

Statelessness and applications for leave to remain: a best practice guide

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Foreword

Today, there are at least 10 million people in the world who are stateless. These are individuals who have been denied a nationality and, as a result, denied access to basic human rights such as education, healthcare, marriage, employment and freedom of movement. Statelessness affects families for generations – a third of the world’s stateless are children. If these children have children of their own, the suffering associated with having no nationality will be passed on.

Statelessness and the lack of nationality have a wide and complex range of causes including gaps in nationality law, the emergence of new States and changes in borders, and loss or deprivation of nationality. It can be created through discriminatory practices and seriously affects both populations that consider themselves to be “in their own country” and those in a migration situation.

UNHCR has a global mandate to address the plight of statelessness. In consultation with States, civil society and international organizations, UNHCR has recently developed its ten-year Global Action Plan to end statelessness by 2024. It sets out a guiding framework of ten actions that need to be taken to end statelessness. These aim to resolve existing situations of statelessness, prevent new cases, and identify and protect stateless people.

Of critical importance to addressing the situation of stateless people, particularly those in a migration context, is the establishment of effective statelessness determination procedures for identifying stateless persons and granting protection status. These help ensure access to fundamental rights provided by the 1954 Convention relating to the Status of Stateless Persons and international human rights law. They facilitate the granting of legal residence for stateless persons and open a pathway to naturalization.

In 2013, the United Kingdom introduced a procedure to identify stateless people and provide them with leave to remain in the UK. This came off the back of research by UNHCR and Asylum Aid on statelessness in the UK, the resulting 2011 report, *Mapping Statelessness in the UK*, and advocacy. The UK is now one of about a dozen States worldwide with a statelessness determination procedure.

Statelessness and Applications for Leave to Remain: A Best Practice Guide seeks to build on the positive momentum of the UK’s move to introduce a statelessness procedure. It gives an overview of the statelessness law framework and provides practical and expert advice for legal representatives navigating what is a complex and developing area of UK law. In doing so, the *Best Practice Guide* serves as an excellent legal resource for practitioners; it will hopefully contribute to strengthening the quality of legal representation being made on behalf of stateless people in the UK and, ultimately, improving their access to the rights that many of us take for granted.

UNHCR is very grateful for this publication and the contribution that the *Best Practice Guide* makes to statelessness determination and the development of statelessness law in the UK. I sincerely hope that it will provide a valuable tool to practitioners and assist them in working to secure protection for stateless persons.

Gonzalo Vargas Llosa

UNHCR Representative to the United Kingdom

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A Introduction

The Immigration Rules were amended in April 2013 to include a new category of leave: 'Part 14 stateless persons'. Statelessness arises when a person is not a national of a state, and this guide focuses upon the definition applied by the Immigration Rules: 'a person who is not considered as a national by any State under the operation of its law'. This definition is taken from the 1954 Convention relating to the Status of Stateless Persons (the 1954 Convention).¹ An important feature of the Immigration Rules relating to stateless persons is the scope they provide to secure recognition by the Home Office of statelessness, a legal condition which itself has important consequences in international law.

This guide sets out the current view of the authors about best practice in advising and representing clients considering or making an application for statelessness leave in the UK. The UK law in this area is in its infancy and is likely to develop particularly quickly. Some key questions of law and practice have yet to be addressed by the courts; this guide provides a snapshot of the state of play as at September 2016. Advisers will need to check current law and policy to ensure that their advice and any submissions or representations are up-to-date.

This guide does not include information about using statelessness arguments as part of a claim for recognition as a refugee or in deprivation of citizenship proceedings. Such arguments are beyond its scope; those wishing to advance such arguments should consult relevant practitioner texts.²

A.1. Who is this guide aimed at?

This guide is aimed at those who may represent clients considering whether and when to make an application for leave to remain as a stateless person. It is designed to help you to identify potentially stateless persons from your caseload, to advise them about making an application, to prepare a well-evidenced application supported by legal argument and to challenge any refusal. For many clients a statelessness application is one of last resort; there is no fee to pay and they have little to lose. Advisers will want to ensure such an application is as robust as possible.

The guide may also be of use to organisations working with potentially stateless persons who may refer them to legal advisers. For them, and for those who are potential applicants, this guide is no substitute for expert legal advice on an individual case and should not be relied upon for this purpose.

A.2. How to use this guide

Part A is an introduction to statelessness generally. Part B contains information about the international and domestic law on statelessness. Part C covers the procedure and practice relating to applications for statelessness leave under Part 14 of the Immigration Rules. It also covers challenges to refusal and the benefits of leave to remain. The guide contains internal cross-references in ***bold italics*** to help you find linked material. At the end of the text there

1 Available at <http://www.unhcr.org/3bbb25729.htm> [accessed 12 September 2016].

2 See e.g. UNHCR, *Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Refugee Convention and its 1967 Protocol relating to the Status of Refugees*, October 2014, PPLA/2014/01, available at: <http://www.refworld.org/docid/543525834.html> [accessed 12 September 2016]. See also E Fripp *Nationality and Statelessness in the International Law of Refugee Status*, Hart, Oxford, 2016.

are additional tables and appendices for reference. You can read the guide end to end or dip in and out as you undertake casework.

A.3. Statelessness globally

A 'stateless person' is defined in the 1954 Convention as 'a person who is not considered as a national by any State under the operation of its law.'

The number of stateless persons is estimated to be over 15 million globally.³ The numbers are unevenly spread, with especially large numbers originating from and living in South East Asia, Central Asia and the Middle East (Palestinians in particular). Many European countries have 'indigenous' stateless populations: for example ethnic Russians in Estonia and Latvia, and Roma living in Eastern European countries. There are also large stateless populations throughout the world arising from, for example, State succession, conflict between States and civil war, gaps in and conflict between nationality laws, disappearance of State territory, for example through climate change, and discriminatory laws and State practice. Well-known examples of communities where statelessness is prevalent are the Roma, Palestinian, Kuwaiti Bidoon, Rohingya and Saharawi peoples.

Stateless persons may have very markedly reduced socio-economic and political rights. For example, they may have no rights to work, marry, attend school or higher education, register their birth, vote, or take public office. Often, stateless persons are not able in law to own property or to start a business. Inter-generational statelessness therefore plays a role in consolidating poverty and marginalisation. Travel within the State where they were born, let alone across borders, may be limited or impossible. Stateless persons who migrate may suffer all of these impediments. Stateless persons, and those of disputed nationality, are particularly difficult to remove to other States. In international law, and generally in international practice, there is a strong expectation that a State will accept the return of its nationals from other States. Stateless persons have no State to which that expectation can attach and therefore may suffer disproportionately from lengthy detention while States attempt, fruitlessly, to move them elsewhere.

A.4. The Statelessness Conventions

The 1954 Convention was drafted in the aftermath of the Second World War. Mechanisms for the protection of both refugees and stateless persons were initially considered together but eventually a separate treaty was drafted to protect stateless persons.

The purpose of the 1954 Convention is to oblige States to identify stateless persons on their territory so that they can enjoy certain minimum rights and formalise their status. It is very closely aligned to the 1951 UN Convention relating to the Status of Refugees (the Refugee Convention) in its wording and structure, as well as its origins. Despite this, the identification and protection of stateless persons is less developed than that of refugees in many countries, including in the UK.

A further treaty, the 1961 UN Convention on the Reduction of Statelessness,⁴ was adopted and came into force in 1975. Its purpose is to prevent statelessness arising.

A history of these two important conventions can be found in the introduction to the 2014 *UNHCR Handbook on Protection of Stateless Persons (UNHCR Statelessness Handbook)*.⁵ UNHCR initiated a major drive to increase the number of State signatories to both

3 Institute on Statelessness and Inclusion *The World's Stateless* 2014 <http://www.institutesi.org/worldsstateless.pdf> [accessed 12 September 2016].

4 Available at <http://www.unhcr.org/3bbb286d8.html> [accessed 12 September 2016].

5 Available at <http://www.refworld.org/docid/53b676aa4.html> [accessed 7 January 2016]. References to the UNHCR Guidelines Nos 1-3 are to the documents which were subsequently developed into the *Handbook* of June 2014. There is some re-wording and the paragraph numbers are different.

Conventions in 2011, 50 years on from the signing of the 1961 Convention. As at September 2016, 88 States have ratified or acceded to the 1954 Convention⁶; 67 the 1961 Convention.⁷

A.5. Implementation of the 1954 Convention in UK law

The UK ratified the 1954 Convention in 1959. It did not, however, establish a formal mechanism for recognising and providing protection to stateless persons or for ensuring that they had access to the rights set out in the 1954 Convention.

In 2011 UNHCR and Asylum Aid produced a comprehensive report, *Mapping Statelessness in the United Kingdom*,⁸ with a view to persuading the UK government to implement a statelessness determination procedure. The report provides a good introduction to the background issues faced by stateless persons. It found that many stateless persons were destitute and vulnerable to exploitation; and many spent lengthy periods in immigration detention separated from family members.

The UK government introduced Part 14 of the Immigration Rules, which came into force on 6 April 2013, to provide a mechanism for granting leave to remain on the basis of statelessness.

Between 9 April 2013 and 31 March 2016 the Home Office received 1592 applications for statelessness leave. In this period 39 applications were granted and 715 were refused, a success rate of around 5%. The number of applications seems low for a new category of leave of this nature, but the number of stateless persons living in the UK is unknown. Factors contributing to the relatively low numbers of applications include: lack of legal aid; low levels of awareness of the procedure amongst applicants, NGOs, and lawyers; some, or perhaps many, stateless persons already having refugee status or a grant of leave in another category; and many failed asylum seekers not being in touch with lawyers or indeed NGOs. Errors in Home Office decision-making and lack of clear entitlement to legal aid may have contributed to the low levels of grants, together with some of those refused not having met the requirements of the Rules. Experience shows that competent legal representation increases the proportion of cases granted statelessness leave.

Decision-making is very slow in most cases (taking at least a year and one case has been pending for three years) and there are insufficient numbers of Home Office staff members dealing with applications. There are a handful of pending applications for judicial review, challenging decisions to refuse leave to remain as a stateless person. There is relatively little judicial guidance about the meaning of Part 14 of the Immigration Rules or about the factual situations giving rise to statelessness. For example, there are no equivalents of the Upper Tribunal's country guidance cases.

A.5.a. Home Office Instruction

The Home Office issued an instruction, *Applications for leave to remain as a stateless person (2013 Home Office Instruction)*,⁹ to accompany the new immigration rules. It was amended

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- 6 A list is available at https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtmsg_no=V-3&chapter=5&Temp=mtmsg2&clang=_en [accessed 13 September 2016].
- 7 A list is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=V-4&chapter=5&clang=_en [accessed 18 September 2016]. A map of the States parties is available at: UNHCR *States Party to the Statelessness Conventions – As at 1st June 2016*, 1 June 2016, available at: <http://www.refworld.org/docid/54576a754.html> [accessed 18 September 2016].
- 8 UNHCR *Mapping Statelessness in The United Kingdom* 22 November 2011, available at: <http://www.refworld.org/docid/4ecb6a192.html> [accessed 23 September 2016].
- 9 Available at: <http://webarchive.nationalarchives.gov.uk/20140104224755/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/stateless-guide/stateless-guide.pdf?view=Binary> [accessed 28 September 2016]. See A Harvey 'The UK's new statelessness determination procedure in context' *Journal of Immigration, Asylum and Nationality Law*, (2013) 27(4), 294-314.

quite extensively following a review of the procedure. The new version, in the form of an Asylum Policy Instruction, *Statelessness and applications for leave to remain, Version 2.0 (2016 Home Office Instruction)*, was published on 18 February 2016.¹⁰ Despite consultation and feedback, the *2016 Home Office Instruction* is still not fully consistent with the position of UNHCR, or of ILPA and other interested organisations, on appropriate procedure and standards. Although it does not take precedence over the rules and cannot lawfully restrict their content or scope, it may be taken as the Home Office guidance to its own staff, and as a statement of policy as to how the Home Office will address applications. Departure from it could be the basis for a judicial review challenge. It is therefore an extremely useful indication of how decisions will (probably) be made by the Home Office and helps to illuminate the Home Office's understanding of the rules.

A.5.b. The authority in UK law of the 1954 Convention and UNHCR Statelessness Handbook

International obligations found in treaties or conventions ratified by the UK are not automatically binding or enforceable in UK courts unless Parliament has provided for this, although there is a hint that, perhaps, direct reliance may be placed on human rights treaties.¹¹

The extent of formal incorporation of the 1954 Convention is limited to Article 1(1). The Immigration Rules state:

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; ...

The 1954 Convention and the UNHCR *Statelessness Handbook* represent potentially important sources of assistance in the interpretation of the rules. This is particularly so given that the statelessness rules were explicitly intended to 'ensure visible compliance' with the UK's obligations under the 1954 and 1961 Conventions and to address a 'potential gap in the UK's protection response' (*2013 Home Office Instruction*). The *2016 Home Office Instruction* goes further at section 1.3, stating that the policy objective is to 'ensure we fully comply with our international obligations under the UN Statelessness Conventions' (note the reference to both the 1954 and 1961 Conventions). That said, these statements are very unlikely to be sufficient to establish that there has been incorporation of the whole of the 1954 Convention into UK law.

The *UNHCR Statelessness Handbook* is not a direct source of law in the UK, although it does have persuasive value: 'the relevance of the UNHCR guidance is not in dispute'.¹² The *2016 Home Office Instruction*, at section 1.2, sets out the Home Office position on the *Handbook*:

'The guidance in this instruction is drawn from the UNHCR Guidelines, now set out in its 2014 Handbook on the Protection of Stateless Persons, although it does not follow those guidelines in every respect. Where there are differences, this instruction must be applied.'

10 Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501509/Statelessness_AI_v2.0__EXT_.pdf [accessed 13 September 2016].

11 See Lord Kerr in *R (SG and ors) v Secretary of State for Work and Pensions* [2015] UKSC 16.

12 *Pham v Secretary of State for the Home Department* [2015] UKSC 19, paragraph 35, leading judgment of Lord Carnwath.

In practice it is best to refer primarily to the Immigration Rules, the current Home Office *Instruction* and case law: more extensive legal argument may best be reserved for cases where this might make a real difference to the outcome.

A.5.c. Other potential sources of law on statelessness

There are statelessness determination procedures in other jurisdictions. There may be helpful judicial decisions in States with a statelessness determination procedure which could be referenced in a UK statelessness application. Some European States have a formal or an *ad hoc* procedure to recognise stateless persons, for example Hungary, Spain, France and Italy. The Supreme Court in Spain has made decisions in Saharawi cases.¹³ Refer to **Appendix 4: Further reading** for organisations which provide access to such decisions.

A.5.d. Legal aid for statelessness work: what is in scope

Legal Aid is not generally available for advising, representing or assisting someone who wishes to make an application for leave to remain as a stateless person, or to ask for an administrative review of a refusal. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 was drafted and brought into force before the UK's stateless determination procedure was implemented. ILPA has lobbied, unsuccessfully to date, for statelessness applications to be within the scope of legal aid and continues to press for legal aid to be made available.¹⁴

The legal aid exceptional case funding procedure is potentially applicable.

Legal aid may be available to investigate or to bring an application for judicial review of a decision to refuse a statelessness application, providing the merits and means tests for legal aid are met.

There is more detailed information in **Part C, section 1 Obtaining Legal Aid Funding**.

13 UNHCR *Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons*, 11 July 2016, available at: <http://www.refworld.org/docid/57836cff4.html> [accessed on 16 September 2016] and K Bianchini *The implementation of the Convention relating to the status of stateless persons: procedures and practice in selected EU States*, PhD thesis, University of York, 2015, available at <http://etheses.whiterose.ac.uk/11243/> [accessed 29 September 2016].

14 *ILPA response to the Transforming Legal Aid: Next Steps consultation* 31 October 2013, pp2-3, <http://www.ilpa.org.uk/resource/25527/ilpa-response-to-ministry-of-justice-consultation-transforming-legal-aid-next-steps-31-october-2013> [accessed 13 September 2016].

B The Legal Framework

What follows is a summary of the legal issues which need to be considered when preparing an application for leave to remain as a stateless person. For further discussion about the definitions of key concepts please see **Appendix 4 Further reading on statelessness**.

B.1. Statelessness rules: an outline

The Immigration Rules at Part 14¹⁵ set out a concise framework that governs applications made for statelessness leave. The rules are set out in **Appendix 1** to this guide.

Paragraphs 401 and 402 set out the criteria for recognition as a stateless person. The first paragraph provides the definition, and the second exclusion criteria.

Persons who have been recognised as stateless, under paragraphs 401 and 402, must then meet **additional criteria** to be granted statelessness leave. These requirements are set out in paragraph 403.

Refusal criteria are set out in paragraph 404. These effectively operate as further additional criteria to be met before leave can be granted.

It is possible to be recognised as a stateless person, but not granted leave under Part 14, because of failure to meet the requirements of paragraphs 403 and 404.

Paragraph 405 provides for a grant of leave of 30 months.

Requirements for leave to enter or remain for family members are set out at paragraphs 410-413.

Curtailment of leave for the main applicant is permitted under paragraph 406 and for family members at paragraph 414. Requirements for indefinite leave to remain are at paragraphs 407-409 for the main applicant and paragraphs 415-416 for a family member.

B.2. Key concepts

This section aims to assist in understanding the definition of statelessness, by covering key legal concepts. The section which follows considers the definition as a whole.

B.2.a. Stateless refugees

A stateless person can be entitled to recognition as a refugee; the 1951 Refugee Convention definition explicitly envisages this. The law and practice relating to stateless refugees is very complex.¹⁶

Deprivation of nationality might amount to persecution, which would be the basis of a claim for recognition as a refugee status if there is a Refugee Convention reason.¹⁷

Part C, section 13 considers the 'Co-ordination of statelessness applications and asylum claims' including the important question of whether your client is a refugee or a stateless refugee under the 1951 Refugee Convention.

15 HC 395 as amended at <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-14-stateless-persons>.

16 *Supra* n 2 for further resources on this point.

17 For an example see *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809 3 WLR 1188. The principle is examined in detail at E Fripp *Nationality and Statelessness in the International Law of Refugee Status*, Hart, Oxford, 2016, chapter 6 (p236, and paragraph 6.22).

B.2.b. Nationality law

'Nationality' is a political-legal term denoting linkage of an individual to a particular State, for purposes of international law. Nationality law distinguishes between automatic (*ex lege*), and non-automatic, acquisition and loss of nationality. In the former case, the operation of the law alone does the work, for example where a country's law says that all children born in the territory are nationals, or that persons lose their nationality upon entering foreign military service. In the case of non-automatic acquisition or loss, there is a need for the State or the individual to do something. For example, if the law says that all children born outside the territory to a parent who is a national will be nationals only if registered as such at an embassy within a fixed period or by a certain age, an application to register would have to be made as a precondition of the link of nationality coming into existence.

Acquisition of nationality refers to the various ways in which a person acquires nationality, whether automatic or not – see previous paragraph for examples.

Denial of nationality is a term which appears in the *2016 Home Office Instruction* and in the *UNHCR Statelessness Handbook*. It is not defined in either. It is not a technical legal term, but can be taken to mean any indication that a State does not consider a person to be a national. For example, denial could be explicit, by refusing a naturalisation application, or implicit, by failure to respond to a request to confirm a nationality.

A person may **renounce** their nationality using a formal procedure. The 1961 Convention on the Reduction of Statelessness requires States signatories to operate a safeguard that the renunciation cannot take place unless the person acquires another nationality.¹⁸ Some States do not have such a safeguard, however, and the person's expectation that a new nationality can be acquired is not achieved. Even if a person has no nationality because they voluntarily renounced their nationality, they may still be determined to be stateless (paragraph 51 *UNHCR Statelessness Handbook*). A host State could provide temporary permission in these circumstances while nationality is resolved, while recommending re-acquisition of the nationality which was renounced (paragraphs 158-160 *UNHCR Statelessness Handbook* and see the *2016 Home Office Instruction* section 4.6.6).

