

Codification of European Rules for the Conditions of Administrative Detention of Migrants

22 June 2017

The European Network on Statelessness (ENS) warmly welcomes the opportunity to comment on the draft codifying instrument of European rules on the administrative detention of migrants. 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.

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 vulnerabilities, 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.

The five key areas for reform that ENS is calling for and working constructively towards with governments, UN bodies and other stakeholders, are grounded in international and regional human rights standards, and detailed in our *Agenda for Change*:

1. **Implementing a range of alternatives to detention** in line with international standards and good practice, improving guidance to ensure that statelessness is considered as a relevant factor in all decisions to detain, and that decisions adhere to international standards on the prohibition of arbitrary detention.

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)



2. **Developing Statelessness Determination Procedures** that meet international standards and good practice, are fully accessible to all those subject to their jurisdiction (including in detention), and which enable states to identify and grant protection to those recognised as stateless.
3. **Putting in place robust mechanisms to protect individuals' rights, respond to vulnerabilities, and exercise the duty to not discriminate**, including through prohibiting the detention of children and combatting gender and disability related discrimination.
4. **Facilitating integration in the community** through providing protection from re-detention, access to basic rights and freedoms for those awaiting determination of their status, and regularisation and a facilitated route to naturalisation for those recognised as stateless.
5. **Improving recording and reporting on statelessness**, building accountability into the operation of immigration detention systems, publishing disaggregated statistics, and facilitating access for independent monitoring bodies, lawyers and community members.

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. ENS' written comments on the draft text of the codifying instrument indicate where it could be strengthened through references to the standards relating to the protection of stateless persons. In summary, this includes:

- Insertion of a definition of statelessness into the General Principles (Part A);
- Insertion of a subsection on Identification of Statelessness during decisions to detain and detention reviews in Part B, including the need for states to diligently and proactively make necessary enquiries to establish an individual's entitlement to nationality.
- Strengthening of Part D through inclusion of a dedicated subsection on Decisions to Detain, to include reference to statelessness as a juridically relevant fact;
- Insertion of a reference to Statelessness Determination Procedures in Part D.7
- Strengthening of the text throughout on the need to carry out vulnerability assessments *prior to* as well as on an *ongoing basis during* detention, linked to greater emphasis on consideration of alternatives to detention and whether detention is proportionate and necessary in each individual case;
- Inclusion of references to relevant jurisprudence of the ECtHR e.g. *Kim v Russia & Harabi v Netherlands*, and other resources outlined in the ENS Regional Detention Toolkit⁵

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⁵ http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Detention_Toolkit.pdf