, if a respondent is eligible for CAT protection, but crimes render her ineligible for Withholding, she must be granted deferral of removal.¹⁷⁴

When an individual is granted Withholding under CAT, the scope of protection is the same as Withholding under INA §241(b)(3) (see section above). When the grant is instead for deferral of removal under CAT, she is given a removal order whose enforcement is deferred until such time as the deferral is terminated. However, under withholding of removal, either statutorily or under CAT, the respondent is also given a removal order whose enforcement is withheld.

The IJ is required to inform the individual granted deferral of removal of the following:

Deferral of removal

1. Does not confer upon the alien any lawful or permanent immigration status in the United States;
2. Will not necessarily result in the alien being released from the custody of the DHS if the alien is subject to such custody;
3. Is effective only until terminated;
4. Is subject to review and termination based on a DHS motion if the Immigration Judge determines that it is not likely that the alien would be tortured in the country to which removal has been deferred, or upon the alien’s request; and

¹⁶⁶ 8 C.F.R. § 1208.18(a)(7).

¹⁶⁷ See, e.g., *Pierre v. Attorney Gen. of U.S.*, 528 F.3d 180, 187-89 (3d Cir. 2008).

¹⁶⁸ See generally *Kamara v. Attorney Gen. of U.S.*, 420 F.3d 202, 212 (3d Cir. 2005); *Sevoian v. Ashcroft*, 290 F.3d 166, 174 (3d Cir. 2002).

¹⁶⁹ 8 C.F.R. § 1208.16(c)(2); see also *Matter of J-E-*, 23 I&N Dec. 291, 303-04 (BIA 2002); *Matter of G-A-*, 23 I&N Dec. 366, 371-72 (BIA 2002); *Matter of M-B-A-*, 23 I&N Dec. at 478-79.

¹⁷⁰ 8 C.F.R. § 1208.16(c)(3).

¹⁷¹ *Matter of S-V-*, 22 I&N Dec. 1306, 1313 (BIA 2000).

¹⁷² 8 C.F.R. § 1208.16(d)(2); see also INA § 241(b)(3)(B).

¹⁷³ See 8 C.F.R. § 1208.17(a); *Matter of G-A-*, 23 I&N Dec. at 368.

¹⁷⁴ 8 C.F.R. §§ 1208.16(c)(4), 1208.17(a);

5. Defers removal only to the country where it has been determined that the alien is likely to be tortured and does not preclude the DHS from removing the alien to another country where it is not likely the alien would be tortured.¹⁷⁵

A grant of Withholding or deferral of removal under CAT provides some basic protections for a stateless person. However, as with a grant of Withholding under INA §241(b)(3), the absence of a permanent resolution of legal status under CAT protection may be particularly difficult for a stateless person. She will remain in legal limbo, with an underlying order of removal entered against her. A grant of CAT protection neither resolves the underlying issue of statelessness, nor provides permanent stability, the ability to petition for reunification with family members, or to travel internationally to visit them.

C. Cancellation of Removal For Certain Nonpermanent Residents under INA §240A(b)(1)

Another form of relief that stateless persons may qualify for is Cancellation of Removal for certain non-Lawful Permanent Residents. Where an individual's stateless status is relevant will be in meeting the "exceptional and extremely unusual" hardship requirement for cancellation of removal for certain nonpermanent residents under INA §240A(b)(1).

6. Eligibility Requirements for Cancellation of Removal under INA §240A(b)(1)

An individual who is not a lawful permanent resident of the United States and who is placed into removal proceedings may be eligible for cancellation of removal under INA §240A(b). Cancellation of removal is a discretionary grant of relief from removal based on certain humanitarian considerations in an individual case. In order to be eligible for a grant of cancellation of removal, the respondent must prove that she meets the following criteria:

- Has been physically present in the United States for a continuous period of not less than ten years immediately preceding [receipt of the notice to appear];
- Has been a person of good moral character during such period;
- Has not been convicted of a criminal offense matching those described under INA §212(a)(2) (concerning crimes of moral turpitude), INA §237(a)(2) (a long list of crimes that make one deportable, such as crimes of moral turpitude, aggravated felonies, sex offenses, domestic violence, etc.) or INA §237(a)(3) (concerning visa fraud and other use of false documents, and falsely claiming to be a U.S. citizen); and
- Has a U.S. citizen or lawful permanent spouse, parent, or child, which family member would suffer exceptional and extremely unusual hardship if the person were removed from the United States.¹⁷⁶

In the case of stateless persons, it is the final factor—proving "exceptional and extremely unusual hardship"—that becomes particularly relevant to an individual's lack of a nationality.

7. Proving Exceptional and Extremely Unusual Hardship

In considering whether the circumstances resulting from a respondent's removal will result in exceptional and extremely unusual hardship in a particular case, an IJ will consider evidence of:

- Age of a [respondent], both at the time of entry and at the time of the application for relief;
- Family ties in the United States and abroad;
- Length of residence in this country;
- The health of the respondent and qualifying family members;
- The political and economic conditions in the country of return;
- The possibility of other means of adjusting status in the United States;
- The [respondent]'s involvement and position in his or her community here; and,

¹⁷⁵ EOIR, IMMIGRATION JUDGE BENCHMARK – ASYLUM, WITHHOLDING OF REMOVAL, CAT, *available at* <https://www.justice.gov/eoir/immigration-judge-benchmark-section-241b>.

¹⁷⁶ See 8 C.F.R. § 1229b(b).

- Her or his immigration history.¹⁷⁷

Importantly, all hardship factors should be considered in the aggregate to determine whether the qualifying relative (i.e., the U.S. citizen or lawful permanent spouse, parent, or child of the respondent) will suffer hardship that is “exceptional and extremely unusual.”¹⁷⁸ Applying the aggregated hardship analysis in the case of stateless persons, the hardships resulting from an individual’s lack of nationality in the country designated for removal may well rise to the level of both “exceptional and extreme.”¹⁷⁹

Practice Point

When addressing the hardship requirement for a stateless person, in addition to the information listed above, consider including:

- * General information about statelessness in the United States, including lack of alternative forms of relief for this individual and likelihood of continued reporting requirements and other hardships;
- * The inability of a stateless person to return to visit with their family and community abroad; and
- * The treatment of stateless persons in the country to which this individual has been ordered removed.

Resources

EOIR, IMMIGRATION JUDGE BENCH BOOK – ASYLUM, WITHHOLDING OF REMOVAL, CAT, *available at* <https://www.justice.gov/eoir/immigration-judge-benchbook-section-241b>.

EOIR, IMMIGRATION JUDGE BENCH BOOK – CANCELLATION OF REMOVAL UNDER INA SECTION 204A(B)(1), *available at* <https://www.justice.gov/eoir/immigration-judge-benchbook-240ab1-standard>

Section 5: Motions to Reopen

A. Motions to Reopen

Where a stateless individual has a strong asylum claim that was not properly considered during her removal hearing, or she discovered after a final order of removal that she was stateless, the next step may be to file a motion to reopen to present these additional factors.¹⁸⁰ Prevailing on a motion to reopen can be difficult. According to the EOIR bench book, a motion to reopen will not be granted unless the IJ or BIA is satisfied that the evidence sought to be offered is material, was not available, and could not have been discovered or presented at the former hearing.¹⁸¹

Furthermore, with limited exceptions, motions to reopen are subject to time and numerical limitations. Specifically, a party may file only one motion to reopen and it must be filed within 90 days of a final order of removal.¹⁸² If the motion is not filed within 90 days, there are certain scenarios under which a motion to reopen is nonetheless valid: (a) the individual intends to apply for asylum, Withholding or CAT relief *and* the basis for the claim is a result of

¹⁷⁷ *Matter of Monreal*, 23 I&N Dec. 56, 63 (BIA 2001) (emphasis added).

¹⁷⁸ *Id.* at 64; see also *Matter of Recinas*, 23 I&N Dec. 467, 472 (BIA 2002) (finding that the “exceptional and extreme hardship” standard had been met in the case of a respondent based on the aggregate of her and her family’s circumstances).

