



European
Network on
Statelessness

PROTECTING STATELESS PERSONS FROM ARBITRARY DETENTION



IN POLAND

 Legal
Aid
Center
The Halina Nieć

“ Poland is not my country, but what is my country? I have nowhere to go and no one cares.

They said - you have no passport so we have to put you in detention. But I came to you willingly - I argued. They never listened, if you have no papers, everyone thinks you are lying.

MR B STATELESS FORMER DETAINEE IN POLAND, ORIGINALLY FROM RWANDA



LIST OF ABBREVIATIONS

BG	Border Guard
CEAS	Common European Asylum System
ECJ	European Court of Justice
ECHR	1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
HNLAC	Halina Niec Legal Aid Center
UNHCR	UN High Commissioner for Refugees
RSD	Refugee Status Determination

CONTENTS

Introducing the interviewees	5
1. Introduction	7
1.1 Statelessness and detention	7
1.2 Research objectives, methodology and limitations	8
1.3 Statelessness and detention in Poland	9
2. Law and policy context	11
2.1 International and regional obligations pertaining to statelessness and detention	11
2.2 National laws, policies and jurisprudence pertaining to statelessness and detention	13
2.3 Data on statelessness and detention	14
3. Key issues of concern	15
3.1 Identification & determination procedures	15
3.2 Decision to detain and procedural guarantees	16
3.3 Length of detention	19
3.4 Removal and re-documentation	20
3.5 Alternatives to detention	21
3.6 Children, families and vulnerable groups	22
3.7 Conditions of detention	23
3.8 Conditions of release and re-detention	24
4. Conclusion and recommendations	26
Bibliography	29
Endnotes	30
Acknowledgements	32

INTRODUCING THE INTERVIEWEES

Mr B is an orphan from Rwanda. His parents, both Rwandan nationals, were killed when he was a child and he has never had any identity documents. Without any knowledge about his origins and exact place of birth, he moved to Tanzania and then to Europe. Finally he came to Poland. The lack of identity documents led to his detention, following which he applied for asylum. With no travel documents and having had his asylum claim rejected, the Court subsequently prolonged his detention in the Guarded Centre (a closed immigration detention facility) with a view to deportation. As his identity was not confirmed he spent the maximum period of 12 months in detention.

Mr C is a middle-aged man from Pakistan born to Pakistani parents. He lived his whole life believing that he was Pakistani, however after he came to Europe his passport was destroyed and he was placed in detention while the authorities attempted to confirm his identity. Due to the fact that his asylum claim was rejected while being in the guarded centre, he spent the maximum period of 12 months in detention as the state attempted to remove him. However, no travel document was issued to him within one year by the Pakistani Diplomatic Post and he was finally released from the Guarded Centre.

Mr G is a foundling from Kyrgyzstan who never knew his parents and was not documented. After he turned 18, he travelled all over Europe and five years ago decided to stay permanently in Poland. He was apprehended by border guards for possessing a false travel document and was detained. However, as a result of the Court proceedings he was allowed to establish his identity by way of a declaration, and he was able to obtain a Polish birth certificate. After this, the authorities initiated return proceedings against him, and the courts applied alternatives to detention for his case. Mr. G. has been in a marital relationship with a foreigner living in Poland, but he has not been able to get a civil marriage license. He also has no right to work and no access to medical care. Mr. G suffers from terminal cancer.

Mr I was born in the mid-1960s in Winnica in what was then the USSR and is now Ukraine. He arrived in Poland on his USSR passport, legally, where he remained. In 2011 he applied for permission to stay under the Amnesty Act but was refused, as he had lost his passport - the only document that could confirm his identity. He tried to confirm his citizenship then but the Ukrainian authorities refused to recognise him as a Ukrainian citizen. The Russian Federation also declined to readmit him. Mr. I was therefore left in a legal limbo in Poland for another two years. With the support of his lawyer, he applied for refugee status in 2014. The biggest fear for him, before he filed his asylum application, was being placed in detention. Nevertheless although he was initially detained while filing the application, Polish Border Guards decided to apply alternatives to detention.

Mr A is a young man originally from Gyumri (Leninakan) in the former Soviet Union who arrived in Poland with his family at the age of two, shortly before the break-up of the USSR. Neither he nor his family members have ever obtained Armenian citizenship. After several years of living in Poland irregularly, all members of his family, other than him, were granted tolerated stay status. An attempt at deportation led to his detention, which was extended several times. While still a teenager, Mr. A spent almost 11 months in the Guarded Centre for Foreigners, after which, he was finally granted tolerated stay status and released.

Mr S is a middle-aged man - an orphan from Bangladesh. In 2007 his friend helped him to travel illegally to Italy. Living undocumented in Europe for several years, he came to Poland in 2011. As he did not fulfil conditions under Polish legislation to be granted permission to stay, he was detained in the Guarded Centre for Foreigners for the purpose of forced return. The Polish authorities approached the Bangladeshi embassy several times during his detention, but they never received any answer. As his identity was not confirmed within the maximum one year detention period, he was released and still lives in Poland. With no place to go, he lives at his friend's apartment awaiting for the return decision or information that he has been granted tolerated stay.

MR I'S STORY

Mr. I is a 52 year old ethnic Russian, born in what is today Ukraine. He arrived in Poland legally, more than 25 years ago with a Soviet Union (USSR) passport, as the Soviet Union was on the brink of collapse. As his USSR passport was stolen shortly after he came to Poland, he was refused a passport by Ukraine several times. In 2012, he attempted to legalize his stay under the 2011 Polish Amnesty Act. However, a lack of travel documents resulted in him being denied permission to stay, despite his extensive efforts, before the Governor's Office, to prove that the competent Ukrainian authorities did not want to confirm his nationality. Unable to legalize his situation, by any other means, his continued stay in Poland is illegal. Consequently, he is afraid to come out of the shadows. Due to his lack of legal status Mr. I experienced significant trauma, caused by the uncertainty of what would happen to him if he was apprehended by border guard officers. He has spent years worrying about whether he might be detained and arbitrarily sent somewhere. His problems are compounded because, on several occasions, the Ukrainian Consulate has refused to give him written confirmation that he is not considered by Ukrainian Authorities to be a Ukrainian citizen. Paradoxically, this refusal is despite the authorities not accepting that he is a citizen of the Ukraine, even though he was born in the Ukraine. Hence, despite his best efforts, Mr. I lived in constant fear of being prosecuted for his lack of documentation.

In 2013 Mr. I heard that an organisation in Poland had launched a campaign against statelessness. He consequently visited its office, asking for advice. As there is no statelessness determination procedure in Poland, the lawyer recommended to initiate a refugee procedure, as the single avenue available to him. Mr. I was hesitant, at first, as he feared that this would lead to his detention in the guarded center for foreigners. Nevertheless, in December 2014, Mr. I decided to apply and went with his lawyer to Warsaw to file a refugee application. Due to the lack of identity documentation, the Border Guards initially disallowed his application. However, after a one hour, stressful wait, he was informed that the Border Guards had decided to authorise his release by applying alternatives to detention. Greatly relieved, Mr I has been living in Cracow ever since, awaiting for an outcome of his refugee application. On a monthly basis, he reports, in person, to the Border Guards Division in Cracow. However, his legal situation remains precarious and he is unable to work legally. Despite this, he seems content enough with his humble life as long as he continues to enjoy his freedom, no longer at risk of detention.

"My biggest fear? Being placed in detention for not having documentation."

1. INTRODUCTION



1.1 STATELESSNESS AND DETENTION

The increasing use of immigration detention, including for punitive purposes, and the criminalisation of irregular migration by a growing number of states, is a concerning global and European trend. This results in increasing numbers of persons being detained for longer than they should, or for reasons that are unlawful. While arbitrary detention is a significant area of concern in general, the unique characteristics associated with stateless persons and those at risk of statelessness make them more likely to be detained arbitrarily, for unduly lengthy periods of time. As the European Court of Human Rights (ECtHR) held in *Kim v. Russia*, a stateless person is highly vulnerable to be "left to languish for months and

years...without any authority taking an active interest in his fate and well-being".¹ This is mainly because immigration systems and detention regimes do not have appropriate procedures in place to identify statelessness and protect stateless persons.

All stateless persons should enjoy the rights accorded to them by international and regional human rights law. Their rights should be respected, protected and fulfilled at all times, including in the exercise of immigration control. The circumstances facing persons with no established nationality – including their vulnerability as a result of their statelessness and the inherent difficulty of removing them – are significant factors to be taken into account in determining the lawfulness of immigration

detention. The process of resolving the identity of stateless persons and a stateless person's immigration status is often complex and burdensome. Lawful removal of such persons is generally subject to extensive delays and is often impossible. In many European countries, stateless persons detained for removal purposes are therefore vulnerable to prolonged and repeat detention. These factors in turn make stateless persons especially vulnerable to the negative impact of detention. The emotional and psychological stress of lengthy—even indefinite—periods of detention without hope of release or removal is particularly likely to affect stateless persons throughout Europe.

It is evident that the failure of immigration regimes to comprehend and accommodate the phenomenon of statelessness, identify stateless persons and ensure that they do not directly or indirectly discriminate against them often results in stateless persons being punished for their statelessness. Thus, the European Network on Statelessness has embarked on a two year project aimed at better understanding the extent and consequences of the detention of stateless persons in Europe, and advocating for protecting stateless persons from arbitrary detention through the application of regional and international standards. Among the outputs of this project are:

- A regional toolkit for practitioners, on protecting stateless persons from arbitrary detention – which sets out regional and international standards which states are required to comply with and practitioners can draw on in their work;² and
- A series of country reports investigating the law, policy and practice related to the detention of stateless persons in selected European countries and its impact on stateless persons and those at risk of statelessness. These reports are meant as information resources but also as awareness raising and advocacy resources that we hope will contribute to strengthening protection frameworks in this regard. In year 1 of the project (2015), three such country reports (including this one) have been drafted on Malta, the Netherlands and Poland. In year two, further reports will be published on other countries.³

1.2 RESEARCH OBJECTIVES, METHODOLOGY AND LIMITATIONS

The goals of this study are two-fold:

1. filling an information gap on statelessness and detention in Poland; and
2. to serve as an advocacy tool to promote greater protection for stateless persons and those at risk of statelessness from arbitrary detention, including through improved identification and determination of statelessness.

