European rules for the administrative detention of migrants

Written submission to the European Committee on Legal Co-Operation of the Council of Europe

1. About the European Network on Statelessness

The European Network on Statelessness (ENS) is a civil society alliance with over 100 organisational and individual members in 40 countries, working to end statelessness and ensure that stateless people in Europe are protected and access their human rights.

2. Introduction: protecting stateless persons from arbitrary detention

Since 2014, ENS has worked to evidence the extent and impact of administrative detention on stateless people around Europe, publishing a series of country research reports, a toolkit for practitioners setting out the international and regional legal frameworks pertaining to the administrative detention of stateless people, and the testimonies of stateless people in detention.[1] Additionally, at a major regional conference in Budapest in May this year, ENS published an *Agenda for Change*[2] aimed at law and policymakers in Europe, setting out steps towards securing the protection of stateless people from arbitrary detention, alongside a campaign calling for urgent action - #LockedInLimbo.[3]

As the European Court of Human Rights held in *Kim v Russia*, a stateless person is highly vulnerable to being "*simply left to languish for months and years…without any authority taking an active interest in [their] fate and well-being*".[4] The unique barriers to removal faced by stateless persons and those at risk of statelessness, put them at particular risk of unlawful or arbitrary detention in the context of removal procedures. ENS' research from six European countries shines a light on systems and practices in which men, women, and children without a nationality are trapped, subjected to long term detention despite there being no reasonable prospect of return. Few are able to break this cycle and are therefore left in a legal limbo.

To fulfil their international obligations towards stateless people and those at risk of statelessness, states must take proactive steps to protect them from unlawful and arbitrary detention, and guarantee their fundamental rights and freedoms. Above all, it is imperative that effective procedures to identify and recognise statelessness, assess and respond to situations of vulnerability, implement community based alternatives to detention, and grant stateless people and those who cannot be removed a legal status and basic rights, are put in place.

3. General comments on the draft

ENS warmly welcomes the opportunity to submit our views on the draft European rules on the administrative detention of migrants. ENS fully endorses the Joint Written Submission to the Committee made by the International Detention Coalition and the International Commission of Jurists, and will not repeat the important points made in that submission, but instead focus on how and where we believe the European Rules for the Administrative Detention of Migrants should explicitly reference international standards on the protection of stateless persons from arbitrary detention.

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[1] http://www.statelessness.eu/protecting-stateless-persons-from-detention

[2] http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS_LockeInLimbo_Detention_Agenda_online.pdf

[3] www.lockedinlimbo.eu

[4] Kim v Russia [2014] Application no 44260/13 (ECtHR)

ENS welcomes the increasing attention by the Council of Europe on both statelessness and the administrative detention of migrants. However, stateless people will only be protected from arbitrary detention if the nexus between and convergence of these two legal fields is recognised and acted upon. As such, it is essential that the rights of stateless persons are explicitly articulated and codified within the European Rules for the Conditions of Administrative Detention of Migrants. In this submission, we indicate where the Rules could be strengthened through references to the standards relating to the protection of stateless persons.

4. Definitions

We agree with IDC and ICJ, that including a definition of 'migrant', a term that is not defined in international law, is problematic in the context of an exercise that is intended to codify existing legal standards. We also agree that the scope of applicability of these Rules should apply to all persons held in administrative immigration detention, whomsoever may be detained and wherever the deprivation of liberty may occur. This is a particularly pertinent point in the case of stateless persons, many of whom reside in the state in which they were born, and have not crossed an international border.

It would, however, be helpful to reference the international legal definitions for groups of persons affected by administrative immigration detention, where these do exist. Stateless persons are entirely absent from the current draft, and including a reference to the 1954 UN Convention on the Status of Stateless Persons would serve to draw attention to the nexus described above between the international legal frameworks pertaining to the protection of stateless persons and administrative immigration detention. According to Article 1(1) of the 1954 Convention, a stateless person is defined as '*a person who is not considered as a national by any State under the operation of its law*'.

5. Detention Procedures: statelessness as a juridically relevant fact

We agree with IDC and ICJ that the section on Detention Procedures should precede that on Legal Remedies and Conditions of Detention. In addition to the comments made by IDC and ICJ on the structure and content of this section, we would highlight in particular, the identification of statelessness as a key procedural safeguard that should be integral to the decision to detain. Persons subject to administrative immigration detention should also be informed of and have access to routes to recognition and protection as a stateless person, including statelessness determination procedures where these are available. This should be clearly articulated in the section of the rules covering 'Detention Procedures'.

Statelessness is a juridically relevant fact to immigration detention, as the very nature of statelessness makes stateless persons extremely difficult to remove, and detaining persons when there is no reasonable prospect of removal is most likely to render the detention arbitrary.[5] The UNHCR Handbook on Protection of Stateless Persons recognises that the 1954 Convention Relating to the Status of Stateless Persons does not "*prescribe any mechanism to identify stateless persons as such*."[6] However, the Handbook makes it clear that it is implicit in the Convention that states have a duty to identify stateless persons in their territories to "*provide them appropriate treatment in order to comply with their Convention*

[5] *Kim v Russia* [2014] Application no 44260/13 (ECtHR)

[6] UN High Commissioner for Refugees (UNHCR), Handbook on Protection of Stateless Persons (2014), para.8

commitments."[7] Thus, all state parties to the Convention, should have such a procedure in place.

The Handbook also clarifies that statelessness is a juridically relevant fact in relation to the protection against arbitrary detention – under Article 9(1) ICCPR – and various other fundamental rights. The Handbook emphasises that "*the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention*"[8] of stateless persons, and therefore, statelessness determination procedures are an essential mechanism to reduce the risk of prolonged and/or arbitrary detention. The failure to identify statelessness can therefore be regarded as a procedural and substantive gap, particularly when it results in stateless persons or those at risk of statelessness being arbitrarily detained.[9]

The ECtHR has also addressed the issue of identification of statelessness in the context of immigration detention. In Auaud v Bulgaria, the Court found that the failure to act with due diligence and recognise a link between the detained applicant's statelessness and impossibility of removal, resulted in a violation of Article 5.[10] Similarly, in Okonkwo v Austria, it was alleged that the Austrian authorities were aware of Mr. Okonkwo's statelessness. Therefore, his detention "*could not possibly have served the purpose of securing his deportation*."[11]

These important standards are entirely absent from the current draft rules, and should be incorporated into the section on Detention Procedures, with reference to the relevant ECtHR jurisprudence and international standards.

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[7] Ibid, para.8
[8] Ibid, para.115
[9] ENS, Protecting Stateless Persons from Arbitrary Detention: a toolkit for practitioners (2015) http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Detention_Toolkit.pdf
[10] Auad v Bulgaria [2011] Application no 46390/10 (ECtHR)
[11] Okonkwo v Austria [2001] Application no 35117/97 (ECtHR), p 3