A person suffers **loss** of nationality when the law operates to effect that loss – for example, where a law states that a woman loses her nationality if she marries a man of a different nationality (*UNHCR Statelessness Handbook* paragraph 26 and footnote). Where a person fails to comply with formalities which the law requires, for example a residence requirement, and as a consequence the law operates so that his or her nationality is terminated, the person has lost nationality, not renounced it.¹⁹ Experts at a meeting convened by UNHCR to consider the meaning of the 1961 Convention on the Reduction of Statelessness concluded that where a State has previously documented a national, but subsequently refuses to do so, this may be considered to evidence the absence (or loss, in loose terms) of nationality even though there is no formal legal act by the state.²⁰

A person is **deprived** of their nationality when the State makes a decision to withdraw nationality, for example as a form of punishment for some kind of activity considered contrary to the interests of the state²¹ (*UNHCR Statelessness Handbook* paragraph 25 and footnote). Paragraph 56 of the *UNHCR Statelessness Handbook* says that where a State deprives

18 Article 7(6) 1961 Convention on the Reduction of Statelessness, *supra* note 4.

19 Note 34 to paragraph 52 of the *UNHCR Statelessness Handbook*.

20 Paragraph 11, UNHCR Expert Meeting – *Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ('Tunis Conclusions')* March 2014, available at: <http://www.refworld.org/docid/533a754b4.html> [accessed 15 September 2016].

21 An example is s40 of the British Nationality Act 1981 which allows the Secretary of State to deprive a naturalized person of British citizenship even if they are left stateless as a result. See A Harvey 'Recent Developments on Deprivation of Nationality on Grounds of National Security and Terrorism resulting in Statelessness', *Journal of Immigration, Asylum and Nationality Law* (2014) 28(4), 339-341.

a person of their nationality, but that deprivation is contrary to the state's international obligations, the deprivation must be treated as effective for the purposes of the 1954 Convention, as otherwise the person who has in fact been deprived of their nationality could not be treated as stateless and could not be afforded a status linked to international protection under the 1954 Convention.²²

B.2.c. What is a State?

International lawyers have traditionally been divided as to what is constitutive of a State. The main division has been between those who regard recognition by other States as constitutive of statehood, and those who regard statehood as depending upon satisfaction of objective factual criteria. Between the extreme positions are those, presently the majority, who regard recognition as important but not as constitutive in itself of statehood. Instead it is evidence of the opinion of other States that factual criteria, which are mandatory, are satisfied. It has also been suggested that recognition as a State should be regarded as a duty upon other States if the objective criteria are satisfied, although this proposition appears not to have been accepted. In practice however, entering into the complexities of this area of law is unlikely to be necessary.

The *UNHCR Statelessness Handbook* at paragraph 19 considers the international law on what is a State. It draws on the 1933 Montevideo Convention on Rights and Duties of States to identify a permanent population, a defined territory, a government and capacity to enter into relations with other States as the main constituent elements required for statehood. It is pointed out at paragraph 20 of the *Handbook* that for an entity to be a 'State' for the purposes of Article 1(1) of the 1954 Convention, it is not necessary for it to have received universal or large-scale recognition as such by other States or to have become a member State of the United Nations, although these will be strong evidence of statehood.

While identifying that a decision-maker may be inclined to look toward his or her State's official stance on a particular entity's legal personality, the *UNHCR Statelessness Handbook* cautions against treating this as the final word. The *2016 Home Office Instruction* at section 4.5.1 gives Palestine as an example of a territory that is not a State. That other States have now recognised Palestine as a State does not change the UK's contrary view. As a result, most Palestinians are likely to be accepted by the Home Office as meeting the definition of a stateless person, i.e. 'a person who is not considered as a national by any State under the operation of its law' under paragraph 401.

In general, the conditions for retention of statehood once it has been established are less demanding than those required for initial establishment. Accordingly a State in turmoil with weak government and gripped by civil war, such as Somalia or Syria, will likely continue to be treated as a State for a substantial period, unless a new State is established on the territory. The UK position is fully consistent with this (*2016 Home Office Instruction*, 4.5.1 *UNHCR Statelessness Handbook* paragraph 19-21).

B.2.d. Definition of a stateless person

A stateless person is defined as a person who is '**not considered as a national by any State under the operation of its law**' (Immigration Rules paragraph 401(a)). The definition of a stateless person in paragraph 401(a) of the Immigration Rules can be broken down into four parts: 'not considered ...as a national...by any State...under the operation of its law'.²³ In practice it is better to look at the first two parts of the definition together.

22 There is a view that s40 British Nationality Act 1981 is contrary to the UK's international obligations (see G Goodwin-Gill *Deprivation of Citizenship resulting in Statelessness and its Implications in International Law*, 5 May 2014, cached at <http://tinyurl.com/jdqy25>) [accessed 30 September 2016].

23 See *R (Sameda) v Secretary of State for the Home Department (statelessness; Pham [2015] UKSC 19 applied)* (IJR) [2015] UKUT 00658, paragraph 13.

i. 'not considered as a national'

To decide whether someone is 'considered as a national' under Article 1(1) of the 1954 Convention requires consideration of the content of rights, duties and legal or actual connections between a person and the State in question. The UK statelessness determination procedure requires an analysis of whether or not a State is providing to a person the kind of assistance which it usually provides to nationals, and is indicating by this that it considers that person to be a national. The *UNHCR Statelessness Handbook* sets out the UNHCR view on who is considered to be a national at paragraphs 23-56.

Historically, a contrast has been drawn between *de jure* statelessness and *de facto* statelessness. *De jure* statelessness is not a term used in the 1954 or 1961 Conventions, but it is usually taken to mean those who are stateless as a matter of law and fall within the definition in Article 1(1) of the 1954 Convention. *De facto* statelessness is not defined in any international law instrument, although it is used in the Final Act of the 1961 Convention. It is best regarded simply as a descriptive term without legal character, applied to persons who are not legally stateless but may be compared with them in some other respect, such as inability to return to the country of, for example birth, due to failure of consular protection and assistance.²⁴ Some courts or tribunals, including in the UK, have made reference to *de jure* and *de facto* statelessness, but the term *de facto* stateless is unclear and ambiguous, and is not used in this guide.²⁵ The UK procedure only applies to those who are stateless as a matter of law, and within the definition in the 1954 Convention. For some applicants, proving that they are stateless to the required standard of proof might only be possible after the passage of additional time or the accumulation of further evidence. At a certain point the response, or lack of response, of national authorities can be said to pass a factual threshold; the applicant is not 'considered as a national' and meets the legal definition. Others may clearly be stateless from the outset, because of their membership of a group which is known to have that characteristic, such as Palestinians or Kuwaiti Bidoons. It is important to read this part of the text together with **iv. 'under the operation of its law'**, especially the part beginning 'The practical issue ...'.

Articles 1-10 of the 1961 Convention on the Prevention and Reduction of Statelessness set out the international obligations of States parties, which include the UK and may also include other States involved in a particular case. Reference can be made to the materials interpreting that Convention.²⁶ The UK has not incorporated the 1961 Convention so the material will be persuasive only.

The *2016 Home Office Instruction* draws heavily and explicitly on the *UNHCR Statelessness Handbook* in section 4.6 'Establishing nationality in stateless cases'.

The *UNHCR Statelessness Handbook* states that 'the definition in Article 1(1) of the 1954 Convention incorporates a concept of national which reflects a formal link, of a political and legal character, between the individual and a particular state' (paragraph 52). This is consistent with the traditional understanding of the term in international law.²⁷ It is now common for

24 *UNHCR Statelessness Handbook*, paragraph 7, footnote 4, with reference to the 'Prato Conclusions': UN High Commissioner for Refugees (UNHCR) *Expert Meeting – The Concept of Stateless Persons under International Law* ('Prato Conclusions') May 2010, available at: <http://www.refworld.org/docid/4ca1ae002.html> [accessed 19 September 2016].

25 See UNHCR *UNHCR and De Facto Statelessness* April 2010 available at <http://www.unhcr.org/4bc2ddeb9.pdf> [accessed 7 January 2016] and A Harvey, 'The de facto statelessness debate' *Journal of Immigration, Asylum and Nationality Law*, (2010) 24(3), 257.

26 See UNHCR 'Tunis Conclusions', *supra* n 20.

27 For discussion generally on the meaning of 'nationality' see 'The Meaning of Nationality in International Law: Substantive and Procedural Aspects', A Edwards, in A Edwards and L van Waas *Nationality and Statelessness under International Law*, Cambridge University Press, Cambridge, 2014; E Fripp *Nationality and Statelessness in the International Law of Refugee Status*, Hart, Oxford, 2016, chapter 1; also M Ganczer 'The Right to Nationality as a Human Right?' in *Hungarian Yearbook of International Law and European Law 2014*, Eleven International Publishing, The Hague, 2015, 15-33.

persons to have a nationality link with a State even though they do not reside, or never have resided, in the State territory, and they will be nationals under the Article 1(1) definition (paragraph 53 and 54). The *UNHCR Statelessness Handbook* provides that, in general, nationality is associated with the right of entry, re-entry and residence in the State's territory but that in States with distinct territories there may be situations in which rights of entry and residence do not extend to the whole territory belonging to a State (paragraph 53). This is most typical of colonial or post-colonial situations.

The *UNHCR Statelessness Handbook* identifies that, 'where different categories of nationality within a State have different rights associated with them that does not prevent their holders from being treated as a 'national' for the purposes of Article 1(1)' (paragraph 53). Importantly, if a person enjoys diminished rights which fall short of those required in terms of international human rights obligations this does not necessarily mean that they do not have a nationality (paragraph 53),²⁸ although diminished rights may be evidence of a state's failure to consider a person as a national.

A State's **arbitrary refusal** to admit a person with clear evidence of their nationality may be a denial of nationality, or be the consequence of a deprivation of nationality. Denial or deprivation of nationality in defiance of international standards may engage the Refugee Convention.²⁹

A State's **reasoned refusal** to admit a person who has clear evidence of their nationality, for example under legal measures which remove the right of return because of long residence abroad³⁰ or illegal exit,³¹ may also amount to a breach of international human rights standards and/or be persecutory where there is a Refugee Convention reason. The State may continue to recognise the person as a national by, for example, renewing their passport.³²

One of the most challenging types of case, and one of the most typical, is where a person is **refused the right of return or residence because they lack documents**. It may be unclear whether a person without documents is stateless or just has difficulty evidencing their nationality. Many persons were born in situations where they were not documented, for example in a refugee camp, in poverty or a remote rural area. There may be many barriers for individual applicants to obtaining further evidence of statelessness: the cost of travel to visit an embassy, the difficulty obtaining documents from countries of origin and the immense practical barriers and cost of litigation in their country of origin to try to challenge unlawful deprivation. A State's refusal to recognise a person, its continued silence, or its demands for ever more evidence may eventually constitute a failure to consider the person as a national under the operation of its law. See **Part C, section 16 Evidencing the claim**.

The expert view is that a person is probably stateless where they were **previously documented, and are unable to obtain re-documentation**, and the State provides no valid reasons³³ for refusal to re-document.³⁴ This is because the State has clearly considered them as a national in the past, and will no longer do so. But it is a matter of quality of evidence, both of the state's reasons, or lack of them, and the applicant's efforts to obtain documents.

28 E.g. Chinese nationals who do not hold a hukou (internal ID which gives some rights and provides access to certain State provision) may have an asylum claim but they are not stateless: *AX (family planning scheme)* [2012] UKUT 97, CG.

29 See *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809 3 WLR 1188. The principle is examined in detail in E Fripp *Nationality and Statelessness in the International Law of Refugee Status*, Hart, Oxford, 2016, chapter 6.

30 E.g. Cuba requires nationals to apply for re-entry, which can be refused.

31 E.g. Iran, Eritrea.

32 Again, Cuba renews passports while imposing conditions for re-entry which are extremely difficult to meet.

33 An evidenced allegation of fraudulent acquisition of nationality is a reason to cease considering a person as a national, that is permitted by the 1961 Convention: see *Janko Rottmann v Freistaat Bayern*, ECJ, C-135/08, judgment of 2 March 2010.

34 'Tunis Conclusions', paragraph 11, *supra* n 20.

Statelessness may also arise and be at least partially evidenced by State succession, State secession and situations where there is a conflict of laws. Gender discrimination may prevent a mother passing her nationality to her children, the father may be unknown, stateless himself, or otherwise unable to pass his nationality to the child and thus the child will be stateless.

ii. 'competent authorities'

It is important to understand which bodies in any particular State are competent to determine nationality, in order to know whether a decision that a person is or is not a national holds any weight. Determining which State bodies are competent will require factual analysis.

The *2016 Home Office Instruction* does not give any detail about how the Home Office identifies which authority is competent to determine nationality. It does state that a passport which has been 'issued in error by an authority that is not competent to determine nationality issues' will not raise a presumption that the holder is a national of the country issuing the passport (*2016 Home Office Instruction* section 4.3.2).

A trafficked applicant held a properly issued national passport of country B which he denied reflected his nationality. The embassy of country B in London refused to issue an emergency travel document to him. His representatives made enquiries by email of the consulate of country B in a third country where the passport had been issued. The enquiries politely asked for copies of his or his parents' birth certificates, or naturalisation certificate, as the applicant did not hold them himself. The consulate replied, but failed to provide any information about the evidence which had been provided by the trafficker to support the application for the passport. Statelessness leave was granted.

The *UNHCR Statelessness Handbook* recognises that 'the competent authority or authorities will differ from State to State and in many cases there will be more than one competent authority involved' (paragraph 27). It says that low level officials may be the competent authorities in many cases, and that the competent authority is that which is mandated to apply the legal provisions relating to nationality which are relevant to an individual's case (paragraph 28).

For most countries the competent authority is, or is represented by, the State's embassy or consulate in the UK. Some embassies are given authority to decide whether or not to issue passports, indicating competence in nationality matters, whilst others are required to refer applications for documents to an authority in the country of origin.

In cases where nationality is acquired automatically, for example, at birth a child is deemed to have the nationality of the parent, or of the country of birth, the competent authority may be a birth registry or a passport office.

In cases of non-automatic acquisition or loss of nationality, there may be a government department responsible for issuing a nationality certificate to a successful applicant, or for issuing documentary evidence of renunciation.

Where a person has had identity documents that evidence nationality confiscated by a State official, it may be arguable that the confiscation is a deprivation of nationality by the state. This would depend upon the authority, or lack of it, which the official wields and on the person's ability to re-assert their nationality.³⁵ Where the deprivation is discriminatory it could amount to persecution for a Refugee Convention reason.

35 *ST (Ethnic Eritrean – nationality – return) Ethiopia* CG [2011] UKUT 252 (IAC).

iii. 'by any State'

The States to consider are those where the applicant has a relevant link, 'whether by birth on the territory, descent, marriage, through a child or habitual residence' (2016 Home Office Instruction section 4.5.1). The application form provides a rudimentary and not entirely accurate checklist regarding possible family links and residence rights.³⁶ The *UNHCR Statelessness Handbook* (paragraph 18) refers to 'adoption' rather than 'through a child', which must be correct, since the child may gain a nationality by the act of adoption, whereas examples of laws providing for parents to acquire nationality 'through a child' are likely to be non-existent.

An investigation into a parent or grandparent's nationality may reveal that they have passed on a nationality which they themselves have since lost. Conversely, a parent may have, or have had, a nationality which the child did not, or cannot, acquire, for example in cases of colonial independence or State secession.

Where a person is from a former UK colony, British nationality law, can produce some helpful results and the person may even be British, or, entitled to register as British.³⁷

Nationality can be acquired automatically, or lost, through marriage.³⁸

Periods of residence either in a country, or away from it, can be relevant to a right to naturalise or to be re-documented, or can lead to automatic loss of nationality.³⁹ 'Habitual residence' is not defined in the 2016 Home Office Instruction. It is suggested that it is not necessary to consider in detail States which people have only passed through, in particular staying for a short time, or without lawful residence (for example, to seek asylum). Time spent in a country unlawfully for many years could nevertheless amount to 'habitual residence'.⁴⁰

See **Part C, section 16.e. Foreign nationality and immigration law** for how to investigate nationality law.

iv. 'under the operation of its law'

'Law' is not limited to legislation, but includes 'ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice' (2016 Home Office Instruction, section 4.6, *UNHCR Statelessness Handbook*, paragraph 22). The relevant law may well be an old version which was in force at the time of event in question e.g. birth of grandparents, parents or the applicant, marriage of the applicant or their parents, or long residence. Reference should be made to laws with transitional and with retrospective effect.

State practice is perhaps the most controversial element in the above list, but is crucial given the aim of the 1954 Convention to offer protection to those whose nationality is not recognised. State practice is brought into play by the definitions in the 1954 Convention and in the Immigration Rules of a stateless person. '[N]ot considered as a national' implies some

36 Application form FLR(S) and its guidance [February 2016 version]. See **Part C, section 18.b.** for problems with the form.

37 See eg Sch 2, British Nationality Act 1981. See L Fransman, *British Nationality Law*, 3rd edn, Bloomsbury Professional, West Sussex, 2011, at section 17.9 (the *de facto/de jure* distinction made in that section may be regarded as not reflecting current thinking on 'under operation of its law').

38 E.g. Senegalese law provides for automatic acquisition of nationality when a woman marries a Senegalese man. See **Part B section 8 Further requirements for a grant of statelessness leave: admissibility paragraph 403(c)** for a brief discussion of naturalisation by application following marriage.

39 *R (Sameda) v Secretary of State for the Home Department* (statelessness; Pham [2015] UKSC 19 applied) (IJR) [2015] UKUT 00658 is an example of the Home Office asserting that residence in Libya gave rise to a right to naturalise, incorrectly because the facts did not support the conclusion, and erroneously in law because having a future right to naturalise at the time of the decision does not mean that a person is 'considered as a national' by any state.

40 Bidoons born and habitually resident in Kuwait are classified as 'illegal residents' in Kuwaiti law – Kuwaiti Cabinet Decree 409/2011, identified at paragraph 6.4.4 Home Office *Country Information and Guidance, Kuwait: Bidoons*, v2.0 July 2016.

regard to the process of consideration. There is also frequent reference to State practice in the *2016 Home Office Instruction* and *UNHCR Statelessness Handbook*.

'Establishing whether an individual is not considered as a national under the operation of its law requires an analysis of how a State applies its nationality laws in practice and has applied them to the individual, taking account of any review/appeal decisions that may have had an impact on the individual's status. The reference to "by the operation of its law"⁴¹ in the definition of a stateless person in Article 1(1) is intended to refer to those situations where State practice does not follow the letter of the law.' (*2016 Home Office Instruction*, section 4.6.1).

Information about the practice of the State may be general (for example, the State is reluctant to grant nationality to people in certain ethnic groups) or particular to the applicant (a letter from the embassy stating that the particular person is not recognised as a national).

A straightforward reading of the State's legislation may appear to indicate that a client is not a national: for example if a child's mother cannot transmit her nationality to her child because only fathers can do so in her country of nationality. It is necessary, however, to make further enquiries and to attempt to understand the practice of the State in question: is there a more favourable decree, regulation, policy or practice of granting nationality in such circumstances that might mean that this child is still treated as a national?⁴²

By contrast, where a law seems to indicate a clear entitlement to nationality (whether automatically or e.g. by registration), it may be that the law is disregarded or disappplied in practice.

In a case where a person would appear to have acquired nationality automatically, but in practice the national authorities have treated the individual as a non-national, the guidance is clear that 'it is the position of the national authorities rather than the letter of the law that is likely to be decisive' (*2016 Home Office Instruction* section 4.6.3).

It is the subjective position of the State that is critical in determining whether an individual is considered to be its national, even if the State appears to apply its own laws in error (*UNHCR Statelessness Handbook* paragraph 99), although the caseworker is directed to look at what information has been provided to the competent authorities by the applicant⁴³ (*2016 Home Office Instruction*, section 4.3.6).