Thus, the researchers sought to analyse the risk of arbitrary detention faced by stateless persons and those at risk of statelessness. They also aimed at identifying and describing any legal and/or practical conditions which may bear influence on the possibility of detention of such persons as well as the overall impact of detention on stateless persons, including its impacts on their wellbeing and basic rights. To this end, the present first chapter provides an overview of the research objectives and introduces the reader to the Polish context. A second chapter is concerned with law and policy and existing (statistical) data on statelessness and detention. Then, in chapter three, key issues of concern are identified. The report concludes with a summary of findings and recommendations for improvements.

The small number of stateless persons in Poland, the lack of a dedicated identification procedure and relevant literature and jurisprudence directly concerning this matter created a highly challenging research environment. In this context, this study employs a varied methodology: During February and March 2015, a desk research was carried out of the relevant Polish laws, policies and practices, in the context of binding international and regional human rights standards relating to statelessness. From March to June 2015 field interviews with professionals, stakeholders and stateless persons (including those at risk of statelessness) were conducted and transcribed. The study also involved a statistical review of available quantitative data and an analysis of accessible case law – both on the status of the stateless and on the application of detention. Simultaneously to collecting information for this report, consultations with a broad set of stakeholders were held, including civil society organizations, academics, and government officials.

With regard to the interviews with stateless persons, it should be noted that no extensive legal analysis or fact check of each individual case was conducted. These stories and personal experiences are only meant to inform and illustrate the broader research findings. It should also be emphasized, that nearly all interviewees whose testimonies are used in the present report to illustrate the real-life impact of detention, fall in the category of persons at risk of statelessness. For obvious reasons, any efforts aimed at estimating the size of this group in Poland are bound to end in failure. The conducted research suggests, however, that this “at risk” group, which in practical and legal terms is difficult to identify and label, faces the same risks and difficulties, including the heightened risk of detention, as those who are *de jure* stateless.

The verification of the actual number of stateless persons and those at risk of statelessness, including those vulnerable to detention, has proved to be a

methodological challenge due to the fact that Poland has not introduced a dedicated statelessness determination procedure, nor applied a generally accepted legal definition of a stateless person. Moreover, the data concerning the general size of the stateless population may be flawed because of the way such numbers are collected⁴ and the fact that stateless persons who cannot regulate their situation on the territory may not want to disclose the fact of their irregular residence. Other sets of data: concerning the stateless in detention and in removal proceedings were found to be not readily available and there are doubts as to whether such cases are uniformly recorded. Another problematic issue is the use of two statistical categories which may include the numbers referring to the stateless: “without nationality” and “undetermined nationality”. In some cases, stateless persons may also be wrongfully included in other categories, as having a nationality which in reality they never had or have already lost. Furthermore, information on the number of foreigners returned without any identity documents is especially difficult to determine. It is also almost impossible to track individual trajectories of detention, release and re-detention through the available statistics because they are usually presented separately. Thus, the data on immigration detention and its relation to statelessness should be interpreted with caution.

1.3 STATELESSNESS AND DETENTION IN POLAND

Poland remains one of four EU states (alongside Estonia, Malta and Cyprus) still not party to either of the UN Statelessness Conventions.⁵ One should bear in mind, however, that the definition of statelessness, as spelled out in Article 1.1 of the 1954 Convention Relating to the Status of Stateless Persons (according to which, a stateless person is someone “who is not considered as a national by any State under the operation of its law”) is already part of customary international law and has been authoritatively interpreted in the UNHCR Handbook on Protection of Stateless Persons.⁶ It follows, therefore, that this definition is also binding in Poland.

It must be noted in this regard, that “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.”⁷

Even though Poland admittedly took steps aimed at reducing statelessness, by adopting its new law on citizenship in 2012, a formal procedure of identifying the stateless has not, as yet, been introduced. The lack of such a procedure results in protection gaps and exposes stateless persons to many negative consequences, most prominently - detention. Paradoxically, it is the prospect of imminent detention that seems to be the main factor

detering stateless persons from disclosing themselves and approaching state authorities to initiate legal proceedings to regularise their status. With the threat of detention, many prefer to live in a legal limbo as “invisibles”, remaining on the margins of society, without any legal guarantees to the exercise of their human rights.

In practice, the stateless themselves either shy away from the authorities and NGOs alike in fear of being apprehended, or attempt to address their problems by entering into many different legal procedures. They often fail to identify themselves as stateless persons and tend to focus on their imminent problems such as lack of documentation, lack of residence or limitations in accessing different services.

The lack of a legal residence title, coupled with prolonged stay within the Polish territory, severely limits the regularisation options available to stateless persons. In the absence of a dedicated statelessness determination procedure, for stateless persons with protection needs and a history of discrimination or persecution in the country of former habitual residence, the logical choice would be the asylum procedure which is governed by the provisions of the Act of 13 June 2003 on Granting Protection to Foreigners within the Territory of the Republic of Poland.

Filing an asylum application automatically triggers a process of evaluating the grounds for granting subsidiary protection. This type of status is intended for foreigners otherwise not meeting the requirements for refugee status, but who nonetheless cannot safely return to their country due to a real risk of serious and irreparable harm, such as the infliction of the death penalty, torture, inhuman or degrading treatment or punishment, or serious and individual threat to life or health resulting from the widespread use of violence against civilians in situations of international or internal armed conflict.

The stateless, not qualifying for these two types of protection, rooted in the 1951 Refugee Convention and in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), can still hope to regularise their stay by means of receiving a residence permit for humanitarian reasons or through ‘tolerated’ stay.⁸ The decision on these statuses can only be made, however, once return proceedings are initiated, and in practice they are often carried out with the person in question being placed in detention.

A failure to return a person should automatically result in the granting of a tolerated status, even without any active effort from the foreigner in question.⁹ Though this status gives free access to the labour market, it neither guarantees a travel document nor integration assistance and denotes this measure as a temporary solution. Overall, the need to undergo return proceedings in order

to receive a status that almost certainly results in detention, is a clear deterring factor, more so considering the lengthy identification process involved.

Until recently, the problem of statelessness has not been the subject of public debate in Poland as it was never perceived to be a matter of much importance by state authorities. Similarly, civil society organisations have had little knowledge and even less direct experience assisting stateless people, and therefore, for many years, there seemed to be a lack of interest and effort on their behalf to address the issue. As the scarcity of data indicates, the stateless population in Poland appears to be very small, a principal explanation, possibly, for overlooking their plight. As there is no homogenous group of stateless persons, nor a stable in-situ residing population, every such case is regarded as a separate occurrence rather than part of a broader phenomenon. Nevertheless, the practice of providing free legal aid to foreigners during protection and return proceedings shows that there is a certain, often overlooked, category of cases of persons not *prima facie* recorded as being stateless by the authorities (or even the lawyers assisting them). In turn, due to their complex status situation, exacerbated by difficulties relating to documentation and/or identification, they can be classified as being stateless, or at risk of statelessness. Such a categorisation may often elude those involved in identification or legalisation procedures due to a combination of reasons: Individuals may be assumed to have provided inadequate data and documentation to finalise the identification process or accused of sabotaging the procedure in order to stop the removal process. Or, on occasion their nationality may be erroneously ascertained or their legal status in the country of former residence may be misjudged.

Moreover, such persons themselves often deny that they are stateless and argue that their current plight is only due to poor communication between Polish authorities and their national embassies. It should therefore be emphasised that this group requires further close scrutiny and that it is essential that not only a proper and effective statelessness identification process is in place but that this process recognizes the complexity of such ambiguous cases. The plight of the stateless, and those at risk of statelessness, should be also always regarded as linked to a more general notion of unreturnability, which may be caused by a wide spectrum of grounds, from the technical difficulties of a carrying out returns, to legal obstacles hindering removal. In extreme cases, a person detained may successfully undergo the identification process with the relevant country acknowledging that the person is its national, but failing to provide travel documentation, thus pushing the individual into an unclear category whose plight is, in fact, similar to the stateless.

2. LAW AND POLICY CONTEXT



2.1 INTERNATIONAL AND REGIONAL OBLIGATIONS PERTAINING TO STATELESSNESS AND DETENTION

Whilst not party to the two most important international conventions focusing on statelessness - the 1954 Convention Relating to the Status of Stateless Persons and 1961 Convention on the Reduction of Statelessness - Poland is still bound by a number of crucial international treaties that have a direct bearing on safeguarding the rights of the stateless, namely:

- the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws¹⁰ as well as its Protocol relating to statelessness;¹¹
- the Convention on the Elimination of all Forms of Racial Discrimination;¹²
- the International Covenant on Economic, Social and Cultural Rights;¹³
- the Covenant on Civil and Political Rights;¹⁴
- the 1979 Convention on the Elimination of All Forms of Discrimination against Women;¹⁵
- the 1989 Convention on the Rights of the Child;¹⁶ and
- the 1997 European Convention on Nationality (which Poland has signed but is yet to ratify).¹⁷

The official Polish policy on migration indicates that the introduction of a new law on citizenship (2012) allows for commencing the ratification process of the European Convention on Nationality. It is unclear if this will also lead to accession of the 1954 and 1961 statelessness conventions. Such accession would not only mean that Poland acknowledges the plight of the stateless, and accepts the need to respect their human rights, but it should, consequently, lead to regulating and improving their legal status through adequate national procedures. In 1991, Poland acceded to the 1951 Convention Relating to the Status of Refugees, but there was never any real interest in adopting the parallel statelessness conventions. This may be explained by the fact that Poland does not host an *in situ* stateless population and

the cases of persons deprived of citizenship are few and far between. Moreover, there is a common perception that the stateless do not face any particular hardship that would set them apart from other foreigners and hence there is a lack of initiative or advocacy from civil society to change the legal status quo. When interviewed about their views and assessment of the present situation, several stakeholders tended to agree that the smallness of the group is reason enough to justify the government's inertia in this sphere. However, even if there were data to reliably confirm the relatively small size of the stateless population, such an approach ignores the human rights protection of those individuals who are afflicted by statelessness.

Moreover, addressing the plight of the stateless and those at risk of statelessness in terms of providing them with a legal status and protecting them from arbitrary and pointless detention may be reinforced by other, more general international obligations. It should therefore be emphasised that although no specific legal instrument addressing statelessness is in place, Poland is still bound by the peremptory rules prohibiting discrimination on any grounds, as well as the principle of *non-refoulement* and those universal standards relevant to detention, rooted *inter alia* in Article 5 of ECHR.