¹⁷⁹ In the context of adjustment of status, either before USCIS or the immigration court, immigration law provides an inadmissibility waiver for extreme hardship under INA §212(h) (addressing inadmissibility for a single simple possession of less than 30g of marijuana) and under INA §212(i) (addressing inadmissibility for fraud or willful misrepresentation of fact). While not fully explored in this manual, these instances could benefit from similar analysis.

¹⁸⁰ For additional information on motions in general, see VIKRAM K. BADRINATH, HELEN PARSONAGE, & JENNA PEYTON, AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) DOC. NO. 14072246b., TIME-BARRED MOTIONS TO REOPEN- TIPS AND TRICKS FOR SUCCESS, 795 (May 17, 2016), *available at* <http://www.aila.org/File/Related/14072246b.pdf>.

¹⁸¹ See EOIR IMMIGRATION JUDGE BENCHBOOK - MOTIONS, ¶6, *available at* https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Motions_to_Reopen_Guide.pdf.

¹⁸² 8 C.F.R. § 1002.239(b)(1), (4).

changed conditions in the country of removal;¹⁸³ (b) an in absentia order was due to exceptional circumstances;¹⁸⁴ or (c) the underlying order was due to ineffective assistance of counsel.¹⁸⁵

In reference to stateless cases, motions to reopen based on changed country conditions may be the most frequently relevant ground. Particularly where an individual's country rendered her stateless after her arrival in the United States, a showing of a change in country conditions is clearly a possibility. Such was the case in *Jourbina v. Holder*,¹⁸⁶ where a family formerly from Kazakhstan was denationalized several years after they had entered the United States and had already received an order of removal. After their citizenship was revoked by the Kazakh government, the Jourbinas filed a motion to reopen their case on the basis of changed country conditions. After an initial denial at the BIA, the Jourbinas arguments –based on their newly-imposed statelessness - found success before the Second Circuit Court of Appeals. Counsel's opening brief in the *Jourbina* case can be found in the Appendix to the present manual.

If none of these bases for motioning to reopen is supported by the facts and circumstances of a stateless individual's case, or the motion is time or number-barred, other options include requesting that ICE join a motion to reopen and requesting that either ICE or EOIR grant a motion to reopen *sua sponte*.

B. Joint Motions to Reopen and Motions to Reopen Sua Sponte

Many stateless individuals have long-standing final orders of removal and are outside the 90-day time limit¹⁸⁷ for a general motion to reopen. Alternatively, they may have previously filed a motion to reopen unsuccessfully and thus exceeded the numerical limitations. Absent one of the exceptions to the time or numerical bars described above, under these circumstances, a joint motion to reopen or a motion to reopen *sua sponte* can be considered. The venue for filing the motion will depend on which entity—the EOIR, IJ, or the BIA— entered the final administrative decision on the individual's case.

8. Joint Motion to Reopen

The ICE Office of the Chief Counsel (OCC) has the discretion to decide to join a Joint Motion to Reopen.¹⁸⁸ If ICE does join such a request, the Immigration Court or the BIA will likely grant the motion to reopen¹⁸⁹ and allow a new brief to be submitted. A joint motion to reopen does not require a showing of changed circumstances, and the time and numerical limitations that generally apply to motions to reopen do not apply.

In preparing a request for a joint motion to reopen, it is important to keep in mind that OCC will not have access to the individual's agency file at the time. As such, a written request to OCC to join a motion to reopen may include the following information:

- 1) A detailed procedural and factual summary of the case, including:
 - (a) why the original asylum claim, if any, was denied;
 - (b) whether there is a criminal history;
 - (c) how the individual became stateless; and
 - (d) why this is the only form of relief that remains.
- 2) An explanation of any new asylum claim or new factors affecting the previous claim;
- 3) An explanation of statelessness, including:
 - (a) the legal basis for the statelessness finding (see Section 2 above on proving statelessness);

¹⁸³ 8 C.F.R. § 1003.23(b)(4)(i).

¹⁸⁴ 8 C.F.R. § 1003.23(b)(4)(ii).

¹⁸⁵ The procedural and substantive standards for raising a claim of ineffective assistance of counsel are contained in a Practice Advisory prepared by the American Immigration Council. See AMERICAN IMMIGRATION COUNCIL, SEEKING REMEDIES FOR INEFFECTIVE ASSISTANCE OF COUNSEL IN IMMIGRATION CASES (Jan. 19, 2016), available at <https://www.americanimmigrationcouncil.org/research/seeking-remedies-ineffective-assistance-counsel-immigration-cases>.

¹⁸⁶ *Jourbina*, 532 Fed. Appx. 1.

¹⁸⁷ See 8 C.F.R. § 1002.23.

¹⁸⁸ See 8 C.F.R. § 1003.23(b)(4)(iv).

¹⁸⁹ Cf. *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (In discussing rulings on motions to continue, the BIA stated "If the DHS affirmatively expresses a lack of opposition, the proceedings ordinarily should be continued by the IJ in the absence of unusual, clearly identified, and supported reasons for not doing so.")

- (b) that there are no forms of relief from removal in the U.S. solely based on being stateless;
- (c) the indefinite nature of statelessness;
- (d) the unlikelihood of removal for a stateless individual;
- (e) how long the individual has been stateless.

Chapter Three: Alleviating Other Hardships

There are no paths to citizenship or lawful permanent residence based on a statelessness status for stateless individuals living in the United States. Those with a final order of removal may be detained, typically face restrictive reporting requirements, are rarely able to travel outside of the United States, and must renew their employment authorization indefinitely.

Section 1: Challenging Detention

Stateless individuals in the United States often are held in immigration detention by ICE before, during, and even after their court proceedings, including after they have received a final administrative order of removal. Detention is one of the most compelling hardships that stateless people face. The following presents considerations for stateless people in presenting challenges to their detention.

Like all people, stateless individuals must be protected from arbitrary detention. In order for detention not to be arbitrary, it must be necessary in each individual case, reasonable in all the circumstances, proportionate to any risks presented, and non-discriminatory in nature.¹⁹⁰ It also requires independent, periodic review of the on-going appropriateness of detention. Indefinite as well as mandatory forms of detention are arbitrary *per se*.

Practice Point

Similar to refugees, stateless individuals, by virtue of their stateless status, arguably have a particular incentive to attend their immigration appointments in the interest of resolving their status. Thus, generally speaking, an individual's status as a stateless person should be considered as a factor in detention decisions. Likewise, given the strong unlikelihood of removal, it is not reasonable to detain a stateless person with a final order of removal solely to effectuate removal. This is similar to the situation of an individual who has been granted Withholding under INA §241(b)(3) or withholding or deferral of removal under CAT.

Under U.S. law, there are various moments when a stateless person may challenge her detention by ICE. This includes during removal proceedings (a bond hearing before an IJ); immediately following a final administrative order of removal; at the 90-day post-order custody review; at the 180-day custody review; and beyond (via a petition for a writ of habeas corpus).

1. Bond Hearing before an Immigration Judge

The bond hearing is an individual's first opportunity to present her case for release from ICE detention before an independent authority. Certain individuals may motion for a custody redetermination hearing before an Immigration Judge pursuant to INA §240.¹⁹¹ In making a decision on a motion for bond, an IJ will weigh the equities in favor of releasing the individual, against any risk of flight or danger to the community that she presents. Factors to take into

¹⁹⁰ For an in-depth discussion of the international human rights framework prohibiting arbitrary deprivation of liberty, particularly in the context of asylum-seekers, see UNHCR, GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION (2012), available at <http://www.unhcr.org/505b10ee9.html>.

