

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2010/1188 JR

Between:

B.D. (BHUTAN AND NEPAL)

Applicant

-and-

**THE MINISTER FOR JUSTICE AND EQUALITY, THE REFUGEE APPEALS
TRIBUNAL AND THE ATTORNEY GENERAL**

Respondents

**WRITTEN SUBMISSIONS ON BEHALF OF
UNHCR ACTING AS AMICUS CURIAE**

A. Introduction¹

1. The Office of the United Nations High Commissioner for Refugees ("UNHCR") was granted leave on 14 May 2018 to intervene as *amicus curiae* in these proceedings. UNHCR has a direct interest in ensuring a proper and consistent interpretation of the 1951 Convention relating to the Status of Refugees ("1951 Convention")² in Ireland, as part of its supervisory responsibility. UNHCR makes this submission as *amicus curiae* in order to assist the High Court of Ireland in its interpretation and application of refugee

¹ This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law.

² The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, available at: <http://www.refworld.org/docid/3be01b964.html>.

law concepts in the context of applications for international protection. UNHCR welcomes this opportunity as this case raises a number of legal issues relating to refugee and statelessness law, in particular the interpretation of the refugee definition in the context of stateless persons with multiple countries of former habitual residence. UNHCR's interest as an intervener is based on the organisation's duty to fulfil its mandate of ensuring the consistent and coherent interpretation of international refugee law.

B. UNHCR's mandate, interest and expertise in this matter

2. UNHCR is a global humanitarian and non-political organisation. As a subsidiary organ of the United Nations, UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, to seek solutions to the problem of refugees.³ Paragraph 8(a) of the 1950 Statute of the Office of the United Nations High Commissioner for Refugees ("Statute") and the Preamble of the 1951 Convention confer responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees,⁴ whereas Article 35(1) of the 1951 Convention obliges State Parties to cooperate with UNHCR in the exercise of its functions. Similar obligations for States are laid down in Article II(1) of the 1967 Protocol relating to the Status of Refugees ("1967 Protocol").⁵
3. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention and 1967 Protocol. Such guidelines are *inter alia* included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of

³ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html>.

⁴ According to Article 8(a) of the Statute, 'The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'.

⁵ The 1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

Refugees ("UNHCR Refugee Handbook")⁶, subsequent UNHCR Guidelines on International Protection⁷, as well as other notes and guidance. The status of UNHCR statements and publications, including in particular the UNHCR Refugee Handbook and Guidelines on International Protection, as normative guides has been acknowledged in multiple decisions of the Irish Superior Courts.⁸

4. UNHCR's supervisory responsibility has been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union ("TFEU")⁹, as well as in Declaration 17 to the Treaty of Amsterdam, which provides that '*consultations shall be established with the United Nations High Commissioner for Refugees ...on matters relating to asylum policy*'.¹⁰ Secondary European Union legislation also emphasises the role of UNHCR. For instance, Recital 15 of Directive 2004/83/EC ("Qualification Directive"), in which Ireland participates, states that consultations with UNHCR '*may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention*'.¹¹ The supervisory responsibility of UNHCR is specifically articulated in Article 21 of Directive 2005/85/EC ("the Asylum Procedures Directive")¹², in which Ireland also participates.

⁶ The UNHCR Refugee Handbook and Guidelines on International Protection available up to December 2011 are published together in: 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*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

⁷ UNHCR issues 'Guidelines on International Protection' pursuant to its mandate, as contained in its Statute, in conjunction with Article 35 of the 1951 Convention. The Guidelines are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

⁸ See further *IR v. Refugee Appeals Tribunal* [2009] IEHC 353, Cooke J, 24 July 2009, *VZ v. Minister for Justice, Equality and Law Reform* [2002] 2 IR 135, *AN v. Minister for Justice, Equality and Law Reform* [2008] 2 IR 48, *KD (Nigeria) v. Refugee Appeals Tribunal* [2013] 1 IR 448 and *MAM (Somalia) and Others v. Minister for Justice and Equality* [2018] IEHC 113, Humphreys J, 26 February 2018.