According to the general body of international norms, detention is permissible only as a necessary last resort, when authorities are able to demonstrate a valid legal ground for deprivation of liberty. Detention may never be applied arbitrarily. In the migration context, administrative detention is only permissible with a view to deportation or prevention of illegal entry and cannot have a punitive element.¹⁸

At the regional level, crucial provisions concerning detention are envisaged in the EU Returns Directive, which sets clear limits as to the justifiable goal of detention in return proceedings, stating that "Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process" in particular when there is a risk of absconding or when the person in question obstructs his or her own return process. The Directive specifically states that migration detention is a measure of last resort and it can only be imposed when there are "no other sufficient but less coercive measures can be applied".¹⁹ The Directive also limits detention to six months, extendable to a maximum of 18 months in exceptional cases. Accordingly, detention should always be applied for as short as possible and only as long as a reasonable prospect of removal exists. When "it appears that a reasonable prospect of removal no longer exists for legal or other considerations [...] detention ceases to be justified and the person concerned shall be released immediately".

Statelessness, by its very nature, severely restricts access to basic identity and travel documents that those with a nationality normally possess. Moreover, stateless persons are often without a legal residence in any country. Thus, being undocumented or lacking the necessary immigration permits, cannot be used as a general justification for detention of such persons.²⁰

The first publicly expressed interest and support for the stateless in Poland came from the Halina Niec Legal Aid Center (HNLAC), which in 2013 produced a first report on the stateless in Poland under the project "*The invisible Stateless persons in Poland*".²¹ This project addressed the specific problem of the non-accession to the UN Statelessness Conventions and the lack of specific statelessness determination procedures. The HNLAC also formed a coalition of NGOs calling for accession to the 1954 and 1961 statelessness conventions²² and became a member of the ENS, alongside the Helsinki Foundation for Human Rights. International cooperation helped further highlighting the need to sign these key international treaties.

As a result of the ongoing advocacy by this coalition, five MPs filed a formal inquiry with the Ministry of Interior asking about the possibility of acceding to the statelessness conventions. The issue was further picked up by the Ombudsman's Office. In November 2014, replying to a formal enquiry by HNLAC, the Ministry of Interior announced that having completed its internal legal consultations, it had decided to recommend that Poland signs the 1961 Convention on the Reduction of Statelessness. The letter also indicated that, at the same time, further analyses were being prepared in order to decide whether accession to the 1954 Convention relating to the Status of Stateless Persons is also possible and necessary.

This position is in line with the general direction of Polish migration policy documents, including: the Migration Policy of Poland – the current state of play and the further actions: 2012, drafted by the Ministry of Internal Affairs²³ and an accompanying Implementation Plan adopted in 2014 by the Ministry of Internal Affairs, Migration Unit²⁴. The Migration Policy contains a single paragraph concerning the situation of stateless persons in Poland. While referring to the introduction of a new law on citizenship it further elaborates that the entry into force of these new regulations will allow for commencing the ratification process of the European Convention on Nationality. Furthermore, the document indicates that after changing the citizenship law, Polish authorities will start a discussion concerning the possible accession to the 1954 and 1961 statelessness conventions.

The accompanying Implementation Plan presents the plans concerning signing the conventions in an extremely cautious manner, setting out a consultation process that

will commence in 2015 – 2016. Following this guideline, the Ministry of Interior approached a broad circle of stakeholders including the Ministry of Labour and Social Policy, the Ministry of Finance, the Ministry of National Education, the Ministry of Economy, the Human Rights Ombudsman and the departments of citizenship and foreigners at all regional Voivod's offices.²⁵ At this stage of the consultation process, civil society organisations have not been included.

The Ombudsman proposed that Poland accedes to the two statelessness conventions and underlined that those legal instruments were already quoted as key legal treaties that Poland should sign in a 2013 Ombudsman's Office publication: Polish Map of International Human Rights Conventions.²⁶ The Ombudsman also expressed her concern over the Ministry of Interior's position that it would work towards acceding to the 1961 convention but not, as yet, the 1954 convention. The Ombudsman argued that the Ministry's justification of such an approach was not convincing. According to the Ombudsman, both conventions should be adopted and relevant changes in national legislation should be introduced. The Ombudsman concluded by requesting the Ministry of Interior to present its official standpoint concerning the abovementioned issues, inter alia concerning the introduction of guarantees of legalisation of stay for the stateless and asking for a change of policy with regard to ratifying the 1954 convention.

2.2 NATIONAL LAWS, POLICIES AND JURISPRUDENCE PERTAINING TO STATELESSNESS AND DETENTION

The legal position of foreigners in Poland is governed by two separate acts: the Act on Foreigners and the Protection Act. The former governs the deprivation of personal freedom of foreigners for the purpose of deportation or for other similar purposes. The latter governs international protection proceedings in relation to foreigners, including the conditions under which such proceedings can be initiated.

Polish immigration legislation was significantly modified in May 2014. The most important changes were introduced in this Act²⁷, which may also influence the situation of stateless persons, include:

- The introduction of alternatives to detention of foreigners (also in relation to persons seeking international protection), such as reporting to relevant authorities, cash guarantee payments (bail), depositing a travel document or the obligation to remain in a designated place
- Enabling Border Guards to grant humanitarian protection or consent for tolerated stay if there are grounds for protection against deportation, in particular family ties in Poland or a dangerous situation

- in the country of origin. At present, tolerated stay status appears to be the most easy to access for the stateless or those at risk of statelessness in detention
- Extension of the detention of foreigners up to a maximum of 18 months, in line with the provisions of the Return Directive
- A prohibition for detaining unaccompanied minors under 15 years (unaccompanied minors in asylum proceedings may not be detained, irrespective of their age)
- When examining an application for the detention of an unaccompanied minor under 15 years of age in a guarded centre, the court shall, in each case, take into account the degree of his/her physical and mental development, personality traits, circumstances of arrest (apprehension) and personal situation justifying placement in a guarded centre
- Enabling Border Guards to issue return orders
- Overruling regulations which require the negative decision in a refugee procedure to include a deportation order; and thus separating the protection proceedings (which include decision on refugee status or supplementary protection) from return proceedings (which may end in removal or in providing an unreturnable person with humanitarian protection or tolerated stay).
- Improvement of detention conditions, improving the general living standard in guarded centres and introducing alternatives to detention
- Regulating the administration of disciplinary punishment to detainees (e.g. temporary deprivation of the right to participate in certain types of cultural, educational and sports activities, or the right to make additional purchases) for the violation of bans or orders of the detention centre rules
- Introducing the possibility of issuing a decision to release a foreigner from a guarded centre by a Border Guard body under whose authority the centre is placed (previously, in such situations any release decision was made by a court upon a request of the BG, which would extend the length of stay of a foreigner in the centre)
- Introducing stronger guarantees allowing for the use of judicial review of the administrative process in migration or protection proceedings (a conditional suspensive effect of the claim for judicial review to the Administrative Court, if lodged jointly with a request of suspending the removal, which is decided by the Court)
- Establishing a system for NGOs to monitor return operations
- Changes to the grounds for prolonging the detention period with a view to deportation

As a consequence of the abovementioned amendments to the legal framework applicable to foreigners' status, it was necessary to introduce a number of corresponding changes in the Refugee Status Determination (RSD) procedure which is governed by the Act on Protection.

Thus, from 1st May 2014, each application for granting refugee status is considered only as an application for granting supplementary protection but no longer also as application for tolerated stay. An obligation to return is no longer issued within the refugee procedure. Currently, stateless persons qualifying for no other status but tolerated stay must first enter return proceedings, facing detention and a risk of removal, hoping to finally be found to fulfil the tolerated stay criteria. In fact, the lack of a nationality or more generally, difficulties in identification, may in fact heighten the likelihood of detention as this may be perceived by the authorities as a factor that increases the risk of absconding. Clearly, the prospect of detention alone may be enough to discourage stateless persons from deciding to try this legal option and thus, many would rather stay in hiding than actively seek to start their own removal. It is therefore clear that a separate, fair and effective process must be established to identify and address the needs of this group.

2.3 DATA ON STATELESSNESS AND DETENTION

There is a lack of adequate or comprehensive data collected by state authorities on the total number of stateless persons and persons of unknown nationality residing in Poland. The only available official source that may help in estimating the number of stateless people in Poland is provided by the Polish Central Statistical Office. Census information is obtained through self-declaration on a census questionnaire. The Central Statistical Office also gathers information from public administration bodies. The available data gathered through the 2011 Polish Census shows that the group of people without citizenship in Poland is relatively small – 8,805 people were documented as persons with “undefined nationality” and 2,020 as “stateless persons”. This data is likely to contain some inconsistencies due to the fact that there was no verification of the results. Moreover, according to the Office, the figure of “undocumented persons” was based also on the data from shelters and other entities and therefore it may include homeless persons, who are, in fact, Polish citizens. This category may also include stateless persons. Thus, the above data unfortunately fails to shed much light on the prevalence of statelessness in Poland.

The Office for Foreigners and Border Guards Headquarter has gathered statistics on the number of stateless persons among registered asylum seekers in Poland and persons who were granted tolerated stay under the new Foreigners Act. However, most of foreigners who were recorded as “stateless” in the registration system are those who presented some evidence of statelessness issued by foreign authorities, international institutions or organisations - for instance travel documents issued to Palestinians by UNRWA or by the International Committee of the Red Cross to other

stateless persons or so-called “no record letters”; apart from those cases where it is clear whether the foreigner is stateless, or not. In the absence of a dedicated identification process, it is difficult to ascertain how the Polish authorities deem a foreigner to be stateless, and whether the personal statement of the individual alone (ie. self-identification) is considered by the authorities as sufficient evidence to record the person in question as “stateless” in the registration. When asked about this, the Border Guard explained that problematic situations are decided on a case-by-case basis.

Data regarding asylum seekers is firstly registered by Border Guards (responsible for enrolling refugee applications) in accordance with her/his passport, other relevant documents and information. According to the data collected by the Office for Foreigners, in 2014, among the total number of 6,621 stateless persons, 38 asylum applications were submitted, 22 applicants were granted refugee status and one was given subsidiary protection.²⁸

The additional set of data collected by the Office for Foreigners concerns the number of foreigners who hold a valid residence card issued on the basis of refugee status, subsidiary protection, tolerated stay, temporary stay permit, permanent stay permit or long-term EU resident permit. According to this data, in 2014, 625 stateless persons held valid residence cards.