¹⁹¹ "Arriving" non-citizens are not eligible for a custody redetermination hearing before an IJ, though they may request discretionary grant of parole by DHS. See 8 C.F.R. § 1003.19(h)(2)(i)(B)). Also, individuals who are deportable on certain criminal grounds as specified under INA §236(c), or found to be subject to mandatory detention related to provisions for suspected terrorists under INA §236A, are not eligible for bond.

consideration in terms of equities include community ties, employment history, and immigration record.¹⁹² Stateless persons have often lived in their communities for an extended period of time and have deep community ties, as well as employment history. The element of statelessness may reflect in the immigration history where, for example, the individual had to obtain fraudulent documents in order to travel. Moreover, while the ability of DHS to eventually effectuate removal in a particular case is considered a less significant factor¹⁹³ in the bond determination, in a stateless person's case, this may be uniquely relevant, as at least part of the justification for detention is to ensure compliance with an eventual removal order.

Practice Point

Individuals who are ineligible for a custody redetermination hearing may be eligible for release on parole pursuant to INA §212(d)(5)(a). Such individuals should consider making a request for release from detention to DHS. At least one federal court has also found that an immigration judge may release an individual on conditional parole, including on her own recognizance, under INA §236(a).¹⁹⁴

9. Immediately Following a Final Administrative Order of Removal

Following a final administrative order of removal, a non-citizen may be held in detention in order to facilitate ICE's efforts to secure removal. This authority has a limit of 90 days during which the individual may be held without review of the need to detain.¹⁹⁵ However, ICE may, in its discretion, release an individual during this period. Requesting discretionary release during this period should address the justification for detention (e.g., to facilitate removal) and present arguments as to why such justification is less likely. For example, in the case of stateless people, removal is highly unlikely, if not impossible.

Notably, given that certain types of protection from removal actually carry an underlying removal order (e.g., Withholding or deferral of removal) a stateless person who has been granted such protection may be subject to detention for the 90-day period following the final administrative decision. Given the dual factors weighing against likelihood of removal (e.g., statelessness, as well as the administrative order protection), stateless persons in this situation have particularly strong equities weighing in favor of their release from detention.¹⁹⁶

Practice Point

During the 90-day removal period, the detained individual is required by law to make attempts to assist ICE in securing removal to a country. This requirement attaches to stateless people, despite the fact that they have no country to which they can be removed. Importantly, if the individual refuses to make attempts to facilitate her removal, this may be used to justify her continued detention past the 90-day removal period.¹⁹⁷ Similarly, demonstrating repeated, albeit unsuccessful, attempts to secure removal will support release at the 90-day review. As such, it is important to document all such attempts/contacts, as well as any responses

2. Post-Order Custody Review at Ninety Days

Upon expiration of the 90-day removal period, ICE will by statute review the need for continued detention. Absent justification of the individual being a danger to the community, significant flight risk or that removal is imminently pending, the individual should be released at the 90-day review. In general, the detained individual does not need to request that ICE conduct this custody review; rather, ICE initiates the review itself. However, the individual should receive notice 30 days prior that the review will be conducted. This allows the individual to present evidence and other documents in support of release upon review.

¹⁹² See EOIR, IMMIGRATION JUDGE BENCH BOOK INTRODUCTORY GUIDE – BOND, [hereinafter EOIR Bench Book- Bond] available at <https://www.justice.gov/eoir/file/830231/download>; see also DOROTHY HARBECK, BOND HEARINGS IN A NUTSHELL, in PRISON LAW 2015 (Practising Law Institute ed., 2015).

¹⁹³ See EOIR Bench Book- Bond (citing *Matter of P-C-M*, 20 I&N Dec. 432 (BIA 1991)).

¹⁹⁴ See *Rivera v. Holder*, 307 F.R.D. 539 (W.D. Wash. 2015).

¹⁹⁵ See 8 U.S.C. §1231(a).

¹⁹⁶ See Memo, Cooper, INS, General Counsel, HQCOU 50/1.1 (Apr. 21, 2000), reprinted in 77 No. 39 *Interpreter Releases* 1445, 1460 (Oct. 9, 2000).

¹⁹⁷ See 8 U.S.C.1231(a)(1)(C).

In addition to any typical evidence that might be submitted explaining why an individual should be released,¹⁹⁸ evidence of statelessness may support the case for release. Evidence can include:

- 1) Explanation of statelessness and why the individual is stateless;
- 2) Official U.S. Government letters finding this person stateless (if applicable);
- 3) UNHCR statelessness status determination or evidence that the individual has requested to be recognized as stateless under UNHCR's mandate (if applicable);
- 4) Evidence of the individual's cooperation with attempts to remove her, including letters submitted by the individual to relevant consulates, and any responses taking a position on the citizenship of the individual, or evidence on the State(s) general attitude in terms of nationality status of persons similarly situated;
- 5) Case law demonstrating that similarly situated individuals were found to be stateless or not able to be removed from the United States.

3. Post-Order Custody Review at 180 Days

If an individual is detained beyond the initial 90-day custody review, ICE will initiate a second custody determination after 180 days in detention.¹⁹⁹ At this stage, the presumptive reasonableness of continued detention shifts, and ICE must justify why continued detention for removal purposes is necessary. Thus, the focus of this review is on whether removal is reasonably possible in the near future.

Similar to the 90-day review, an individual may provide evidence in support of release, focusing on the unlikelihood of removal. For stateless persons, again, the focus of such evidence may be to prove the high unlikelihood or impossibility of removal. Additionally, evidence of efforts to comply with the removal order and secure removal to another country will also be of value.

4. Petition for a Writ of Habeas Corpus

If after 180 days, ICE decides not to release a stateless person *or fails to make a prompt decision regarding ongoing detention*, the individual may file a petition for a writ of habeas corpus in federal district court. Such a challenge would be brought under the 2001 U.S. Supreme Court opinion in *Zadvydas v. Davis*.²⁰⁰ In *Zadvydas*, the Court held that, as a general principle, DHS cannot detain those with a final administrative order of removal for longer than six months if there is no "significant likelihood of removal in the reasonably foreseeable future."²⁰¹

Resources

FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, GETTING A BOND: YOUR KEYS TO RELEASE FROM DETENTION (May 2013), *available at* <http://firrp.org/media/Bond-Guide-2013.pdf> (tailored for pro se bond applicants).

AMERICAN BAR ASSOCIATION, A LEGAL GUIDE FOR ICE DETAINEES: PETITIONING FOR RELEASE FROM INDEFINITE DETENTION (2006), *available at* http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/legalguide_indefinitedetention.authcheckdam.pdf.

Section 2: Orders of Supervision

Orders of Supervision (OSUP) are regulated forms of release from detention used for certain qualifying non-U.S. citizen individuals who cannot be removed from the United States in a "reasonable" time.²⁰² OSUP are envisioned as a limited release program for individuals who have been in detention beyond the statutory 90-day removal period

¹⁹⁸ Such evidence would demonstrate that an individual is neither a flight risk nor a danger to the community.

¹⁹⁹ Importantly, this review is carried out at ICE Headquarters Post-Order Detention Unit (HQPDU) in Washington, D.C.

²⁰⁰ 533 U.S. 678 (2001).

²⁰¹ *Zadvydas*, 533 U.S. 678.

²⁰² OSUP are governed by INA §241, 8 U.S.C. §1231, and 8 C.F.R. § 241.5.

with no possibility of removal, who are a low flight risk, and who are not considered a danger to the community. As discussed above, because stateless persons have no country that recognizes them as their citizen, they cannot obtain travel documents to facilitate removal. Under these circumstances removal is exceedingly unlikely, and frequent OSUP reporting requirements can be at once particularly burdensome on the stateless person and less valuable from a law enforcement perspective.