⁹ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, [OJ C 115/47, 9.05.2008], available at: <http://www.refworld.org/docid/4b17a07e2.html>

¹⁰ European Union, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340/134, 10.11.1997], available at: <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0134040034>

¹¹ European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC, available at: <http://www.refworld.org/docid/4157e75e4.html>

¹² European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326; 13 December 2005, pp. 13-34, available at: <http://www.refworld.org/docid/4394203c4.html>

5. With respect to stateless refugees, UNHCR has responsibilities for refugees who are stateless pursuant to Article 6A(II) of the Statute of UNHCR and Article 1A(2) of the 1951 Convention. In resolutions adopted in 1994, 1995 and 2006, the UN General Assembly further entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the protection of stateless persons.¹³ This mandate has continued to evolve as conclusions of UNHCR's Executive Committee¹⁴ have been endorsed by the UN General Assembly. UN General Assembly resolutions 3274 (XXIV) and 31/36 designate UNHCR as the body to examine the cases of persons who claim the benefit of the 1961 Convention on the Reduction of Statelessness and to assist such persons in presenting their claims to the appropriate national authorities. Over time, UNHCR has developed a recognised expertise on statelessness issues.¹⁵ UNHCR's statelessness mandate has been exercised in part by the publication of the UNHCR Handbook on Protection of Stateless Persons in 2014 ("UNHCR Statelessness Handbook"), which includes guidance on the criteria for determining statelessness, procedures for the determination of stateless persons and the status of stateless persons at the national level.¹⁶
6. Given the mandate accorded to the organisation, UNHCR has a responsibility and unique expertise to present its views to this Court. UNHCR is of the opinion that the outcome of these proceedings will have far-reaching implications for the protection of stateless

¹³ UNGA resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 20 October 1995, available at: <http://www.refworld.org/docid/3ae68c443f.html>

¹⁴ ExCom Conclusion No. 90 (LII), *Conclusion on International Protection*, 5 October 2001, para. (q), available at: <http://www.refworld.org/docid/3bd3e3024.html>; ExCom Conclusion No. 95 (LIV), *General Conclusion on International Protection*, 10 October 2003, para. (y), available at: <http://www.refworld.org/docid/3f93aede7.html>; ExCom Conclusion No. 99 (LV), *General Conclusion on International Protection*, 8 October 2004, para. (aa), available at: <http://www.refworld.org/docid/41750ef74.html>; ExCom Conclusion No. 102 (LVI), *General Conclusion on International Protection*, 7 October 2005, para. (y), available at: <http://www.refworld.org/docid/43575ce3e.html>; ExCom Conclusion No. 106 (LVII), *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, 6 October 2006, paras. (f), (h), (i), (j) and (t), available at: <http://www.refworld.org/docid/453497302.html>.

¹⁵ Of greatest relevance are: UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, available at: <http://www.refworld.org/docid/53b676aa4.html>; *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, available at: <http://www.refworld.org/docid/50d460c72.html>; Other recent documents of UNHCR on the topic include UNHCR, *Regional Expert Roundtable on Good Practices for the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons in South East Asia*, 2 March 2011, available at: <http://www.refworld.org/docid/4d6e09932.html>; UNHCR, *UNHCR Action to Address Statelessness: A Strategy Note*, March 2010, available at: <http://www.refworld.org/docid/4b9e0c3d2.html>; UNHCR, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, 2008, available at: <http://www.refworld.org/docid/49a28afb2.html>

¹⁶ UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, available at: <http://www.refworld.org/docid/53b676aa4.html>.

persons, including those who are refugees and asylum-seekers, in this country and internationally.