In 2014, of the 2,916 foreigners apprehended by Border Guard Officers, 753 persons were detained. In 364 cases, alternative measures were applied. In comparison, in 2013 (when alternatives to detention were not yet introduced) 1,738 people were detained. However, Border Guards do not gather separate statistics on apprehended or detained stateless individuals. According to the Headquarters of the National Border Guard, during the last two years, the Border Guard requested foreign diplomatic missions to identify 1,392 persons. Of these, 927 persons were identified. The status of the remaining 465 persons is unclear and precise data on their current situation could not be accessed. However, it is anticipated that some of them are likely to be stateless and subject to detention while the Border Guard undertake further attempts to confirm their identity. Other individuals may have been released, either remaining in Poland or moving on irregularly to another country. Therefore, this number (465 persons) may in fact constitute a hidden stateless population (or at least be at risk of statelessness) who continue to face either actual, or a risk of, detention.

Since the new Foreigners Act came into force, four undocumented migrants (two “stateless persons”, one Vietnamese and one Russian) were granted tolerated stay status. There were 9,002 return decisions executed in 2014.

3. KEY ISSUES OF CONCERN



3.1 IDENTIFICATION & DETERMINATION PROCEDURES

As stated above, there is no legal definition of statelessness in Polish law and legislators have overlooked the need to adopt protection measures for the stateless. Polish authorities only rarely grapple with issues such as statelessness and undetermined citizenship, and, if they do, the label of “undetermined citizenship” is often applied to persons who cannot prove their citizenship or lack thereof. The main reason for this is the lack of a statelessness determination procedure. Thus, stateless persons in need of protection are initially always categorised as unidentified migrants who may be returned to their country of origin and hence are channelled into the return procedure. However, due to the risk of lengthy detention many foreigners decide to claim asylum as the only avenue open to them.

In the refugee status determination (RSD) procedure, authorities apply a specific set of evidence measures to establish the nationality of foreigners. These include documentary evidence provided by applicants, personal

interviews, linguistic analysis, verification of knowledge of the country of origin, witnesses and information gathered previously by Border Guards from foreign consular authorities. The scope of the evidentiary proceedings in the refugee procedure does not relate directly to statelessness, as statelessness determination is not an aim of the asylum procedure. Additionally, the fact that this procedure is not designed for stateless persons makes decision-makers hesitant to ascribe a status of statelessness to individuals. Even if they are often aware that stateless persons may more likely face discrimination and the denial of their human rights in their countries of origin, at the same time they are of the opinion that being stateless does not necessarily result in being persecuted and therefore is not a relevant factor in an asylum procedure.

This research has shown, however, that stateless persons may be found both among rejected asylum seekers and beneficiaries of international protection. Stateless persons who are rejected asylum seekers have no access to travel documentation. However, “Polish Travel Documents” can be issued to foreigners who have a

settlement permit or are granted subsidiary protection or humanitarian stay in Poland. Travel Documents can be issued only if an applicant lost his previous travel document, the document was destroyed or expired and a replacement cannot be obtained. Moreover, on the basis of Article 252 of the Foreigners Act²⁹, persons who received a tolerated stay are not allowed to receive such a document. Therefore, there are no known cases, to date, of persons being granted such a document on the basis of statelessness alone.

A stateless person may therefore only obtain an identification document based on a legal status that isn't related to international protection or under Article 260 of the Foreigners Act, which stipulates that *"a Polish identity document may be issued to a foreigner who resides in the territory of the Republic of Poland and has no citizenship, provided this is justified by the interest of the Republic of Poland"*.³⁰

According to the Foreigners Act, legalisation of stay may be obtained through temporary and permanent residence permits (issued by the Voivods' Offices). However, the practical implementation of these provisions can be problematic. For example, applicants are required to provide proof of a documented stay in Poland when applying for residence permits. Furthermore, the Foreigners Act requires that a travel document is also submitted with the application and only in "particularly justified cases" may a Voivod omit this requirement. In practice, the authorities rarely use their discretion to apply this exception.

Finally, the refusal of legal stay rights under these provisions leads to the initiation of return proceedings if the foreigner does not leave the country voluntarily. Paradoxically, this procedure is currently the only option, by which undocumented migrants remaining illegally in Poland may legalise their presence on the grounds of unconfirmed identity and being unreturnable. According to the law, a foreigner shall be granted a permit for tolerated stay *inter alia*, if expulsion is unenforceable due to reasons beyond the control of the executing authority and the foreigner. Statelessness is, however, not identified as a factor. Consequently, this procedure doesn't follow the evidentiary standards recommended for statelessness determination, as stipulated in the UNHCR Handbook.³¹ Therefore, the in-depth investigation involving evidence, from a variety of sources as prescribed by UNHCR, goes far beyond what the return procedure is designed to achieve.

Another issue related to the return procedure is that it can be initiated only *ex officio* by the Chief of the Border Guards Division. Thus, there is no guarantee that state authorities will initiate it at all. The experience in practice shows however that Border Guards usually accept "motions for granting tolerated stay" which are not

enshrined in the Foreigners Act, considering them to be "notifications of illegal stay". While this allows them to initiate the return procedure *ex officio*, it also increases the risk of detention. While return proceedings are ongoing, a foreigner does not have legal residence status and does not receive any social assistance or accommodation. Given that proceedings can take a long time, this is problematic, given the fact that being granted tolerated stay status prevents stateless people from accessing the rights attributed to them under the 1954 Convention. Instead, they may only apply for assistance in the form of shelter, food, clothing and the so called "designated benefit" – a single sum given to foreigners for a specific purpose (e.g. in order to cover their medical treatment expenses).

It seems, therefore, that in order to enhance the human rights protection of stateless persons, including through assessing whether they are eligible for protection under the Statelessness Conventions, ratification of these instruments and introduction of a proper procedure for determining statelessness is a practical necessity. Only through such a procedure can a state clarify whether someone in fact possesses a nationality and then provide stateless individuals with a set of rights laid down in international instruments, including protection against arbitrary detention. Moreover, also in the context of the decision to detain and the assessment of legality of ongoing detention, there is a due diligence requirement to identify statelessness, persons at risk of statelessness and specific vulnerabilities of stateless persons as this has a bearing on the removal objective of the detention.

The current lack of such a dedicated procedure causes persons without nationality to shy away from contact with the authorities. As a result they do not attempt to legalise their status, afraid of the consequences of disclosing themselves. Such a status-quo also puts them in a risk of detention.

Analysis of rules governing return and asylum proceedings leads to the conclusion that separate statelessness determination proceedings before the Office for Foreigners may appear as the most suitable system for the determination of statelessness, since the scope of admissible evidence in the asylum procedure is much wider, and the state authorities, at least in some cases, play an active role in acquiring evidence of statelessness. Moreover, the Office for Foreigners has more capacity and experience to execute status determination procedures than the Border Guards or Voivods.

3.2 DECISION TO DETAIN AND PROCEDURAL GUARANTEES

The right not to be arbitrarily detained is a fundamental human right enshrined in international law. According to

the UNHCR Guidelines, the term “arbitrariness” should be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability. To guard against arbitrariness, any detention needs to be necessary in the individual case and proportionate to a legitimate purpose. Whether a deprivation of the liberty is arbitrary will depend on the reasonableness of the detention in a particular case, as the word “arbitrary” implies a lack of reasonable justification.³²

Under EU law, Poland is bound by the legislative instruments of the Common European Asylum System (CEAS) and common standards for Member States concerning return procedures for third-country nationals under the Return Directive. Thus, Polish immigration provisions have seen many amendments based on EU legislation concerning migration and asylum. In May 2014, the new Foreigners Act entered into force, revising certain provisions concerning detention of third country nationals in accordance with the Directive.³³ In addition, at the same time, amendments to the Protection Act of 2003 came into force and slightly amended the detention regime of asylum seekers.

a) Detention in pursuit of a legitimate objective and as a measure of last resort

Decisions to detain are issued by District Courts upon the request of Border Guards based on specific grounds. The length of time that a migrant may spend in pre-detention cannot exceed 48 hours (until the detainee is handed over to the District Court). The Court then has 24 hours to issue the decision. In case of stateless persons they will be subjected to mandatory apprehension in case of lack of identity documents until the competent authorities decide whether to detain them or apply less restrictive measures.

The Foreigners Act refers more directly to the objectives of detention stipulated in the Return Directive than the previous law, but still falls short of Article 15(1) of the Directive which stipulates that detention can only be resorted to if “other sufficient but less coercive measures cannot be applied effectively in a specific case”.

By comparison, Article 398 of the Foreigners Act states that a foreigner shall be placed in a guarded facility if there is a probability that a return decision will be issued without a specified period for voluntary return; the return decision has been issued without a specified period for voluntary return; the foreigner has not voluntarily left the territory of the Republic of Poland within the period specified in the return decision and immediate forced execution of the decision is not possible; or the foreigner fails to meet the obligations set out in the ruling on use of alternative measures

Thus, if the reasons behind the return decision, which does not specify the time limit for the foreigner’s voluntary return, have occurred or such a decision has been already issued, the law prompts the issue of a decision to detain. Article 315 indicates, that among the reasons for issuing a decision which does not specify the time limit for the foreigner’s voluntary return, are:

- a risk of absconding further defined inter alia by lack of identity documents
- necessity for safeguarding national security or public safety and order³⁴

One of the key concerns regarding these provisions is that they allow for an individual to be detained when there is only a reasonable likelihood that the return decision will be issued. This can lead to arbitrary detention, particularly for stateless persons or those at risk of statelessness, as the difficulties related to removal will only come to light when the evidence related to removal is being assessed as part of the removal decision. Furthermore, the current application of Article 398 may lead to extension of the detention, even if there is no realistic prospect that a foreigner will receive a return decision. This is particularly problematic, as some important circumstances (like statelessness or family ties) which affect an outcome of the return procedure often come to the light only after the return procedure is opened. Problems with obtaining permission to stay in Poland and the fact that the return procedure is the only one where undocumented migrants, including stateless persons remaining illegally in Poland may legalise their presence make their situation even worse.

It seems then that on this subject Poland can learn more from other European countries. In the Netherlands, for instance, before detention is even considered, the return decision should be issued, as it confirms that a presence of a foreigner in the country is unlawful.³⁵ This seems to be the only way of achieving objectives of due diligence and proportionality also in the light of European case-law. For instance, the European Court of Justice (ECJ) is of the opinion that in order to consider that there is a “reasonable prospect of removal” which legitimises detention, “there must, at the time of the national court’s review of the lawfulness of detention, be a real prospect that the removal can be carried out successfully.”³⁶ Equally, there is a need to identify stateless persons before a decision to detain is taken, as stateless persons have no country of nationality to which they can return, making removal extremely difficult.