ICE holds the discretion to reduce the conditions of an OSUP depending on the circumstances of the individual.²⁰³ If a stateless person is required to report more frequently, she may request that the local ICE Field Office reduce her reporting requirement to once a year. In preparing such a request, consider including:

- 1) A history of the individual's compliance with any current or previous reporting requirements. This may make note of the fact that the individual did not intentionally fail to depart, but rather as a stateless person, is and was unable to obtain valid travel documents.
- 2) An explanation of what it means to be stateless, **particularly addressing the prioritization of resources**. The fact that a stateless person (by virtue of their **lack of a nationality**) cannot be removed is another persuasive aspect of a request to reduce reporting requirements. Thus, **evidence of an individual's statelessness status, including any determination by UNHCR or another authority, may be helpful to include**. This is also related to why a stateless individual may not fall under one of ICE's identified enforcement and removal priorities.
- 3) Changes to the individual's case: If there has been no change to the individual's status as a stateless person, a reduced reporting requirement could save ICE time and resources.

Practice Point

ICE/ERO leadership has asked that any request for changes in orders of supervision for stateless individuals be first sent to the Regional Public Liaison for the area in which the individual reports. If no resolution is reached at the field level, contact ERO via email at ERO.INFO@ice.dhs.gov or by calling the ICE Detention and Reporting and Information Line (1-888-351-4024).

Section 3: Employment Authorization

Many stateless persons enjoy employment by virtue of being on an order of supervision. Stateless people must typically reapply for work authorization on an annual basis. This timeframe can be costly and onerous on a stateless individual who will need continuous and indefinite work authorization to avoid gaps in employment.

By regulation, USCIS has the discretion to grant EADs.²⁰⁴ In some instances, an EAD's validity period is linked to a person's "status," and in most cases, EADs are granted for a 1-year period.²⁰⁵ There is no specific validity period set out for stateless individuals, and where the statute does not specifically limit the time-period for an EAD grant, USCIS can determine the validity period of the work document.²⁰⁶ This presents an opportunity for stateless individuals to request and receive a multi-year EAD.

²⁰³ See UNITED STATES DEPARTMENT OF STATE, BUREAU OF POPULATION, REFUGEES AND MIGRATION, U.S. COMMEMORATIONS PLEDGES – AN UPDATE (June 24, 2013), available at <https://2009-2017.state.gov/j/prm/releases/factsheets/2013/211074.htm> ("In response to UNHCR's request to tailor reporting requirements for stateless aliens to their individual circumstances and risk, ICE issued new reporting guidance to all ICE ERO Field Office Directors on August 23, 2012. Effectively immediately, ICE ERO Field Offices are authorized to use discretion in establishing reporting requirements of aliens released on an Order of Recognizance or Order of Supervision. The guidance states that each alien's case and reporting requirements may be reassessed and modified based on the alien's level of compliance, ICE's detention enforcement priorities, or changes to the circumstances of the individual case as a matter of discretion. At a minimum, however, aliens released on an Order of Recognizance or Order of Supervision must report at least once per year. This guidance supersedes the Victor X. Cerda memorandum on Orders of Supervision dated November 12, 2004.")

²⁰⁴ Employment authorization is governed by 8 C.F.R. § 274a.12.

²⁰⁵ See USCIS, Employment Authorization Document, available at

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=820a0a5659083210VgnVCM100000082ca60aRCRD&vgnnextchannel=820a0a5659083210VgnVCM100000082ca60aRCRD> (last visited June 2, 2017).

²⁰⁶ 8 C.F.R. § 274a.12(a); 8 C.F.R. § 274a.12(a)(5) (an example where a time limit is imposed in the statute; an EAD cannot be granted to an asylee for longer than 5 years).

Each section of the regulations governs the grant of an EAD to individuals depending on their status.²⁰⁷ Thus, each status is governed by different statutorily placed limitations, and do not appear to be transferable to another status. There are two sections relevant to stateless individuals:

- 1) Section 8 C.F.R. § 274a.12(c)(18) applies to individuals who have a final order of removal or deportation and who are released pursuant to an order of supervision. Specifically, this section states that a District Director has the discretion to grant an EAD if the individual “cannot be removed due to the refusal of all countries designated by the alien or under section 241 of the Act to receive the alien, or because removal of the alien is otherwise impracticable or contrary to the public interest.” Factors a District Director must consider when adjudicating this type of EAD application are whether the individual needs to be employed, whether there is a dependent, and how long the individual might stay in the United States before they can be removed. There is no discussion in §274a.12(c)(18) of a mandatory limit to the time period for which an EAD may be granted.
- 2) Section 8 C.F.R. §274a.12(c)(14) applies to persons granted deferred action. This determination is based on economic necessity, which must be established through a showing of current income, annual expenses, and assets. In a case where ICE grants deferred action with a request for work authorization, USCIS makes the final decision with regard to the work authorization. There is precedent for individuals with deferred action being granted multiple year EADs. For example, many individuals granted Deferred Action for Childhood Arrivals received two-year work authorization.

Agency guidance supports granting a person with statelessness status a multi-year EAD, although this is not a standard practice. A DHS interim rule from 2004²⁰⁸ granted USCIS the ability to issue EADs for longer or shorter terms than one year, based on individual determinations.²⁰⁹ The underlying policy justification noted that limitations “often require an alien whose underlying status is longer than one year, or whose underlying application will remain pending with BCIS for longer than one year, to apply for renewal of the EAD every year, creating a burden on the applicant and an additional workload for BCIS.”²¹⁰ Despite this interim rule, there is no standard practice for granting stateless individuals a multi-year EAD.²¹¹

Practice Point

When requesting an EAD, consider submitting a request for a multi-year EAD citing to 8 C.F.R. § 274a.12(c)(18) or 8 C.F.R. 274a.12(c)(14), depending on the stateless individual’s situation. In addition to those factors typically included in a request for an EAD, highlight that because of an individual’s statelessness, there is a significant likelihood that she will remain indefinitely in the United States, and requiring her to annually renew the EAD creates hardships both in terms of expense and continuity of employment.

²⁰⁷ 8 C.F.R §274a.12.

²⁰⁸ In 2004, DHS issued an Interim Rule on Employment Authorization Documents, 69 Federal Regulation 45555, (Interim Rule) which amended the Bureau of Citizenship and Immigration Services (BCIS) internal regulations or policies for EADs. See Employment Authorization Documents, 69 FR 45555.

²⁰⁹ According to the Interim Rule, validity periods would be based on criteria such as “The applicant’s immigration status, general processing time for the underlying application or petition, required background checks and response times for background checks by other agencies, as necessary; other security considerations and factors as deemed appropriate by BCIS.” NATIONAL IMMIGRATION LAW CENTER, *Under New Interim Rule, USCIS May Issue EADs Valid for Longer or Shorter than One Year*, 18 IMM. RTS. Update 5 (Aug. 9, 2004); see also 69 FR 45555.

²¹⁰ 69 FR 45555.

²¹¹ In both 2006 and 2008, the CIS Ombudsman recommended that USCIS start implementing the 2004 Interim Rule by issuing multi-year Employment Authorization Documents. See RECOMMENDATION FROM THE CIS OMBUDSMAN TO THE DIRECTOR, USCIS (Mar. 20, 2006); RECOMMENDATIONS ON USCIS PROCESSING DELAYS FOR EMPLOYMENT AUTHORIZATION DOCUMENTS, USCIS (Oct. 2, 2008).

APPENDIX:

OPENING BRIEF FROM
JOURBINA V. HOLDER

No. 11-1540

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Boris JOURBINA
Tatiana JOURBINA
Natalia JOURBINA
Polina JOURBINA,

Petitioners,

v.

Eric HOLDER, ATTORNEY GENERAL,
Melissa K. LOTT, OFFICE OF IMMIGRATION LITIGATION;
Lloyd SHERMAN, IMMIGRATION & CUSTOMS ENFORCEMENT
NEW YORK FIELD OFFICE;

Respondents

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

Petitioners, Boris, Tatiana, Natalia, and Polina Jourbina, seek review of an order of the Board of Immigration Appeals (BIA) dated March 22, 2011 that dismissed the Petitioners' Motion to Reopen Removal Proceedings. Add. at 45-48. This action challenges the BIA's arbitrary and capricious dismissal of the motion on the grounds that: the agency failed properly to address—and thus perfunctorily dismissed—the Petitioners' claim that their recent denationalization because of non-Kazak nationality constitutes a change in country conditions in their native Kazakhstan, the central basis for the Motion to Reopen; the agency erroneously reduced the Petitioners' denationalization claim as one of "statelessness" arising from non-discriminatory acts; the agency failed to provide any reasoning or legal analysis when dismissing the Petitioners' arguments and *prima facie* asylum proffer.