C. Outline of UNHCR's position

7. This submission addresses Grounds E.2 and E.3 of the Statement of Grounds of the Applicant dated 30 August 2010. The issue in this judicial review relates to the approach that the Refugee Appeals Tribunal (now the International Protection Appeals Tribunal) should adopt when determining the 'country of reference' in the context of establishing whether a stateless person is a refugee for the purposes of Section 2 of the Refugee Act 1996 (as amended) and Article 2(c) of the Qualification Directive¹⁷ in the following circumstances:

- (a) When a State arbitrarily deprives a person of nationality and that person has no other nationality; and
- (b) When a stateless person has more than one country of former habitual residence.

8. UNHCR submits, in summary, that:

- (a) Where a State arbitrarily deprives a person of his or her nationality and the person has no other nationality, the person should be regarded as stateless or 'not having a nationality' within the meaning of the phrase in Article 1A(2) of the 1951 Convention. Accordingly, under Article 1A(2) of the 1951 Convention, for a stateless applicant the country of reference against which the refugee definition should be assessed is the country of former habitual residence. This is further developed in Part D below.

¹⁷ European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 30 September 2004, OJ L 304/12-304/23; 30.9.2004, 2004/83/EC, available at: <http://www.refworld.org/docid/4157e75e4.html>

(b) Where a person ‘not having a nationality’ has more than one country of former habitual residence, that person should only have to meet the refugee criteria of a well-founded fear of persecution for one or more Convention grounds under Article 1A(2) of the 1951 Convention in relation to one of those countries and be unable or, owing to such fear, be unwilling to return to that country. As part of an assessment of whether a stateless person is a Convention refugee, a determination must also be made as to whether the person is excluded from refugee status pursuant to Article 1E of the 1951 Convention, as outlined in Part E.

9. Additionally, the Court has indicated it may consider making a preliminary reference to the Court of Justice of the European Union ('CJEU') on the legal issues raised in this case. While UNHCR takes no position on this matter, Part F below highlights the primacy of the 1951 Convention. Part G concludes and summarises UNHCR's position.

10. In making this submission, UNHCR seeks exclusively to address issues of legal principle arising from the concerned case, in order to support consistent interpretation of refugee law in line with international standards. As such, UNHCR does not address nor comment on the Applicant's eligibility for international protection, nor make a recommendation on the merits of the case in question.

D. Identification of the country of reference in a situation where a State arbitrarily deprives a person of nationality and that person has no other nationality

11. Article 1A(2) of the 1951 Convention defines a refugee as a person who:

[O]wing 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

12. Ireland is a party to the 1951 Convention.¹⁸ The purpose of the Refugee Act 1996 is to give effect to the 1951 Convention.¹⁹ Section 2 of the Refugee Act 1996, as restated in Section 2 of the International Protection Act 2015, incorporated into Irish law the definition of a refugee found in Article 1A(2) of the 1951 Convention. Section 2 of the Refugee Act 1996 also transposed into Irish law Article 2(c) of the Qualification Directive. Furthermore, Irish statutory provisions must be construed and applied, so far as possible, in accordance with the State's obligations under international law, to ensure the avoidance of conflicts between domestic and international law.²⁰
13. When interpreting the meaning of Article 1A(2) of the 1951 Convention, consideration should be given to the Vienna Convention on the Law of Treaties ('Vienna Convention')²¹, which confirms that a treaty shall be '*interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose*'.²² They²³ must also be read in light of subsequent developments in international law,²⁴ in particular international human rights law. In relation to the 1951 Convention, this means interpretation by reference to the object and purpose of extending the protection of the international community to refugees and assuring to '*refugees the widest possible exercise of fundamental rights and freedoms*'.²⁵

¹⁸ Irish Treaty Series No. 8 of 1956

¹⁹ The long title of the Refugee Act 1996 '*An Act to give effect to the Convention relating to the Status of Refugees done at Geneva on the 28th day of July 1951, the Protocol relating to the Status of Refugees done at New York on the 31st day of January, 1967....*' See also the Third Schedule of the Act which includes the 1951 Convention.

