Migrants Resource Centre, University of Liverpool Law Clinic, European Network on Statelessness, and Institute on Statelessness and Inclusion

Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review

United Kingdom

Introduction

1. Migrants Resource Centre, the European Network on Statelessness, the Institute on Statelessness and Inclusion, and the University of Liverpool Law Clinic make this submission to the Universal Periodic Review (UPR) in relation to statelessness, access to nationality and the right to liberty and respect for human rights of stateless persons in the United Kingdom. This joint submission draws on the combined expertise of the submitting organisations in the UK and internationally.

2. Migrants Resource Centre (MRC) is a non-profit organisation founded in 1984 which hosts Asylum Aid and the Project for the Registration of Children as British Citizens (PRCBC). Asylum Aid provides free legal representation to asylum seekers and stateless persons; undertakes related policy work, advocacy and education; and played a key role in researching statelessness[1] and pressuring the UK Government to introduce a statelessness determination procedure. PRCBC provides legal advice and assistance and conducts research and education relating to the registration of children as British citizens.

3. The Liverpool Law Clinic is part of the School of Law and Social Justice, University of Liverpool. It is staffed by practising lawyers who, since 2013, advise and represent people in the UK's statelessness determination procedure. It has collaborated with UNHCR[2] and met with Home Office officials to press for changes to practice and policy. The Clinic and the Immigration Law Practitioners' Association are publishing a Best Practice Guide relating to statelessness applications in the UK.[3]

4. The European Network on Statelessness (ENS) is a civil society alliance of NGOs, lawyers, academics and other independent experts committed to addressing statelessness in Europe. Based in London, it currently has over 100 members (including 55 organisations) in 39 European countries. ENS organises its work around three pillars – law and policy, communications and capacity-building. The Network provides expert advice and support to a range of stakeholders, including governments.

5. The Institute on Statelessness and Inclusion (the Institute) is an independent non-profit organisation dedicated to promoting an integrated, human rights based response to the injustice of statelessness and exclusion. Established in August 2014, it is the only global centre committed to promoting the human rights of stateless persons and ending statelessness. Its

[1] *Mapping Statelessness in the United Kingdom* (Asylum Aid and UNHCR, 22 November 2011) http://www.asylumaid.org.uk/mapping-statelessness-in-the-uk/ ('*Mapping Statelessness*').
[2] The Office of the United Nations High Commissioner for Refugees.
[3] (forthcoming, November 2016).

work combines research, education, and advocacy. It provides expertise and support to civil society, academia, the UN and governments.

Universal Periodic Review of the United Kingdom (First and Second Cycles)

6. The UK was subject to the UPR in 2008 (first cycle) and 2012 (second cycle). OHCHR's[4] summary on the UK's 2012 Review noted that the Equal Rights Trust had reported the lack of a statelessness determination procedure in the UK.[5] Subsequently, the Working Group noted that Germany had asked what the UK had done to address the recommendation to introduce a procedure for determining statelessness.[6] In 2012, States made numerous recommendations to the UK on migrants' rights, particularly on indefinite immigration detention, some of which are relevant to the rights of stateless persons. Some of these were accepted in full or in part by the UK; others were rejected.[7]

The United Kingdom's International Legal Obligations

7. **International obligations relating to nationality and statelessness:** Article 15 of the Universal Declaration of Human Rights (UDHR) enshrines the right of every individual to a nationality – a fundamental right which affects the ability to enjoy numerous other human rights. This right is entrenched in various international treaties, including the International Covenant on Civil and Political Rights (ICCPR) (Article 24), Convention on the Elimination of All Forms of Discrimination against Women (Article 9) and the Convention on the Rights of the Child (CRC) (Article 7). The 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) and the 1961 Convention on the Reduction of Statelessness (1961 Convention) obligate States Parties (including the UK) to take certain measures to protect persons who are stateless or at risk of statelessness. Although UK law gives effect to many provisions of the 1961 Convention and some provisions of the 1954 Convention, the UK has only formally incorporated Article 1(1) of the 1954 Convention and has not formally incorporated the 1961 Convention or the CRC.

8. **Other international obligations including on liberty and unlawful detention**: The ICCPR (Article 9), European Convention on Human Rights (ECHR) (Article 5) and Charter of Fundamental Rights of the European Union (Article 6) enshrine the right to liberty and security of the person and freedom from arbitrary detention. In addition, Article 26 of the 1954 Convention obligates States to permit stateless persons 'lawfully in'[8] their territory to choose

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[4] The Office of the High Commissioner for Human Rights.

[5] Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 United Kingdom of Great Britain and Northern Ireland (Human Rights Council Working Group on the Universal Periodic Review Thirteenth session Geneva, 21 May - 4 June 2012) A/HRC/WG.6/13/GBR/3, 9 March 2012, para 139.

[6] Report of the Working Group on the Universal Periodic Review, A/HRC/21/9, 6 July 2012, para 81.

[7] See United Nations Universal Periodic Review Mid Term Report of the United Kingdom of Great Britain and Northern Ireland, and the British Overseas Territories, and Crown Dependencies (2014), https://www.justice.gov.uk/downloads/human-rights/uk-upr-mid-term-report-2014.pdf ('2014 Mid-Term Report').