Jurisdiction in this case is proper under the REAL ID Act of 2005, which limited judicial review of decisions rendered by immigration judges and the BIA to "constitutional claims or questions of law raised upon a petition for review." REAL ID Act § 106(a)(1)(A)(iii), codified at 8 U.S.C. § 1252(a)(2)(D). This Court has considered at length what constitutes a question of law that would allow jurisdiction to vest. *Liu v. INS*, 508 F.3d 716 (2d Cir. 2007); *Khan v. Gonzales*, 495 F.3d 31 (2d Cir. 2007); *Chen v. Gonzales*, 471 F.3d 315 (2d Cir. 2006). This Court will look to the "nature of the claims raised" rather than the merits of the claims and will "scrutinize a petitioner's arguments to determine whether they raise reviewable questions [of law]." *Khan*, 495 F.3d at 35. A petition that "merely quarrels over the correctness of the factual findings or justification for the discretionary choices" fails to raise a sufficient question of law in which case the Court could

exercise jurisdiction. *Chen*, 471 F.3d at 329. For example, this Court has classified objections to an agency's factual findings and the balancing of factors in which discretion was exercised as questions of fact which do not give rise to judicial review. *Chen*, 471 F.3d at 332.

However, this Court *does* have jurisdiction to review petitions that raise objections about the agency's application of an incorrect standard or its abuse of discretion in ignoring important facts in the record. *Khan*, 495 F.3d at 35.

With respect to a motion to reopen, the United States Supreme Court has held that although the BIA has broad discretion to grant or deny a motion to reopen, higher courts retain jurisdiction to review the BIA's decision. *Kucana v. Holder*, 130 S.Ct. 827 (2010). Here, the Petitioners petition for review of their Motion to Reopen based on a change in country conditions. 8 C.F.R. § 1003.2(c)(3)(ii). Petitioners claim that the Kazakh government's

recent persecutory revocation of their Kazakh citizenship, coupled with their resulting non-Kazakh nationality, gives rise to a *prima facie* claim for asylum under 8 U.S.C. § 1158.

Petitioners maintain that the BIA abused its discretion when it denied their Motion to Reopen with conclusory statements devoid of reasoning and when it ignored extensive record evidence regarding their claim of a change in country conditions. Petitioners further claim that the BIA failed completely to consider their *prima facie* showing of a fear of future persecution because of their non-Kazakh nationality. This Court has concluded that a decision which "is argued to be an abuse of discretion because it was made without rational justification" raises a question of law that vests jurisdiction with this Court. *Chen*, 471 F.3d at 329. This is precisely what the Petitioners allege.

The Petitioners contend that the BIA committed errors of law in failing to consider substantial

evidence in the record and by failing to consider material arguments they put forth. The Petitioners further contend that the BIA provided no reasoning or analysis in addressing the legal issues presented in their motion or when choosing to ignore significant and persuasive decisions on the subject.

Venue for review properly lies with this Court under 8 U.S.C. § 1252(b)(2). The Immigration Judge completed the prior proceedings in New York, New York, and, thus, wholly within this Circuit. Finally, as the Petitioners filed their Motion to Reopen with the BIA, they have exhausted their administrative remedies.

II. STATEMENT OF THE ISSUES

(1) Whether the BIA's denial of Petitioners' Motion to Reopen constitutes an abuse of discretion when it failed to consider:

a. Whether the Kazak government's recent revocation of the Petitioners' Kazak citizenship, coupled with Kazakhstan's demonstrated persecution of denationalized individuals, constitutes a change of country conditions for the purposes of a motion to reopen pursuant to 8 U.S.C. § 1229a(c)(7)(C)(ii);

b. Whether revocation of citizenship and fear of future persecution based on non-Kazak nationality is a sufficient proffer of *prima facie* eligibility for asylum or withholding of removal.

III. STATEMENT OF THE CASE

The Petitioners, Boris, Tatiana, Natalia, and Polina Jourbina, are former citizens of Kazakhstan who were recently denationalized. R. at 49-71; 86. They have no country of citizenship. They are Christian and of Chechen ethnicity.

After a hearing on the claims for asylum based on ethnicity and religion, the Petitioners accepted voluntary departure from the Immigration Court in New York, New York, on January 25, 1999. R. at 76-79. They filed a timely appeal of the decision to the BIA and obtained a stay of their departure from the United States. On July 23, 2002, the BIA affirmed the Immigration Court's decision. R. at 71-75.

Pursuant to enhanced discriminatory policy, on December 22, 2009, the Republic of Kazakhstan revoked Kazakh citizenship for all four Petitioners, leaving the Jourbinas without citizenship from any nation and effectively

preventing Immigration and Customs Enforcement (ICE) of the Department of Homeland Security (DHS) from executing the order of removal. R. at 86.

On June 23, 2010, pursuant to 8 C.F.R. § 1003.2(c)(3)(ii), the Petitioners filed their Motion to Reopen Removal Proceedings with the BIA based on the persecutory revocation of their citizenship and fear of future persecution based on nationality. R. at 18-136. On March 22, 2011, the BIA, in a two paragraph decision, dismissed the Petitioners' motion to reopen finding that their "resulting statelessness" was not a change in country conditions sufficient to warrant reopening and that such statelessness, alone, would fail to establish a *prima facie* case for asylum.¹ Add. at 45-48. The instant appeal timely followed.

¹ The BIA issued two decisions dismissing the Motion to Reopen. One decision was addressed to Boris Jourbina, the other decision was addressed to Tatiana, Natalia, and Polina Jourbina. A detailed review of the underlying record indicates that although the Immigration Judge issued one oral decision for all four Jourbinas, he separated Boris Jourbina's voluntary departure case from the other family members because different statutory rules applied to Tatiana, Natalia, and Polina given the date that they

IV. STATEMENT OF THE FACTS

The Petitioners are a family from the former Soviet Union. R. at 49-70. Boris Jourbina (a.k.a. Boris Zhurbina; Boris Jourbine) and his wife, Tatiana Jourbina (a.k.a. Tatyana Zhurbina; Tatiana Jourbine), were born in Chechnya. R. at 63-70; 303. Boris Jourbina entered the United States on a B-2 visa on September 15, 1993. R. at 59. Tatiana Jourbina entered the United States with her daughters, Natalia Jourbina (a.k.a. Natalya Zhurbina, Natalia Kowal, Natalia Jourbine) and Polina Jourbina (a.k.a. Polina Zhurbina, Polina Camacho), on B-2 visas on August 11, 1995. R. at 60-62. The family entered with passports issued by the U.S.S.R. (Union of Soviet Socialist Republics).

Boris and Tatiana filed separate applications for political asylum, which eventually were joined. R. at 409-413; 538-548. Their asylum claims were

entered the United States. Despite this procedural bifurcation, all four Jourbinas have always maintained a claim as a family and have filed a joint Motion to Reopen, the denial of which is at issue in this Petition for Review.

substantially predicated on their Chechen ethnicity and Christian religion. R. at 199-215. The applications for asylum were referred to an Immigration Judge, before whom they renewed their asylum claim. Inexplicably, only Boris was permitted to testify during the asylum hearing. R. at 265; 294-357. On January 25, 1999, Judge William Jankun² denied the family's claim for asylum and granted them voluntary departure to Kazakhstan, valid until March 26, 1999. R. at 212-215.

The Jourbinas appealed the decision to the BIA, which affirmed the Immigration Judge's decision on July 23, 2002. R. at 71-75. Still fearing return to the newly created country of Kazakhstan, where they have no strong ties, the family remained in the United States.