This emphasis on State practice means that even nationality acquired by fraud or mistake should be considered effective, unless and until revoked or annulled by the granting State (*2016 Home Office Instruction* 4.6.7, *UNHCR Statelessness Handbook* paragraph 45). It may be that the State takes no formal decision to revoke or annul nationality, but alleges that a passport has been obtained fraudulently, and refuses consular protection. In such a case it is the practice of the State that should take precedence.

However, the optimism that may be engendered on reading these statements – that this is a realistic procedure designed to regularise the status of those who have failed to achieve recognition by their State authorities and readmission to their country of origin – needs to be tempered by two considerations. The first is practical and the second is legal.

41 The Home Office misquotes the 1954 Convention. The text should read 'under the operation of its law'. The Home Office has committed to amending this in the next version of the *2016 Home Office Instruction* (communication to the authors, 13 September 2016).

42 For example, some residents of Egypt who were born of Palestinian fathers and Egyptian mothers have been given a limited right to obtain nationality by decree. See O El-Abed *The Invisible Community: Egypt's Palestinians*, 8 June 2011 available at <https://al-shabaka.org/briefs/invisible-community-egypts-palestinians/#fnref-331-5> [accessed 13 September 2016].

43 The Home Office has accepted letters from embassies stating that the applicant is not a national, without asking what information was provided to obtain those letters.

The practical issue is that on many occasions a clear decision about a person's entitlement to nationality may well not be forthcoming. Instead, the embassy or consulate asks the person to produce documents to establish their nationality before it will consider their application. These demands are often unrealistic given the absence of family members to assist in the country of origin, the absence of funds, and the length of absence of the applicant from the country. The *2016 Home Office Instruction* addresses this problem, in section 4.6.1, recognising that this situation 'in practice amounts to a denial of recognition.'

In other cases, enquiry to a State may be met with lengthy delay, or refusal to respond, perhaps for months or even years. The *2016 Home Office Instruction* states:

'Wherever possible, the caseworker must progress the case to conclusion and no time should be wasted waiting for a response, particularly if the State's representatives have a general policy or practice of never replying to such requests. Caseworkers must not make any automatic assumptions as the result of another State's failure to respond.' (section 4.6.5)

The *UNHCR Statelessness Handbook* provides, at paragraph 41, 'If a competent authority has a general policy of never replying to such requests, no inference can be drawn from this failure to respond based on the nonresponse alone.' If the State has previously routinely responded to requests, the *2016 Home Office Instruction* states that a lack of response 'can usually be taken as evidence that the individual is not known to the State' (4.6.5). This is a watered down version of paragraph 41 of the *UNHCR Statelessness Handbook*: 'when a State routinely responds to such queries, a lack of response will generally provide strong confirmation that the individual is not a national'. In addressing this complex situation, it is important to bear in mind the standard of proof. The applicant needs evidence which will support their claim to be stateless to the standard of balance of probabilities, and the point at which there is sufficient evidence in such a case as this will have to be argued on a case by case basis. See **Part B, section 5 Statelessness: standard of proof**.

The legal issue: in *Pham v Secretary of State for the Home Department*⁴⁴ one question for the Supreme Court was whether the Secretary of State's order to deprive Mr Pham of UK nationality was lawful under s40 British Nationality Act 1981. Section 40(4) of that Act provides that 'the Secretary of State may not make an order depriving an individual of a British nationality status if satisfied that the order would make a person stateless'. The Vietnamese government had refused to confirm whether or not Mr Pham was a Vietnamese national prior to the UK's deprivation decision, only stating after the decision that he was not. The Supreme Court held that the timeline was crucial; when the Home Office made the deprivation decision, Mr Pham was still a Vietnamese national according to the law of Vietnam (paragraph 38) so there was no barrier to deprivation of his British citizenship.

The Court of Appeal had held that the failure of the Vietnamese government to acknowledge Mr Pham's nationality was arbitrary, and therefore did not make Mr Pham stateless. For example, Jackson LJ, giving the leading judgment, stated,

'The fact that in practice the Vietnamese Government may ride roughshod over its own laws does not, in my view, constitute "the operation of its law" within the meaning of article 1.1 of the 1954 Convention.'⁴⁵

The Supreme Court made no formal ruling on the position of the Court of Appeal. Various remarks suggest, however, that (at least for some members of the Court) the phrase 'the

⁴⁴ *Supra* n 12.

⁴⁵ *B2 v Secretary of State for the Home Department* [2013] EWCA Civ 616 at para 88.

operation of its law' does not bring within the 1954 Statelessness Convention definition those who have no citizenship because of wholly arbitrary conduct by a state, in situations where the rule of law is weak and the denial of citizenship has no proper legal basis.

As a result, *Pham* hints at a restrictive approach to the definition of a stateless person, imperiling the primary purpose of the Convention, which was to protect persons put at risk by exactly this type of conduct by national authorities. As the *UNHCR Statelessness Handbook* states at paragraph 56, illegality on an international level, in the act of 'bestowal, refusal or withdrawal of nationality...is generally irrelevant for the purposes of Art 1(1)', otherwise the illegal actions of a State would prevent the victim of those actions from being protected by the 1954 Convention – the more extreme the illegality, the less the protection afforded by the international community.

We should expect the Home Office to follow its own revised *2016 Home Office Instruction*, written post-*Pham*, in its determinations. In *R (Semedá) v Secretary of State for the Home Department*⁴⁶ the President of the Upper Tribunal cited Lord Carnwarth at paragraph 38 of *Pham*:

'... I would accept that the question arising under Article 1(1) of the 1954 Convention in this case is not necessarily to be decided solely by reference to the text of the nationality legislation of the State in question ... reference may also be made to the practice of the Government ...'

The President then asserted that '... a broad meaning is to be ascribed to the words "under the operation of its law"'.⁴⁷ He also observed that the Supreme Court had not endorsed the reasoning of the Court of Appeal.

Whilst the remarks in the Supreme Court in *Pham* are arguably *obiter* and therefore not binding, they do raise the spectre of applicants being expected to mount legal challenges in the courts of their country of origin against negative decisions about their nationality. Doing so is impracticable for those living in the UK without access to money and without family or other persons to assist, particularly in States where the rule of law is weak and the outcome unlikely to be positive. The *UNHCR Statelessness Handbook* states clearly that a determination of statelessness must be made whether or not nationality might be reacquired⁴⁸ (but see **Part B, section 8 Further requirements for a grant of statelessness leave: admissibility paragraph 403(c)**).

A State may have powers to treat a nationality acquired by naturalisation as a nullity, or to deprive the person of that nationality if it was obtained by fraud.⁴⁹ Where a person has properly issued documents which raise a presumption that they are a national of a State, if that State refuses to re-document them without making a formal decision as to deprivation, the act might be treated as arbitrary deprivation.⁵⁰ It is suggested, however, that this will depend on reasonable compliance with the State's procedures, and the reasonableness of the procedures themselves (see further **Part C, section 16 Evidencing the claim**).

46 *R (Semedá) v Secretary of State for the Home Department (statelessness; Pham [2015] UKSC 19 applied)* IJR [2015] UKUT 00658 (IAC).

47 See *R (Semedá) v Secretary of State for the Home Department*, *supra* n 46, paragraph 28.

48 Paragraph 117 'Exploring solutions abroad'.

49 See for example *Janko Rottmann v Freistaat Bayern*, C-135/08, judgment of 2 March 2010.

50 See paragraph 11, 'Tunis Conclusions', *supra* n 20.

B.3. Timing of the assessment of statelessness

The statelessness rules use the present tense for the definition of statelessness (paragraph 401), the exclusion clauses (paragraph 402) and the requirements for limited leave to remain (paragraph 403). The *2016 Home Office Instruction* at section 4.4 confirms that the determination of statelessness is ‘not a historic or predictive exercise’ in language borrowed directly from the *UNHCR Statelessness Handbook* (paragraph 50, on ‘temporal issues’ in interpretation of Art 1(1) of the Convention). Recent case law confirms this position.⁵¹ The Home Office should not delay nor suspend a determination, nor refuse to recognise a person as stateless because it believes that they might be able to acquire a nationality, or acquire documents to establish their nationality, in the future. Even if the applicant is stateless, the burden is on them to show that they are **‘not admissible ... to any other country’** (paragraph 403(c)) to obtain a grant of leave to remain. This may involve a request to acquire or reacquire nationality (see **Part B, section 8 Further requirements for a grant of statelessness leave: admissibility paragraph 403(c)**).⁵²

B.4. Statelessness: burden of proof

In general the burden of proving entitlement rests with the applicant, although it may shift where credible evidence is provided.⁵³ In addition paragraph 403(d) imposes a separate evidential requirement mandating that the applicant must have **‘obtained and submitted all reasonably available evidence to enable the Secretary of State to determine whether they are stateless’**. This requirement is directed only to the determination of statelessness, and does not impose any requirement to adduce evidence showing non-application of the exclusion clauses, or admissibility (see **Part B, section 8 Further requirements for a grant of statelessness leave: admissibility paragraph 403(c)**). The *2016 Home Office Instruction* goes further than the general principle, and states that the caseworker ‘must assist’ the applicant ‘where the available information is lacking or inconclusive’ (section 4.2). This includes ‘interviewing, researching and, if necessary, making enquiries with the relevant authorities and organisations’ (section 4.2). This is a significant departure from the normal position in immigration cases, and a stronger statement than in the *2013 Home Office Instruction*, but it does not go as far as sharing the burden of proof, and the applicant must prove a negative: a lack of nationality.

For children, the *2016 Home Office Instruction* requires ‘the caseworker to assist in the determination of statelessness by making enquiries which the child is not in a position to undertake’ (section 1.4, in compliance with the UK’s obligations under Article 7 of the UN Convention on the Rights of the Child, which provides that every child has a right to a nationality). This appears to require the caseworker to do more for a child than an adult applicant. The *Instruction* states at section 1.4 that caseworkers must comply with their duties under s55 Borders, Citizenship and Immigration Act 2009, by ‘considering the individual circumstances of the case and the impact on children’.

The *2016 Home Office Instruction* at section 4.3.5 ‘Country Research’ contemplates the case worker using internal Home Office resources including the Country of Origin Information Service, the Foreign and Commonwealth Office and overseas posts. They are directed not

51 *R (Semeda) v Secretary of State for the Home Department*, *supra* n 46, paragraph 29: ‘Future forecasts are alien to this exercise.’ This follows the reasoning of the Supreme Court in *Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62.

52 *R (JM) v Secretary of State for the Home Department (Statelessness: Part 14 of HC 395)* IJR [2015] UKUT 00676 (IAC) confirms this interpretation.

53 M Symes and P Jorro *Asylum Law and Practice*, 2nd Ed, Bloomsbury Professional, West Sussex, 2010, paragraph 6.12, p324, cite *Smith v Secretary of State for the Home Department*, (00/TH/02130: the legal burden of proof [in the assessment of nationality in asylum cases] lies on the applicant throughout, although the evidential burden may shift with the submission of credible evidence.

to contact the authorities of a State unless the applicant consents to the contact. See **Part C, section 8 Obtaining informed consent**.

The *2016 Home Office Instruction* also suggests that a caseworker might 'seek clarification' about another state's position on nationality if there appears to be a mistake (section 4.3.6).

Home Office caseworkers have been extremely reluctant to carry out their own enquiries even when they have agreed to do so following an explicit request from the applicant.

Even when the Home Office has agreed to carry out enquiries, it has been the minimum possible: at interview a caseworker agreed to 'email, fax and write' to a State authority to pursue the applicant's document request. There was no reference to this in a decision to refuse the stateless application. On obtaining the Home Office file it was apparent that one short email was sent, and even that was not sent to the relevant State authority, but to the embassy, and the email was not followed up when the embassy did not reply.

Reference could be made to decisions in asylum and cases under Article 3 of the European Convention on Human Rights, where the Home Office is required to verify documents where it is easy to do so, and where they come from an 'unimpeachable source'.⁵⁴

The judgment in *Semeda*⁵⁵ in the Upper Tribunal refers to the *2013 Home Office Guidance* at sections 2.2, 3.2, 3.3 and 3.4 (see now sections 4.2, 4.3 and 4.4 of the *2016 Home Office Instruction*, which are broader) and also to public law principles set out in the *Tameside* case: did the decision maker 'ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?'⁵⁶

The *UNHCR Statelessness Handbook* suggests a 'shared burden', a 'collaborative' procedure (paragraph 88) and 'non-adversarial approach' (paragraph 89) but acknowledges that the applicant is required to prove a negative which 'presents significant challenges to applicants' (paragraph 88).

B.5. Statelessness: standard of proof

The rules do not set out a standard of proof. The *2016 Home Office Instruction* provides that 'The applicant is required to establish that he or she is not considered a national of any State to the standard of the balance of probabilities (that is more likely than not.)' (section 4.2).

This is at odds with the *UNHCR Statelessness Handbook* which explicitly links the standard of proof in a statelessness determination with the 'reasonable degree' standard applied in refugee status determinations. A higher standard of proof would 'undermine the object and purpose of the 1954 Convention' (paragraph 91).

The *2016 Home Office Instruction* sets out the justification for the standard of proof: the factual issues to be decided 'justify a higher standard of proof than the reasonable likelihood...where the issue is threat to life, liberty and person' (section 4.2). This appears counter to the position in the *UNHCR Statelessness Handbook* that leave granted to stateless

54 *MJ (Singh v Belgium: Tanveer Ahmed (unaffected)) Afghanistan* [2013] UKUT 253 (IAC). The decision in *Tanveer Ahmed* [2002] Imm AR 318 envisages cases where it might be appropriate for the Home Office to verify documents. In *Singh and Others v. Belgium* (no. 33210/11) [Articles 3 and 13-Rule 39], the documents were emails between the appellant and UNHCR.

55 *R (Semeda) v Secretary of State for the Home Department supra* n 46.

56 *Secretary of State for Education and Science v Metropolitan Borough Council of Tameside* [1977] AC 1014, paragraph 1065b.

persons is a 'protection issue'.⁵⁷ The Government's reasoning appears to be derived from the Court of Appeal judgment in *MA (Ethiopia) v Secretary of State for the Home Department*.⁵⁸ The case concerned the factual issue of ability to return. It is suggested that the five reasons given at paragraphs 78-83 of the judgment for rejecting the 'real risk' test for proving inability to return do not apply to proving statelessness. Inability to return and statelessness are not the same. Proving statelessness involves meeting a particular legal definition and statelessness raises issues of international protection.

The *2016 Home Office Instruction* at section 3.2 states that caseworkers may rely upon findings of fact in the asylum procedure, even though the lower standard was applied in making those findings. The Home Office has accepted that it must take into account findings made in the asylum support tribunal, where there is nothing, such as the passage of time, to disturb them.⁵⁹ There is other potentially relevant guidance dealing with nationality, for example the Asylum Instruction *Nationality: doubtful, disputed and other cases*⁶⁰ which provides instructions, including as to burden and standard of proof in asylum and non-asylum cases, with a section on disputed statelessness. At the time of writing this was not helpful guidance but it does illustrate the need to explore other Home Office sources. See also **Part C, Section 6 Analysing the information you have collected**.

B.6. Exclusion clauses

Paragraph 402 of the Rules excludes from recognition as stateless under paragraph 401 those who have alternative protection (402 (a) and (b)) and those who are undeserving due to their own actions (402 (c)-(e)).

402. A person is excluded from recognition as a stateless person if there are serious reasons for considering that they:

- (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.

57 For example, where the *Handbook* refers to protection of refugees and stateless persons together at paragraph 124 of the *Handbook*.

58 [2009] EWCA Civ 289, paragraphs 78-83, judgment of Stanley Burton LJ.

59 Home Office agreement to re-issue the decision letter to take into account an asylum support decision following a permission decision in an application for judicial review, May 2016.

60 Asylum Instruction, Asylum Screening and Routing, 26 October 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257467/nativity-doubtful-disputed.pdf [accessed on 12 July 2016].

The rule does not precisely mirror the 1954 Convention and the 1954 Convention does not precisely mirror the Refugee Convention. The *2016 Home Office Instruction* nevertheless refers caseworkers to Home Office guidance on 'mirror' clauses in the Refugee Convention as well as *UNHCR Handbook* to that Convention,⁶¹ possibly because the *UNHCR Statelessness Handbook* to the 1954 Convention does not contain any guidance on the exclusion clauses (see paragraph 13 therein). The UNHCR view is that the 'exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied',⁶² and there is a strong argument that the same is true for exclusion from the benefits of the 1954 Convention.

Exclusion is more widely drawn in the rules than in the 1954 Convention. Paragraph 402 states that, '**A person is excluded from recognition as a stateless person if there are serious reasons for considering that...**' they fall under one of the definitions at 402 (a)-(e). By contrast, Article 1(2) of the 1954 Convention provides that 'This Convention shall not apply' to those who fall under the exclusion clauses. A person who falls under the definition in paragraph 401(a) is still stateless, whether or not they have committed a certain type of criminal offence, or enjoy alternative forms of protection, but they will not be entitled to formal recognition as a stateless person under Part 14, to statelessness leave under that part, or to the protections of the 1954 Convention.

Further, paragraph 402 imposes upon **all** grounds the requirement for 'serious reasons to believe' that a condition for exclusion is met. In the 1954 Convention this lower standard is only applied to a subset of the reasons for exclusion – those set out at Article 1(2)(iii) which are responsibility for crimes against peace, war crime, or crime against humanity; serious non-political crime prior to admission to the country of residence; or acts contrary to the purposes and principles of the United Nations.

In cases where a person may be excluded under paragraph 402, the recognition of statelessness may be material to another immigration application, for example a request to revoke a deportation order; or for asserting rights under international law which are not set out in the 1954 Convention, since '[s]tatelessness is a juridically relevant fact under international law' (paragraph 9 *UNHCR Statelessness Handbook*). The *2016 Home Office Instruction* confirms that a finding that a person meets the definition in paragraph 401(a) 'is a declaratory act, akin to recognition as a refugee under the 1951 Convention' (section 4.1).⁶³ For cases where a person is excluded under Part 14 of the Rules, the definition in paragraph 401 is '**for the purposes of this Part [of the Rules]**' and only potentially applicable to other immigration applications. The argument can be made that rule 401(a) should be the working definition for immigration decision-making elsewhere, given that there is no other definition of a stateless person in the Immigration Rules.

B.6.a. Exclusion clauses: burden and standard of proof

The *2016 Home Office Instruction* at section 5.3 acknowledges that the burden of proof shifts to the Home Office for the three 'fault-based' exclusion clauses. The rule makes no such distinction. The Home Office must prove its case if it applies any of the five clauses.

Paragraph 402 of the Immigration Rules applies the 'serious reasons' standard of proof to *all* the exclusion clauses, not just the fault-based ones. The *2016 Home Office Instruction* requires caseworkers to have 'strong' or 'clear and credible evidence' that a person has committed the crimes or performed the acts in question. It states that the standard is not as high as the

61 See also case law and literature on the exclusion clauses in the Refugee Convention in, for example, Js C Hathaway and M Foster *The Law of Refugee Status*, 2nd Edn, Cambridge, Cambridge University Press, 2014.

62 *Al-Sirri v Secretary of State for the Home Department*, [2012] UKSC 54, paragraph 75 confirms the authority of this proposition in UK law.

63 The definition of a stateless person is recognised as a part of customary international law (paragraph 13 *UNHCR Statelessness Handbook* and see **Part B, section 2.d. Definition of a stateless person**).

criminal standard, and must amount to more than ‘suspecting’ or ‘believing’ (section 5.3, on the fault-based clauses).

The 1954 Convention requires ‘serious reasons for considering that’ a person has committed a relevant act or crime for the fault-based exclusions to apply (Article 1(2)(iii)). It does not set out any standard for the alternative protection clauses (Article 1(2)(i-ii)).