[8] UNHCR observes that the drafting history of the 1954 Convention affirms that persons who have applied to remain in a country based on their statelessness are 'lawfully in' that country, and clarifies the meaning of other terms such as 'lawfully staying' and 'habitually resident'. *Handbook on Protection of Stateless Persons*,

their place of residence and move freely within the country. International law requires that where immigration detention is necessary for a permissible purpose, it must as brief as possible and cannot be indefinite.[9] 'Routine detention of individuals seeking protection on the grounds of statelessness is arbitrary'.[10] Stateless persons also benefit from the general application of international human rights standards found in the core human rights treaties, such as equality before the law, non-discrimination, adequate standard of living, etc.[11]

Domestic Law and Significant Domestic Developments since the Previous UPR Cycle

9. **Domestic law on statelessness:** In April 2013, the United Kingdom introduced a procedure through which persons may be recognised as stateless and in some cases granted leave to remain in the UK.[12] The procedure is established in the Immigration Rules,[13] and the Government's interpretation of the Rules is in its published guidance.[14] The Immigration Rules provide some stateless persons a lawful temporary status and route to permanent residence.[15] Applicants who meet the requirements of the Rules will normally be granted 2.5 years leave to remain, which can be renewed. After 5 years' lawful residence, they can apply for permanent residence and may later be eligible for British nationality.

10. **Domestic law on nationality**: The British Nationality Act 1981 (BNA) governs acquisition and deprivation of British nationality.[16] Prior to the commencement of the BNA, any child born in

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(UNHCR, 30 June 2014) http://www.refworld.org/docid/53b676aa4.html ('UNHCR Statelessness Handbook'), paras 132-139.

[9] See *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (UNHCR, 2012) http://www.refworld.org/docid/503489533b8.html, paras. 15-21, 34; see also, e.g., *JN v United Kingdom* (May 2016) Application no 37289/12 (ECtHR) (concluding that the absence of a fixed time limit in the UK does not breach the right to liberty under ECHR Article 5; however, the applicant, an Iranian national, was detained for approximately 4 and a half years, and the Court found that the authorities had not acted with due diligence to enforce his removal, which resulted in a violation of Article 5 with respect to part of his detention).

[10] UNHCR Statelessness Handbook (note 8) para 112; see also *Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners* (European Network on Statelessness, 2015) http://www.statelessness.eu/protecting-stateless-persons-from-detention, 2.2.

[11] There are some restrictions. For example, stateless persons have no right to vote or be elected to political office under international human rights law.

[12] For ease of reference, we refer in this submission to Part 14 of the Immigration Rules as a 'statelessness determination procedure'. More technically, however, Part 14 is more accurately described as a procedure for applying for leave to remain in the UK based on statelessness. The importance of this distinction is evident in our discussion of the UK's definition of statelessness and departures from international law relating to statelessness.

[13] (HC 395, 23 May 1994, as amended), at Part 14: Stateless Persons (effective 6 April 2013) https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-14-stateless-persons, paras 401-416.

[14] The initial guidance was published in 2013: *Applications for leave to remain as a stateless person* (1 May 2013), http://webarchive.nationalarchives.gov.uk/20140104224755/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/stateless-guide/stateless-guide.pdf?view=Binary ('2013 guidance') and revised in 2016: *Asylum Policy Instruction, Statelessness and applications for leave to remain*, Version 2.0 (18 Feb 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501509/Statelessness_AI_v2.0__EXT_.pdf ('2016 guidance').

[15] Known in the UK as 'indefinite leave to remain'.

[16] British Nationality Act 1981, 1981 Chapter 61, 30 October 1981, http://www.legislation.gov.uk/ukpga/1981/61/contents. Although this submission does not examine

the UK was British by birth.[17] The BNA provides that children born in the UK acquire citizenship at birth if either parent has British citizenship, is settled in the UK, or is a member of the British Armed Forces. Sections 1(3) and 1(4) of the Act entitle children born in the UK to register as British if, during their childhood, either parent becomes a British citizen or settled; or if they reside in the UK for the first ten years of their lives.[18] These provisions seek to preserve the entitlement of persons who, prior to the Act, would have been British at and by birth, through an opportunity to register where it is subsequently demonstrated that they have a sufficient connection to the UK.[19] The BNA further permits children born in the UK who are stateless from birth to register as British citizens, after a minimum of 5 years' residence in the UK and before they reach age 22.[20] The BNA also contains provisions for the registration of certain groups, such as children of British overseas citizens, British overseas territories citizens, and British subjects who would otherwise be stateless at birth.[21]

11. Naturalisation as British citizens for adult migrants normally requires 5 years' continuous, lawful residency in the UK and indefinite leave to remain for the 12 months preceding the date of application, as well as good character, English language proficiency, and a certificate of knowledge of life in the UK. Naturalisation is discretionary.[22]

12. **Domestic law on immigration detention:** Domestic law permits the administrative detention of persons subject to immigration control, including stateless persons, in certain

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deprivation of citizenship resulting in statelessness, we note that Section 40(4A) of the BNA as amended in 2014 permits the Government to deprive of citizenship a naturalised citizen who 'has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom' and who 'the Secretary of State has reasonable grounds for believing … is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory'. This provision is of significant concern. Potential future access to nationality does not feature in the definition of statelessness, and there is no guarantee that once deprived British citizenship, such persons will secure another nationality. See also Immigration Act 2014, Section 66, http://www.legislation.gov.uk/ukpga/2014/22/section/66/enacted); *Secretary of State for the Home Department v Al-Jedda*, UKSC (9 October 2013) (note that this decision interprets a previous version of the BNA, which was amended in response to the *Al-Jedda* decision); Amal de Chickera, 'Theresa May but the UK shall not' (European Network on Statelessness Blog, 19 November 2013) http://www.statelessness.eu/blog/theresa-may-uk-shall-not.

[17] Ministerial statements during the passage of the BNA confirm the intention that changes to this *jus soli* rule were to continue offering British citizenship only to persons with sufficiently close personal connections to the UK. See Hansard, British Nationality Bill, HC Deb 02 June 1981 vol 5 cc868-79, http://hansard.millbanksystems.com/commons/1981/jun/02/british-nationality-bill-1.

[18] Without absences greater than 90 days in any relevant year and subject to a good character requirement.