²⁰ *Ó'Domhnaill v. Merrick* [1984] IR 151, 166.

²¹ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html>.

²² *Ibid*, Article 31(1).

²³ Irish Treaty Series No.4 of 2006.

²⁴ See for example, *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, International Court of Justice (ICJ), 21 June 1971, available at: http://www.refworld.org/cases/ICJ_4023a2531.html, where the Court said that, '*its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation*'.

²⁵ 1951 Convention, Preamble, paras. 1-3.

14. The starting point of any exercise in the determination of whether an individual should be recognised as a refugee by the State is the identification of their country of nationality or, if stateless, their country of former habitual residence. This reflects the underlying *raison d'être* of the 1951 Convention, namely that the international community responds to the need to provide international protection in the absence of the national protection of the country of origin.²⁶
15. The preliminary determination of the country or countries by reference to which the examination of an application takes place is a question of law and fact to be determined by the competent national authorities.
16. The phrase 'not having a nationality' within Article 1A(2) of the 1951 Convention refers to a stateless person. Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons ("1954 Convention") defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law'²⁷ [emphasis added].
17. Ireland is a party to the 1954 Convention and that Convention's definition of a stateless person is incorporated in Irish law.²⁸ The definition of a stateless person in the 1954 Convention is also part of customary international law.²⁹ UNHCR's Statelessness Handbook provides further guidance on the definition of a stateless person, noting that the reference to 'law' in Article 1(1):

²⁶ UN High Commissioner for Refugees (UNHCR), *Persons in need of international protection*, June 2017, available at: <http://www.refworld.org/docid/596787734.html>.

²⁷ See further Para 7 UNHCR Statelessness Handbook: *The 1954 Convention establishes the universal definition of a "stateless person" in its Article 1(1). Persons who fall within the scope of Article 1(1) are sometimes referred to as "de jure" stateless persons even though that term is not used in the Convention itself. By contrast, reference is made in the Final Act of the 1961 Convention to "de facto" stateless persons and there is an implicit reference in the Final Act of the 1954 Convention. Unlike the term "stateless person" as defined in Article 1(1), the term de facto statelessness is not defined in any international instrument and there is no treaty regime specific to this category of persons (the reference in the Final Act of the 1961 Convention being limited and non-binding in nature). Care must be taken that those who qualify as "stateless persons" under Article 1(1) of the 1954 Convention are recognised as such and not mistakenly referred to as de facto stateless persons as otherwise they may fail to receive the protection guaranteed under the 1954 Convention. This Handbook addresses a range of issues concerning the identification and protection of stateless persons as defined in Article 1(1) of the Convention, yet avoids qualifying them as de jure stateless persons as that term appears nowhere in the treaty itself.*

²⁸ Irish Treaty Series No.2 of 1963. See also section 16(1)(g) *Irish Nationality and Citizenships Acts 1956 to 2004*, as amended, available at: <http://www.irishstatutebook.ie/eli/1956/act/26/enacted/en/print#sec16>

²⁹ International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, at pp. 48-49 available at: <http://www.refworld.org/pdfid/525e7929d.pdf>

‘should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice’³⁰.

18. In determining if a person is not considered as a national, the UNHCR Statelessness Handbook further states:

‘Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual’s case in practice and any review/appeal decisions that may have had an impact on the individual’s status. This is a mixed question of fact and law.

Applying this approach of examining an individual’s position in practice may lead to a different conclusion than one derived from a purely formalistic analysis of the application of nationality laws of a country to an individual’s case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. 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 the implementation in practice’.³¹

19. Therefore, ascertaining whether a person is not considered a national under the operation of its law is a mixed question of fact and law, and regard must be had not only to the nationality or citizenship laws of the country in question but also to the implementation of those laws and State practice.
20. If a person meets the definition of a stateless person as set out in Article 1(1) of the 1954 Convention,³² he or she will be a person ‘not having a nationality’ for the purposes of Article 1(A)(2) of the 1951 Convention, and the country of reference will therefore be the ‘country of former habitual residence.’