B.6.b. Paragraph 402(a): exclusion due to UNRWA protection

Paragraph 402(a) of the Immigration Rules operates to exclude from recognition as a stateless person ‘**persons who 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**’. The wording of the rule is identical to the wording in the 1954 Convention. Although the equivalent exclusion clause found at the first paragraph of Article 1D of the Refugee Convention is worded differently, it has the same meaning. The protection of both conventions is not available to ‘those who are presently receiving protection or assistance’ from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), which operates in the Occupied Territories, Jordan, Lebanon and Syria.⁶⁴

The work of UNRWA is large in scope: it provides protection and assistance for ‘some five million refugees’, and its services ‘encompass education, health care, relief and social services, camp infrastructure and improvement, microfinance and emergency assistance, including in times of armed conflict.’⁶⁵

The *2016 Home Office Instruction* states that persons ‘may come within the scope of the Stateless Convention if they have not received [UNRWA] assistance, or have ceased to receive assistance for reasons beyond their control and independent of their volition’ (paragraph 5.1), reflecting the decision of the Court of Justice of the European Union in *El Kott*,⁶⁶ a Refugee Convention case. Although there is no equivalent to the Qualification Directive⁶⁷ for statelessness cases, the Court of Justice of the European Union case law is likely to be highly persuasive given that it is accepted that the exclusion clauses in the Refugee and 1954 Conventions have the same meaning.

For the same reason, knowledge of Home Office guidance concerning Article 1D of the Refugee Convention may be of assistance in understanding its approach to paragraph 402(a).⁶⁸ UNHCR has also issued potentially helpful position papers, indicating its view of Article 1D, for example that those who fall within its scope are Palestinians who became refugees as a result of the 1948 Arab-Israeli conflict, displaced persons as a result of the 1967 Arab-Israeli conflict and, importantly, their descendants.⁶⁹

64 <http://www.unrwa.org/where-we-work>, [accessed 31 July 2016].

65 <http://www.unrwa.org/who-we-are>, [accessed 23 September 2016].

66 *El Kott* (Case 346/11 CJEU *El Kott and Ors v Bevándorlási és Állampolgársági Hivatal* CJEU Case 346/11 of 19.12.2012). Sections 2.2.14 to 2.2.25 of the Home Office UK Border Agency *Operational Guidance Note Occupied Palestinian Territories* v4, 19 March 2013, were updated to reflect the judgment. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310443/Occu_pales_terri_operational_guidance_2013.pdf [accessed 30 September 2016].

67 Directive 2004/83/EC.

68 Home Office UK Border Agency *Operational Guidance Note Occupied Palestinian Territories* v4, 19 March 2013, op.cit. *supra* note 66; Home Office *Asylum Policy Instruction Article 1D of the Refugee Convention: Palestinian refugees assisted by the United Nations Relief and Works Agency (UNRWA) Version 2.0* 09 May 2016, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524502/A-on-Article-1D-and-Palestinians-v2_0.pdf [accessed 28 September 2016].

69 UNHCR *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, October 2009, available at: <http://www.refworld.org/docid/4add77d42.html> [accessed 23 September 2016]; UNHCR *Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection* May 2013, available at: <http://www.refworld.org/docid/518cb8c84.html> [accessed 29 September 2016].

As UNHCR States “the position of Palestinian refugees under international law is complex and continues to evolve”.⁷⁰ In the Refugee Convention, whilst the first paragraph of Article 1D is an exclusion clause, the second paragraph of Article 1D is an inclusion clause. A Palestinian who is recognised as stateless by the Home Office under the Immigration Rules may also be entitled to recognition as a stateless refugee in reliance on Article 1D. In the Home Office *Operational Guidance Note Occupied Palestinian Territories* it is stated at paragraph 2.2.22 that;

‘...where the condition relating to the cessation of the protection or assistance provided by UNRWA was satisfied, the applicant must be recognised as a refugee within the meaning of Article 2(c) of the Directive (“ipso facto entitled to the benefits”), provided always that he was not excluded by virtue of Article 12(1) (b) or (2) and (3) of the Directive (equivalent to Articles 1E and 1F of the Convention).⁷¹

The argument would be as follows. Firstly, that the applicant is a Palestinian and someone to whom the UNWRA exclusion potentially applies. That they have been recognised as a stateless person must signify that the Home Office accepts they are not excluded on this basis, since the Immigration Rules incorporate the exclusion clause at 402(a). Secondly, it would be irrational for the Home Office to maintain that they are excluded by Article 1D of the Refugee Convention and its equivalent in the Qualification Directive. The first paragraph of Article 1D of the Refugee Convention has the same meaning as the equivalent clause in the 1954 Convention and in paragraph 402(a) of the Immigration Rules. Thirdly, if they are not excluded by the first paragraph of Article 1D, they should benefit from the inclusion clause in the second paragraph of Article 1D (and see Article 2c of the Qualification Directive): those Palestinians who were in receipt of assistance that ceases ‘for any reason’ are automatically (‘ipso facto’) entitled to recognition as refugees. Finally, an argument would need to be made that they are not excluded on some other basis.

There is no equivalent of the second paragraph of Article 1D (2), the inclusion aspect of the Refugee Convention, in the 1954 Convention or in Part 14 of the Immigration Rules. When establishing entitlement to recognition as a stateless person the focus will be on whether a Palestinian client is excluded or not by paragraph 402(a) and then on establishing that the other requirements of the Immigration Rules are met.

B.6.c. Paragraph 402(b): exclusion where other international protection is available

Paragraph 402(b) excludes the stateless person who has, or had, alternative protection, in **‘the country of their former habitual residence’** where they are recognised by that country as having **‘the rights and obligations which are attached to the possession of the nationality of that country’**. The *2016 Home Office Instruction* makes it explicit that the access to this protection must be current (section 5.2); and must be equivalent to ‘to all intents and purposes’ to the rights of nationals in that State (section 5.2). The person must have ‘secure residence’ and must be recognised by the State concerned as having those rights (section 5.2). There are no known refusals under this rule at the time of writing.

Article 1(2)(ii) of the 1954 Convention excludes those ‘who are recognised by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country’.

⁷⁰ UNHCR *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, October 2009, *op.cit.*, supra, note 69.

⁷¹ Home Office UK Border Agency *Operational Guidance Note Occupied Palestinian Territories v4*, 19 March 2013, *op.cit.*, note 66.

Paragraphs 144-146 of the *UNHCR Refugee Handbook*⁷² suggest that this clause would exclude those who have a status just short of full citizenship, are protected from deportation and expulsion and are not mere visitors.

In contrast to the wording of the exclusion clause in the 1954 Convention, which refers to the 'country in which he has taken residence', the rule refers to the 'country of former habitual residence'. The 'country in which he has taken residence' could be taken to mean a State of former residence (not necessarily habitual in character). It could also mean the host State (for example the UK), where this is a State of residence and is itself carrying out the assessment of whether the person is entitled to international protection. The 'country of former habitual residence' may be any country in which the person resided habitually before arriving in the UK. The Refugee Convention and the EU Qualification Directives⁷³ refer to the country in which the person has taken up residence. '[C]ountry of former habitual residence' forms part of the definition of a refugee in the Refugee Convention and the risk of persecution there excludes that country from being considered as a place where alternative protection might be available. The *2016 Home Office Instruction* at section 5.2 is clear that the UNHCR interpretation of the equivalent 1951 Refugee Convention Article 1E⁷⁴ should be followed by decision makers when referring to paragraph 402(b).

The Rule reflects a departure from the purpose of the 1954 Convention, since it involves an investigation into the possibility of return to a country of former habitual residence as part of the recognition procedure. Paragraph 117 of the *UNHCR Statelessness Handbook* states that '[e]fforts to secure admission or re-admission [to another state] may be justified but these need to take place **subsequent to** a determination of statelessness' (our emphasis). The statelessness determination should be carried out to decide whether surrogate protection is required. That surrogate protection will not be required where the stateless person already enjoys rights equivalent to nationals in the host state.

Hathaway and Foster argue that Article 1E of the 1951 Refugee Convention applies whether or not the applicant is at fault in letting their rights of residence lapse in the other country.⁷⁵ This is a point which may be more relevant in statelessness than refugee cases, since in almost every case the relevant country to consider for the stateless person will be the 'country of former habitual residence'. Often a stateless person who leaves a country of former habitual residence loses their right to reside as well as having no right to return.

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- 72 UNHCR *Handbook on Procedures and Criteria for determining refugee status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees* December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html> [accessed 18 September 2016]. See E Fripp *Nationality and Statelessness in the International Law of Refugee Status*, Hart, Oxford, 2016, chapter 8 for analysis of the parallel provision in the Refugee Convention.
- 73 EU Qualification Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Council Directive 2004/83/EC); and EU Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast Directive 2011/95/EU. The UK opted out.)
- 74 UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Interpretation of Article 1E of the 1951 Refugee Convention relating to the Status of Refugees*, paragraph 7, March 2009, available at: <http://www.refworld.org/docid/49c3a3d12.html> [accessed 18 September 2016].
- 75 *Ibid* p 502, footnote 259, with reference to 'UNHCR Note on the Interpretation of Article 1E of the 1951 Refugee Convention relating to the Status of Refugees' (March 2009).

In the summer of 2015 the Home Office refused a fresh claim for asylum, which included a claim to be stateless, made by a Palestinian whose country of former habitual residence was an Arab League country. The basis of refusal was that the applicant could return to that country and continue to live under the sponsorship of family members, as he had done before leaving to study in the UK. The applicant then made a summary application for statelessness leave, with no further evidence on the point on which the fresh claim had been refused. After the *2016 Home Office Instruction* was issued he was granted leave to remain in the UK as a stateless person. The exclusion clause relating to former habitual residence was not considered to apply to the applicant.

Hathaway and Foster argue that the competent authorities of the relevant country must *recognise* the rights, for example by confirming the immediate right to re-entry and providing long term residence rights as a bare minimum.⁷⁶

Since the 2016 version of the *Home Office Instruction* clarified that ‘admissibility’ under paragraph 403(c) is for the purposes of permanent residence, the distinction has narrowed markedly between that paragraph, and the former habitual residence exclusion paragraph 402(b). See section **Part B, section 8 Further requirements for a grant of statelessness leave – Admissibility paragraph 403(c)**.

B.6.d. Paragraphs 402 (c-e): Fault-based exclusion

The ‘fault-based’ exclusion paragraphs are almost identical to Article 1F of the 1951 Refugee Convention and Article 1(2)(iii) of the 1954 Convention. The *2016 Home Office Instruction* states that these paragraphs are to be understood ‘in a manner consistent with’ the Home Office Guidance on Article 1F of the 1951 Refugee Convention.

Reference should be made to the case law⁷⁷ and literature, and the asylum decision-making guidance *Exclusion (Article 1F) and Article 33(2) of the Refugee Convention*,⁷⁸ which is signposted in the *2016 Home Office Instruction*. The *2016 Home Office Instruction* at 5.3 says that the Home Office requires ‘strong’ or ‘clear and credible’ evidence to refuse to recognise a person as stateless under these paragraphs.

The burden and standard of proof in exclusion clauses are dealt with at **Part B, section 6.a. Exclusion clauses: burden and standard of proof**.

Article 1F(ii) of the Refugee Convention specifies that the exclusion will apply where the commission of a serious non-political crime was *prior* to the refugee’s admission to that country ‘as a refugee’ [our emphasis]. The Qualification Directive interprets the equivalent exclusion at Article 12(2)(b) as referring to any time up until the issue of a residence permit to a person as a refugee.⁷⁹ In UNHCR’s view, it would not be correct to use the phrase ‘prior to admission ... as a refugee’ to refer to the period in the country prior to recognition as a refugee, as the recognition of refugee status is declaratory not constitutive.⁸⁰ ‘Admission’ in this context includes mere physical presence in the country. Paragraph 402(d) of the

76 Hathaway and Foster, *supra* n 59 p 503.

77 *AH (Algeria)* [2015] EWCA Civ 1003. Permission to appeal to the Supreme Court was refused on 22 March 2016, Case No: UKSC 2016/0012.

78 1 July 2016, available at: <https://www.gov.uk/government/publications/asylum-instruction-exclusion-article-1f-of-the-refugee-convention> [accessed on 16 September 2016]. On page 31 it is stated that the clause would apply to a person who is present in the UK but has not yet been granted asylum.

79 Article 12(2)(b) 2004/83/EC

80 UNHCR *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Refugee Convention relating to the Status of Refugees*, 4 September 2003, available at: <http://www.refworld.org/docid/3f5857d24.html> [accessed 15 September 2016].

Rules refers to the commission of a serious non-political crime '**outside the UK prior to.... arrival in the UK**'. Since the rules postdate the Qualification Directive it may be assumed that the different wording was chosen deliberately. It may therefore be argued that the wide interpretation of the criteria for exclusion under Article 1F of the Refugee Convention, as set out in the Qualification Directive, is not applicable in the same way to stateless persons. Instead the Home Office could refuse leave under paragraph 404: policy exclusions. See below.

The age of criminal responsibility has not yet been a factor in any leading decisions under this article.⁸¹

B.7. Further requirements for a grant of statelessness leave: introduction to paragraph 403

That a person is recognised as stateless under paragraph 401, and is not excluded under paragraph 402, does not mean that they will be granted leave to remain. They must fulfil the additional criteria in paragraph 403 (and paragraph 404: see **Part B, section 9 Policy exclusions and section 10 General grounds of refusal**). Paragraph 403 states:

'403. The requirements for leave to remain in the United Kingdom as a stateless person are that the applicant:

- (a) has made a valid application to the Secretary of State for limited leave to remain as a stateless person;
- (b) is recognised as a stateless person by the Secretary of State in accordance with paragraph 401;
- (c) is not admissible to their country of former habitual residence or any other country; and
- (d) has obtained and submitted all reasonably available evidence to enable the Secretary of State to determine whether they are stateless.'

The two-stage process is permissible since the 1954 Convention does not oblige States to grant leave to remain to stateless people on their territory and there is no equivalent of Article 33 of the 1951 Refugee Convention (prohibition on *refoulement*). The 1954 Convention provides for the enjoyment of rights in a hierarchy, dependent upon the residence status of the stateless person – lawfully in, lawfully staying in, habitually resident, or simply present in the jurisdiction.⁸² It therefore appears that the Home Office has wide discretion under the 1954 Convention as to the requirements it sets for a grant of 'lawful leave' (criteria such as admissibility, the general grounds of refusal, and the public policy exclusions).

Paragraph 403 of the Immigration Rules requires four criteria to be satisfied before leave will be granted. First, the person must be recognised as stateless under paragraph 401 (which includes reference to the exclusion criteria in paragraph 402). The application must have been made on a valid form (see **Part C, section 18.a. Application form**). The person must have '**obtained and submitted all reasonably available evidence**' to enable a statelessness determination to be made (which must have been the case, if the applicant is being considered for a grant of leave under paragraph 403 – see **Part B, section 4 Statelessness: burden of proof**). Most crucially, the 'admissibility' criterion at paragraph 403(c) must be satisfied. It is a common ground for refusal of applications and needs to be carefully considered – see the next section of this guide.

81 See for example: J Bond and M Krech 'Excluding the most vulnerable: the application of Article 1F(a) to child soldiers', *The International Journal Of Human Rights* Vol. 20, Iss. 4, 2016.

82 The *UNHCR Statelessness Handbook* paragraphs 132-143 set out the access to rights on a 'gradual, conditional scale'.

B.8. Further requirements for a grant of statelessness leave: admissibility paragraph 403(c)

Paragraph 403(c) of the Immigration Rules requires that the person who is recognised as stateless and wishes to be granted leave to remain on this basis **'is not admissible to their country of former habitual residence or any other country'**. The *2016 Home Office Instruction* provides some assistance to the Home Office caseworkers, but there is no single section which fully addresses the issue.

This part of the Immigration Rules raises similar questions to those concerning the definition of a stateless person: What is a country? What does admissibility mean? Is a person only to be considered admissible if they would have secure residence rights, and protection of their human rights, in the receiving country? At what point is admissibility determined? What is the burden and standard of proof? What are the UK's obligations to stateless persons under the 1954 and 1961 Conventions, as interpreted by the *UNHCR Statelessness Handbook*? These questions are dealt with below.

A framework for considering the issue is as follows. An ability only to enter a country does not indicate any particular level of protection. Consider first what rights of residence the person will have – preferably permanent and documented; these may indicate that the person is protected. Then consider whether the rights of the stateless person in the other country will be respected. If rights are not respected then there may be discriminatory treatment which amounts to persecution under the Refugee Convention or a breach of the UK's obligations under Article 3 of the European Convention on Human Rights. It may also be possible to argue that they should not be considered 'admissible' if there will be a breach of fundamental rights.

The requirement to show that the stateless person 'is not admissible' to any other country effectively operates to reduce the class of people to whom the Home Office offers protection by way of a grant of leave. In that effect it is very similar to the exclusion criterion in paragraph 402(b).

B.8.a. What is a 'country' for the admissibility test?

Paragraph 403(c) makes it a requirement of a grant of leave that a person **'is not admissible to their country of former habitual residence or any other country'**. It would be internally consistent to apply the same definition of 'country' in this paragraph of the Immigration Rules as applies in paragraphs at 401 and 402. The question has not yet been properly considered by the courts. The Upper Tribunal explicitly refused to rule on this issue in a case regarding return of a Palestinian to Gaza under the safe third country procedure, which was referred to in the *2013 Home Office Instruction* as being relevant to an interpretation of admissibility.⁸³ The Palestinian territories may not be a 'country' for the purpose of the admissibility test,⁸⁴ and decisions on the meaning of 'country' in the exclusion clause may be relevant.⁸⁵ An area asserting independence, such as Western Sahara, may not be a 'country' in this context.

A Home Office decision to grant discretionary leave to remain in the UK to an applicant for statelessness leave does not mean that they are **'admissible'** under paragraph 403(c) as the phrase **'any other country'** does not include the UK.⁸⁶

See **Part B, section 2.c. What is a State?** for further discussion.

83 *HA (Article 24 QD) Palestinian Territories* [2015] UKUT 00465 (IAC) of 10 July 2015, paragraph 14.

84 Permission decision of the Upper Tribunal (Immigration and Asylum Chamber), unreported, 7 April 2016.

85 There is authority for the view that 'country of former habitual residence' could have a wider definition than 'country of nationality'. The latter requires statehood to create nationality. The former could be a non-State territory, such as Hong Kong when it was under the legal authority of the United Kingdom. See *Tjhe Kwet Koe v Minister for Immigration & Ethnic Affairs & Ors* [1997] FCA 912 (8 September 1997): Hong Kong was treated as a country of former habitual residence as it had a distinct area with identifiable borders; its own immigration laws; a permanent identifiable community and a degree of autonomy of administration.

86 Permission decision of the UK Upper Tribunal (Immigration and Asylum Chamber), unreported, 30 September 2014.

B.8.b. What does 'admissibility' mean?

The *2016 Home Office Instruction* indicates that admissibility equates to a right to enter with permanent residence in the relevant country:

- (i) At section 1.4, for children, it states that 'a decision as to whether or not they qualify for leave under stateless provisions will depend on whether they are admissible to another country for purposes of permanent residence there.';
- (i) At section 3.4, interview policy, an interview will not be required where the applicant 'is clearly admissible to another country for purposes of permanent residence....';
- (i) At section 6.2, on refusal, it states that, 'If an ETD has been secured or a passport used to arrange to remove the individual, then this can be accepted as evidence that they are re-admissible for the purpose of permanent residence.'

In most cases, States will only issue an emergency travel document to a person who is a national, and a refusal should properly be made by reference to paragraph 401(a). Holding a stateless person's travel document would not necessarily give the applicant permanent residence or rights akin to those of a national on return to the country which issued that document.⁸⁷

The *2013 Home Office Instruction* suggested that simple entry⁸⁸ to a country might be enough to show that the stateless person is 'admissible', since it suggested that the safe third country procedure could apply. It was necessary to consider both the immigration status and the kind of protection the stateless person could enjoy in the receiving country. The *2016 Home Office Instruction* deliberately marks a change in the Home Office's understanding of admissibility, as requiring 'permanent residence', an immigration status which is more straightforward to determine.