[19] Even in cases where at the time of birth, the required connection did not exist or was insufficiently clear because neither parent was British or settled. The BNA also includes provision for certain children not born in the UK to apply to be registered as British; for example, Section 3(1) applies to any child in the UK, who may be registered at the discretion of the Secretary of State.

[20] Para 3, Schedule 2, BNA 1981 states:

> *(1) A person born in the United Kingdom or a British overseas territory after commencement shall be entitled, on an application for his registration under this paragraph, to be so registered if the following requirements are satisfied in his case, namely—*
> *(a) that he is and always has been stateless; and*
> *(b) that on the date of the application he […]2 was under the age of twenty-two; and*
> *(c) that he was in the United Kingdom or a British overseas territory (no matter which) at the beginning of the period of five years ending with that date and that (subject to paragraph 6) the number of days on which he was absent from both the United Kingdom and the British overseas territories in that period does not exceed 450.*

[21] See *Mapping Statelessness* (note 1) Section. 6.4.1.

[22] Section 6 BNA 1981. For persons married to British citizens, the required period of residency in the UK is reduced by 2 years.

circumstances and subject to some limitations. Government policy is that detention is usually appropriate: (1) to effect removal from the UK; (2) at an initial stage to establish a person's identity or reasons for being in the UK; or (3) when there is reason to believe that the person will not comply with the conditions of temporary admission or release.[23] There is, in written guidance, a presumption in favour of temporary admission or release and the use of alternatives to detention whenever possible.[24] UK law does not establish a time limit for detention, but UK policy requires that the Government undertakes an internal review, every 28 days and whenever there is a relevant change in circumstances, of the ongoing need for immigration detention.[25] UK law also allows applications for bail and requires an automatic bail hearing every 4 months.[26] However, the 4-month provision does not apply to cases in which deportation rather than administrative removal is ordered, which often entail the longest detention periods.[27] Detained persons also have the right to challenge the lawfulness of their detention through *habeas corpus* or judicial review proceedings.

Issues of Concern

13. Whilst we commend the UK for becoming one of the few States to establish an autonomous procedure for granting stateless persons leave to remain, important shortcomings persist in the UK's approach to statelessness. This submission focuses on areas of the UK's law, policy, and practice which undermine the protection of stateless persons and access to nationality, in particular relating to:

    I. Departures from the 1954 Convention in the UK's approach to statelessness

    II. Procedural safeguards during the statelessness determination procedure

    III. Indefinite and arbitrary detention of stateless persons

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[23] Home Office, 'Enforcement Instructions and Guidance' (EIG) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/552478/EIG_55_detention_and_temporary_release_v21.pdf, 55.1.1.

[24] *Ibid*. Immigration Act, 2016 (2016 Chapter 19), http://www.legislation.gov.uk/ukpga/2016/19/contents/enacted, Section 61 (1)-(2) and Schedule 10 (not in force at time of writing), changes 'temporary admission' to 'immigration bail'.

[25] Detention Centre Rules 2001, SI 2001/238, r 9(1) http://www.legislation.gov.uk/uksi/2001/238/article/9/made; EIG (note 23) 55.8.

[26] Immigration Act 2016 (note 24) Section 61 (1)-(2) and Schedule 10 (not in force at time of writing). See also 'Bail for Immigration Detainee's submission to the APPG on Refugees and APPG on Migration's parliamentary inquiry into the use of immigration detention in the UK' (Bail for Immigration Detainees, September 2014) http://www.biduk.org/sites/default/files/media/docs/BID%20submission%20to%20detention%20inquiry_%20immigration%20bail%20Sept%202014.pdf. Judicial guidance states that although each case much be assessed on its facts, 'it is generally accepted that detention for three months would be considered a substantial period of time and six months a long period. Imperative considerations of public safety may be necessary to justify detention in excess of six months'. *Bail Guidance for Judges Presiding over Immigration and Asylum Hearings* (Tribunals Judiciary, Presidential Guidance Note No 1, 2012), https://www.judiciary.gov.uk/wp-content/uploads/2014/07/bail-guidance-immigration-judges.pdf, para 19.

[27] Deportation is ordered when the Government considers that presence is in the UK is not 'conducive to the public good' – usually where there is a criminal history. For further information about removals, deportation, and voluntary departure, see 'Deportations, Removals and Voluntary Departures from the UK' (The Migration Observatory at the University of Oxford, 19 Aug 2016) http://www.migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/.

IV. Socio-economic rights for persons granted leave to remain based on statelessness

V. Preventing statelessness through acquisition of British nationality

Departures from 1954 Convention: general approach, definition and exclusion provisions

14. UNHCR appropriately describes the 1954 Convention as establishing 'a framework for the international protection of stateless persons'.[28] UNHCR observes in its Handbook on statelessness that 'although the 1954 Convention does not explicitly address statelessness determination procedures, there is an implicit responsibility for States to identify stateless persons in order to accord them appropriate standards of treatment under the Convention'.[29] The obligation to identify statelessness stems not only from the 1954 Convention, but is inherently linked to other international human rights and becomes juridically relevant when particular rights, including liberty and security of the person, are engaged.[30] The UK, however, does not consider statelessness to be a 'protection' issue.[31] As elucidated below, this flawed approach results in discriminatory treatment of stateless persons as compared to applicants for asylum and complementary protection,[32] particularly with respect to absence of appeal rights and free legal assistance, access to certain socio-economic rights, and difference in status granted to stateless persons (2.5 years rather than 5 years).