³⁰ UNHCR Statelessness Handbook, para 22.

³¹ *Ibid*, paras. 23-24.

³² It is worth noting that a formal determination under a statelessness determination procedure is not necessary.

21. Sometimes uncertainty may remain as to whether a person has a nationality and in such a scenario the UNHCR Refugee Handbook provides that:

*'where his nationality cannot be clearly established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account'.*³³

22. Where a person is arbitrarily deprived of his or her nationality, and that person has no other nationality, the person will be stateless. Specifically, UNHCR's Statelessness Handbook states that:

*'Bestowal, refusal, or withdrawal of nationality in contravention of international obligations must not be condoned. The illegality on the international level, however, is generally irrelevant for the purposes of Article 1(1) [1954 Convention]. The alternative would mean that an individual who has been stripped of his or her nationality in a manner inconsistent with international law would nevertheless be considered a "national" for the purposes of Article 1(1); a situation at variance with the object and purpose of the 1954 Convention.'*³⁴

23. This position is also supported by the 2013 Report of the UN Secretary-General on 'Human Rights and Arbitrary Deprivation of Nationality', which states that:

³³ UNHCR Refugee Handbook, para. 89.

³⁴ UNHCR Statelessness Handbook, para. 56. See also, UNHCR Expert Meeting - The Concept of Stateless Persons under International Law ("Prato Conclusions"), May 2010, available at: <http://www.refworld.org/docid/4ca1ae002.html>, Para 18 *'The ordinary meaning of Article 1(1) requires that a "stateless persons" is a person who is considered a national by a State regardless of the background to this situation. Thus, where a deprivation of nationality may be contrary to rules of international law, this illegality is not relevant in determining whether the person is a national for the purposes of Article 1(1) – rather, it is the position under domestic law that is relevant. The alternative approach would lead to outcomes contrary to the ordinary meaning of the terms of Article 1(1) interpreted in light of the Convention's object and purpose. This, does not however, prejudice any obligation that States may have not to recognize such situations as legal where the illegality relates to a violation of jus cogens norms.'* The Prato Conclusions was the first expert meeting considering the definition of the term 'stateless person' in Article 1(1) of the 1954 Convention as *'a person who is not considered as a national by any State under the operation of its law'*, by analyzing the various components of that definition. The meeting formed part of an expert meeting series which culminated in the development of four UNHCR guidelines on statelessness-related issues in 2012, 3 of which were consolidated in the UNHCR Statelessness Handbook.

*'Where a person has been left stateless due to loss or deprivation of nationality in violation of international law, this does not stand in the way of recognition and protection as a stateless person.'*³⁵

24. Therefore, the unlawfulness of the act of deprivation of nationality does not negate the result of statelessness.³⁶ Any alternative interpretation would mean that an individual who has been deprived of his or her nationality in a manner inconsistent with international law would nevertheless be considered a national without the related rights and obligations attained with that status.³⁷ Such a situation would be at variance with the object and purpose of both the 1954 Convention and the 1951 Convention and would run counter to the *raison d'être* of the protection framework for stateless persons and refugees.
25. In summary, the way in which the definition of a stateless person is framed in the 1954 Convention and explained in the UNHCR Statelessness Handbook supports the proposition that, where a State arbitrarily deprives a person of his or her nationality and the person has no other nationality, the person should be regarded as stateless. The meaning of 'not having a nationality' under Article 1A(2) of the 1951 Convention should be interpreted in an analogous manner to the statelessness definition under the 1954 Convention, bearing in mind their common objectives, drafting history and the institutions involved in preparing both the 1951 and 1954 Conventions.³⁸