Where the person is entitled to permanent residence, but is not able to access full civil and political rights for non-discriminatory reasons, for example absolute lack of resources, it is unlikely that the person is entitled to surrogate international protection under the 1954 Convention or under the Refugee Convention. It would be appropriate to consider whether the return would give rise to a breach of Article 3 of the European Convention on Human Rights, leading to a grant of humanitarian protection, or to a breach of Article 8 of that Convention, leading to a grant of leave.

B.8.c. Timing of 'admissibility' assessment

The requirement under Paragraph 403 (c) is that the applicant '**is not admissible to their country of former habitual residence or any other country**'. It is clearly expressed in the present tense.⁸⁹ The assessment of 'admissibility' should therefore be made in relation to the immediate situation. It would defeat the purpose of implementing a statelessness determination procedure to refuse to grant leave on the basis that at some point in the future it may be possible for the applicant to leave the UK. The applicant should, for example, hold a document giving a right to return with permanent residence; or, in the case

87 *H. El-H v Secretary of State for the Home Department* Upper Tribunal, AA/04018/2013, paragraph 37, unreported, available on the Tribunal Decisions website <https://tribunalsdecisions.service.gov.uk/utiac>. A Palestinian was entitled to return to Egypt, which had issued his travel document, but the short term visit visa he would be granted would not give him time to obtain employment, and request residence status, before his visa expired. As a result, he would be at risk of a breach of Article 3 of the European Convention on Human Rights due to the reasonable likelihood of indefinite detention as an unlawfully-present Palestinian.

88 In some early statelessness refusals the Home Office required applicants to prove that there was no possibility that they could be removed to another country, even in the far future, in a test akin to that for 'removability' in unlawful detention cases and applications under paragraph 353B of the Immigration Rules.

89 Permission granted by UK Upper Tribunal (Immigration and Asylum Chamber) on this point on 7 April 2016, unreported case.

of a child, have an entitlement to nationality by registration of their birth at an embassy or other competent authority.⁹⁰

There is support in the *UNHCR Statelessness Handbook* for the argument that, if the admissibility criterion is to be applied, it must relate to the immediate possibilities open to the applicant. See subsection **e. UNHCR Statelessness Handbook on re-admission** below.

B.8.d. Admissibility: burden and standard of proof

The applicant must prove that they are **'not admissible ... to any other country'**, under paragraph 403(c), but there is no requirement, beyond proving the point, to have produced **'all reasonably available evidence'** (paragraph 403(d)). Paragraph 403(d) only requires the applicant to provide all reasonably available evidence in support of the claim **to be stateless**, not in support of the claim that they are **'not admissible'**. Just as for the statelessness definition, the applicant needs to prove a negative. It is suggested that the same approach as is used for investigating statelessness could also be used for investigating admissibility. See **Part B section 4 Statelessness: burden of proof**.

If the 'admissibility' requirement is to be treated in a similar way to an exclusion clause, then it should be 'restrictively interpreted and cautiously applied'⁹¹ and 'narrowly construed'.⁹² This argument is untested but is supported by the reading of the *UNHCR Statelessness Handbook* on re-admission – see subsection **e. UNHCR Statelessness Handbook on re-admission** below. It is also now supported by the *2016 Home Office Instruction*, which, by referring to 'permanent residence' rather than 'safe third country procedures', appears to follow the guidelines in the *UNHCR Statelessness Handbook* in its narrow application of the rule.

The standard of proof is likely to be the balance of probabilities, although there is no authority for this point: the *2016 Home Office Instruction* does not address the issue;⁹³ the determination in *R (JM) v Secretary of State for the Home Department*⁹⁴ did not explicitly address it, and the judgment in *Al-Sirri v Secretary of State for the Home Department* discussed it only in terms of the fault-based exclusions.⁹⁵ The *UNHCR Statelessness Handbook* does not refer to a different standard of proof from that suggested as appropriate for determining statelessness itself (see paragraphs 117 and 153-157).

B.8.e. The UNHCR Statelessness Handbook on re-admission

The *UNHCR Statelessness Handbook* is clear that a determination of statelessness must take place prior to any consideration of which State is to provide protection to the stateless person (paragraph 117). The part of the *Handbook* addressing the position of 'Individuals in a Migratory Context' contains a section entitled, 'Where protection is available in another State'. It provides detailed guidance about the possible removal of stateless persons from a territory where they have been recognised as stateless (paragraphs 153-157 and in particular the documents cited at footnotes 100-110, and paragraph 7, footnote 4). Paragraph 154 states that, 'care must be taken to ensure that the criteria for determining whether an individual has a realistic prospect of obtaining protection elsewhere are narrowly construed'. The footnote states that 'safeguards are necessary to prevent the individual being left without a legal status anywhere and to ensure that any special circumstances justifying a residence permit are properly examined'.

90 *R (JM) v Secretary of State for the Home Department (Statelessness: Part 14 of HC 395)* IJR [2015] UKUT 00676 (IAC).

91 See **Part B, section 6 Exclusion clauses**; *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54, paragraph 75.

92 Paragraph 154 of the *UNHCR Statelessness Handbook*.

93 Section 4.2 relates to proof of statelessness only.

94 *R (JM) v Secretary of State for the Home Department (Statelessness: Part 14 of HC 395)* IJR [2015] UKUT 00676 (IAC).

95 *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54 paragraphs 69-75.

Any procedure for re-admission or re-acquisition of nationality (which might be an option where a voluntary renunciation has not resulted in the acquisition of a new nationality) should be 'easily accessible, both physically and financially, as well as one that is simple in terms of evidentiary requirements'. Discretion in dealing with the application for re/acquisition of nationality does not satisfy these criteria (paragraph 156, reflected in the judgment in *Al-Jedda*⁹⁶). Being 'physically present in a country of former nationality where legal entry and residence are not guaranteed would not suffice' (paragraph 156).

The UNHCR defines the conditions for readmission of the stateless person to another State: the person **is able** to 'acquire or reacquire nationality through a simple, rapid, and non-discretionary procedure, which is a mere formality; or enjoys permanent residence status in a country of former habitual residence to which **immediate** return is possible' (emphasis added). Paragraphs 155-157 expand on the meaning of these criteria.

The *UNHCR Statelessness Handbook* also addresses the possibility of States co-operating to 'find the most appropriate solution'. Paragraph 117, in the section headed 'Additional Procedural Considerations', sub-heading 'Exploring Solutions Abroad' makes the following points which are a summary of the requirements set out at paragraphs 153-157 where the subject is dealt with in more detail:

- efforts to secure re/admission must be subsequent to a determination of statelessness;
- the determination of statelessness is necessary to ensure full protection of the rights of the stateless person;
- there needs to be a 'realistic prospect' of re/admission;
- the re/admission may be through acquisition or reacquisition of nationality;
- the process is likely to require State co-operation.

The *UNHCR Statelessness Handbook* permits States to give a status which is 'more transitory in nature' than that described in paras 148-152 (requiring a grant of leave of two to five years). This suggests that some form of protection is provided while the person is negotiating access elsewhere.

The 1954 Convention sets out the rights of stateless persons at Articles 11 to 32. They should be afforded these rights even if they are not granted a residence permit (see the *UNHCR Statelessness Handbook* at paragraphs 132-137) although the question remains as to which country should afford them these rights. In the UK, determination of statelessness followed by a refusal of leave to remain results in the applicant having temporary admission/bail only ("immigration bail" under s61 of, and Schedule 10 to, the Immigration Act 2016, not in force at the time of writing). The Home Office will not issue a stateless person's travel document unless some form of leave has been granted to the applicant. (see **Part C, section 22 Decision: determination that a person is stateless but leave to remain is refused**).

96 *Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62, paragraphs 25-26.

B.9. Policy exclusions

Paragraph 404(b) sets out further reasons not to grant leave to remain:

404. An applicant will be refused leave to remain in the United Kingdom as stateless person if:

...

- (b) there are reasonable grounds for considering that they are:
 - (i) a danger to the security of the United Kingdom;
 - (i) a danger to the public order of the United Kingdom; or

Paragraph 406 provides for curtailment of leave on the same grounds. Paragraph 409 applies the same criteria to applications for indefinite leave to remain.

The *2016 Home Office Instruction* refers to the equivalent provisions in Immigration Rules 334(iii) and 339D (iii) on asylum and humanitarian protection.

The 1954 Convention permits expulsion of a stateless person 'lawfully in' a State on the same grounds. The person must have access to an appeal before a court (except where compelling reasons of national security require). The person must be allowed to negotiate entry to another territory, but the host State may impose 'internal measures' while waiting for the person to leave. For the meaning of 'lawfully in' see **Part C, section 22 Decision: Determination that a person is stateless but leave to remain is refused.**

B.10. General Grounds of Refusal

Paragraph 404(c) of the Immigration Rules applies the general grounds of refusal to statelessness applications. Paragraph 409 applies the same criteria to applications for indefinite leave to remain.

404. An applicant will be refused leave to remain in the United Kingdom as stateless person if:

....

- (c) their application would fall to be refused under any of the grounds set out in paragraph 322 of these Rules.

There is no information that there have been any refusals on paragraph 322 grounds in statelessness applications.

The General Grounds for Refusal Guidance, Section 4 of 5 *Considering leave to remain*, v 23, 19 April 2016, states: 'where there is satisfactory evidence to show that the applicant or their appointed representative has deliberately provided representations or documents which they know to be false', the application should be refused, whether the deception was successful or not (this refers to Paragraphs 322(1A), 322(2) and 322(2A)). Where an applicant has previously deliberately given false information it may be possible to make representations – for example, if the applicant did not have access to a statelessness determination procedure and instead applied for asylum prior to May 2013. This could be argued in many cases at the moment, but its applicability will reduce over time. The Home Office has granted statelessness leave to a stateless person who had previously made false representations in their asylum application and admitted to these in the statelessness leave application.

Paragraph 322(1B) mandates a refusal where the applicant is subject to a deportation order. See **Part C, section 11 Ex-offenders and those subject to a Deportation Order.**

Paragraph 322(1C) provides for mandatory refusal of indefinite leave to remain in the circumstances set out in the rule (criminal convictions).⁹⁷ One possibility is to apply for further leave to remain instead of indefinite leave to remain. For some types of offences in some circumstances it may be possible to appeal the conviction or sentence (for example *Ex parte Adimi* [1999] EWHC Admin 765; [2001] QB 667). The difficulty is that the 1954 Convention is not part of UK law and in any case the 1954 Convention does not afford protection against penalties for illegal entry, unlike Article 31(1) of the Refugee Convention. There will therefore be no grounds for overturning a conviction or reducing a sentence based on the 1954 Convention itself.

Where sub-paragraphs 322(3), (5), (5A), (9), (10) and (11) apply, refusal is discretionary. The guidance to paragraph 322(11) allows the Secretary of State to require parental consent to a statelessness application being made by an unaccompanied minor. Asylum seekers are exempt from this requirement.

⁹⁷ *Iqbal (paragraph 322 Immigration Rules)* [2015] UKUT 00434 (IAC).

C PRACTICE: How to make an application for leave to remain as a stateless person

This section explores many of the practical and tactical issues that will be the subject of your advice to your client, and the steps you will need to take to assemble evidence to support the application for leave. It sets out the procedure followed by the Home Office and how you can advocate for your client throughout that process. It concludes with information about the rights of those recognised as stateless.

C.1. Obtaining legal aid funding

For a solicitor it is a matter of professional obligation, required by the Solicitors Regulation Authority Code of Conduct,⁹⁸ to discuss with your client 'whether public funding may be available'. Because advice and representation in relation to a statelessness application and any appeal hearing are not in scope for Legal Help and Controlled Work, you should advise that legal aid may be available via exceptional case funding. See **Part A, section 5.d. Legal aid for statelessness work: what is in scope.**

Best practice requires that you apply on your client's behalf for exceptional case funding, advise your client to consider applying for exceptional case funding themselves, or refer your client to an organisation which can assist them in doing so. There has been at least one successful application for exceptional case funding for a statelessness application and it is important that statelessness work is funded wherever possible. Any application for exceptional case funding should have regard to the Legal Aid Agency guidance, and address each relevant issue set out therein. It should emphasise that 'the decision making process in a statelessness case may involve some subtlety and sophistication, arising from the recognition in international law of a distinction between *de jure* and *de facto* statelessness.'⁹⁹ Other points are the complexity of other concepts in the Immigration Rules, the difficulties with the application form (see **Part C, section 18.b. Problems with the application form**), the need for evidence; the difficulty of obtaining this, the high stakes, the merits of the application and that there is no right of appeal, as well as any features particular to the client, for example lack of English language skills, schooling, literacy, or mental health problems.

For a child, reference should be made to section 1.4 of the *2016 Home Office Instruction* which states:

'Close attention must always be given to the welfare and best interests of the child when considering their nationality status and potential that they may be stateless. This involves the same procedural and evidentiary safeguards for child claimants as apply in asylum claims, including priority processing of their claims and the provision of appropriately trained interviewers, legal representatives and interpreters, where an interview is undertaken. It also requires the caseworker to assist in the determination of statelessness by making enquiries which the child is not in a position to undertake claims.'

98 2011, Version 16, IB 1.16.

99 *R (Sameda) v Secretary of State for the Home Department*, *supra* n 46, paragraph 27.

Arguably this means that a child applicant should have a lawyer paid for by legal aid, as for child asylum claimants.

There is, provided the legal aid means and merits tests are met, legal aid to investigate and bring an application for judicial review of any refusal of statelessness leave.

Legal aid cannot be used to fund advice on matters of foreign law unless this is relevant to determining any issue relating to the law of England and Wales, for example where a point of foreign law arises as an issue in UK legal proceedings.¹⁰⁰ In a statelessness application, the nationality law of relevant countries is relevant to determining statelessness in UK law and falls within the scope of legal aid funding where this is secured.

C.2. Who can make an application?

There is no requirement that the applicant has extant leave at the time of making the application. There is no (apparent) bar in the Immigration Rules on switching into statelessness leave at any time (although see **Part C, section 15 Switching**), and there is no time limit within which an applicant must request statelessness leave. The majority of applicants will be failed asylum seekers who are classed as overstayers or illegal entrants. Some applicants have never made an asylum claim and there is no requirement to do so.

Key legal issues are not yet determined in UK law and there are no equivalents of country guidance cases. Where it appears to you that your client may be stateless then advancing an application for the Home Office to decide is an acceptable approach given the undeveloped State of the law.

C.3. Representing families

Where there is a family with a potential main applicant and dependants, it is important to be clear about who is your client for professional reasons. You should investigate each family member's situation and then advise who has the strongest application, who can submit an application and whether more than one application should be made in parallel to maximise the chances of success.

The *2016 Home Office Instruction* states explicitly at section 3.5, 'If a spouse or partner or child wishes to be considered individually as a stateless person, they must complete and submit a separate application', and that leave in line for a family member does not entail recognition that they are stateless.

You should almost always interview all those who can express themselves and in particular those who have capacity. It is best practice to interview family members separately to ensure that their instructions are freely given and so that any conflicts of interest can be identified. A dependant may have a stronger application than the person who first approached you and, if so, should be the main applicant or submit an application in parallel.

Stateless children who are likely to reach the age of 18 before being granted indefinite leave to remain should apply for leave to remain in their own right rather than as a family member: see **Part C, section 24 Rights of family members of a stateless person**.

Take a statement from a dependant who has relevant evidence to provide about the main applicant, or has difficulties of their own as a result of the main applicant's or their own statelessness. If a conflict of interest emerges, you will need to consider your professional obligations.

100 Sections 32 and 152 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

C.4. Referring to your client's lack of nationality in correspondence

Ensure that you describe your client's lack of nationality correctly in any correspondence with the Home Office or other bodies by describing them as 'stateless'. To avoid prejudicing your client's position, do not adopt any designation of a nationality by the Home Office.

Throughout your work, you must take great care to describe with precision the client's and their family members' place of birth or residence and ethnicity. None of these terms are synonymous with 'nationality'. See **Part C, section 16.b. Using interpreters for statelessness applications: special considerations** and **Part C, section 16.e. Foreign nationality and immigration law**.

For example, your client's birth place may be Asmara. You should name the exact place of birth, rather than a country: Asmara was located in Ethiopia, and is now located in Eritrea following State secession. Your client may be of Tigrinyan ethnic origin but may not speak Tigrinyan, only Amharic, which they picked up while living in Addis Ababa. Before deciding whether your client has Eritrean or Ethiopian nationality, you will need to make direct reference to the nationality law and practice of both States. In this particular kind of case you will certainly need the assistance of an expert.

C.5. Collecting information about your client's immigration history

Best practice demands that an application is only made once the adviser has full knowledge of the applicant's previous immigration history. In particular you should review all previous applications, including visa applications made abroad, documentary evidence, interviews and formal statements, and any tribunal determinations.

Your first step should therefore be to obtain the full Home Office file under subject access request procedures. Consider challenging any decision by the Home Office to abrogate or 'black out' parts of the file when disclosing it to you, if you think relevant information has been hidden, e.g. about attempts to remove or to document.

Communication between the Home Office and relevant embassies/consulates is often referred to in the Home Office file, or you may know that it has taken place, but copies or notes of the outcome are not disclosed. If obvious documents such as these are missing, you can write back asking for these to be disclosed, making very clear you are asking for information which should already have been provided, not for an updated bundle. If you do so within three months of the original request no additional fee is payable.

Tribunal determinations can alternatively be obtained from the Her Majesty's Courts and Tribunal Service's tribunal customer service centre where they are missing.

Other sources of information that are potentially relevant and which you should obtain before proceeding include:

- The file from any previous legal representative;
- Copies of all asylum support determinations and supporting evidence. These may not all be on the Home Office file. You can request an electronic copy from the Asylum Support Tribunal for up to 12 months from the date of decision. After 12 months the statements of reasons are archived but it should be possible to obtain copies by writing to the tribunal with consent from your client and as much information as you have, for example dates of hearings and reference numbers. You may make a polite request to the Asylum Support

Appeals Project (hereafter ASAP)¹⁰¹ if it represented your client;

- Copies of all communications with embassies of countries with which your client may be linked by birth, marriage, descent or residence, including letters from the Red Cross, records of visits to embassies where your client was accompanied by an independent person or volunteer, and records of telephone interviews;
- Copies of documents belonging to family members which are relevant to nationality and, particularly if they are in the UK, papers relating to their immigration history; consider obtaining the Home Office files of family members via a subject access request.

C.6. Analysing the information you have collected

It is likely that other applications have already been rejected before a statelessness application is made (for a discussion of why this might be see **Part C, section 14 Co-ordination of statelessness applications and asylum claims**) and you may well be faced with a large volume of material. Creating a schedule can be helpful, listing all the relevant factual findings, who made them, on the basis of what evidence, and when.

Any previous factual findings by tribunal judges will be the 'starting point'¹⁰² for consideration of the statelessness application. If there are helpful findings by an immigration judge or a tribunal judge in an asylum support appeal¹⁰³ you should rely on them. See **Part B, section 5 Statelessness: standard of proof**. Bear in mind that negative findings are likely to be relied upon by the Home Office. The *2016 Home Office Instruction* States in section 3.2,

'Findings of fact relevant to determining whether a person is stateless which have previously been established during an asylum claim may be relied upon when considering a subsequent statelessness application, unless information is provided which calls those findings into question.'

Caseworker notes from the Home Office General Case Information Database may state that your client is stateless, or that there is no hope of removal and that the file should be sent to storage. There may even be a decision that your client is stateless, contained in a rejection of further submissions. There may be one line of useful evidence in several hundred pages of copy documents, so a forensic standard of work is required.

Once you have assembled all the relevant documents you must study them meticulously to identify possible inconsistencies, credibility problems and gaps in the evidence. You must take a careful note of information already provided which might be relevant to nationality, for example information about other countries in which your client has resided, aliases that they have used, family members, schooling, any identity documents or passports, and military service. Credibility is a key issue, just as it is in many asylum cases. Decision-makers in statelessness cases tend to have previous experience in asylum decision-making and you can expect the same approach, for example comparing answers given in various interviews and statements for small differences which are asserted to undermine credibility, a sceptical approach and applying a standard of proof higher than the balance of probabilities.