15. The UK's definition of statelessness departs from the 1954 Convention definition in Article 1(1) (also considered customary international law). Article 1(1)'s definition is not limited by Article 1(2) of the Convention, which excludes some stateless persons from the Convention's application. The UK Immigration Rules, though, define persons who fall within an exclusion provision as falling beyond the scope of the *definition* of stateless persons:

> *401. For the purposes of this Part a stateless person is a person who:*
> *(a) satisfies the requirements of Article 1(1) of the 1954 United Nations Convention relating to the Status of Stateless Persons, as a person who is not considered as a national by any State under the operation of its law;*
> *(b) is in the United Kingdom; **and** (emphasis added)*
> *(c) is not excluded from recognition as a Stateless person under paragraph 402.*[33]

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[28] 'Introductory note by the Office of the United Nations High Commissioner for Refugees' (UNHCR, Geneva, May 2014), http://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-status-stateless-persons.html, 3.

[29] UNHCR Statelessness Handbook (note 8) para 144.

[30] See *ibid*, para 122.

[31] This is evident in the lack of legal aid and implementation of an administrative review procedure instead of a full right of appeal. Further, although the Government's 2013 statelessness guidance (Section 2.1) referred to 'the UK's protection response', the 2016 guidance does not; and a 2015 email from the Home Office stated that 'stateless applications are not considered to be protection based applications'; Email of 27.07.2015 in response to a request by Liverpool Law Clinic for one of their clients for permission to work.

[32] Called 'humanitarian protection' in the UK.

[33] Para 402 states:
A person is excluded from recognition as a stateless person if there are serious reasons for considering that they:

16. This divergence in approach matters. Even if legitimately denied protection in the UK because an exclusion ground applies (in accordance with the 1954 Convention), to deny that such persons are stateless by definition is inconsistent with international law and undermines the exercise of other human rights, including in relation to non-discrimination and liberty.[34] The language of Para 401, '[f]or the purposes of this part', suggests that a different definition may apply in contexts other than Part 14 of the Immigration Rules and denotes that, for example, in detention-related decisions, the UK should acknowledge persons as stateless where they meet the 1954 Convention definition, even if they would be excluded under Para 402 of the Immigration Rules (and therefore not considered stateless for purposes of Part 14), or if they would be barred from leave under other provisions. Statelessness can be acknowledged in the asylum context (even if refugee status or complementary protection is not granted) or pursuant to an application for a stateless person's travel document.[35] As discussed below, in some cases, the Government's lack of recognition of statelessness leads to futile removal efforts and lengthy immigration detention which may violate the right to liberty.

17. The Immigration Rules at Para 402(b) exclude stateless persons who are recognised as having 'rights and obligations which are attached to the possession of the nationality' of 'the country of their former habitual residence'. Although the Government's 2016 guidance states that this provision 'mirrors' Article 1(2)(ii) of the 1954 Convention and 'reflects' Article 1E of the 1951 Convention relating to the Status of Refugees,[36] the wording is significantly different from those Conventions, both of which refer to 'the country in which' a stateless person has 'taken

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(a) are at present receiving from organs or agencies of the United Nations, other than the United Nations High Commissioner for Refugees, protection or assistance, so long as they are receiving such protection or assistance;

(b) are recognised by the competent authorities of the country of their former habitual residence as having the rights and obligations which are attached to the possession of the nationality of that country;

(c) have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

(d) have committed a serious non-political crime outside the UK prior to their arrival in the UK;

(e) have been guilty of acts contrary to the purposes and principles of the United Nations.

[34] See also Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing, 2016), Chapter 1.

[35] Article 28 of the 1954 Convention *requires* issuance of a travel document to any stateless person 'lawfully staying in' the territory unless there are 'compelling reasons of national security or public order'; Article 28 also provides that States *may* issue travel documents to other stateless persons 'in their territory' and *must* give 'sympathetic consideration' to issuance of travel documents to any stateless persons 'who are unable to obtain a travel document from the country of their lawful residence'. UNHCR's Statelessness Handbook (note 8, paras 136-37) observes that 'lawfully staying in' refers not only to persons with residence permits; it may include persons 'recognised as stateless … but to whom no residence permit has been issued….' (due to 'length of time already spent in the country'). We note that the Home Office's webpage on travel documents (https://www.gov.uk/apply-home-office-travel-document/overview) suggests, incorrectly, that to obtain a stateless person's travel document, the applicant must have leave to remain *as a stateless person*. Although the UK requires some form of leave to remain to obtain a travel document, a stateless person who has leave to remain in a category other than under Part 14 of the Immigration Rules (e.g., a stateless person with leave to remain as a student or spouse) should be eligible for a stateless person's travel document. The Government's guidance for the application for a travel document confirms (at No. 4) that eligibility is based on having been recognised as stateless *pursuant to the 1954 Convention definition*. 'TD112 BRP Guidance Notes, Version 03/2016' https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508053/TD112_BRP_Guidance_Notes_03_2016_Final__2_.pdf.

[36] (note 14) Section 5.2.

residence'.[37] This divergence from the 1954 Convention is particularly significant because Para 402 exclusions affect the definition of statelessness under Part 14 of the Rules.

18. Para 403 of the Immigration Rules adds additional requirements that apply before the Government will grant leave to remain to a person who has been recognised as stateless under the Immigration Rules. Under 403(c), applicants must not be 'admissible to their country of former habitual residence or any other country'. UNHCR confirms that it is consistent with the 1954 Convention to grant a stateless person a 'more transitional' status (compared to the status the State normally grants to stateless persons) if he or she 'enjoys permanent residence status in a country of previous habitual residence to which immediate return is possible'.[38] To comply with this, admissibility should be assessed with respect to a country of previous habitual residence (rather than 'any other country'), where the applicant has permanent residency, and immediate return must be possible. Additionally, return to a country of former habitual residence must offer

> … the opportunity to live a life of security and dignity in conformity with the object and purpose of the 1954 Convention … [which entails] a full range of civil, economic, social and cultural rights, and where there is a reasonable prospect of obtaining nationality of that State.[39]

We commend the improvement in the Government's 2016 guidance which indicates that 'admissibility' entails a permanent residency requirement;[40] however, we are concerned that, at times, Government caseworkers incorrectly interpret the admissibility requirement in ways that do not comply fully with UNHCR guidelines.[41]

19. Para 404 of the Immigration Rules is broader in its approach to exclusion than the 1954 Convention. Stateless persons will be refused leave to remain in the UK if:

> …there are reasonable grounds for considering that they are … a danger to the security … [or] public order of the United Kingdom; or … their application would fall to be refused under any of the grounds set out in paragraph 322 of these Rules.