³⁵ UN Human Rights Council, Human rights and arbitrary deprivation of nationality: Report of the Secretary-General, 25th Session, A/HRC/25/28, 19 December 2013, para 42: <http://www.refworld.org/docid/52f8d19a4.html>

³⁶ Para 56, UNHCR Statelessness Handbook; UN Human Rights Council, Human rights and arbitrary deprivation of nationality: Report of the Secretary-General, 25th Session, A/HRC/25/28, 19 December 2013, para 3, para 25: <http://www.refworld.org/docid/52f8d19a4.html>

³⁷ *Ibid.*

³⁸ By resolution 248 (IX) of 8 August 1949, the Economic and Social Council (ECOSOC) established an Ad Hoc Committee whose task was to consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if so decided, the preparation of a draft convention. The Ad Hoc Committee met from 16 January to 16 February 1950 and adopted a report containing the text of a draft Convention Relating to the Status of Refugees and a Protocol Relating to the Status of Stateless Persons. The Ad Hoc Committee reconvened from 14 to 25 August 1950 and then submitted its report to the fifth session of the General Assembly, containing the revised draft Convention and the draft Protocol. By resolution 429(V) of 14 December 1950, the General Assembly decided to convene a Conference of Plenipotentiaries in Geneva to complete the drafting of the Convention relating to the Status of Refugees and the Protocol relating to the Status of Stateless Persons. The Conference of Plenipotentiaries met in July 1951 and adopted a Convention Relating to the Status of Refugees and referred the draft protocol on the status of stateless persons who are not refugees, to the appropriate organs of the United Nations. The 1951 Convention entered into force on 22 April 1954. On 26 April 1954, the ECOSOC convened a Second Conference of Plenipotentiaries with an agenda to revise the draft Protocol Relating to the Status of Stateless Persons, in the light of the provisions of the 1951 Convention and the observations made by the governments concerned. The conference met in September 1954. The conference adopted the 1954 Convention rather than as a protocol to the 1951 Convention. The 1954 Convention entered into force on 6 June 1960. Furthermore, refugees and stateless persons both received protection and assistance from the international refugee organizations that preceded UNHCR. Today most of the rights

E. The test to be applied when determining refugee status for stateless persons where there are multiple countries of former habitual residence

Defining country of former habitual residence

26. The drafters of the 1951 Convention defined the ‘country of former habitual residence’ as *‘the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned’*.³⁹ Further, UNHCR’s Statelessness Handbook provides that ‘habitual residence’ is to be understood as *‘stable, factual residence’* which includes *‘stateless persons who have been granted permanent residence, and also applies to individuals without a residence permit who are settled in a country, having been there for a number of years, who have an expectation of ongoing residence there’*.⁴⁰ It is noted that a definition of the concept of ‘country of former habitual residence’ is not provided in the Qualification Directive, Refugee Act 1996 or EC (Eligibility for Protection) Regulations 2006 (S.I. No. 518/2006), which were in force at the material time.⁴¹

Correct approach when there are multiple countries of former habitual residence

27. In the case of persons with more than one nationality, Article 1A(2) of the 1951 Convention explicitly states that:

‘In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if,

granted to stateless persons under the 1954 Convention are the same as those granted to refugees under the 1951 Refugee Convention – see further UN High Commissioner for Refugees (UNHCR), Nationality and Statelessness: Handbook for Parliamentarians N° 22, July 2014, available at: <http://www.refworld.org/docid/53d0a0974.html>

³⁹ UN Ad Hoc Committee on Refugees and Stateless Persons, *Report of the Ad Hoc Committee on Statelessness and Related Persons (Lake Success, New York, 16 January to 16 February 1950)*, 17 February 1950, E/1618; E/AC.32/5, available at: <http://www.refworld.org/docid/40aa15374.html>. UNHCR Refugee Handbook, para 103.

⁴⁰ UNHCR Statelessness Handbook, para 139.