It is also worrisome that Article 398, read in conjunction with Article 315, can be confusing. Article 315 of the new Foreigners Act states that a risk of absconding may occur if a foreigner has declared unwillingness to fulfil his/her obligations arising from the receipt of the return decision; has no documents confirming his/her identity; has

crossed or attempted to cross the border in breach of legal regulations; or has entered the territory of Poland while registered as a foreigner whose stay within the territory of the Poland is undesirable or in the Schengen Information System.

The complexity of the Foreigners Act and the fact that both provisions are separated from one another may lead to mistakes in establishing grounds for detention by state authorities. Therefore in practice, there are situations in which irregular status and a lack of identity documentation results in detention, even when the person concerned is stateless or at risk of statelessness. Thus, having in mind that there are only two administrative objectives legitimating immigration detention: prevention of unlawful entry and removal, the law should rather impose a safeguard against a presumption of the risk of absconding on account of irregular stay in order to prevent detention from being automatically resorted to. This seems to be in accord with the view of ECtHR. For instance, in the case of *Vasileva v Denmark*, the European Court of Human Rights expressed an opinion that article 5(1) of the ECHR contains an exhaustive list of exceptions to deprivation of liberty and only the narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his/her liberty.³⁷

b) Asylum seekers

According to the Protection Act, asylum seekers shall not be detained unless there is a need to establish their identity; prevent the abuse of proceedings for granting refugee status; prevent risks to the safety, health, life or property of other individuals; or protect state defence or security or protect safety and public order.³⁸

Moreover, although in general, Polish provisions do not allow to apply detention for the sole reason to determine the admissibility of the application and to initiate the asylum procedure, Article 87 of the Protection Act states, however, that asylum seekers may be detained when they crossed or attempted to cross the border contrary to the law if they are not directly arriving from the territory where they could be subject to serious harm, they haven't lodged an asylum application immediately after arriving and unless they explain the reasons of unlawful stay. This provision may raise concerns, firstly because few persons seeking international protection await a decision on visa application in their country of origin and some of them, as stateless individuals, do not have a passport. Secondly, because foreigners are usually not aware of the necessity to lodge an asylum application immediately upon arrival. Moreover, in case of stateless persons, the fact that they arrived from the territory where they could be subject to serious harm may not be so obvious at the initial stage of the procedure. Also, as misusing the refugee procedure is a ground for detention (the sole one initially assessed by

the Office for Foreigners, not the Border Guard authorities) the risk of detention arises for stateless persons, as statelessness is not prima facie identified as grounds for protection. Finally, a related concern is the absence of a dedicated regularisation route for stateless individuals who have lived in Poland for a long time (as in the case of former USSR nationals) but for whom removal is not possible and who, due to the lack of statelessness determination mechanisms, often have no option but to initiate asylum procedures.

c) Individual circumstances of a case

According to Polish legislation, the decision to detain must specify the legal and factual grounds for detention and the detention period. Nevertheless a salient feature of detention, when used as a deterrent to irregular migration, is that it does not usually take into account the individual circumstances of detainees. Such application of detention is contrary to international standards, as it imputes a punitive element which is not a legally justified purpose of this administrative measure. In the national context, even if the Return Directive considers detention as a measure of last resort and requires it to be necessary, in everyday practice Courts rigorously follow the criteria mentioned in the Foreigners Act and the Protection Act, relying more on basic facts established by Border Guards during the apprehension rather than carry out an individualised assessment as to the necessity and the proportionality of detention. Therefore, when it comes to assessing the legitimacy of detention, common factual grounds are considered to be enough to justify detention in individual cases.

According to foreigners who appear at the border crossing point in Terespol, the mere statement that their original goal was to enter the EU, while not explicitly stating that they wanted to come to Poland, could be interpreted by state authorities as proof of risk of abuse of the procedure, resulting in a decision to detain being taken.³⁹ Moreover, it happens that Courts' judgments justify detention due to the risk of abusing the refugee procedure because an individual appeared at the border several times receiving a so called "refusal of entry".⁴⁰ Courts also extended detention because Polish authorities failed to establish identity of a foreigner.⁴¹

All of above-mentioned reasons for detention are questionable, in particular if we take into consideration that, pursuant to the principle of non arbitrariness, the burden of proof to provide grounds why detention is necessary and proportionate, in each individual case, is placed on the state. This gives rise to a presumption against detention which is not always followed in the national context. The outcome of such practices could be tragic for stateless detainees in immigration detention.

d) Right to review the lawfulness of the detention

The Polish legal framework provides for regular periodic reviews of the necessity to detain irregular migrants. The first decision to detain can be issued for no longer than three months,⁴² while each decision to prolong has to be given for a specific time period, with the overall period of detention not exceeding 12 months (exceptionally 18 months, when a detained migrant decides to initiate judicial review of the return decision).⁴³

After being placed in the detention centre, detainees (asylum seekers and migrants) have seven days to challenge the lawfulness of the detention. After the initial standard two months of detention, the detention centre must validate the continuation of detention in the court. (Detainees have again a seven day period in which to dispute the decision).⁴⁴ However, detainees are only legally required to be present at the initial hearing. This limitation on the right to be present at proceedings may particularly affect stateless persons who remain in detention longer than the initial period of two months for the purpose of establishing their identity. The lack of a statelessness determination procedure may also play a significant role in this regard, as it delays the establishment of the fact of statelessness. These processes do not, therefore, favour an investigation of the facts or of the reasonableness and proportionality of the detention.

3.3 LENGTH OF DETENTION

“ The waiting is the worst part of detention. It’s like you don’t have any control any more, you just sit and wait. You wait for someone else to tell who you are and what is your country.

Mr C, originally from Pakistan

Although the Return Directive sets forth that detention shall be as short as possible, it fails to ensure the application of this requirement in practice. The Directive states only that detention sanctioned by Member States shall not exceed six months but may be extended by another twelve months, in two circumstances: the lack of cooperation by the detainee or delays in obtaining the necessary documentation from third countries. In keeping with the Directive, Polish legislation only allows for detention to be extended in these circumstances.

However, it appears that Polish legislation does not necessarily fall within the scope of the above-mentioned time periods, as it provides for the possibility of detaining foreigners under return procedure up to 18 months and asylum seekers up to six months. Therefore, under the law, asylum seekers can be detained for up to six months during the asylum procedure, and if their applications are rejected, a further 18 months during the return procedure; altogether, 24 months.⁴⁵ It must be noted though, that to date Polish NGOs have not found any

cases of clear infringement of the Return Directive where state authorities extended the detention period over 24 months. In fact, the position of the Office for Foreigners and the Border Guards Headquarters - repeatedly presented during consultations with NGOs - is that 18 months remains the maximum period of allowed detention. Thus, this can be seen as a gap in the law, but - at least at present - not one in practice.

Even though the new law is much more precise and can be read as providing safeguards with respect to stateless persons, the current judicial practice exhibits its improper implementation.

The key legal requirement, which is yet to be acknowledged, is that detention should only be extended when there is an enforceable return decision, actions to deport are taken with due diligence and deportation is possible within a reasonable period of time. Consequently, the justifications of court orders prolonging detention should rely on the actions undertaken to obtain a travel document with due diligence and a realistic prospect of expulsion.

An analysis of court decisions since the new Act on Foreigners came into force on 1 May 2014, shows that in cases of delays in providing travel documents there was no mention of whether such delays were temporary or permanent, there was no evidence of unwillingness of migrants to cooperate in this respect and there was no information to establish that the authorities had pursued the matter vigorously and diligently. Consequently, stateless persons in Poland might be at risk of extensively long deprivation of liberty without a scrupulous justification concerning the pending identification process.

All of the above-mentioned criteria for extending detention are problematic as they are more likely to occur in the context of statelessness. In particular, it is more likely the case, for stateless persons, that the country of origin will not issue identity documents or cooperate with returns. Nevertheless, Polish authorities do not see the relevance of identifying statelessness while making a decision to detain, as their focus is more on effecting deportation than protecting the right to liberty.⁴⁶ When this occurs, the detention itself becomes difficult to challenge due to the lack of a statelessness determination procedure. It also follows from the HNLAC’s experience that the difficulty in providing a foreigner with a travel document means that what should be a short term pre-deportation detention often becomes prolonged. It is even more problematic if an individual initiates a refugee procedure while being in detention and receives a negative decision in both cases. One vivid illustration of this risk is the case of Mr. B, an orphan from Rwanda who was taken into administrative detention as an irregular non-citizen in Poland in 2011. With his claim to asylum

rejected, no grounds to remain in Poland and no other country willing to receive him, he remained in detention for one year⁴⁷.

Mr. B was born in Rwanda. His parents were killed when he was a child, and he never had any identity documents, has no knowledge of his origins or exact place of birth. As a young orphaned child, Mr. B fled Rwanda for Tanzania and found himself in a camp for refugees, where a woman he met took care of him and sent him to school. He lived in Tanzania until 2011. Around that time he met a man who offered him a job in Europe. That man organised his trip to Europe and did all the paperwork. In 2011 Mr. B arrived in Poland and filed a motion to be granted asylum, but his request was denied. Since 2011, Mr. B has undergone six subsequent asylum procedures, all of which were unsuccessful. When Mr. B came to the Border Guards to apply for asylum, he had no identity documents. Therefore, he was detained and placed in a Guarded Centre for Foreigners. In February 2012, he received a final decision in his asylum case, according to which his motion to be granted refugee status was denied and he was to be expelled back to his country of origin. As he still had no travel documents, the Court subsequently prolonged his stay in the Guarded Centre with a view to deportation, not justifying whether the expulsion would be feasible or if the competent authorities undertook efforts to obtain a travel document with due diligence. As his identity was not confirmed until the maximum one year period of detention lapsed, he was finally released and still lives in Poland.

The first ground of time limit extension (lack of cooperation) is a common argument used by authorities in the public debate concerning all migrants. However, as it was rightly pointed out in the document *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*,⁴⁸ the extended detention, on account of the lack of cooperation, may operate as a punishment or, for instance, authorities may use detention to compel the detainee to cooperate. Both practices are unlawful under international human rights law. Moreover, only an appropriate status determination procedure capable of identifying stateless persons would remove all doubts in this regard.