The 1954 Convention establishes which types of criminal activity which should affect either exclusion from protection or expulsion from a State's territory. Article 1(2) excludes stateless persons who have committed certain very grave acts from the Convention's protection.[42] Article 31 of the 1954 Convention discusses circumstances in which stateless persons who are 'lawfully in' the State may be expelled for national security reasons. Whilst there are important legal distinctions between expulsion and refusal of leave to remain (the latter not being explicitly governed by the 1954 Convention), it is problematic that the Immigration

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[37] The Government's 2016 guidance also refers to UNHCR guidance on Article 1E; however, due to the divergent formulation of Para 402(b), guidance on Article 1E and Article 1(2)(ii) is only partially applicable to Para 402(b). See *UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees* (UNHCR, March 2009) http://www.refworld.org/docid/49c3a3d12.html.

[38] UNHCR Statelessness Handbook (note 8) paras 153-154.

[39] *Ibid,* para 157.

[40] (note 14), see Sections 1.3, 3.4, 4.4, 6.2.

[41] We note, for example, that in July 2016, a Palestinian applicant was refused on the basis of admissibility to Libya despite it being clear from the documents that he did not have a right to enter Libya or of permanent residence there. The refusal letter said that he could apply for a visa to enter Libya. This decision was withdrawn when challenged.

[42] Crimes against peace or humanity, war crimes, serious non-political crimes (outside the country of residence), or 'acts contrary to the purposes and principles of the United Nations'.

Rules, particularly Para 322, are much broader than Articles 1(2) and 31. For example, 322(1B) requires refusal of leave to any person who is the 'subject of a deportation order or a decision to make a deportation order', and under 322(5), leave 'should normally be refused' for any person whose presence is considered undesirable due to their 'conduct…, character or associations'.[43] The breadth of these provisions means that some persons who are stateless will be refused leave to remain in the UK, particularly those who have a criminal history (even if based on minor offences). However, such persons may not be able to depart the UK, and they will live in limbo – without an immigration status, without permission to work, in some cases destitute and homeless, and potentially pushed into exploitative circumstances or committing criminal offenses to survive. Further, this provision may contribute to other human rights violations, e.g., stateless persons being unlawfully detained. Detention often occurs ostensibly pending imminent removal, but the Home Office does not refer potentially stateless detained persons to the statelessness application procedure and is sometimes slow to acknowledge statelessness or the impossibility of removal.[44] This is likely particularly so where the person is barred from being granted leave to remain under the Immigration Rules (or even recognition as stateless under the flawed definitional limitation in 401(c)).

20. Article 31 of the 1954 Convention prohibits expulsion of persons who are 'lawfully in' the country. UNHCR has confirmed that persons awaiting statelessness determination are 'lawfully in' the country.[45] In contrast, UK policy is that statelessness applications will 'normally' be decided before removal arrangements are made, but that a statelessness application does not necessarily prevent removal.[46] Although Article 31 of the 1954 Convention allows an exception when national security or public order is threatened, in such cases, absent 'compelling reasons of national security', the applicant must be 'allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority', and should be granted a 'reasonable period within which to seek legal admission into another country' before being expelled. UK law, however, does not include these guarantees for persons awaiting statelessness determination.

Safeguards during the statelessness determination procedure

21. 'Procedural guarantees are fundamental elements of statelessness determination procedures…. [D]ue process guarantees … including [those that apply in] refugee status determination procedures, are necessary in this context.'[47] Necessary procedural guarantees include a comprehensive right of appeal covering questions of both fact and law and provision of free legal assistance to stateless persons.[48] Further, UNHCR considers that statelessness determinations should be made within 6 months; or in exceptional cases, within 1 year.[49]

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[43] These are just two examples of reasons for refusal under Para 322; for the full text, see the Immigration Rules, para 322: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-9-grounds-for-refusal.

[44] See European Network on Statelessness, 'Protecting Stateless Persons from Arbitrary Detention in the United Kingdom' (forthcoming, November 2016) ('ENS Report 2016').

[45] UNHCR Statelessness Handbook (note 8) para 135. See also note 8.

[46] According to the policy, removal may occur if the applicant does not have leave to remain in the UK of any kind and an emergency travel document is issued. 2016 guidance (note 14) Section 6.2.

[47] UNHCR Statelessness Handbook (note 8) para 71.

[48] *Ibid*, paras 71, 76.

[49] *Ibid*, paras 74-75.

22. However, the UK's failure to recognise statelessness as a protection issue means that for statelessness applications, there is neither a free-standing right of appeal to the independent First Tier Tribunal, nor free legal assistance (unless 'exceptional case funding' is granted).[50] Both of these safeguards are available in the asylum and complementary protection context. The potentially available limited remedies for refusal under the stateless determination procedure (administrative review, judicial review, or a new application) are inadequate. Internal administrative review[51] may be subject to the same flaws as initial decision making, and there is no legal aid for administrative review. Although legal aid currently is available for judicial review of refusal of statelessness applications, judicial review is limited in the scope of its review of the facts. New applications will often not succeed if negative credibility assessments were made in the initial flawed proceeding or if a similar flawed approach is taken in a new decision.