² The Honorable Judge Jankun is now retired. He has been ranked 5th in the nation for denial rates in asylum cases with a 94% denial rate according to Transactional Records Access Clearinghouse, Syracuse University (http://trac.syr.edu/immigration/reports/160/include/judge_0005_name-r.html).

On September 30, 2007, Natalia married Grzegorz S. Kowal, a U.S. citizen. R. at 85. Natalia and Grzegorz have one U.S. citizen child, Sophie Kowal. Natalia's husband filed a Form I-130 Application for Alien Relative on her behalf on November 6, 2009. R. at 83. This application has not been adjudicated despite various inquiries from Natalia and her counsel.

On October 23, 2009, ICE arrested all four of the Jourbinas at their homes in the early morning. Natalia, Polina, and Tatiana were released the same day. Boris was released on January 15, 2010. All four Jourbinas were initially placed on the Intensive Supervision Appearance Program (ISAP), and later downgraded to an ordinary Order of Supervision due to their compliance with the program's requirements.

Then, on December 22, 2009, pursuant to a national policy to create a native, ethnically pure majority and exclude persons it deemed non-Kazakh,

the Republic of Kazakhstan revoked Kazakhstani citizenship for Boris, Tatiana, Natalia and Polina, citing their failure to timely register with the Kazak consulate. R. at 86. This denationalization, now coupled with the Kazakh government's demonstrated persecutory practice against those it deems non-Kazakh nationals, has created a new basis of fear of return to Kazakhstan for the Jourbinas.

On June 23, 2010, the Jourbinas, through undersigned counsel, filed the motion to reopen that is the subject of this timely filed petition for review.

V. SUMMARY OF THE ARGUMENT

The BIA abused its discretion when it denied the Petitioners' motion to reopen their removal proceedings. In its two-paragraph order, the BIA failed to analyze the Petitioners' central argument, that Kazakhstan's revocation of their citizenship and the documented persecution of those it deems *non-Kazak* constitute a change in country conditions.

The BIA adopts an impermissibly myopic analysis of the motion as it fails to consider the substantial record evidence that Kazakhstan's stated reasons and procedures for revoking citizenship are pretextual; Kazakhstan uses the grant and revocation of citizenship as a political tool to favor certain groups it considers Kazakh and to disfavor and persecute others. The BIA failed to consider Kazakhstan's persecution of denationalized individuals, which is the central

component of the Petitioners' change in country conditions argument.

The BIA also erred in finding that the Petitioners failed to meet their burden to establish a *prima facie* case for asylum. The Petitioners claim that revocation of citizenship on a protected ground amounts to past persecution, and that they fear future persecution based on their non-Kazak nationality. The BIA's decision that revocation of citizenship merely results in statelessness and that statelessness, alone, can never establish a *prima facie* case for asylum is legally flawed, illogical, overly simplistic, and contrary to persuasive Circuit Court holdings, which the BIA ignores.

Additionally, the BIA failed to consider the Petitioners' fear of future persecution based on non-Kazak nationality, which was argued extensively in the motion to reopen and for which the

Petitioners provided substantial evidentiary support.

VI. ARGUMENT

A. The BIA abused its discretion in its legally flawed and myopic treatment of Petitioners' change of country conditions argument

1. The standard of review for a Motion to Reopen is abuse of discretion

This Court reviews the BIA's denial of a Motion to Reopen for abuse of discretion. *Kaur v. BIA*, 413 F.3d 232 (2d Cir. 2005); *Zhao v. DOJ*, 265 F.3d 83 (2d Cir. 2001). An abuse of discretion:

may be found in those circumstances where the Board's decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the Board has acted in an arbitrary or capricious manner.

Zhao, 265 F.3d at 93. The Supreme Court has held that the "arbitrary and capricious" standard is narrow, and that a court is not to substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463

U.S. 29, 43 (1983). Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its actions, including a "rational connection between the facts found and the choice made." *Id.* at 43.

This Court has found an abuse of discretion where the agency's reasoning is sufficiently flawed. *Bah v. Mukasey*, 529 F.3d 99, 110 (2d Cir. 2008) (the BIA erred by assuming that past persecution was a one-time event and in failing to consider other forms of persecution). This Court also has found abuse of discretion when the BIA issued a three sentence denial devoid of reasoning and that "failed to account for the substantial evidence" relating to the Petitioners' changed country conditions claim. *Norani v. Gonzales*, 451 F.3d 292 (2d Cir. 2006). Finally, the BIA may abuse its discretion if it ignores pertinent facts or fails to provide an opportunity to provide an

explanation of previously unobtainable evidence that is in dispute. *Zhao*, 265 F.3d at 95-97.

2. The BIA failed to consider revocation of citizenship as a persecutory event that constitutes a change in country conditions

Revocation of citizenship, especially when it results in a person having no nationality at all, has long been considered by U.S. courts to be a grave human rights violation. The Supreme Court has characterized denationalization as a "total destruction of the individual's status in organized society" and is "a form of punishment more primitive than torture." *Trop v. Dulles*, 356 U.S. 86, 101-102 (1958). The Sixth Circuit Court of Appeals has called denationalization an "extreme sanction" and inherently "troubling." *Stserba v. Holder*, 2011 WL 1901546 (C.A.6) (May 20, 2011). The Seventh Circuit Court of Appeals stated that to be made stateless, even if no further harm will come to the individual, still amounts to persecution. *Haile v. Holder*, 591 F.3d 572, 574 (7th Cir. 2010)

("Indeed, if to be made stateless is persecution, as we believe, at least in the absence of any reason for disbelief offered by the Board of Immigration Appeals, then to be deported to the country that made you stateless and continues to consider you stateless is to be subjected to persecution even if the country will allow you to remain and will not bother you as long as you behave yourself.") Finally, the BIA, itself, has opined that denaturalization can be a "harbinger of persecution." *Id.* at 573 (quoting an unpublished BIA's decision).

Consistent with the generally accepted view that denationalization is a severe sanction, Petitioners argue that the discriminatory revocation of their citizenship constitutes a change in country conditions that gives rise to a new claim for asylum based on nationality. Just as this Court has found that a deterioration in conditions or a change in degree of harm to a specific group

constitutes a change in country conditions, so does it follow that an entirely new and overt act of persecution directed at an individual—in this case, the denationalization of the Petitioners—will constitute a change in country conditions. *Norani v. Gonzales*, 451 F.3d 292 (2d Cir. 2006).

The persecution suffered (and to be suffered) by the Jourbinas through their denationalization is of a different order and magnitude than that claimed in cases where the severity of harm has increased or where country conditions have deteriorated. *Norani*, 451 F.3d 292. Here, the Kazakh government has shifted its historic persecution of ethnic and religious *minorities* to a broader, more toxic, objective: the persecution of those it considers and now deems *non-Kazakh*. This animus translates into persecutory state action through the stripping of citizenship or the “right to have rights” from those the government targets.

Stserba, 2011 WL 1901546 (C.A.6) quoting *Trop*, 356 U.S. at 101-102.

Contrary to the BIA's view, denationalization can be more than a merely routine administrative action having no persecutory valence. Under the standard considered by the Seventh Circuit, for example, it ought to be enough for the BIA to analyze whether revocation of citizenship was premised on a protected ground and whether it might result in statelessness. *Haile* at 574. If yes, then the claim is satisfied. This approach is consistent with the core concerns of the Refugee Act of 1980 and the fundamental human rights protections guaranteed to populations around whom states engineer nationality laws in order to target, reject, deport, or exclude them.³ *R.* at 105-106. Scholars and researchers have expressed grave concern with the varying methodologies for ethnic cleansing and the unique role played by the

³ David Weissbrodt and Clay Collins, *The Human Rights of Stateless Persons*, 28 Hum. Rts. Q. 245-276 (2006).

discriminatory deprivation of nationality in these efforts. See Larua van Waas, Nationality Matters: Statelessness Under International Law (*School of Human Rights Research Series*, Volume 29, November 28, 2008), <http://arno.uvt.nl/show.cgi?fid=113179>. As stated by Professor van Waas, "denial of citizenship distinguishes itself through the element of discrimination and the notion that it targets particular population groups. Or put simply: denial of citizenship is the discriminatory deprivation of nationality." *Id.* at 98 (Emphasis in original). At its core, denationalization "severs the legal bond between a person and his state." *Id.* at 108.