⁴¹ Available at: <http://www.irishstatutebook.ie/eli/2006/si/518/made/en/print> ; Regulation 2 ‘country of origin’ means the country or countries of nationality or, for stateless persons, of former habitual residence. See also Section 2 of International Protection Act 2015 replacing S.I. No. 518 of 2006 available at: <http://www.irishstatutebook.ie/eli/2015/act/66/section/2/enacted/en/html>

*without any valid reason based on a well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national’.*⁴²

28. Paragraph 106 of the UNHCR Refugee Handbook further clarifies that the provision above *‘is intended to exclude from refugee status all persons with dual or multiple nationality who can avail themselves of protection of at least one of the countries of which they are nationals. Wherever available, national protection takes precedence over international protection’.*
29. While no similar provision is present in Article 1A(2) of the 1951 Convention for stateless persons with more than one country of former habitual residence, the UNHCR Refugee Handbook stipulates that a stateless person *‘may have more than one country of former habitual residence, and that he may have a fear of persecution in relation to more than one of them’.*⁴³ However, the Handbook further clarifies that the refugee definition in the 1951 Convention does not require a stateless applicant to have a well-founded fear of persecution on Convention grounds in relation to all countries of former habitual residence.⁴⁴
30. UNHCR’s position is that where a person ‘not having a nationality’ has more than one country of former habitual residence, that person should only have to meet the refugee criteria of a well-founded fear of persecution for one or more Convention grounds in relation to one of those countries, and be unable or unwilling, owing to such fear of persecution, to return to that country. Nevertheless, where a stateless person claims a fear of persecution against multiple countries of former habitual residence, the assessment of a well-founded fear must be made against each of those countries. As part of the assessment whether that stateless person is a Convention refugee, it is also necessary to determine whether the person is excluded from refugee status pursuant to Article 1E.⁴⁵

⁴² UNHCR Refugee Handbook, paras 106-107.

⁴³ UNHCR Refugee Handbook, para 104.

⁴⁴ *Ibid.*

⁴⁵ Decision-makers must also consider whether the applicant falls within the grounds for cessation or exclusion under Article 1C and 1F of the 1951 Convention, respectively.

31. Article 1E provides that the 1951 Convention '*shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country*'. It is reflected in Section 2(b) of the Refugee Act 1996.
32. The UNHCR Refugee Handbook notes that a person would be excluded from refugee status under Article 1E of the 1951 Convention '*if [the] person's status is largely assimilated to that of a national of the country*', and that '*in particular he must, like a national, be fully protected against deportation or expulsion*'.⁴⁶ Thus, a stateless person may be excluded from refugee status based on Article 1E if she or he has secure residency status in another country and can enjoy, in practice, the rights and obligations which attach to the possession of the nationality of that country⁴⁷ including the right to re-enter.⁴⁸
33. This interpretation is in line with the object and purpose of the 1951 Convention, as it ensures that stateless persons who would otherwise qualify as refugees with reference to one country of former habitual residence may be excluded from refugee status on the grounds that they have taken residence in another country only if they have been determined to have rights and obligations akin to nationals in that country and hence are not in need of international protection.
34. Such an approach treats stateless persons with multiple countries of former habitual residence as similarly as possible to those who have more than one country of nationality while maintaining the important distinction between stateless persons and nationals, the former generally being without recourse to state protection that is available to nationals.⁴⁹

F. Reference to the CJEU for a preliminary ruling

⁴⁶ UNHCR Refugee Handbook, para 145.

⁴⁷ *Ibid.*

⁴⁸ UNHCR, *UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*, March 2009, para. 10, <http://www.refworld.org/docid/49c3a3d12.html>.

⁴⁹ UNHCR Refugee Handbook, para 101 where it is stated that '*the question of "availment of protection" of the country of his former habitual residence does not, of course, arise*'.