23. Statelessness applications are often factually and legally complex and require specialist legal advice. The possibility of exceptional case funding is not an adequate alternative to standard legal aid, because legal advisors must undertake a significant amount of work to apply for it, for which they receive limited remuneration only if exceptional case funding is granted, and many legal advisors cannot take that risk. We are aware of only one case in which exceptional case funding has been granted for a statelessness application. Advocacy for statelessness applications to be included under legal aid have been unsuccessful thus far.[52]

24. The absence of legal aid and appeal rights are compounded by a low success rate and substantial delays in decision making (more than 3 years in some cases).[53] By the end of March 2016, only 754 (47.4%) of 1,592 statelessness applications made since April 2013 had been decided, and only 39 granted (5.2 % of decided applications).[54] Additionally, there are significant errors in Home Office decision making.[55]

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[50] See Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) (2012 Chapter 10) http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted.

[51] Limited to 'caseworking errors'.

[52] For further information about legal aid and barriers to it, particularly if a 'residence test' becomes applicable, see Immigration Law Practitioners' Association, 'ILPA evidence to the Joint Committee on Human Rights' enquiry into the implications for access to justice of the Government's proposed legal aid changes 30 September 2013', Document No. 13.09.21039, http://www.ilpa.org.uk/resources.php/21039/ilpa-evidence-to-the-joint-committee-on-human-rights-enquiry-into-the-implications-for-access-to-jus.

[53] Whilst awaiting a decision, stateless persons usually do not have permission to work (or be self-employed) and access to support is limited.

[54] Data provided by the UK Home Office (Statelessness Review Unit, Complex Case Directorate) to Katia Bianchini (ENS consultant researcher) in an email dated 21 June 2016 during research for the European Network on Statelessness report 'Protecting Stateless Persons from Arbitrary Detention in the United Kingdom' (note 44).

[55] Examples of flawed decisions (based on the experiences of Asylum Aid and Liverpool Law Clinic) include: 1) refusal after granting another type of status (with much shorter period of leave), on basis that applicant was 'admissible' to the UK as a result of the other status; 2) 2013 refusal without interview – contravening Government's 2013 guidance; 3) refusal without adequate investigation with authorities of country of alleged nationality (even after, in accordance with its guidance, Government agreed to investigate). The 2016 guidance (note 14, Section 4.2) states that where an applicant has sought to provide as much information as possible, Home Office caseworkers 'must assist the applicant by interviewing them, undertaking relevant research and, if necessary, making enquiries with the relevant authorities and organisations'. Additionally, in the case of *Semeda v Secretary of State for the Home Department (statelessness; Pham [2015] UKSC 19 applied)* [2015] UKUT 658 (21 October 2015), the Tribunal found that the Government improperly refused leave to remain on basis that applicant had a 'claim' to Libyan nationality (under the Immigration Rules, nationality must be assessed as at the time of the decision, rather than with respect to future possibilities). But cf *R (JM) v SSHD* (Statelessness: Part 14 of HC 395) [2015] UKUT 00676 (IAC) (22 September 2015), in which the Tribunal

Indefinite and arbitrary detention of stateless persons

25. The UK asserts in the 2014 UPR Mid-Term Report that Government policy on the use of immigration detention complies with its international obligations; that immigration detention is used sparingly and for the shortest time necessary; that alternatives to detention are used wherever possible; and that appropriate safeguards exist for detained persons.[56] This is not the reality for some, possibly most, stateless persons detained under immigration powers in the UK.[57]

26. It is unclear how many stateless persons are detained in the UK or for how long. The published data are flawed and incomplete, as individuals are not usually recorded as stateless when they enter detention unless they have previously been recognised as stateless, nor does the data show the *length* of detention by nationality (or lack thereof).[58] Government officials sometimes wrongly attribute stateless persons a nationality; categorise them as 'persons with unknown nationality'; make unwarranted guesses regarding alternative places to which a person might be removed when circumstances are such that a reasonable person would consider the person stateless and removal not 'imminent'. Therefore, the numbers of stateless persons in detention are likely higher than published figures.[59] Bearing in mind these limitations, the Government's published data show that 108 'stateless persons', 37 persons of 'other or unknown nationality', and 56 persons from the Occupied Palestinian Territories entered immigration detention in 2015.[60]

27. Although UK policy requires internal review of continuing detention, in practice, this review is often cursory. Although UK law allows bail applications, in practice, it is sometimes difficult for stateless persons to succeed with bail applications. A successful bail application may require a strong statelessness application, which is difficult to make from detention, especially without legal assistance. Like stateless persons generally, detained stateless persons are ineligible for free legal assistance for statelessness applications. Generally, the only lawyers permitted to represent detained persons under legal aid contracts (for matters in scope of legal aid) are those whose organisation have contracts with a detention centre;[61] and such

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decided a baby was stateless under the Immigration Rules but admissible to Zimbabwe because he could be immediately registered in a non-discretionary procedure; and therefore refusal of leave to remain in the UK was appropriate.

[56] See 2014 Mid-Term Report (note 7) 110.111.

[57] The majority of stateless persons assisted by Liverpool Law Clinic have been subject to immigration detention at some stage of their stay in the UK, including some persons who had already been determined to be stateless and some Palestinians.

[58] The Home Office defines 'stateless' under 'country of nationalities' within its immigration detention statistics as referring to individuals who are: (1) Kuwaiti Bidoons; or (2) 'recognised as stateless by UNHCR … under Article 1 of the 1954 Convention'; or (3) 'stateless on the relevant record held by the Home Office'. Home Office, 'User Guide to Home Office Immigration Statistics' (last updated 25 August 2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/547190/user-guide-immigration-statistics.pdf, 18.