You then need to establish what evidence you have, or may be able to obtain, to overcome any negative factual findings. Where a judge has not accepted facts asserted by your client applying the lower standard of proof in an asylum case, there is a very low prospect of success

101 Asylum Support Appeals Project – <http://www.asaproject.org/> [accessed 6 October 2016].

102 *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 00702, para 39; *Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804

103 The Upper Tribunal has granted permission in a judicial review where the Home Office did not take into account favourable factual findings by the asylum support judge where there was no subsequent evidence to call them into question (unreported, May 2016).

in reviving them for the statelessness application unless you have new and compelling documentary evidence.

When reviewing findings in your client's case, you will need to take into account judicial decisions in the UK and elsewhere which may not have been considered in, or may post-date, the asylum appeal determination, including country guidance cases. These may provide a reason to depart from the findings of the immigration judge.

Some of the most difficult cases are those where there are already negative credibility findings by an immigration judge but where the client continues to assert the same facts as the basis of their statelessness application. For example an immigration judge in a decision in an asylum appeal may not have accepted claimed deaths of close relatives at the hands of the authorities, but your client's instructions are that they cannot obtain documents from family members in their country of origin because they were killed. We return in **Part C, section 16**, to **Evidencing the Claim**.

Case study: your client has claimed that he was born in what is now Eritrea, and to be of Eritrean background. He claims to have lived most of his life in Ethiopia. The immigration judge found that he has no Eritrean background and that he is in fact of Ethiopian national background, and did not accept that he has no family members in Ethiopia. His asylum claim has been finally determined. Your client approaches you claiming to be stateless. He has approached the Ethiopian embassy and was issued with a note from embassy officials that he must produce an Ethiopian ID card or other evidence of Ethiopian nationality before any application will be considered. Your client tells you that as a person who is of Eritrean background, an Ethiopian ID cannot be obtained and in any case he has no family members in Ethiopia to help in this process.

It will be very difficult to make a successful statelessness application without further evidence to support the claim to be of Eritrean background and to have no family members in Ethiopia since the Home Office will almost certainly rely on the factual findings of the immigration judge to refuse the application.

C.7. Advising your client

Your advice will be based on your review of your client's immigration papers, your client's instructions, what evidence you have, your understanding of the Immigration Rules, the 2016 *Home Office Instruction*; and developing case law, including country guidance cases. Home Office country information and guidance may be relevant (for example, on Kuwaiti Bidoons and on Palestine). You should consider whether your client's case raises possible challenges to the Home Office's interpretation of the Immigration Rules. Information in this guide may help you in formulating your advice about specific issues, for example the timing of the application and coordinating different applications, as well as more general points such as the overall merits of the case and further steps that could be taken to strengthen the evidential basis of the application.

In most statelessness cases you should update your advice to your client as the case develops. This process will continue after the application has been submitted, prior to interview and while waiting for the decision.

You should of course cover the requirements of the Immigration Rules and explain that recognition of statelessness is insufficient to secure leave to remain; under Part 14 of the Immigration Rules there are additional criteria to meet such as showing that the person is not admissible to any other country.

Where relevant, you should include in your advice the potential consequences of making a statelessness application. It will shine a spotlight on the question of your client's removability. You may succeed in persuading their national authorities to document or admit your client during your investigations into their statelessness or admissibility. The Home Office may undertake enquiries of its own during the statelessness determination procedure to similar effect. A State may erroneously document your client, through mistake as to fact or law. See **Part B, section 2.d. 'under the operation of its law'** for a discussion of errors by competent authorities. Usually it will be difficult or even impossible to challenge removal in these circumstances, assuming any asylum claim has been determined. Your client may be removed very quickly, unless there is another claim that they can make, either alongside the statelessness leave application or at the point of refusal. They will need to be advised in advance about the strengths and merits of that other claim, and any difficulties in advancing that claim at the point of removal.

Sometimes a client may approach you for advice about whether they should renounce their nationality or take other action that will result in a loss of nationality, for example remaining outside their country of nationality for a long period of time. There is no formal bar to a grant of statelessness leave where a nationality has been renounced even intentionally, but the Home Office is likely to be unsympathetic. The *2016 Home Office Instruction* section 4.6.6 is clear,

'Where there is evidence to suggest that someone has deliberately renounced nationality in an attempt to benefit from stateless provisions, and there remains an option for them to approach the relevant State to reacquire their former nationality, the stateless application should be refused'.

Thus renunciation is not a course of action which should normally be advised due to the uncertainty of outcome. There is a possibility in any case that the State of which the person is currently a national may properly refuse to allow a renunciation where the person will become stateless.¹⁰⁴ Where the client can reacquire nationality, a grant of leave will be refused on the basis that they will be admissible to the country of which they are a national.

C.8. Obtaining informed consent

It is a matter of professional obligation to obtain your client's **informed** consent, taking into account any issues about their capacity, before writing to third parties such as national authorities, embassies or consulates.

Your client may be very cautious about providing this consent. You may need to advise that approaching national authorities with enquiries about nationality – in practice, often the approach will be a request for re-documentation – may impact on the credibility of any later fresh claim for asylum or subsidiary protection. The Home Office may decide that such an approach to national authorities is inconsistent with a well-founded fear of persecution.¹⁰⁵

For some of those who are 'failed asylum seekers' there may be a level of worry and concern, or even fear. Careful legal advice to help them understand why their asylum claim has failed, as well as realistic advice appraising all other possible options, may be necessary before they are ready to approach national authorities for evidence. Others may already have come to terms with their situation, for example while applying for support on the grounds that they are taking all reasonable steps to place themselves in a position to leave the UK. Some clients may wish to make a statelessness application without attempting to obtain evidence; see **Part C, section 17 Timing of the application** for a discussion of when this might be realistic.

¹⁰⁴ States parties to the 1961 Convention have obligations to prevent statelessness arising.

¹⁰⁵ E Fripp *Nationality and Statelessness in the International Law of Refugee Status*, Hart, Oxford, 2016.

Parents may fear that if they acquire a nationality for their child they will facilitate the family's removal and consider this not to be in the best interests of their child.

The Home Office may make its own enquiries. This is covered in the *2016 Home Office Instruction*, section 4.2, which states:

'Enquiries of the authorities of the country of former habitual residence which disclose the applicant's personal details must be done with the written consent of the applicant, but if that consent is denied without good reason (for example, it has already been established that the person's claimed fear of those authorities was not well-founded), it may be inferred that the applicant is not genuinely willing to cooperate and is failing to discharge the burden of proof, taking account of all the available information. See Section 4.3 below and Section 4.3.5 Enquiries with other governments or authorities.'

Your client may have reasons for refusing consent which do not raise the possibility of an asylum claim. For example, they may fear that their relatives will be put at risk by an approach to the national authorities; that a trafficker or agent may be exposed by a request to the national authorities about the validity of a passport which was obtained improperly; or your client may risk criminal penalties for having obtained a passport or other document improperly.

C.9. Children in the statelessness determination procedure

References to particular issues arising in children's cases are set out at relevant points throughout this guide. If you are representing a child, or an applicant with a child, you should be familiar with the ILPA publication, *Working with children and young people subject to immigration control: Guidelines for best practice*¹⁰⁶ much of which is of relevance here. What follows are sources of information and authority to which you can refer to support your argument in cases where children are involved.

You can find information about the particular difficulties stateless children face in the European Network on Statelessness's publication, *No Child should be Stateless*.¹⁰⁷

The *2016 Home Office Instruction* section 1.4 states that 'close attention should always be given to the welfare and best interests of the child when considering their nationality status and potential that they may be stateless'. It refers to *ZH (Tanzania) (FC) v Secretary of State for the Home Department*,¹⁰⁸ and the requirement that the best interests of the child be a primary consideration (although not necessarily the only consideration) when decisions are made affecting children; to *Every Child Matters*;¹⁰⁹ to s55 of the Borders, Citizenship and Immigration Act 2009; as well as to Article 7 of the UN Convention on the Rights of the Child, which provides that every child has a right to acquire a nationality.¹¹⁰

106 2nd edn, ILPA/Heaven Crawley, 2012.

107 European Network on Statelessness, London, 2015. The report focusses on birth registration of children to prevent statelessness but also calls for European States to address: '...stateless children born to irregular migrants or to refugees, children of same-sex couples, children commissioned by European parents through international commercial surrogacy and children who have been abandoned ... In any and all such cases, it is vital to recall that the right to acquire a nationality is a right of every child. Even if the circumstances of the child's conception or birth are complex (even perceivably controversial), the best interest of the child to be protected from statelessness must prevail over any questions which may arise from his or her parents' status or choices.' (Executive summary), available at www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf [accessed 17 September 2016].

108 [2011] UKSC 4.

109 Department for Education and Skills (2003) *Every Child Matters* (Cm 5860), London, The Stationery Office. Available from: <https://www.education.gov.uk/consultations/downloadableDocs/EveryChildMatters.pdf> / [accessed 26 September 2016].

110 For a critique of the UK's operation of its law providing for registration for a stateless child, see *Ending Childhood Statelessness – A Comparative Study of Safeguards to Ensure the Right to a Nationality for Children Born in Europe*, European Network on Statelessness, London, 2016, A2 'Procedural Safeguards'.

The 2016 *Home Office Instruction* section 1.4 confirms that the s55 Borders, Citizenship and Immigration Act 2009 duty exists where an applicant has 'genuine and subsisting family life' with any child, not only where the child has made their own application or is a dependant of a principal applicant.

The *UNHCR Statelessness Handbook* paragraph 119 sets out the UNHCR's recommended procedures for States determining children's statelessness applications. These are: priority processing of applications, and provision of appropriately trained legal representatives, interviewers and interpreters, as well as the assumption of a greater share of the burden of proof by the State.

A child who is stateless may be entitled to registration as a British citizen under the provisions of Schedule 2 to the British Nationality Act 1981. See also s3(1) of that Act on discretionary registration of children.

C.10. Detainees

A stateless person in detention is at risk because there is no State which will advocate for them. Some stateless persons experience lengthy periods in detention. Some experience multiple attempts to remove them. Evidence of the Home Office's failed attempts to remove your client may be relevant to a grant of leave.

There is copious evidence that immigration detainees are held for long periods even after removal has failed. A number of persons who are stateless or at risk of statelessness are detained in the UK. 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 2015.¹¹¹ In June 2015 the Home Office confirmed that it had received no applications for a grant of leave as a stateless person from anyone in detention. There is no evidence available that Home Office officials are directed to refer detainees into the statelessness determination procedure.¹¹²

Because the Home Office must justify detention, this is a rare moment when it actively investigates removability. It may arrange for your client to speak to embassy officials and even take your client to visit them. There may be an NGO that would help you to document a detained client's contact with an embassy (see **Appendix 3 Specialist Organisations**). If your client is formally refused an emergency travel document it is arguable that the State no longer considers your client as a national; State *practice* is the focus (see 2016 *Home Office Instruction*, throughout).

If you represent a detainee whom you consider to be stateless you should make immediate and urgent representations, followed up on regular basis, for their release, putting forward all relevant information supporting a claim that they are irremovable.¹¹³ You should make an application for bail. A pending statelessness application will be evidence in support of a grant of bail.

111 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. [accessed 17 September 2016].

112 An example of this is the Home Office country information and guidance: *Ethiopia: People of mixed Eritrean/Ethiopian nationality*, v1.0, 31 August 2016, which refers to several sources which mention that some of these people may be stateless, and in spite of that considers only their position as refugees, failing to mention that there are immigration rules providing for a determination of statelessness and a grant of leave to remain as a stateless person.

113 See paragraph 115 *UNHCR Statelessness Handbook*: 'Statelessness determination procedures are ... an important mechanism to reduce the risk of prolonged and/or arbitrary detention.' See *Protecting Stateless Persons from Arbitrary Detention: A regional toolkit for practitioners* European Network on Statelessness, December 2015, <http://tinyurl.com/zlfch4k>. See also *R v Secretary of State for the Home Department ex p Khadir*, [2005] UKHL 39 for the difficulties which must be overcome.

The law on detention and bail is not within scope of this guide.¹¹⁴ The *UNHCR Statelessness Handbook* contains guidelines regarding the detention of stateless persons at paragraphs 112-115, headed 'Detention'. The international law applying to stateless detainees is set out fully in the European Network on Statelessness *Detention Toolkit*.¹¹⁵

Detention may be unlawful from the outset if there is evidence that, before detaining, the Home Office failed to obtain or to make arrangements imminently to obtain a travel document for the client to be removed. You should advise your client, or refer them for advice, about the possibility of obtaining compensation for any period of unlawful detention, bearing in mind the limitation periods.

A client had approached his embassy and instructed his representatives to get in touch with the embassy too, to request re-documentation as part of an investigation of statelessness. The Home Office detained him claiming that they had arranged an interview with the embassy. This never took place. He was released at a bail hearing after some weeks. He has been advised that he is entitled to compensation for unlawful detention.

C.11. Ex-offenders and those subject to a deportation order

The Immigration Rules prevent some stateless ex-offenders from being recognised as stateless, and prevent others from being granted leave to remain as a stateless person. The following provisions are relevant:

- **'A person is excluded from recognition as stateless person if there are serious reasons for consider that they: ... have committed a serious non-political crime outside the UK prior to their arrival in the UK'** – paragraph 402(d);
- **'An applicant will be refused leave to remain in the United Kingdom as stateless person if: (b) there are reasonable grounds for considering that they are (i) a danger to the security of the United Kingdom; (ii) a danger to the public order of the University Kingdom'** – paragraph 404(b); or
- **'An applicant will be refused leave to remain in the United Kingdom as stateless person if: ... (c) their application would fall to be refused under any of the grounds set out in paragraph 322 of these Rules.'** – paragraph 404(c).

Paragraph 322(1B) mandates a refusal of leave to those subject to a deportation order.

If you consider that your client might be excluded from recognition under paragraph 402 or 404 of the Rules, refer to **Part B, section 6 Exclusion clauses; section 9 Policy exclusions;** and **section 10 General grounds of refusal**. You will need to take the following steps:

- (i) You must ensure that you have a full picture of any criminal history. Find out whether the crime is only alleged or whether there is a conviction. If there is a conviction, you should obtain the judge's sentencing remarks, which may be in the Home Office file. It may be quicker, and you may receive more complete information, if you obtain documents relating to past criminal proceedings from the representative in the criminal proceedings or from

114 Detention criteria are contained in the Home Office Enforcement Instructions and Guidance Chapter 55, which is updated regularly.

115 European Network on Statelessness *Protecting Stateless Persons from Arbitrary Detention: A regional toolkit for practitioners*, European Network on Statelessness, London, December 2015 http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Detention_Toolkit.pdf [accessed 29 September 2016].

the appropriate criminal court. Obtain copies of probation reports. Both may support your representations as to mitigating factors and your client's propensity to re-offend.

- (ii) Decide whether there could be an advantage to your client in obtaining a declaration that they are stateless, for example for the purposes of making an application for revocation of a deportation order under paragraphs 398 and 399 of the Immigration Rules, or for leave under paragraph 353B;
- (iii) Prepare a letter of representations and request recognition as stateless under paragraph 401(a):
 - Remind the Home Office that they must make a separate finding under paragraph 401(a) before making an assessment under paragraphs 402-404;
 - Clarify relevant facts;
 - Include relevant supporting evidence;
 - Complete and include an application form FLR(S) since the Home Office is likely to reject the application if you do not do so;
 - Clearly state that the burden of proof is on the Home Office to prove that the exclusion clause applies, to the standard of balance of probabilities;
 - Refer to section 5 of the *2016 Home Office Instruction* on exclusion clauses;
 - Refer to any helpful case law and guidance relating to Article 1F of the Refugee Convention and Article 17 of the Qualification Directive.¹¹⁶

Persons who are excluded will have to make an application for leave under paragraph 398A of Part 12 of the Immigration Rules if they are subject to deportation proceedings. The argument may be that they meet the definition of a stateless person set out in paragraph 401(a); that this meets the requirement of a 'very compelling circumstance' set out in paragraph 398; and that leave to remain should be granted. These are difficult arguments to substantiate, and require very clear and persistent efforts by the representative to persuade national authorities to document. There is likely to be a decision from the Upper Tribunal on this point.

C.12. Co-ordination of statelessness and other applications: general considerations

If your client could make other applications as well as one for leave to remain as a stateless person, you will need to advise on how these might be coordinated and take your client's instructions. You will need to advise your client about the risks of a particular course of action. You will need to consider whether to advance one application first, or whether to make them concurrently. Your client may be required, if they receive a s120 (Nationality, Immigration and Asylum Act 2002) notice, to put forward all outstanding issues relating to their entitlement to enter or remain in the UK so that these can be dealt with in one appeal. Failure to put forward a relevant issue may lead to its being certified with the effect that it cannot be aired at a later appeal (s96 2002 Act) and may also damage credibility.

If you decide to make the applications concurrently, the Home Office may decide in which order it will decide the applications, and may not agree to follow the order of decision-making preferred by your client. If it grants leave to remain in another category, it may then refuse statelessness leave. Some of the factors you will need to consider include:

- Whether any of the applications give protection from removal or deportation (have suspensive effect);
- The relative merits of each application;

116 2004/83/EU.

- Whether it is possible for the applications to be advanced concurrently;
- Whether, if their preferred application is refused, another of the applications could then be made;
- Whether there will be a fee to pay for the application;
- The availability of legal aid funding, including via exceptional case funding, to advance each application;
- Any potential impact on credibility if an application is delayed and, where relevant, how this might be minimised, usually by putting forward the factual basis of any application that you might wish to pursue in the future;
- The likely timescale for decision making on each application;
- Whether there are any difficulties investigating and evidencing a statelessness application if concurrent applications are made. This particularly applies to asylum cases and is discussed below in more detail;
- The relative benefits of the grant of leave that could result from each potential application in the light of your client's particular circumstances and priorities. Including: whether the conditions of leave will include access to public funds, student finance and housing assistance under homelessness provisions; whether family reunion will be available, and if so on what basis; the duration of leave; whether there is a fee to pay to extend leave; whether a travel document is available; how long it will take to progress to indefinite leave; and the level of certainty of an eventual grant of indefinite leave;
- The desirability of relying on e.g. a relationship with an EEA national: might the relationship break down, and what will happen if and when the UK leaves the EU?
- Whether there is a right of appeal should an application be refused. If so, would a right of appeal allow your client to obtain positive findings to support a later statelessness application?

Bear in mind how quickly removal action might be taken should an application you put forward first be refused. In addition, how realistic is it to prepare and submit one of the other applications available to your client in the face of removal directions? Will it be possible to collect the necessary evidence at short notice and will the timing of such an application impact on its credibility?

The information that follows is restricted to special factors to take into account where your client might make a statelessness application. Detailed information on the other types of application mentioned in the following sections is outside the scope of this guide.

C.13. Coordination of statelessness applications and asylum claims

You may advise and represent a person who has both a potential asylum and statelessness application. You will need to consider whether to submit the applications at the same time or sequentially and, if sequentially, which to make first.

C.13.a. Dublin III cases

You should take full instructions on all matters potentially relevant to the Dublin III Regulation.¹¹⁷ For example, a period of residence in another State could be a basis for removal there, even if the only asylum claim made by your client is in the UK. There are also time limits for requesting a transfer under Dublin III that you will need to bear in mind.

You should also take instructions on both the potential asylum and statelessness claims. You can then advise your client on whether a statelessness application might be advanced instead of, or alongside, an asylum application and the impact of this on the possibility of removal.

¹¹⁷ (EU) No 604/2013.

Dublin III only applies where there has been an ‘application for international protection’, which is, in turn, defined in the Qualification Directive (2004/83/EC) at Article 2(g) as:

‘a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, **and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately.**’¹¹⁸ (our emphasis)

It is clear that if the applicant has never made an application for international protection, either in the UK or in another member State, Dublin III does not apply. If your client has never made such an application, and if they do not advance an asylum claim in the UK, Dublin III cannot apply to them. In some cases your client will have never intended to claim asylum but is recorded as having done so in another member State.