35. UNHCR understands that the present case may call for the determination of questions of EU law,⁵⁰ including those arising from the interface of the relevant provisions of EU law and public international law, including the 1951 Convention. Consequently, the Court may consider a preliminary reference to the CJEU, including on such questions. While UNHCR takes no position on the matter, it highlights that the Treaty on the Functioning of the EU creates an explicit obligation for EU secondary legislation on asylum to conform to the 1951 Convention.⁵¹ The primacy of the 1951 Convention is further recognised in European Council Conclusions, which affirm that the Common European Asylum System is based on the ‘full and inclusive application’ of the 1951 Convention.⁵² It follows that the transposition of the Qualification Directive into national legislation of EU Member States, including Ireland, all of which are State Parties to the 1951 Convention and therefore bound by its obligations, must also be in line with the 1951 Convention. Furthermore, Recitals 3, 16 and 17 of the Qualification Directive state that the 1951 Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Qualification Directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that Convention on the basis of common concepts and criteria.
36. Furthermore, the CJEU has acknowledged these important principles and, consequently, the central role of the 1951 Convention when applying the Qualification Directive. More particularly, the Court has repeatedly reiterated that this instrument must be interpreted ‘*in a manner consistent with the 1951 Convention and the other relevant treaties*’ referred to in Article 63(1) TEC.⁵³

⁵⁰ Article 13 of the Qualification Directive requires participating Member States, in accordance with the criteria established by Chapters II and III of the Qualification Directive, to grant refugee status to a third country national or a stateless person ‘who qualifies as a refugee’, refugee being defined by Article 2 therein.

⁵¹ Article 78 TFEU.

⁵² For example, Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999; European Council, *The Stockholm Programme An open and secure Europe serving and protecting citizens*, OJ C 115, 4.5.2010 p. 69.

⁵³ Now Article 78 para. 1 TFEU. See *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08, C-176/08, C-178/08 and C-179/08, Court of Justice of the European Union (“CJEU”), 2 March 2010, at paras. 53-54: <http://www.unhcr.org/refworld/docid/4b8e6ea22.html>; *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, CJEU, 17 June 2010, at para. 38:

G. Conclusion

37. For the foregoing reasons, UNHCR is of the view that where a State arbitrarily deprives a person of his or her nationality and that person has no other nationality, the person should be regarded as ‘not having a nationality’ within the meaning of Article 1A(2) of the 1951 Convention, as replicated in Section 2 of the Refugee Act 1996 (as amended).
38. In addition, where a stateless person with multiple former countries of habitual residence is seeking asylum, he or she should only have to establish a well-founded fear of persecution for one or more Convention grounds in relation to one of those countries, and be unable or unwilling, owing to such fear of persecution, to return to that country. Nevertheless, where a person claims a fear of persecution against multiple countries, the assessment of a well-founded fear must be made against each of those countries.
39. As part of the assessment of whether a stateless person with multiple former countries of habitual residence is a refugee under the 1951 Convention and thus in need of international protection, it is also necessary to determine whether the person is excluded from refugee status pursuant to Article 1E of the 1951 Convention.
40. Such an approach as outlined above is the best means of ensuring protection of stateless refugees and upholding the object and purpose of the 1951 Convention. UNHCR would be grateful to the Court to participate in the hearing scheduled for 17 July 2018 to address the substance of this submission.

Colin Smith B.L.

25 June 2018

<http://www.unhcr.org/refworld/docid/4c1f62d42.html>; *Bundesrepublik Deutschland v. B and D*, C- 57/09 and C-101/09, CJEU, 9 November 2010, at para. 78: <http://www.unhcr.org/refworld/docid/4cda83852.html>.

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2010/1188JR

Between:-

B.D. (BHUTAN AND NEPAL)

Applicant

-and-

**THE MINISTER FOR JUSTICE
AND LAW REFORM,**

**THE REFUGEE APPEALS
TRIBUNAL, AND**

THE ATTORNEY GENERAL

Respondent

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