[59] See also *Mapping Statelessness* (note 1) 28-60.

[60] Home Office, National Statistics 'Immigration statistics. Detention tables - dt_01 to pr_01. Table dt_04: People entering detention by country of nationality, sex, place of initial detention and age' (25 February 2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501999/detention-q4-2015-tabs.ods.

[61] Circumstances in which a solicitor without a detention centre contract can represent a client in detention include: where the solicitor has already done 5 hours' work when the client is detained and continued representation is in the best interests of client; or where the solicitor has represented a close family member in circumstances relevant to the detained person's case.

lawyers may not have competence regarding statelessness, particularly because they generally work on matters funded through legal aid. Detained persons also face significant barriers in gathering evidence required to prove statelessness, such as letters from embassies of countries of possible nationality. When interviews with embassies occur, they are not recorded; no independent person accompanies the applicant; and no or limited attempts are made to confirm information given by the detainee. Additionally, as discussed above, some detained stateless persons may not be recognised as stateless due to flaws in the procedure. Such persons may be detained for long periods because they cannot be removed from the UK. We are also aware of a case in which a stateless person was detained for more than three years; the Home Office resisted his release for six months after formally recognising him as stateless and only pursuant to a Court order.[62]

28. Recent ENS research confirms that UK authorities sometimes detain stateless persons for years, even where the person clearly is not imminently removable and there is no lawful basis for continued immigration detention.[63] ENS's research indicates that some stateless persons receive compensation after judicial challenges finding that their detention was unlawful. For example, ENS's report highlights the case of a man of Guinean/Gambian origin held in immigration detention for three and a half years. Although he cooperated with removal efforts, neither the Guinean nor the Gambian Government recognised him as a citizen. The British Government nevertheless kept him in detention and continued seeking to remove him. Eventually, he successfully challenged the legality of his detention and was awarded damages.[64] Notwithstanding the possibility of successful judicial challenges, the UK courts sometimes permit significant flexibility to the Government regarding the reasonableness of lengthy immigration detention. In a recent case concerning a man of Western Saharan origin, the Administrative Court found lawful the 10 months of detention at issue, in part because the Government continued making efforts to remove the applicant (notwithstanding the evident futility of attempted removal to Western Sahara, not a State recognised by the UK).[65] Furthermore, we note that release and/or monetary awards for unlawful detention only partially redress the harm done by long-term immigration detention.

Socio-economic rights for persons granted leave to remain based on statelessness

29. The UK does not ensure to stateless people the full range of socio-economic rights guaranteed under the 1954 Convention and international human rights law, in particular rights to education and housing. With respect to educational rights, the UK's position is not in line with Article 22(2) of the 1954 Convention, which states:

> The Contracting States shall accord to stateless persons treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign

[62] This case arose in 2008 and was resolved in 2011, prior to the implementation of Part 14 of the Immigration Rules.
[63] See 'Protecting Stateless Persons from Arbitrary Detention in the United Kingdom' (note 44).
[64] See *ibid*.
[65] *ML (Morocco) v Secretary of State for the Home Department* [2016] EWHC 2177 (Admin). The Tribunal also took into account that the applicant was considered at high risk of absconding and re-offending.

school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

30. Those who are granted leave to remain as stateless persons (and their family members) do not qualify for student finance (home student fees and student loans to cover fees and basic living costs for university education). For most stateless young people, accessing university education, with fees of approximately £9,000 per annum, is not possible. It is not until indefinite leave is granted and three years' lawful residence completed that most stateless persons become eligible for student finance. This has harsh consequences for some stateless young people. For example, the Home Office refused indefinite leave to remain (which would have facilitated access to the necessary Government loan) to a young woman recognised as stateless who was applying to University. Because the 1954 Convention is not incorporated into UK law, the court upheld the Government's decision in judicial review proceedings. The UK could have amended the relevant education finance regulations to include stateless persons and their family members in May 2016[66] when making amendments extending the benefits of student finance to young people with long residence in the UK.[67] However, the Government did not include stateless persons in the amendments.

31. The UK's treatment of stateless persons in need of housing assistance also contravenes the 1954 Convention, Article 21, which provides that States shall treat 'stateless persons lawfully staying in their territory' favourably (and in line with others generally in the same circumstances) with respect to housing. Persons who are permitted to have recourse to public funds in categories other than statelessness (such as those granted refugee status or humanitarian protection) can access housing assistance (when otherwise eligible). In contrast, persons granted statelessness leave can access welfare benefits, but they are not eligible for housing assistance.

Preventing statelessness through acquisition of British nationality

32. The 1954 Convention, Article 32, requires States to 'facilitate the assimilation and naturalization of stateless persons … [and] in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.' Additionally, the 1961 Convention requires that States grant nationality to persons born in their territory 'who would otherwise be stateless',[68] and the CRC requires that States guarantee the right of children to acquire a nationality, particularly 'where the child would otherwise be stateless'.[69]

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[66] As part of the Education (Student Fees, Awards and Support) (Amendment) Regulations 2016 (2016 No. 584) http://www.legislation.gov.uk/uksi/2016/584/introduction/made.

[67] Seven year's residence if starting their course at an age of less than 18, or half their life or twenty years if starting the course at the age of 18 or older.

[68] Article 1. See subsections of Article 1 for permitted conditions to this provision.