The *2016 Home Office Instruction* states:

‘Where another EU Member State or Norway or Iceland is considered responsible for an asylum claim under the Dublin arrangements, separate applications for leave on the basis of statelessness will not be considered. However, as the Dublin provisions only apply where an asylum claim has been made, they will not be applicable where only a statelessness application has been made.’ (section 3.3)

There is no direct experience to draw on here. Section 3.3 of the *2016 Instruction* seems to indicate that Dublin III will not be applied where an asylum claim has not been made in the UK (but has been made in another EU member State, Norway or Iceland).

You might also argue that by making a statelessness application your client does ‘explicitly request another kind of protection, outside the scope of [the Qualification Directive], that can be applied for separately’ (see definition in Article 2g quoted above) and that therefore they have not made an application for international protection as defined by the Directive. This argument is untested.

C.13.b. Other asylum cases

i. Introduction

In most cases, your advice will probably be that it is best to advance the statelessness application after the asylum claim has been finally determined. For most applicants refugee leave is preferable to leave to remain as a stateless person and if your client is recognised as a refugee there will be little point in pursuing a statelessness application. In addition, there are the inherent difficulties for you and your client, and for the Home Office, in investigating and evidencing a statelessness application whilst an asylum claim is pending, see below.

If you decide to exhaust the claim for recognition as a refugee first, put forward full details of the factual basis of your statelessness application as part of the asylum claim. Doing so should head off any argument later that the factual basis of the statelessness claim is not credible because it is advanced late. In many cases there will be substantial overlap between the asylum and the statelessness cases in any event. If there is an appeal hearing, put forward any evidence of statelessness and make submissions with the aim of securing factual findings favourable to an application based on statelessness.

In some cases you may decide to advance the statelessness application first. Other than in Dublin III Regulation cases (see above) this is most likely to occur where leave as a stateless

¹¹⁸ The same definition appears in the Recast Directive 2011/95/EU at Article 2(h).

person offers some advantage to the applicant over refugee status, or where you judge that a positive decision is much more likely on a statelessness application. Bear in mind, and advise your client about, the impact on their credibility of any delay in applying for asylum. See below for further discussion. It is best practice to put forward the full facts of the asylum claim at the earliest possible opportunity even if no formal asylum claim is made. There is more discussion of these points below.

In some cases you may decide to make concurrent applications. One reason for the submission of concurrent applications is an attempt to minimise delay in achieving a grant of leave of some kind for your client. There is no experience that submitting concurrent applications will achieve this. At the time of writing, the Home Office refuses any statelessness application made whilst an asylum claim is pending and does so almost as soon as the statelessness application is submitted, without any substantive consideration. It does so on the basis that the statelessness application has been made prematurely. The Home Office regards a statelessness application as an application of last resort. This is discussed further below.

The *2016 Home Office Instruction* at section 1.3 indicates that its 'underlying policy objective' is (amongst other things):

'to provide a means for the consideration of those who are stateless and who have no other right to remain in the UK but who cannot be removed because they would not be admitted to another country for purposes of residence to be allowed to stay.'

The *Instruction* goes on to state:

'Applications for leave on the basis of statelessness will not be accepted for consideration until any asylum claim has been finally determined or withdrawn including the consideration of any further submissions. Similarly, applications for leave to remain as a stateless person will not be accepted if they amount to the submission of further evidence relating to protection needs. These must be lodged in person in Liverpool in accordance with the published Further Submissions Policy.' (section 3.1)

You may also find that if you include details about the factual basis of a protection claim in a statelessness application this is treated as an asylum claim or as a fresh claim for asylum even if you do not want it to be and that the statelessness application is accordingly refused. Consider making your client's position as to the order of available applications explicit.

In your representations that accompany any application, make the point that the *2016 Home Office Instruction* cannot add additional bases for refusal to those set out in the Immigration Rules. Representations could point out that the other 'underlying policy objective' at section 1.3 of the *2016 Home Office Instruction*: to 'ensure we fully comply with our international obligations under the UN Statelessness Conventions'. Assert that the Home Office's position that a statelessness application is not available until after all other avenues are exhausted is contrary to this policy objective. It shuts out meritorious applications from determination and shuts the applicant out from recognition as stateless and from a grant of leave giving access to the benefits set out in the 1954 Convention.

ii. Investigating a statelessness application while an asylum claim is pending

Section 4.3.6 of the *2016 Home Office Instruction* states that it is good practice to obtain the applicant's consent to enquiries with overseas governments or authorities and forbids disclosure of the 'details or rejection of an asylum claim'. The *UNHCR Statelessness Handbook* makes an almost identical point at paragraph 96 but expects that an asylum claim will have been 'definitively ...concluded' and says that the State which is determining statelessness is 'under no circumstances' to make enquiries of overseas governments if an asylum claim is pending.

The *UNHCR Statelessness Handbook* also contains a section on 'Co-ordinating refugee status and statelessness determinations' (paragraphs 78-81). This contains a set of clear principles which is much more nuanced than the Home Office's approach of refusing to consider all statelessness applications made whilst an asylum claim is pending. It indicates that suspension (not refusal) of the statelessness determination is the most appropriate procedure, since it is possible for both asylum to be granted and statelessness to be recognised:

- where both a claim under the Refugee Convention and a claim under the 1954 Convention are made, both should be assessed and if appropriate both types of status should be recognised (paragraph 78);
- Where, to investigate statelessness, enquiries of foreign authorities have to be made 'which could compromise the confidentiality to which refugees and asylum-seekers are entitled. ... refugee status determination is to proceed and consideration of the statelessness claim to be suspended' (paragraph 79);
- 'Where refugee status and statelessness determinations are conducted in separate procedures and a determination of statelessness can be made without contacting the authorities of the country of origin, both procedures may proceed in parallel'; but here it is also acceptable to proceed with the asylum process first where findings of fact there might assist statelessness determination (para 80);
- The *Handbook* lists four circumstances in which a suspended statelessness claim might be reactivated, including where the refugee claim fails, where refugee status ceases, and if additional evidence of statelessness emerges (para 81).

Asylum practitioners will recognise that there are difficulties contacting national authorities which are alleged to have persecuted the applicant where an asylum claim is pending or might be relied on in the future. The risks involved in making an approach mean that asylum practitioners will be extremely reluctant to suggest this to an asylum seeker or potential asylum seeker. Doing so might compromise the confidentiality of the application, putting family members, and the asylum seeker, at additional risk. It might also be seen as damaging to credibility in the eyes of the Home Office or an immigration judge, and perhaps even be considered to be reavilment of protection.¹¹⁹ Reavilment cannot take place before refugee status has been 'accorded'.¹²⁰ In any case, the person is unlikely to have the necessary intention to re-avail themselves of the protection of their state.

In some cases, the statelessness application can confidently be evidenced without approaching the national authorities of the country where your client fears persecution. Where your client makes concurrent applications, you should point out in representations to the Home Office that there is no need to contact national authorities, and why. Include in your letter that you wish a substantive decision to be made on the statelessness application at the same time as a decision is made on your client's refugee claim or as soon as possible afterwards. You should explain that your client's pending asylum claim is not a lawful basis for refusal of a statelessness application as it is not one of the grounds of refusal set out in the Immigration Rules; the *Instruction* cannot be used to introduce a new ground for refusal.

119 Article 1C(1) 1951 Refugee Convention. Paragraph 121 of the UNHCR *Handbook And Guidelines On Procedures And Criteria For Determining Refugee Status* States 'if a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of his country of nationality.' Although Hathaway and Foster point out that this cessation clause cannot apply to stateless persons 'by virtue of its plain language' J C Hathaway and M Foster *The Law of Refugee Status* 2nd Edn, Cambridge, Cambridge University Press, 2014, p 465 footnote 19. See also E Fripp *Nationality and Statelessness in the International Law of Refugee Status*, Hart, Oxford, 2016, Chapter 8, for criticism of this interpretation of Article 1C(1) of the 1951 Refugee Convention.

120 *Re B, Hoxha et anor v Secretary of State for the Home Department* [2005] UKHL 19, paragraph 60; see E Fripp *Nationality and Statelessness in the International Law of Refugee Status*, Hart, Oxford, 2016, Chapter 7, section B1.

The Home Office formally refused an application for statelessness leave because it considered that the claimant had a pending asylum claim.¹²¹ The representatives have requested that the Home Office make a substantive decision, on the basis that the Immigration Rules do not allow for a formal refusal of an application on the basis that an asylum claim is pending. The representatives explained that the Home Office could also suspend the decision until the asylum claim has been determined. Representations could also be made for the two applications to be considered in tandem, where an approach to the competent authorities was not necessary or would not put the applicant in danger (for example, where the agent of persecution is a non-State actor); and where a request to confirm that a person is a national would not raise the possibility that the person is re-availing themselves of the protection of their country of nationality/former habitual residence.

C.14. Coordination of statelessness applications and other non-asylum applications

For a list of factors to weigh up in deciding how to coordinate applications see **Part C, section 12 Co-ordination of statelessness and other applications: general considerations**.

If making concurrent applications, you will need to indicate clearly which your client would like to be determined first. Because the Home Office regards statelessness applications as an application of last resort, you may find that other applications are dealt with first, even if this is not what your client wishes.

You can make vigorous submissions if the Home Office does not respect the priority of applications which your client has requested, or consider an application for judicial review to challenge the priority given to the applications. You can argue that the Home Office has an obligation to identify those who are stateless in the Convention. The Home Office recognises at section 1.3 of the *2016 Home Office Instruction* that the policy objective is to 'ensure we fully comply with our international obligations under the UN Statelessness Conventions'.

The Home Office *Victims of Modern Slavery: Competent Authority Guidance*¹²² indicates that the Home Office should consider the application providing the more generous form of leave first, when more than one type of leave is available. Arguably what is more generous is something your client ought to be able to decide on advice, according to their own circumstances and priorities. See the two examples in the case study boxes and consider arguing by analogy with the guidance on trafficking cases.

Case study: The Home Office made a grant of discretionary leave after a statelessness application was lodged. The statelessness application was refused, the only reason given being the grant of discretionary leave. When challenged, the Home Office changed its position, and asserted that the applicant was 'admissible to any other country', in this case the UK, on the basis of the grant of discretionary leave. The Upper Tribunal granted permission in a judicial review commenting adversely on the Home Office's interpretation of the Immigration Rules. The Home Office withdrew the refusal of the application for statelessness leave and, after interviewing the applicant, made a grant of statelessness leave instead.

¹²¹ Refusal was sent out on 2 September 2016.

¹²² Home Office *Victims of modern slavery – Competent Authority Guidance* v3.0, p121. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521763/Victims_of_modern_slavery_-_Competent_Authority_guidance_v3_0.pdf [accessed 17 September 2016].

Case study: The Home Office agreed to consider a statelessness application first, and to allow the applicant to pursue a trafficking referral later. The trafficking policy demanded the more generous grant of leave be granted if there were two possible bases of leave. Therefore, it was logical to investigate first the application which would lead to the more generous grant.

C.14.a. Article 8 cases

Your client may make a simultaneous claim alongside their statelessness application asserting that a refusal to grant them leave would be a breach of their rights under Article 8 of the European Convention on Human Rights. Such a claim might be made outside the Immigration Rules and be based on a claimed disproportionate interference with their protected rights either in the UK or in their country of origin, for example because as a stateless person they would be unable to exercise basic rights such as the rights to marry, work, or access housing.¹²³

Such a claim would be most useful to a person recognised as stateless under paragraph 401 but refused leave to remain, or to any person seeking a right of appeal during which some of the factual issues relevant to statelessness could be aired, albeit within the framework of Article 8 (see **Part C, section 21.b. Challenging a refusal letter**).

There have been court decisions¹²⁴ where the person claimed that they were irremovable and that the Home Office had an obligation to grant leave (including on Article 8 grounds). These provide some indication of how difficult it is likely to be to succeed in such a claim (see **Part C, section 14.b. Paragraph 353B of the Immigration Rules**).

Alternatively, your client may be able to make an Article 8 claim based on something independent of statelessness, for example their family life in the UK, under Appendix FM or outside the Immigration Rules.

A positive decision may result in leave outside the rules or leave under Appendix FM rather than statelessness leave, so the application should clearly state if the applicant wishes the Home Office to consider the application for statelessness leave first. There is no guarantee that the Home Office will do so.

The Home Office has maintained that a refusal to grant leave as a stateless person will not give rise to a human rights appeal where Article 8 is simply advanced in representations. It maintains that for the Article 8 claim to be valid it must be submitted separately following the correct procedure, which might be an in-person application following the fresh claim procedure under paragraph 353 of the rules, or an application on the relevant form under Appendix FM or under paragraph 276ADE of the rules, with payment of a fee or a successful application for a fee waiver.

123 See the resources pages of websites of the European Network on Statelessness, the Equal Rights Trust, the Open Society Institute and the Institute for Statelessness and Inclusion. See also 'An Obligation for Statelessness Determination under the European Convention on Human Rights?' European Network on Statelessness Discussion Paper, September 2014, Caia Vlieks et al.

124 *R (MS, AR and FW) v Secretary of State for the Home Department* [2009] EWCA Civ 1310 where an attempt to argue that leave should be granted where prospects of removal are 'remote', and the client remains on temporary admission, did not succeed. See S York 'Revisiting removability in the hostile environment', *Birkbeck Law Review*, Vol 3 Issue 2 Dec 2015, on the 'Hale threshold', see *R v Secretary of State for the Home Department ex p Khadir* [2005] UKHL 39.

C.14.b. Paragraph 353B of the Immigration Rules

If your client is, as you assert, irremovable, then even if the Home Office does not accept that your client is stateless it should consider a grant of leave to remain under Paragraph 353B of the Immigration Rules. The Enforcement Instructions and Guidance, Chapter 53,¹²⁵ set out criteria for a grant of leave under this paragraph including the possibility of a grant of leave where a person cannot be removed. At 53.1.1 'Exceptional Circumstances – relevant factors' it is stated:

'Decision makers must assess the practical likelihood of removal. Where it is concluded that removal is unlikely, that the factors outlined in 'Character' and 'Compliance' do not weigh against the individual, and there has been significant delay by the Home Office, then a grant of discretionary leave may be appropriate provided there is credible evidence that:

- the migrant is undocumented ;
- has made genuine efforts to secure appropriate travel documentation to facilitate voluntary departure from the UK but has been unable to do so for reasons beyond their control; or
- it is accepted that the prospects of securing a document and/or return to the country of origin are unrealistic.'

You cannot make an application directly relying on paragraph 353B; paragraph 353B is only considered where some other application is made, for example a fresh claim or an application on an application form. You could include a paragraph in representations asking for this to be considered in the alternative if your client is found not to be stateless. Grants of leave on this basis are extremely rare and assembling evidence requires a dogged approach.

C.14.c. EEA cases

i. Family members who hold a Stateless Person's Travel Document

The 2016 Home Office Instruction states that applications for leave as a stateless person 'will not be considered for the family members of EU nationals who are exercising treaty rights and the family member already has a stateless travel document' (section 3.3). It is not clear what 'will not be considered' means – will an application be refused or will it be treated as invalid? It is unclear whether it matters who issued the travel document: the UK Home Office or the authorities in another country.

The logic of the Home Office position is also not explained. It may be that the family member who holds a stateless person's travel document is considered by the Home Office already to enjoy the protections of the 1954 Convention, or to be admissible to the State which issued the travel document and therefore not entitled to leave under Rule 403(c). Alternatively, that they may be able to obtain an EEA family permit might mean that the Home Office does not consider that they should have access to statelessness leave, which it regards as an application of last resort.

A holder of a UK-issued stateless person's travel document who is a family member of an EEA national would be in a strong position to switch into statelessness leave. They must already be recognised as stateless and have some form of leave to remain in the UK, since that is a condition of the issue of the travel document. The EEA national could then apply for leave to remain as the family member of the stateless person. Such a scenario might occur where the EEA national can no longer exercise Treaty rights, for example where they become a parent

¹²⁵ Available at: <https://www.gov.uk/government/collections/enforcement-instructions-and-guidance> [accessed 21 September 2016].

and choose to leave the labour market, where they cease to have an entitlement to remain in the UK or if and when the UK leaves the EU.

ii. Family members who do not have a stateless person's travel document

You should advise your client of the advantages and disadvantages of having leave as a stateless person in their own right on the one hand, or applying for an EEA family permit on the other. One factor that may count against an EEA family permit is the need to rely on a relationship. Another factor is that statelessness enquiries are arguably less intrusive than those carried out under regulation 8 of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) which often involve lengthy interviews and early morning visits to the home address. A stateless family member may find it very difficult, or even impossible, to make a valid application to the Home Office for an EEA family permit if they lack identity documents; having a valid passport is a requirement of the application.

The *2016 Home Office Instruction* at section 6.4 provides information to the caseworker about all, not just EEA, family members:

'As part of the consideration of the application, caseworkers must consider any explanations provided by the applicant as to why they cannot seek entry for the purpose of residence to the State that their family member (for example, a spouse) is from.'

The Home Office's position is contentious. The EEA national will no doubt have the right to return to their country of nationality and possibly to have their stateless family member accompany them.¹²⁶ That said, it would not be lawful in most circumstances to remove a qualified person exercising Treaty rights, and in almost all cases the stateless person would only gain a right of residence if their family member resides in the other EEA country. On this basis the stateless family member of an EEA national may be able to challenge any suggestion that they are admissible for the purposes of permanent residence. A lack of documents may also be a barrier to the stateless person obtaining any right to enter or reside in the country of nationality of their family member.

Example: The Home Office has granted statelessness leave to a Palestinian who is in a religious marriage, and has a child, with an EEA qualifying worker with a Residence Certificate. She had not provided any evidence that she was cohabiting with him but had informed the Home Office of the relationship. The Home Office did not investigate this relationship and did not appear to consider admissibility.

The situation of a person who is able to request the nationality of their spouse/partner whilst living in the UK is discussed at **Part B, Section 2.d.iii 'by any State'**.

If you are faced with this situation, you should refer to the full discussion of admissibility at **Part B, Section 8, Further requirements for a grant of statelessness leave: Admissibility paragraph 403(c)**.

C.14.d. Trafficking cases

If your stateless client was trafficked to the UK the Home Office may want your client to enter the National Referral Mechanism, even though the process is protracted and a grant of leave on this basis may be for only six months. A potential victim of trafficking may also have a

¹²⁶ *R v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* Case 370/90 [1992] ECR I-4265.

protection or asylum claim to make and that claim may be made concurrently with a referral into the National Referral Mechanism.

The usual position is that you can request that your client's statelessness application be decided first. You can argue that the Home Office *Victims of Modern Slavery – Competent Authority Guidance* contemplates consideration of other types of leave at the same time as 'trafficking leave'. The instruction is that caseworkers must 'issue the more generous grant of leave' where more than one type of leave is available.¹²⁷ It is logical to first consider the application which results in a more generous grant of leave. The Home Office agreed to take this approach in one case, in April 2015, but only after very detailed representations.

C.15. Switching

Switching from another category of leave into leave to remain as a statelessness person is permitted.

The Immigration Rules at paragraph 407 provide for a grant of indefinite leave as a stateless person to be made where the applicant:

'407.

- (b) was last granted limited leave to remain as a stateless person; and
- (c) has spent a continuous period of five years in the United Kingdom with lawful leave, except that any period of overstaying for a period of 28 days or less will be disregarded.'

Paragraph 415 makes similar provision for the grant of indefinite leave to remain to the family members of stateless persons. They must have five years lawful leave and the latest period of leave must have been as the family member of a stateless person.

A grant of indefinite leave to remain only requires the last period of leave to be in the statelessness category (paragraphs 407(c) and 415(c); see **Part C, section 23.b. Periods of leave, renewal and indefinite leave**). This provides clear confirmation that a person may switch in-country from another category of leave into statelessness leave. For the stateless person, it is only possible to apply for leave to remain, although family members may also apply for leave to enter (paragraph 411 of the Immigration Rules).