Thus, the Seventh Circuit requires that the agency review the reasons for revocation and understand the resulting vulnerability of the individual. *Haile*, 591 F.3d 572. This approach is the correct one and the one that recognizes the social and legal reality for those who have become

stateless through an affirmative act of denationalization: they are now marginalized, outcast, excluded and they have no right to engage in basic rights.^{4, 5}

In addition, the BIA ignores its own test to determine whether revocation of citizenship is persecution. The BIA has articulated a 'denaturalization plus' test that requires an additional examination of the circumstances flowing from the stripping of citizenship to determine whether they rise to the level of persecution on a protected ground. *Haile*, 591 F.3d at 573 (quoting an unpublished BIA decision). The BIA did not do so here.

By ignoring and refusing to reach the Petitioners' central argument that revocation of citizenship is persecution, the BIA refuses to

⁴ M. Lynch, *Lives on Hold: the Human Cost of Statelessness*, Refugees International (February, 2005) <http://www.refintl.org/sites/default/files/LivesonHold.pdf>

⁵ *Open Society Justice Initiative Makes Statement to the African Commission on Human and Peoples' Rights*, (May 2, 2005), http://www.soros.org/initiatives/justice/focus/equality_citizenship/news/africa_20050502.

engage in the central question of whether an overt act of persecution can constitute a change in country conditions on which a motion to reopen may be based. The BIA's cursory and dismissive treatment of this issue is a flagrant abuse of its discretion given the gravity current thinking has brought to the analysis of revocation of citizenship and the Seventh Circuit's recent criticism of the BIA on this very issue. *Haile*, 591 F.3d at 574.

3. The BIA provided no reasoning or analysis of Petitioners' argument that Kazakhstan revoked their citizenship on pretextual grounds and that non-Kazak nationals are regularly persecuted

The BIA's denial of the Petitioner's motion to reopen is two paragraphs in length and contains only one sentence regarding the central claim that conditions in Kazakhstan have materially changed:

The evidence proffered with the respondents' present motion indicating that they are no longer considered citizens of Kazakhstan because they failed to register with the Consulate as required by law does not reflect changed country

conditions in Kazakhstan that materially affect their eligibility for asylum, withholding of removal, and protection under the Convention Against Torture.

Add. at 45-48. The Petitioners do not contest the factual characterization in the denial, that their failure to register with the consulate is the stated reason for the revocation of Kazak citizenship. However, revocation of citizenship is ultimately a unilateral action by the government, and the BIA provides no reasoning as to why such a unilateral government action would not constitute a change of country conditions. The BIA is required to consider credible and specific evidence that a government action is pretextual and ultimately constitutes persecution based on a protected ground. *Huang v. INS*, 421 F.3d 125, 128 (2d. Cir. 2005).

Even if the BIA finds that revocation of citizenship does not constitute persecution, it is still required to analyze whether, as Petitioners allege, they are now at risk of persecution because

they are no longer nationals of Kazakhstan. See *Norani*, 451 F.3d 292 (finding that the BIA abused its discretion in denying a motion to reopen for failing to account for the substantial record evidence).

a. Revoking citizenship on pretextual grounds must be addressed

The Petitioners argued that the revocation of their citizenship was based on protected grounds (their ethnicity and religion). The reasons given by the Kazak government in its revocation letter reference only routine administrative procedures (*i.e.* that citizenship is automatically revoked when citizens fail to register with the Kazak consulate within five years of residency abroad).

The Petitioners provided substantial support for their contention that the revocation of their citizenship was pretextual and discriminatory. R. at 99-134. The Petitioners presented an affidavit from Maureen Lynch, the Senior Advocate for Statelessness Initiatives at Refugees

International. R. at 99-101. She has traveled to Kazakhstan to investigate revocation and denial of Kazak citizenship and the plight of stateless individuals. Ms. Lynch contends that ethnic minorities, especially Chechens, are disfavored in Kazakhstan and discriminated against with regards to obtaining or maintaining Kazak citizenship. R. at 99-101.

Other reports presented by Petitioners support Ms. Lynch's expert testimony, asserting that the Kazak government uses citizenship as a political tool to keep certain ethnic groups oppressed, prevent them from voting, and subject them to other bureaucratic persecution, such as denying them the right to work, the right to enroll in public school, the right to travel freely, the right to identity documents, and the right to state-funded services. The Petitioners contend that they, too, have been victims of the Kazak government's

discriminatory revocation of citizenship. R. at 102-134.

The BIA committed a material error by failing to consider the above-mentioned expert affidavit and country reports, which strongly support the argument that the Kazak government's reasons for revoking citizenship were pretextual. This Court has held that the BIA may not overlook any evidence directly presented by the Petitioners. *Huang*, 421 F.3d at 129. As in *Long v. Holder*, 620 F.3d 162 (2d. Cir. 2010), the BIA in the instant matter failed to provide even a minimum level of analysis of the material evidence supporting the Petitioners' claim. In *Long*, this Court found that "facts must be carefully sifted in context to ascertain whether there is a sufficient political element to the alleged persecution." *Id.* at 167. No such analysis was undertaken in the Petitioners' case; the BIA, therefore, abused its discretion in denying the Petitioners' motion to reopen.

That the revocation lacked process by which Petitioners could demonstrate that they qualified for an exception to the revocation law further supports the Petitioners' claim that the revocation of their citizenship was pretextual. The Kazak law states that "[c]itizenship of the Republic of Kazakhstan is lost... if an individual is permanently residing outside of the Republic of Kazakhstan and has not reported to a Kazak mission abroad for five years without valid reason." R. at 91; Article 21 of the Law of the Republic of Kazakhstan on Citizenship. There is no provision in the letter or in the law indicating process by which to challenge revocation or reinstate citizenship. The Kazak government provided no opportunity for the Petitioners to provide evidence that they did not permanently reside in the U.S. or that they had a "valid reason" for failing to register. R. at 86; 91. This lack of due process and mischaracterization of the pertinent Kazak law

further indicates that the revocation was pretextual.

This Court has previously indicated that the BIA errs in dismissing a motion to reopen on disputed evidence without providing an opportunity for a further evidentiary hearing. *Zhao*, 265 F.3d at 95-97. The BIA made such an error in the instant case. The Petitioners provided the BIA with sufficient evidence to call into question the government of Kazakhstan's reasoning in revoking their citizenship. The BIA erred in ignoring this evidence and not providing the Petitioners with an opportunity to properly litigate this evidentiary issue.

b. Persecution of non-Kazak nationals by Kazak government must be analyzed

The instant matter closely resembles the evidentiary facts in *Norani* in which this Court found that the BIA had abused its discretion in denying a motion to reopen based on changed country conditions. *Norani*, 451 F.3d 292. In *Norani*, the

BIA issued a three sentence order, which this Court found to be "conclusory" and "devoid of reasoning," as it failed to account for the substantial evidence on record regarding a deterioration of conditions in the Petitioner's country. *Norani*, 451 F.3d at 295.

Likewise, the Jourbinas presented evidence, including an expert affidavit and numerous country reports from the U.S. State Department and other credible sources, which supports the argument that non-Kazak nationals, like the Petitioners, are routinely persecuted by the Kazak government. R. at 99-134. As argued above, Kazakhstan places severe civil limitations on individuals who are not citizens, including restrictions on the right to work, right to marry, ability to register births of their children, enroll in school, and access public services such as health care. R. at 103; 105-106; 108-110; 118-122; 131. The reports provided with the motion to reopen support these contentions and

provide specific examples of violence against non-Kazak nationals. Finally, the expert states in her affidavit that “[I]f the Jourbin[as] were returned to Kazakhstan, they would almost certainly face severe hardship in the form of denial of their right to a nationality.” R. at 100.