The latter ground (delays in obtaining documentation) can be even more questionable, as it is often beyond the control of the foreigner. While detained, foreigners usually depend on the Border Guards to pursue documentation on their behalf. However, many Regional

Courts do not take into consideration facts such as the frequency of requests to foreign consular authorities, different avenues explored by law enforcement officials and the foreigners themselves with regard to obtaining a travel document. One refused asylum seeker from Pakistan was held in immigration detention in Poland for 12 months as no travel document was issued to him by the Diplomatic Post, although he had cooperated with efforts to facilitate his return. Sadly though, the justifications of the subsequent courts decisions prolonging his stay in the Guarded Centre never analysed his individual situation and did not verify if removal proceedings had been undertaken with due diligence and if deportation was feasible, even though he pointed to the fact directly in his appeals against courts detention orders. The sole fact that was mentioned by the court when ordering the prolonging of his detention, was that the final deportation order was issued and was to be executed.

By contrast, in the ECtHR case of *Kim v Russia*, the Court stated that Article 5(1)(f) of the Convention cannot be relied upon anymore where it is no longer feasible to expel a person and reiterated its view that the authorities had an obligation to consider whether removal is a realistic prospect and whether detention with a view to removal is from the outset, or continues to be, justified.⁴⁹

3.4 REMOVAL AND RE-DOCUMENTATION

“ They placed me in the Guarded Centre and told me that I have to go back to my country, but I didn't have a passport. I did everything they asked of me, I gave them all the information but they kept telling me that the embassy would not give me a document and the court kept prolonging my stay in detention. I didn't understand why these procedures lasted so long and why I had to stay in this Centre for all this time, especially as finally it turned out that I couldn't obtain a passport or any travel document for that matter. The Court kept prolonging my detention but never really explained to me why it was necessary and didn't reply to my appeals where I wrote that I had no passport and there was nothing I could do about it. I felt completely helpless and trapped in a system that couldn't be overcome. Finally I gave up trying.

Mr S, originally from Bangladesh

As discussed above, migrants can be detained in Poland for the duration of procedural measures leading to verification of a person's nationality and up until the issuance of necessary documentation for the purpose of removal. Practice shows that this identification process may take anything from hours to months and is dependent on the type of documentation already in possession of the person in question, the country of origin and its established cooperation with Polish authorities

and the level of cooperation between the individual and the Border Guard. The Border Guard carries out a detailed interview with every person in relation to whom there are doubts concerning their nationality. If necessary, this is then followed by consular interviews to ascertain the country of nationality. According to the representatives of the Border Guard (Section of Identification and Returns) it is almost impossible to indicate the average timeframe of such a process. Countries with whom Poland has signed readmission agreements are bound by formal deadlines as indicated in such documents, but others often do not comply with any deadlines whatsoever, and may often fail to respond to formal identification requests. There were also cases indicated (Afghanistan) in which the national embassy confirmed that the foreigner in question is in fact a national but did not proceed to issue any appropriate documentation. The Border Guard complains that there are no readily available measures to influence such inaction and thus, persons from such “problematic” states may face prolonged detention until their status is resolved. It should be noted that the foreigner in such a situation should not be penalised for the lack of cooperation of their country of origin and therefore should be issued, at least, with tolerated stay as soon as possible.

If a foreigner does not possess a passport, return decisions issued to unidentified migrants are enforced by issuing a standard travel document valid for a single journey (“EU Letter”)⁵⁰ or by providing a travel document through a readmission agreement with a third country. In 2014, the Border Guard conducted four deportations on the basis of other travel documents, three of which were above mentioned “EU Letters” issued to Afghan nationals. One travel document was issued in accordance with the readmission agreement between the European Community and Sri Lanka

3.5 ALTERNATIVES TO DETENTION

“ The Court asked me if I had a place to stay, I tried to explain that life has been very difficult for me, without any document I have nowhere to go, no permanent job, I couldn’t register my address but that I’ve been living with my friends and somehow managed to get on with my life.... The Court decided to place me in the Guarded Center to secure my accommodation. This is how I ended up in this Center....my freedom was taken from me and I feel punished for something I haven’t done.”

Mr M, originally from Pakistan

Since 1st May 2014 the new Foreigners Act implemented provisions concerning alternatives to detention both in the migration and asylum context, in form of an obligation to surrender a travel document; reporting to immigration

authorities at regular intervals; an obligation to stay at a particular address; and release on bail.

According to data received from the Border Guards, there were 2,916 decisions on apprehension issued in 2014. In 753 cases the courts issued a decision to place the individual in a guarded centre. Nevertheless, in 364 cases, after apprehension, the competent authorities decided to apply alternatives to detention. Out of these 364 decisions, 126 were given in the context of the return procedure and 238 in the context of the refugee procedure.

Among alternatives granted in 2014, the most common was an obligation to report to immigration authorities at regular intervals (101). Other alternatives imposed by competent authorities were in the form of imposing an obligation to reside at a particular address (80), to surrender a travel document (32) and bail (7).

By comparison, in 2013 the Courts issued 1,152 decisions to detain. These numbers show that after the new law, alternatives to detention (previously available through appropriate application of the Code of Criminal Procedures) finally started to be used in practice. What also arises from this data, and from the HNLAC’s legal casework however, is that alternatives to detention are not considered first and only resorted to as a last resort. Perhaps this is because, Poland being a transit country, the authorities tend to believe that migration control objectives cannot be effectively achieved outside of detention.

This practice is, however, contrary to international standards as it is well-established in international human rights doctrine that the deprivation of liberty is likely to be considered arbitrary if it is not necessary in all circumstances of a case and proportionate to the goals pursued by authorities. As UNHCR states, “the failure of many governments to offer any alternatives to detention, or to fail to pilot them or to systematise them, puts their detention policies and practices into direct conflict with international law.”⁵¹

Currently, Polish law does not provide for an individual assessment of vulnerability when deciding to detain. In fact, there are no clear guidelines or criteria for authorities to follow in order to decide whether to apply alternatives or not. Thus, it is difficult to expect consistent and fair decision making in the implementation of alternatives. However, HNLAC’s experience shows that, in practice, authorities are more inclined not to impose detention if a stateless person can demonstrate, for instance, that he has a well-established private life and an address of residence in Poland. The recent case of Mr. I., a stateless person from Ukraine, may set an example of good practice in this regard. As an ethnic Russian, born in what is today Ukraine, Mr. I. arrived in Poland legally,

almost 25 years ago, with a Soviet Union (USSR) passport. After his USSR passport was stolen, he was refused a passport by Ukraine. He continued to live in Poland but without citizenship of any country. In 2012, he tried to legalise his stay under the 2011 Amnesty Act but he was denied permission because he did not possess a travel document. Therefore, as his second choice, he decided to initiate an asylum proceeding. However, after his asylum application was accepted, the Border Guards officers decided to implement alternatives, instead of detention, taking into account his long presence in Poland and the fact that he has a place to stay in Poland.

A final concern, is that there is no national programme designed for foreigners in the return procedure to be released unconditionally or with the application of alternatives to detention. Thus, state actors tend to rely on detention to manage immigration issues. HNLAC's daily work confirms that District Courts routinely place foreigners with unconfirmed identity, who are in return procedures, in detention. Stateless persons sometimes find themselves in a precarious situation. Treated as irregular migrants they have no access to gainful employment and permanent accommodation. Once they are apprehended they cannot present any identity or travel documents or prove that they have a permanent address or place to stay. This impedes the use of alternatives to detention. Therefore it is of utmost importance that stateless persons wishing to resolve their situations are provided with proper care and accommodation and given a chance to do so in a non-coercive and dignified manner.

Promisingly, as per information provided by the Border Guards Headquarters in April 2015, Poland – as already identified – is cognisant of the importance of implementing additional measures in preventing unnecessary detention, including by setting up open centres for foreigners in the return procedure. It is not known when these measures will be introduced. If this is done, in the absence of a statelessness determination procedure, alternatives for those subject to return procedures will benefit stateless persons since the return procedure is at present the only pathway they have to regularise their presence.

3.6 CHILDREN, FAMILIES AND VULNERABLE GROUPS

International Human Rights law obligates states to protect vulnerable persons including children, asylum seekers, women and stateless persons.⁵²

In the migration context, stateless individuals may be particularly vulnerable to lengthy detention and can face difficulties in accessing education, healthcare, employment or social security benefits. Moreover, it is necessary to remember that among stateless persons

there are other individuals who are additionally vulnerable to multiple discrimination and the negative effects of detention, including children, women or, for instance, disabled persons.

Although international instruments obligate the screening and assessment of vulnerability, there is no provision for this in the Polish legal system. The only provision can be found in the Protection Act, but that merely states that if a foreigner informs Office for Foreigners that he or she is a victim of violence, the Office must ensure that medical and psychological tests aiming to confirm these circumstances will be provided. However, the act does not give any indication about which agency should perform this assessment *ex officio* and what procedures should be implemented. Also, there is no legal definition of a victim of violence in the current legislation. On the other hand, Article 400 of the Foreigners Act states that a foreigner shall not be detained if it could pose a threat to his/her life or health or if his/her physical and psychological condition could justify a presumption that he/she has experienced violence. Nevertheless, without a sufficient identification mechanism of 'vulnerable foreigners' Article 400 does not guarantee an effective protection against detention for the individuals concerned.

The amendment to the law on granting protection to foreigners within the territory of the Republic of Poland, submitted for public consultation at the beginning of 2015, provides for some positive changes in the asylum procedure.⁵³ For instance, it contains a non-exhaustive list of vulnerable groups such as minors, the disabled, elderly persons, pregnant women, single parents, bedridden patients, persons with mental health problems, victims of trafficking, torture, psychological, physical or sexual violence or violence based on gender, sexual orientation or gender identity. It also requires assessment of whether a vulnerable person needs special treatment or social assistance in asylum proceedings.

However, provisions concerning detention (including conditions for release) and no adequate rules of identification have been presented. This is a missed opportunity, firstly because current provisions establish disparities and differences in court and law enforcement practice in deciding who should be recognised as a person with special needs; and secondly, because experience shows that the direct inclusion of guidelines concerning identification of vulnerable persons (for instance by introducing a non-exhaustive list of relevant evidence presented in relation to vulnerability) is essential to ensure the proportionality of any decision to detain. At the end of August 2015, Polish authorities presented to civil society a new draft of the asylum application form, which included a separate section with vulnerability related questions, aimed at assessing the individual situation of the applicant. Most probably, the draft should

enter into force together with the new law on granting protection to foreigners within the territory of the Republic of Poland.