[69] Article 7 of the CRC states:

1. *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*
2. *States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*

33. Despite various provisions in UK law which aim to prevent childhood statelessness, as discussed in *Mapping Statelessness,* some children born stateless or at risk of statelessness in the UK remain stateless or undocumented.[70] Application fees have become one of the chief impediments preventing children with few financial resources from exercising their entitlement to British nationality. The fees to apply to register as a British citizen are £936 (children) and £1,121 (adult); and adult naturalisation applications cost £1,236.[71] There is no exemption or fee reduction for stateless persons. In addition, acquiring the necessary evidence may be complex and costly, and the law is not straightforward or accessible to lay persons. Other barriers to acquisition of British citizenship include:

    - application of the good character test for children age 10 or over (applied in the same way for children as for adults);
    - poor decision making and poor application of discretion by the Home Office;
    - poor Home Office guidance;
    - Home Office failure to properly consider Section 55 of the Borders, Citizenship and Immigration Act 2009[72] (requiring the Government to 'safeguard and promote the welfare of children' in exercising immigration, asylum, or nationality functions); and
    - the Government's failure to fully comply with obligations under the CRC to consider the best interests of children[73] and/or the right to private and family life under ECHR Article 8.[74]

    The absence of legal aid for advice and assistance in registration applications exacerbates these barriers. If refused registration, there is no legal aid to apply for an internal Home Office review, and a £272 review fee applies.

34. Finally, in contravention of the 1954 Convention, Article 32, the UK has no expedited registration or naturalisation procedure for stateless persons, although the Government can, under current law, exercise its discretion to expedite these processes.[75]

Conclusion and recommendations

35. The co-submitting organisations acknowledge positive steps taken by the UK but observe that challenges remain in ensuring that the UK's laws, policies and practices relating to statelessness and nationality comply fully with international law. Consequently, we propose the following recommendations:

I. Departures from the 1954 Convention

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[70] *Mapping Statelessness* (note 1) 137.

[71] For the full fee schedule, see Home Office, 'Fees with effect from 18 March 2016 for citizenship applications and the right of abode', https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/507609/Master_Fees_Leaflet_2016_03_08_v0_3.pdf.

[72] (2009 Chapter 11) http://www.legislation.gov.uk/ukpga/2009/11/section/55.

[73] In November 2008, the Secretary of State withdrew her reservation to the 1989 Convention on the Rights of the Child concerning immigration and citizenship. At least from that time, the Secretary of State has been bound under Article 3 to ensure primary consideration is given to the best interests of the child in exercising her nationality functions.

[74] Under ECHR, Article 8, the Secretary of State is obligated to ensure that in exercising her nationality functions she does not disproportionately interfere with the right to respect for private and family life.

[75] See BNA Section 6(1) and Schedule 1.

The UK should fully incorporate and comply with the 1954 Convention.

I.A. The UK should recognise 'statelessness status' as a protection status similar to 'refugee status' and 'humanitarian protection'.

I.B. The UK should ensure that its definition of 'stateless person' is fully consistent with the definition provided in the 1954 Convention and that no stateless persons are excluded from this definition on extraneous criteria.

I.C. The UK should amend its policy to guarantee that persons with pending statelessness applications will be considered 'lawfully in' the UK and not expelled in violation of the 1954 Convention, Article 31.

1.D. The UK should amend or eliminate provisions of its laws and policies which operate to exclude stateless persons from leave to remain in the UK which are inconsistent with the provisions or object and purpose of the 1954 Convention or other international law.

II. Procedural safeguards

The UK should ensure that stateless persons have adequate procedural safeguards during the statelessness determination procedure on a non-discriminatory basis.

II.A. The UK should ensure that stateless persons have access to: a comprehensive right of appeal against refusal of leave to remain as a stateless person; appropriately trained lawyers paid for by legal aid (as for asylum applications); an open-minded interview procedure; and assistance in making enquiries of national authorities, which are independently monitored and recorded.

II.B. The UK should train to an appropriate standard the decision makers in the determination procedure and ensure that there are sufficient of them to allow them to make legally correct decisions within UNHCR-recommended time frames.

III. Indefinite and arbitrary detention of stateless persons

In any decision regarding immigration detention, the UK should consider, before a decision to detain and on an ongoing basis, statelessness and risk of statelessness. Where evidence suggests that a person subject to immigration detention may be stateless or at risk of statelessness, the Government should: refer them to the statelessness application procedure in Part 14 of the Immigration Rules; expedite their statelessness application; and consider, in view of statelessness or possible statelessness, whether removal is imminent and detention is necessary and justified.

III.A. The UK should establish a reasonable time limit for immigration detention (28 days or less), particularly with respect to individuals who are stateless or at risk of statelessness and unlikely to be imminently removable.

III.B. The UK should amend the provisions of the Immigration Act 2016 relating to mandatory bail hearings to make such hearings available in deportation cases.

IV. Socio-economic rights for persons granted leave to remain based on statelessness

The UK should ensure that persons granted leave to remain based on statelessness have access to socio-economic rights guaranteed under the 1954 Convention and international human rights law.

IV.A. The UK should amend the Education (Student Support) Regulations 2011, Schedule 2, Part 2, to include stateless persons and their family members in the categories of persons eligible for student finance, and the UK should ensure that if statelessness leave is granted after commencement of a student's course they are eligible for student finance for the remainder of the course, as would be the case where refugee status is granted.

IV.B. The UK should amend the Allocation of Housing and Homeless (Eligibility) (England) Regulations 2006 to make provision for stateless persons.

V. Acquisition of British nationality

The UK should amend its nationality laws and/or policies to ensure that all persons who are stateless or at risk of statelessness have expedited and affordable access to British nationality.

V.A. The UK should allow all stateless children born in the UK to acquire British citizenship without having to wait until they are 5 years old.

V.B. The UK should introduce an expedited procedure for stateless persons wishing to acquire British nationality and provide fee exemptions or appropriately reduced fees for applicants with insufficient means.

V.D. The UK should ensure that stateless persons without sufficient means to pay for legal advice have access to appropriately trained lawyers paid for by legal aid for assistance with applications for British nationality.