The BIA failed to address any of the Petitioners’ arguments that conditions in Kazakhstan amount to persecution for non-Kazak nationals and that the Kazak government’s revocation of their citizenship now placed them within a group that is routinely persecuted. The failure to consider the central argument in the Petitioners’ motion to reopen constitutes an abuse of discretion and should be reversed.

B. The BIA failed to address the Petitioners’ central *prima facie* asylum claim

To obtain asylum, an applicant must be a refugee, which means that he or she must be

unwilling to return to his or her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). In order to establish eligibility for asylum, an applicant must demonstrate a well-founded fear of persecution on one of five protected grounds. 8 C.F.R. § 208.13(b)(2)(i)(A). Absent showing eligibility for humanitarian asylum, an asylum applicant must demonstrate a well-founded fear of persecution, which "is 'a subjective fear that is objectively reasonable. A fear is objectively reasonable even if there is only a slight, though discernable, chance of persecution.'" *Zheng v. Mukasey*, 552 F.3d 277, 284 (2d Cir. 2009), quoting *Tambadou v. Gonzales*, 446 F.3d 298, 302 (2d Cir. 2006).

The Supreme Court has found, and this Court has similarly held, that the probability of persecution

need not be high and indeed may as low as a ten percent chance of persecution to establish a well-founded fear. *INS v. Cardoza-Fonseca*, 480 U.S. 421, (1987); *Huang*, 421 F.3d at 129.

In the context of a motion to reopen, a petitioner need only establish a *prima facie* eligibility for asylum or a "realistic chance" that she will prevail on the merits of the claim. *Poradisova v. Gonzales*, 420 F.3d 70, 78 (2d Cir. 2005). A *prima facie* asylum case may be established by "objective evidence showing a reasonable likelihood" that she will face future persecution based on a protected ground. *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002); *See also Lin v. Gonzales*, 186 Fed.Appx. 161 (2d Cir. 2006). This Court has made clear that a well-founded fear of future persecution from which a *prima facie* case for asylum may be made must have "solid support" and be more than mere speculation. *Huang* 421 F.3d at 129.

In the instant case, the BIA failed to address the substance of the Petitioners' claim for asylum and instead held that the Petitioners failed to establish a *prima facie* case for asylum based on their stateless status alone. The Petitioners argued extensively in their motion to reopen that revocation of citizenship constitutes past persecution and that their resulting non-Kazak nationality gives rise to fear of future persecution. R. at 29-48.

1. Revocation of citizenship as past persecution

The BIA held that the Petitioners failed to establish a *prima facie* case for asylum based on their stateless status alone. Add. at 45-48. This decision is contrary to precedent in the two Circuit Courts to have specifically considered this issue. In *Haile*, the Seventh Circuit Court held that revocation of citizenship when it results in statelessness is persecution *per se* and that the

revocation alone establishes a *prima facie* case for asylum. *Haile*, 591 F.3d 574.

Although the decisions of the Seventh Circuit Court of Appeals are not binding on the BIA when it considers cases in this circuit, they have persuasive authority. The BIA provides no reasoning or explanation for why it rejects the appellate court's decision.

Since the BIA issued its decision, the Sixth Circuit Court of Appeals has joined the Seventh Circuit in finding that "ethnically targeted denationalization of people who do not have dual citizenship may be persecution." *Stserba*, 2011 WL 1901546 (C.A.6). Citing to *Haile*, 591 F.3d 572, the Sixth Circuit addressed the revocation of citizenship resulting in statelessness, stating that the respondent "may have suffered past persecution simply because she became stateless due to her ethnicity" even if she suffered no adverse

consequences and even though her citizenship had been reinstated. *Id* at 21.

2. Non-Kazak nationality gives rise to fear of future persecution

The BIA also failed to address the Petitioners' fear of future persecution based on their non-Kazak nationality. The Petitioners presented solid support for this claim in the forms of an affidavit from Maureen Lynch, a senior advocate for statelessness initiatives at Refugees International and an expert in the treatment of non-Kazak nationals in Kazakhstan; and various country reports, including an excerpt from a recent U.S. State Department Report, which confirms an increase in government persecution of non-Kazak nationals. R. at 99-134. The BIA neither addressed this evidence nor attended to the Petitioners' fear of future persecution when analyzing the *prima facie* case for asylum. Failure to address the central claim for asylum is a clear abuse of discretion on the part of the BIA. *Norani*, 451 F.3d 292; *Bah*, 529

F.3d at 115 (The BIA erred in failing to consider other forms of persecution).

VII. CONCLUSION

For the foregoing reasons, the Petitioners' motion to reopen removal proceedings should be granted and the Petitioners should be allowed to file an application for asylum, withholding of removal, and relief under the Convention Against Torture with the Immigration Court.

Respectfully submitted,

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Dated: August 1, 2011

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed.R. App. P.32(a)(7)(B) because:

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C. Mario Russell

Dated: August 1, 2011

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August 2011, I delivered a true and accurate copy of the foregoing documents, Petitioner's Brief, to the opposing party or counsel at the following addresses through the CM/ECF:

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ADDENDUM

Board of Immigration Appeals Decision of March 22,
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26 Federal Plaza, Room 1130
New York, NY 10278

Name: JOURBINE, BORIS

A073-180-093

073-663-895/896/897

Date of this notice: 3/22/2011

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

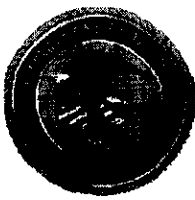
Donna Carr
Chief Clerk

Enclosure

Panel Members:
Miller, Neil P.

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U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

JOURBINE, BORIS
59-31 108TH STREET., APT 6L
CORONA, NY 11368-0000

DHS/ICE Office of Chief Counsel - NYC
26 Federal Plaza, Room 1130
New York, NY 10278

Name: JOURBINE, BORIS

A073-180-093

073-663-895/896/897

Date of this notice: 3/22/2011

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Miller, Neil P.

Trans

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Falls Church, Virginia 22041

File: A073 180 093 - New York, NY

Date: MAR 22 2011

In re: BORIS JOURBINE

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jodi Zieseemer, Esquire


ON BEHALF OF DHS: Catherine G. Baker
Assistant Chief Counsel

APPLICATION: Reopening

ORDER:

The motion is denied. The respondent's motion is untimely filed and has not been shown to qualify for any exception to the filing requirements imposed on motions to reopen deportation proceedings. See section 240(c)(7)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C); 8 C.F.R. § 1003.2(c)(2). The evidence proffered with the respondent's present motion indicating that the respondent is no longer considered a citizen of Kazakhstan because he failed to register with the Consulate as required by law does not reflect changed country conditions in Kazakhstan that materially affect his eligibility for asylum, withholding of removal, and protection under the Convention Against Torture. See 8 C.F.R. § 1003.2(c)(3)(ii). Nor is the respondent's alleged resulting stateless status alone sufficient to demonstrate his prima facie eligibility for such relief. Cf. *Haile v. Holder*, 591 F.3d 572, 573-74 (7th Cir. 2010) (recognizing that taking away a person's citizenship on account of a protected ground amounts to persecution). Finally, the respondent's motion does not demonstrate an exceptional situation that would warrant the exercise of our discretion to reopen his proceedings under our sua sponte authority. See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship").

On this record, the respondent has not provided us with an adequate reason to overlook the untimeliness of his motion. Accordingly, the respondent's motion is denied.



FOR THE BOARD

REPRESENTING **STATELESS PERSONS** BEFORE U.S. IMMIGRATION AUTHORITIES

A Legal Practice Resource from
the United Nations High
Commissioner for Refugees

August 2017



UNHCR

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