The 2014 UNHCR Handbook on Statelessness emphasises that children should, as a rule, not be detained under any circumstances.⁵⁴ Also, the ECtHR made a clear statement about children detention in *Popov v France*, where the Court considered that there was a breach of Article 5 because the authorities had not taken the particular situation of children into account. The Court underlined that two weeks' detention, while not in itself excessive, could seem like a very long time to children living in an environment ill-suited to their age. The conditions in which the applicants' children were detained for two weeks, in an adult environment with a strong police presence, with no activities to keep them occupied, combined with their parents' distress, were clearly ill-suited to their age. The judgment also states that there had been a violation of Article 8 ECHR, in respect of all the applicants, largely because *"it is not clear from the information provided by the Government that an alternative to detention had been considered"*.⁵⁵

On the surface, current Polish immigration law seems to be in compliance with international standards concerning child rights. For instance, the Foreigners Act states that before placing a foreign minor under the guardianship of her/his parents/guardians in a guarded centre, the adjudicating court should always take into consideration the wellbeing of a child. This amendment, reflecting international standards arising from the Convention on the Rights of Children and the Directive 2008/115, was a response to the fact that previously courts have often not applied international standards directly. Nevertheless, it is also necessary to bear in mind that this provision does not adequately reflect and implement the recommendations of a coalition of Polish NGOs which postulated a complete abolishment of the detention of children. Therefore, in principle, current legislation allows for the detention of immigrant children under the age of 18. Unaccompanied minor migrants may be detained, but only if they are older than 15, while all unaccompanied minors who are asylum seekers cannot be detained.

3.7 CONDITIONS OF DETENTION

“ I don't want to complain about the conditions in the Guarded Centre. Everybody was trying to be good to me. Still, after several months of staying in the same place, you just start going crazy. I guess I never really understood how important freedom was for me until I lost it.

Mr A, formerly from the Soviet Union

According to the 2013 Foreigners Act, foreigners staying in a guarded centre for the purpose of expulsion have the possibility to contact UNHCR, Polish government

agencies, foreign diplomatic missions, their own representatives or NGOs providing asylum seekers with legal aid via telephone, fax or post. Personal consultations with representatives of NGOs and other institutions are also possible although, in a few situations, the head of the guarded centre or a Border Guard officer should issue permission.

The Halina Niec Legal Aid Centre regularly monitors the conditions in immigration detention facilities in Poland. Overall, there are no major systemic deficiencies observed and a gradual improvement of the standard of treatment coupled with a liberalisation of some of the strictest rules of the detention regime can be reported, especially over the last two years.

Within the detention facilities, foreigners can move unescorted and relatively freely, between many areas within the buildings. This freedom of movement usually allows detainees to access indoor and outdoor recreation areas, libraries and medical units. Moreover, foreigners from the detention centres located in Biała Podlaska and Ketrzyn confirmed that children (accompanied by adults) may now spend unlimited time walking outside. Additionally, Border Guard officials are no longer allowed to wear uniforms when serving in the guarded centres for foreigners.

Detainees can access indoor and outdoor recreation areas, usually during periods allowed for freedom of movement. Depending on the centre, these areas include outdoor soccer fields or basketball courts and areas for indoor activities such as television, internet, ping pong, gym or for art classes. Nevertheless centres still lack opportunities for meaningful activities, such as educational programmes or vocational activities.

In all guarded centres, bedrooms are in separate areas of the complex. Each bedroom usually sleeps two to eight people. Additionally, in almost all facilities, showers and toilets are fitted with full-length privacy curtains or doors with locks. The only exception is the detention centre in Krosno Odrzańskie, where showers have half-length doors.

Foreigners have the right to medical care, including the right to be placed in hospital, the right to undisturbed sleep between 10 p.m. and 7 a.m. (8 a.m. during holidays), the right to use sanitary facilities as well as toiletries; the right to possess religious objects, exercise religious practices, take part in religious services as well as to listen to or to watch religious services transmitted by the media; the right to buy newspapers, additional food, toiletries etc., and to keep those objects in the social room or in the accommodation cell as well as the right to receive packages with clothes, footwear and other personal belongings; to conduct correspondence and use communication means at his/her own expense; submit

petitions, complaints and requests to the supervising Border Guard; and receive visitors in special rooms.

Asylum seekers and those subject to removal proceedings are not separated in detention, and there are no specific arrangements that would pertain to the stateless. Free legal assistance to those detained is rendered exclusively by NGO lawyers. Due to a lack of a statelessness identification procedures, it is especially important that these lawyers also carry out a screening of provisional identification of such cases, within a broader framework of identifying potentially vulnerable detainees and are able to challenge arbitrary detention.

3.8 CONDITIONS OF RELEASE AND RE-DETENTION

“ When they placed me in the Guarded Centre they gave me a decision, according to which I was supposed to leave Poland and then they asked me to fill out some forms for the Embassy. I did everything they asked for. I thought that maybe my situation will finally be resolved. After one year they released me, they just told me that I am free and I can go now. I thought that since I was in the Centre for a full year and the Border Guards didn't send me anywhere, they will give me a paper allowing me to stay in Poland, but it didn't happen. After all this time I was in the same place as before, with no place to stay and no place to go to.

Mr B, originally from Rwanda

From the state's perspective, an individual's statelessness can be problematic with regard to deportation efforts. From the individual's perspective, statelessness can mean lengthy and unnecessary detention while the state attempts to remove him or her to another country. Furthermore, release from detention does not resolve the statelessness of the individual who is not granted an immigration status. Moreover, in most respects, the stateless former detainee remains excluded from Polish society as current provisions do not necessary guarantee that after release a foreigner will be provided with any kind of support from the state. Social benefits are reserved only for those who seek asylum in Poland or who have been already recognised as refugees or beneficiaries of complementary protection.

Foreigners who are subject to a return procedure and are staying outside the guarded centre are not entitled to receive any social assistance. They have no access to medical care and the labour market, even if the case goes on for more than six months. Based on the current legal framework, they cannot be accommodated in centres for foreigners seeking protection in Poland, and what is more they are not routinely provided with any documentation after being released from the guarded centre (except possibly a copy of the decision on their release from

detention). Cases of re-detention in such a context were not reported but it should be underlined that a decision of release linked to a general conclusion on the non-removability of a foreigner should be always followed by granting, at least, tolerated stay, thus protecting the person in question from a state of legal limbo.

It should be noted however, that in April 2015, Polish authorities stressed the need to implement a national programme dedicated to foreigners in return proceedings staying outside guarded centres, providing them with assistance to cover their essential needs in terms of housing, food, guaranteed access to basic education and medical care. This initiative seems to be a step towards a better application of alternatives to detention but its implementation is dependent upon receiving adequate EU funding.

According to article 406 of the Act on Foreigners, Border Guards shall issue a decision to release a foreigner from a guarded centre when the reasons justifying the use of detention cease to exist; if the detention could pose threat to the life or health of a foreigner; when a foreigner's physical and psychological condition could justify a presumption that he/she has experienced violence; when it is ascertained that, for legal or factual reasons, the execution of a decision of return is not possible (at all).

The ruling of a Polish Border Guard to dismiss a request to release a foreigner from detention may be appealed against within seven days of receipt of the ruling. The complaint shall be filed at a district court. However, the complaint may be filed only if the request was submitted after at least one month from the date of issue of the ruling concerning the placement of foreigner in a guarded centre, the extension of their detention or their release. The court shall examine the complaint within seven days.

Additionally, asylum seekers may be released from a guarded centre through a decision of the Head of the Office for Foreigners. The Head of the Office for Foreigners may issue such a decision *ex officio* or upon request of a foreigner, if the evidence indicates that the foreigner should be recognised as a refugee or be granted supplementary protection.

Monitoring and testimonies of foreigners' experiences of detention in Poland show that provisions determining the maximum period of detention are respected by Courts and Border Guards.⁵⁶ However, if a foreigner is released before the end of the maximum detention period, the authorities assume that if circumstances justifying re-detention reappear (incl. the possibility of issuing a return decision), he/she might, again, be placed in the guarded centre. Thus, the only applicable safeguard protecting foreigners against re-detention are provisions relating to the maximum period of detention. Analysis of compliance

with the norms setting a maximum timeframe of detention shows that they are strictly respected, yet there is no explicit provision referring to the prohibition of re-detention. A good practice accepted by the Border Guard is, however, to count the consecutive periods of detention in one case, jointly. It would be desirable to reflect this good practice in the national legislation.

Some people interviewed expressed grave concerns over the possibility of being re-detained in a guarded centre for foreigners, bearing in mind that maximum period of detention in Poland is now 18 months. These concerns were even more substantial when expressed by people who resided in Poland for many years and had established a family life there and whose undocumented status was beyond their control and independent of their actions.

4. CONCLUSION AND RECOMMENDATIONS



In Poland, there is no protection or provision of status to stateless persons solely on the basis of being stateless, leaving a significant gap for some of the most vulnerable persons in need of a durable solution. The lack of a proper statelessness determination procedure often leads to the situation in which these individuals are left in a grey zone. Moreover, according to Polish law, foreigners can be detained solely for the purpose of confirming their identity, but once a stateless person is placed in detention the focus turns to removal, which in itself is problematic, as it does not resolve the protection needs of the stateless person.

Furthermore, because removal in case of stateless persons is often impossible, what should be short-term detention in preparation of removal often becomes long-term detention, as Polish officials try to convince another country to accept a non-national. The issue of lengthy detention, particularly for administrative reasons is a key

concern, which could be avoided if alternative protection mechanisms for this group were to be put in place. Nevertheless, Poland has not yet acceded to the 1954 Convention Relating to the Status of Stateless Persons, nor introduced a statelessness determination procedure.

There are also no standards developed in Poland that would provide early intervention and individual risk assessment as part of a decision to detain, on a case by case basis. This lack of a proper case assessment mechanism may also have an impact on stateless individuals particularly because the authority to detain in order to establish an identity is formulated in general terms. Other shortcomings in the Polish law and policy framework, which make stateless persons particularly vulnerable, include the possibility of detaining foreigners under return procedures for up to 18 months and the lack of an assessment of vulnerability procedure that could

lead to additional support for vulnerable groups including stateless persons.

Having in mind the above mentioned concerns and the other findings of this research, the following recommendations are made:

1. State authorities should collect accurate data regarding stateless persons, including those in detention. Data on statelessness is necessary to ascertain the extent of the problem and to design effective solutions. Accurate information is necessary in order to understand who the affected persons are, and how they are being treated.
2. Poland should accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, which provide part of the legal framework for the protection of the rights of stateless persons, as well as reducing and preventing statelessness. Poland should also fulfil its obligations to the stateless under international human rights law, including obligations to not discriminate against and to not arbitrarily detain the stateless.
3. State authorities should undertake a comprehensive review of legislation affecting the rights of stateless persons, to amend or replace legislation which does not comply with the 1954 and 1961 Conventions or general principles of international law, and to adopt new legislation as required to fulfill those aspects not covered by existing measures. Authorities should also give adequate attention to the need to ensure appropriate consultation with and involvement of civil society during the review process.
4. Poland should expedite the introduction of a dedicated statelessness determination procedure – accessible to all persons in the territory of the country and in accordance with guidance contained in UNHCR’s Handbook on Protection of Stateless Persons. Determination of statelessness in a dedicated procedure should unequivocally rule out the detention of applicants during the consideration of their claims. The procedure should provide a possibility of regularisation of legal residence status of such persons and issuance of identity and travel documents. Accordingly, the law should set clear rules governing the statelessness determination procedure providing inter alia, that everyone who wishes to determine their statelessness status can do so quickly and effectively.
5. The circumstances facing stateless persons should be considered as a significant factors during the process of determining the lawfulness of immigration detention. The initial decision to detain should always be based on the individual circumstances and personal history of the person in question. Decisions should contain clear reasons why other non-custodial measures would be inadequate for the purpose and, in the light of existing alternative measures, there should be clear proportionality between the detention and the end to be achieved. In particular, when detention proceedings are carried out, state authorities should identify whether or not a person is stateless or at risk of statelessness having in mind that the lack of appropriate documentation or presenting expired documentation should not per se justify the decision to detain and should not be equalled to a risk of absconding.
6. Throughout detention – state authorities must be diligent enough to identify whether people who they initially assessed as not being at risk of statelessness are now at risk – and act accordingly. The Border Guard motions to court, asking for a prolongation of detention of a stateless person should always contain a detailed justification explaining what measures aimed at determining the nationality of the person in question were already taken, what the reaction of the diplomatic mission of the country contacted was and what the prospect of a successful return of this person to the country of origin/former habitual residence is.
7. It should be unlawful to detain persons before a decision to remove them has been taken.
8. It should be ensured that detention is always used as a last resort, after all alternatives (starting with the least restrictive) are exhausted. Less restrictive measures must be shown to be inadequate before detention is applied. Detention should not be applied en masse and state authorities should always bear in mind that detaining stateless persons under a general deterrence justification violates their rights and violates constitutional and international human rights obligations. Therefore, Polish legislators should introduce a general principle of applying alternatives to detention in the first place and considering detention only as a measure of last resort. The choice of alternative to detention should be influenced by the individual assessment of the circumstances of stateless persons.
9. There is a need to recognise that even where the rules of treatment apply in an equal way to stateless persons and third country nationals, the impact of administrative detention on stateless persons (such as the risk of long-term detention) may be more harmful due to their particular vulnerabilities. If identified as being at risk of statelessness, and if alternatives are deemed not suitable, detention of foreigners and prospects of removal should be closely monitored, and release ordered the moment it becomes clear they cannot be removed within a reasonable period of time.
10. Foreigners should be able to effectively enjoy a right to participate in court hearings when they file an objection against a detention order and courts should ex officio appoint a lawyer for the foreigner if he or she does not speak Polish and is unable to

arrange his or her representation by an authorised representative.

11. Stateless children – whether separated or travelling with their parents or guardians should not be detained. The parents or guardians of children should not be separated from children and detained.
12. The age assessment process of stateless children should be carried out as quickly as possible and persons claiming to be minors should not be placed in detention for prolonged periods of time while awaiting the result of such assessments.
13. Special measures for undertaking an early identification of vulnerable stateless persons, including unaccompanied stateless minors, should be formulated and implemented as soon as possible. The task of such identification should be assigned to Border Guards at entry points, detention facilities staff members, medical and psychological staff, refugee centres' social workers and Office for Foreigners officials. Vulnerable persons should be provided with adequate forms of assistance and treatment. Stateless children should be provided a speedy, simplified procedure of regularisation and ultimately naturalisation.
14. Polish legislators should include the provision for accommodation in open centres for foreigners, as an alternative to detention, is available not only to asylum seekers but also to other migrants such as persons in the return procedure or stateless persons.
15. Efforts at re-documentation should be subject to limitations, both in terms of time and the number of embassy presentations. After repeated rejections or prolonged non-response, statelessness should be assumed – and all corresponding rights offered. People must not end up as victims of a state's reluctance to facilitate return.
16. Polish legislators should bring the law in line with the maximum time limit allowed in the Return Directive. The possibility of detaining an individual for a total of 24 months under the asylum and return procedures should be eradicated.
17. Stateless persons should be entitled to the same social, medical, psychological and financial assistance, irrespective of whether they reside in the open centre for foreigners or a place of their choice. A proper procedure for providing such assistance should be established.
18. All released detainees (who could not be removed within a reasonable period of time), should be granted legal status with corresponding rights related to work, access to welfare etc. Documentation which protects them from re-arrest and detention should be provided in all cases.

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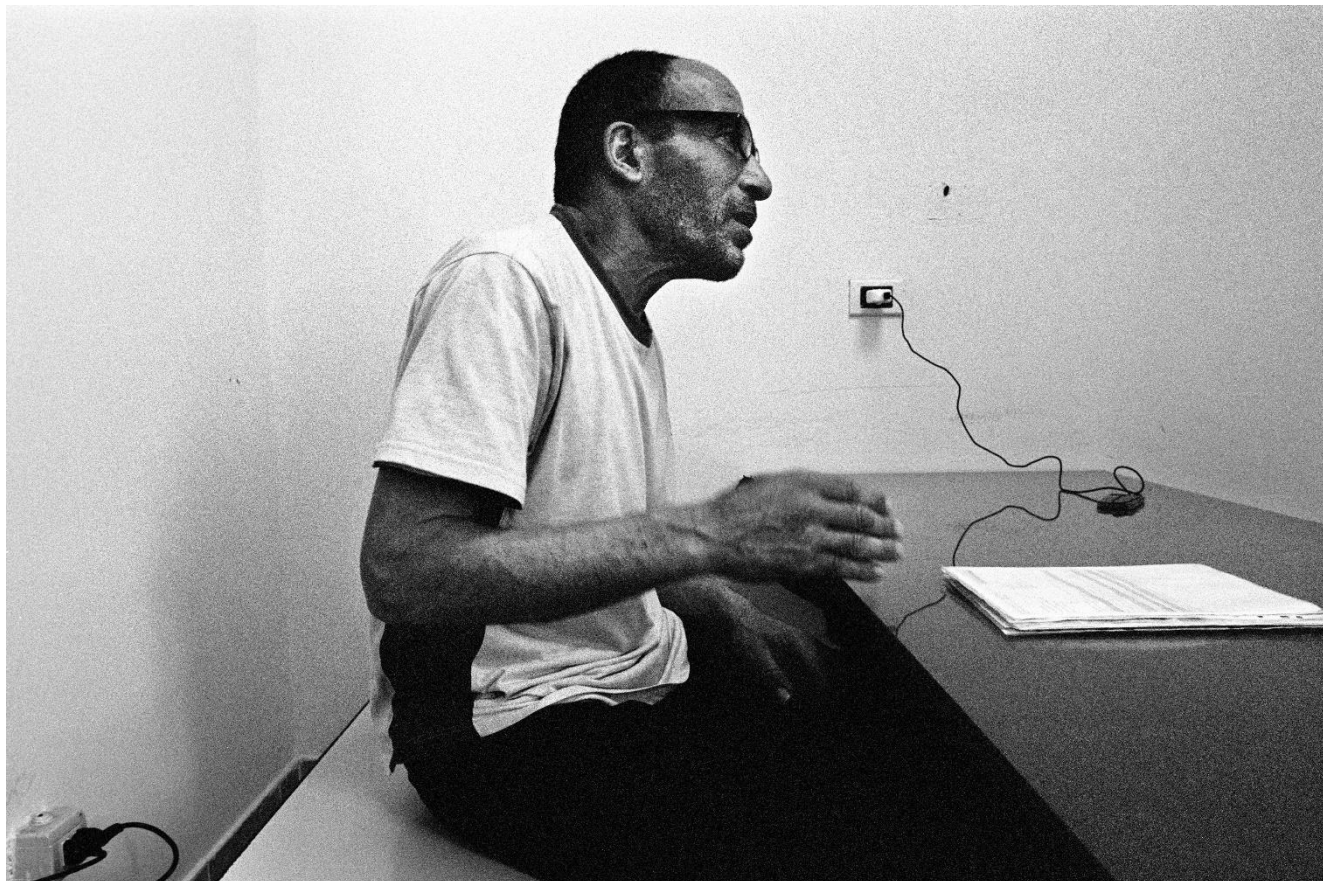
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ENDNOTES



- ¹ *Kim v. Russia* [2014] Application no. 44260/13 (ECtHR) para. 54
- ² European Network on Statelessness, *Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners* (2015)
- ³ Further information is available on the European Network on Statelessness website at www.statelessness.eu
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- ⁸ Under the Foreigners Act of 12 December 2013, Journal of Laws, Item 1650;
- ⁹ Practice shows that this procedure is not always initiated ex officio, which points to how important it is for detainees to have unrestricted access to free legal aid;
- ¹⁰ Poland ratified this Convention on June 15th, 1934 (entry into force 1 July 1937). The preamble reads: 'Being convinced that it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only; recognizing accordingly that the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases of statelessness and double nationality';
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- 52 For further details see: *Protecting Stateless Persons from Arbitrary Detention in Europe. A regional toolkit (...)*, 2015, op cit., p. 34;
- 53 The amendment entered into force in November 2015.
- 54 UN High Commissioner for Refugees (UNHCR). *Handbook on Protection of Stateless Persons*, 2014, para. 113;
- 55 ECtHR judgment of 10.01.2012 in the case Popov v France, applications. no 39472/07 and 39474/07;
- 56 It should be duly noted however that at the time of drafting this report, only 14 months have passed since the new regulations concerning administrative detention took force. It is therefore too early to make a more general assessment of the practice concerning the maximum length of detention applied;

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The logo for the Oak Foundation, featuring a stylized globe icon to the left of the text "OAK FOUNDATION".

The logo for the Institute on Statelessness and Inclusion, featuring a stylized "isi" acronym to the left of the text "Institute on Statelessness and Inclusion".



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Our Network has developed rapidly since we launched in 2012, attracting 103 members in over 39 European countries (see shaded area of map). Our London-based Secretariat coordinates ENS's law & policy, awareness-raising and capacity-building activities. For information about Network activities or membership enquiries contact ENS Director Chris Nash (chris.nash@statelessness.eu).



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