The *2016 Home Office Instruction* at section 3.1 states:

'People who have previously been granted leave to remain in another capacity and who wish to apply for stateless leave should apply up to 28 days before their existing leave expires.'

This is consistent with section 1.3 of the *2016 Home Office Instruction* which states that the 'underlying policy objective [of Part 14 of the Immigration Rules] is toprovide a means for the consideration of those who are stateless and who have no other right to remain in the UK...to be allowed to stay'.

The Immigration Rules should not, however, be narrowed by an instruction or guidance. The guidance that applications for statelessness leave should only be made in the 28-day period before existing leave expires is not a requirement set out in the Immigration Rules and neither is it mentioned on the statelessness application form FLR(S).

127 Home Office *Victims of modern slavery – Competent Authority Guidance* v3.0, p121 *supra* n 122.

Given the benefits that go with statelessness leave, such as recourse to public funds, you should, in an appropriate case, ask the Home Office to consider an application to switch into statelessness leave prior to the 28-day period. Refer to the argument above regarding unlawful narrowing of the Immigration Rules. Support this with reference to the UK's international obligations to recognise and protect stateless persons under the 1954 Convention, and with specific evidence of the reasons why your client wishes to switch into stateless leave earlier. Point out that an application for recognition as a stateless person, and a subsequent grant of leave on that basis, is different from an application for indefinite leave to remain (for example under Appendix FM) where the applicant has to have accrued a certain period of leave for the application to be granted.

You will need to advise on what will happen if the application to switch into statelessness leave is not successful. Will the applicant be able to remain on their current visa? You will need to consider, if they have a valid travel document endorsed with current leave in a different category, whether they are admissible to another country. This is a basis for refusal of leave as a stateless person under paragraph 403(c) of the Immigration Rules (see **Part B, section 8 Further requirements for a grant of statelessness leave: Admissibility paragraph 403(c)**, and **Part C, Section 26 Travel documents**).

The decision about whether or not to make a statelessness application can be deferred in some cases to shortly before your client's leave expires. The law may become clearer in this time and their prospects of success more certain as you gather supporting evidence. There may be no detriment in waiting due to the requirements for a grant of indefinite leave to remain (paragraphs 407(c) and 415 (c), and see above).

C.16. Evidencing the claim

It is best practice to make every effort to collect evidence to support the application. The procedure is new and it is unclear how much evidence is enough. It is a requirement of the Immigration Rules that your client **'has obtained and submitted all reasonably available evidence to enable the Secretary of State to determine whether they are stateless'** (paragraph 403(d)).

Your client may come to you with a history of failed removal; with financial support having been provided to them as a failed asylum seeker who is taking all reasonable steps to leave the UK, under s4 Immigration and Asylum 1999;¹²⁸ with an expired passport that they have been unable to renew; or telling you that the Home Office has lost their documents. None of these is enough evidence to be sure of a successful outcome. Even a determination by an immigration judge that they are stateless is not necessarily sufficient, although it would be very helpful. See **Part B, section 4 Statelessness: burden of proof** and **section 5 Statelessness: standard of proof**. The Home Office operates a triage system to take quick decisions where possible, both grants and refusals (see **Part C, section 18.d. Home Office response to the application**), and an application without merit is likely to be refused swiftly.

C.16.a. Funding to obtain evidence

For information about the scope of legal aid, see **Part A, section 5.d. Legal aid for statelessness work: what is in scope** and for exceptional case funding and legal aid for judicial review see **Part C, section 1 Obtaining legal aid funding**.

If you write a letter to an embassy/consulate to enquire about how an application may be made, or about your client's nationality, or to ask how a birth certificate might be obtained in the country concerned, the embassy is unlikely to charge for a response – although you

128 See the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 (SI 2005/930), paragraph 3(2)(a). The Immigration Act 2016 will repeal s4 and make alternative provision. These parts of the Act are not in force at the time of writing.

may not receive a response at all. Other nationality/immigration applications made to help determine your client's nationality, for example an application for a passport, tend to be low cost, but may nevertheless be unaffordable for those who are destitute. Some embassies require an application to be made in person and your client may not have the means to travel to visit the embassy.

You may need a translation of a foreign document, or law, which evidences your client's request for statelessness leave.

You may rely on the argument that the Home Office has a shared burden to investigate the case (see **Part B, section 4 Statelessness: burden of proof**). If the client is willing to return, the Home Office may have a mechanism in place to request an emergency travel document, and so the client should not have to pay for it. You should advise your client about the different legal consequences of a voluntary and of an assisted departure. The argument that the Home Office should pay may be more successful if your client has not already tried the Assisted Voluntary Return procedure (see **Part C, section 16.f. Contact with an embassy or competent authority**).

The Home Office does not usually pay any fees that might be required to request copies of specific documents such as birth or death certificates. Although Home Office officials involved in removal will apply for one-way travel documents, there is no evidence as yet of the Home Office status review team, which deals with statelessness applications, making any formal requests for travel documents or for other evidence of nationality to embassies or other authorities. Immigration officers have provided tickets for travel to an embassy to request documentation where the person had no pending immigration application.

After submission of an application you may argue that 'the decision maker must take reasonable steps to acquaint himself with the relevant information.'¹²⁹ If lack of such evidence is the only barrier to re-documentation, and your client does not have funds to pay, it is worth considering a request to the team supporting your client under s4 of the Immigration and Asylum Act 1999,¹³⁰ or to a reporting officer, or, where your client has already submitted an application for statelessness leave, to a caseworker in the status review team.

You may need to obtain an expert report from a lawyer or other expert about the law of a particular State, especially to understand how that law is applied in practice. See **Part C, Section 16.g. Expert report** and **16.e. Foreign nationality and immigration law**.

An application for exceptional cases funding may be necessary to pay for translation of foreign documents which evidence your client's entitlement to statelessness leave.

C.16.b. Using interpreters for statelessness applications: special considerations

You should be aware of best practice requirements when using an interpreter and adhere to those at all times.¹³¹

When investigating statelessness cases, bear in mind that in many languages there is no word or clear terminology for 'nationality'. The same word may mean, in different contexts, nationality, ethnicity and place of origin. Your question, 'What is your nationality?' may be also be translated as, 'Where are you from?' 'What is your ethnic group?' or 'Which government issued you with a passport?' all of which might result in different answers. Bear in mind as well that the law relating to nationality in your client's country of origin may not be well understood by your client, so that their answer to the question is likely to be meaningless. Instead, you

¹²⁹ *R (Smeda) v Secretary of State for the Home Department*, at paragraph 17, *supra* n 46.

¹³⁰ The Immigration Act 2016 will repeal s4 and make alternative provision. These parts of the Act are not in force at the time of writing.

¹³¹ See, for example, J Coker, G Kelly and M Soorjoo *Making an Asylum Application: A Best Practice Guide*, ILPA, London, May 2002, Chapter 7.

should take a full family and residence history and research the relevant law yourself, or with the help of an expert.

Consider also whether answering such questions without legal training might explain your client's seemingly inconsistent answers in the course of their immigration history.

C.16.c. Statement in support

In most statelessness cases, as in asylum cases, the applicant's statement is a key document to ensure that you have a complete picture of the history of the case and to provide information to support the application.

In some cases a statement will not be necessary because the documents and previous factual findings present such a strong picture. As for asylum claims, there is no requirement to submit your client's written statement.

If your client is interviewed you may decide to submit a statement to deal with any issues which arise after the interview.

It is helpful to remember that your client is likely to be asked about the contents of the statement in about 12-15 months' time in a Home Office interview. Therefore, including too much detail may not be helpful, as it may just provide additional opportunities for a decision maker to find small inconsistencies in the account.

i. Purpose of the statement

A statement will:

- record your client's instructions;
- organise matters into a chronological account that allows you to spot further gaps and problems;
- in some cases, ensure that your client's point of view is clear to the decision maker, who will decide whether or not to interview; and
- assist your client in preparing for their interview.

Statements must be meticulously prepared. Ask the person making the statement to account for any inconsistencies in the evidence, and for any negative findings of fact in tribunal determinations, which are relevant to the statelessness application.

ii. Content of the statement

If there are previous findings which your client still disputes, consider including something to the effect that, while recognising the status of the tribunal's findings of fact in his case, the applicant States for the record that s/he stands by the original claim for asylum (subject to any corrections to that information that need to be made). This is preferable to re-stating the previous information which has been disbelieved, unless the client can provide very clear and compelling explanations that they have not had the opportunity to set out before.

Check all of your client's documented immigration history and deal with all the problems which arise from these documents or inconsistencies with the account they are now giving (See **Part C, section 5 Analysing the information you have collected**). On the basis of that research, and those instructions, further work may be needed and the client's statement may take time to build. The aim is to cover everything, in sufficient detail to establish their claim and demonstrate that they are credible. The statement should always be drafted in the client's own language. Take into account that the client is likely to be interviewed sometime later and small inconsistencies will damage credibility. In unsuccessful cases in all areas of immigration law one of the main issues is lack of detail and precision in applicants' statements.

The statement can provide a place for your client to explain what attempts they have made to progress their application and for them to express what they feel about their situation. An explanation as to what options they do, or do not, have may be relevant. Many stateless applicants may have been reluctant asylum seekers: no statelessness determination procedure existed, so a set of facts that would have made a strong statelessness application was instead channeled into the asylum process but constituted only a weak asylum claim. Such a client may be able to explain that they did not exaggerate their original asylum claim despite strong incentives to do so, or that there are only a very small number of grants of asylum to persons from their country of origin and that they had no possible incentive to pretend to originate there. Clients may have always stated that they had no knowledge of their parents and grew up in an orphanage, a personal history which is highly relevant to a statelessness application, even when this was irrelevant to the merits of their previous asylum claim. This can be pointed out. If your client is married to a qualified person, and could easily obtain an EEA residence card, they might explain this and that they have little incentive to construct a statelessness case.

The statement is the place for the client to explain in detail their lack of documents or why that they previously had a passport does not prevent their being recognised as stateless.

Your client may have information about their rights in their country of former habitual residence which will go to an assessment of the exclusion criterion set out in paragraph 402(b) (see **Part B, section 6.c. Paragraph 402(b): exclusion where other national international protection is available**). This information may go in the statement or may be used to obtain relevant independent evidence about their rights on entry and their rights while resident.

The *2016 Home Office Instruction* sets out that children, and in particular unaccompanied children, may, 'face acute challenges in communicating basic facts with respect to their nationality' (section 1.4, echoing paragraph 119 of the *UNHCR Statelessness Handbook*). The *UNHCR Statelessness Handbook* provides that 'a child has the right to be heard where he or she has the capacity to form and express a view' (paragraph 71). Experience suggests that the Home Office rarely interviews children in statelessness cases. Therefore representatives need to find creative ways to involve children and to ensure that their right to be heard is respected. You might write a representative's statement setting out information you have obtained from them in your own meeting with them or you might ask them to write a letter to explain what the grant of statelessness leave means to them.

C.16.d. Personal Documents

The application form FLR(S) provides a list of documents which your client could provide as evidence in support of the application (at section 7 of the form, version FLR(S) 04-16):

- identity documents (e.g. birth certificate, extract from civil register, national identity card, voter registration document);
- passports or other travel documents (including expired ones);
- documents regarding applications to acquire nationality or obtain proof of nationality;
- certificate of naturalisation;
- certificate of renunciation of nationality;
- previous responses by States to enquiries about nationality;
- marriage certificate;
- military service record/discharge certificate;
- school certificates;
- medical certificates/records (e.g. attestations issued from hospital on birth, vaccination booklets);
- identity and travel documents of parents, spouse and children.

The *2016 Home Office Instruction* suggests, in addition, ‘other documents pertaining to countries of residence, for example, employment documents, property deeds, tenancy agreements, school records, baptismal certificates and record of sworn oral testimony of neighbours and community members’ (section 4.3.1).

Applicants usually have very few, if any, of the suggested documents. You should:

- Try to get as many of the documents as possible (see **Part C, section 16.f. Contact with an embassy or competent authority** for suggestions);
- Explain exactly how any documents that the client does have were obtained and, as far as possible, what they mean;
- Provide careful evidence of any attempts to obtain such documents, e.g. a Recorded Delivery letter to a relative or to the local municipal authority which holds birth records. Refer to **Part C, section 16.f. Contact with an embassy or competent authority**;
- Obtain translations of relevant documents.

Be clear in your own mind and in your representations what each document would prove. If your client is entitled to nationality because of birth in a particular state’s territory, you will need to document an attempt to obtain a birth certificate. In such a case evidence of attendance at school is probably only circumstantial. On the other hand, if your client would lose their nationality automatically by long residence outside the country of her/his nationality, evidence of residence elsewhere may be very important. If a State has refused to consider your client as a national because your client’s birth was not registered, evidence of attempts to register the birth will be necessary.

C.16.e. Foreign nationality and immigration law

It is essential that you identify the relevant nationality law and its detailed provisions.¹³² Ask your client questions about their travel and residence history. You will need to understand how immigration and nationality laws, and laws as to residence status, apply in any relevant country. Your client’s understanding of their rights may be limited or incorrect and the law or practice may have changed since they left the country.

You should establish in what circumstances the law provides for acquisition, renunciation (if relevant), loss or deprivation of nationality. Take into account that law changes over time and therefore ascertain the law which was relevant at the time of the birth, marriage or residence. Check whether the law has been amended, just as you would for UK legislation. You can then use this knowledge to frame your client’s claim to be stateless and to understand the actions of State authorities.

Internet resources are best for *initial* research. Websites of national embassies and competent authorities *can* provide reliable information. Different websites for the same country may give different information about the same issue. You must cross check everything you find. The country may not operate its laws in the way set out in publicly accessible information, and you will need to bear this in mind, see **Part B, section 2.d.iv. ‘under the operation of its law’**, and **Part C, section 16.f. Contact with an embassy or competent authority**. Expert evidence from a specialised lawyer will normally be required where the national authorities do not make clear the position of the person concerned.

Personalised correspondence to, and ideally from, the competent authority of the relevant country regarding your client’s particular circumstances provides the best evidence of the country’s position, or lack of one.

¹³² This can be determinative, for example in *R (on the application of Sameda) v Secretary of State for the Home Department (statelessness; Pham [2015] UKSC 19 applied)* IJR [2015] UKUT 00658 (IAC) 658, where the law plainly stated that the applicant had to live in Libya for ten years to request naturalisation and the evidence was that he had lived there for eight years only.

If you cannot show that your client has never acquired, or formally lost, their nationality you enter the area of State practice – how does the State treat a particular group of people? (see **Part B, section 2.d.iv 'under the operation of its law'**). For assistance, see the *2016 Home Office Instruction* at 4.6 generally and the *UNHCR Statelessness Handbook* section C on interpretation of terms.

You should obtain evidence about admissibility as well as nationality. Paragraph 403(c) refers to **'any other country'**, so you must conduct a wide examination; for example whether the applicant has a right of admission, for the purposes of permanent residence, to a country where their spouse has a right of entry, or where there is a general right of admission for a particular category of person.¹³³

C.16.f. Contact with an embassy or competent authority

Your first step is to identify the competent authority and any relevant countries to which your client has a formal relevant link (see **Part B, section 2.d.ii. 'competent authorities'**). Your client is unlikely to provide sufficient evidence to found a successful claim to be a stateless person without direct and candid approaches to these competent authorities.

Make sure that in making the enquiries you provide correct, detailed and consistent information about your client to the embassy or other bodies. Your client will need to explain any discrepancies in their personal information. Ensure you have your client's prior written consent, permitting you to contact the relevant organisation; see **Part C, section 8 Obtaining Informed Consent**.

Write a letter setting out your client's relevant history and stating your requests. You will need to be absolutely candid at this point. Your letter is potentially disclosable in the application, and so should be written in neutral language, setting out your client's evidence as to their nationality, and asking the competent authority to state whether they consider your client to be a national. If your client tells the national authority in a letter or during a visit that they are not entitled to that nationality, then the Home Office may refuse statelessness leave claiming that you have prejudiced the application for nationality.¹³⁴ There is no reason why a State authority should provide a person with a confirmation that they are *not* a national: the authority has no link with your client, and can choose to have no dealing with them. Your client must maintain neutrality in their dealings with embassies, and letters must be very carefully worded.

If your client is unwilling to allow you to write to the competent authorities in the relevant country/ies you must take their instructions about why and provide advice about the implications. See **Part C, section 13 Co-ordination of statelessness applications and asylum claims** and **section 14 Co-ordination of statelessness applications and other non-asylum applications**.

Where a State refuses to document someone who provides some evidence of their nationality, you may be able to argue that your client has done everything reasonable to satisfy the State of their claim to hold that nationality and that they have suffered an arbitrary denial or deprivation of nationality; see **Part B, section 2.b. Nationality law**. Such cases are heavily dependent on your client's credibility; see section 4.2 of the *2016 Home Office Instruction*.

It is possible to visit or telephone consular staff in the UK and authorities in your client's country of origin, for example, by writing to a town hall or equivalent body to try to obtain evidence of birth in support of an application for nationality.

¹³³ For example, *Israel: Law No. 5710-1950, The Law of Return*, 5 July 1950, available at: <http://www.refworld.org/docid/3ae6b4ea1b.html> [accessed 26 September 2016].

¹³⁴ *MA (Ethiopia) v. Secretary of State for the Home Department* [2009] EWCA Civ 289 where the asylum seeker told the Ethiopian Embassy that she was 'Eritrean', with the consequence that no weight was attached to the decision of that embassy to refuse to document her.

Your client or the Red Cross may already have made contact with the relevant State authority to evidence entitlement to financial support for failed asylum seekers.

If you receive no reply to your enquiries, or an inconclusive reply, you should write again, with your client's consent and on their instructions. Write regularly and persistently to confirm or update a reply throughout the time you are preparing the application and waiting for a Home Office decision. Steps such as writing every two weeks by recorded delivery, as well as phoning, emailing and sending the applicant there with a witness who will write up an account of the visit, are all helpful.

If no reply is forthcoming, persistent efforts will add weight to your argument that your client is stateless and is willing to cooperate fully to obtain the information, document, or visa in question. You can then argue that the Home Office ought to make its own enquiries and that, in the absence of a reply, it should grant leave.

The *2016 Home Office Instruction* states that no conclusion can necessarily be drawn from a lack of response from an embassy if this is common practice, even though this will leave the applicant without an effective nationality and no prospect of being able to leave the UK. The *2016 Home Office Instruction* has improved the interpretation of this limbo situation, allowing the caseworker to conclude that, if the State has previously routinely responded to requests, a lack of response 'can usually be taken as evidence that the individual is not known to the State' (section 4.6.5). The position in the *UNHCR Statelessness Handbook* is more nuanced.¹³⁵ See **Part B, section 2.d.iv. 'under the operation of its law'** under the heading '**the practical issue**'.

If you are very fortunate the embassy or competent authority will reply carefully, and provide just the evidence you need. It may insist on telephoning you with a reply rather than putting this in writing, in which case you should take a very detailed note of the phone call. Confirm this by writing to the embassy stating what you were told, on what day, and by whom, asking that if the embassy does not agree it writes or contacts you.

It is important to keep records of your letters out. Send all such correspondence by registered mail and obtain tracking records showing delivery.

If you cannot obtain documentary evidence you could draft a statement of your own detailing your attempts to obtain evidence about your client.

See **Part C, section 16.e. Foreign nationality and immigration law** for more information about obtaining evidence on foreign law or on the operation of foreign law as it relates to your client.

C.16.g. Expert report

Experts in the nationality law(s) concerned need to be consulted where the available information is inconsistent, unclear, or not accepted by the Home Office. An expert report may be particularly necessary where State practice does not follow the letter of the law, or to comment on the rights which a person might enjoy in the country of origin.¹³⁶ An expert should be someone either qualified in, or competent to advise on, the nationality law(s) concerned.

The cost of the report is a consideration. If you ask in your representations what steps an applicant could take to show that they cannot return to a country of former habitual residence, or to demonstrate that they are not stateless and admissible to a country, you may receive a response from the Home Office, although this a rather remote possibility given current staffing levels. You may get some indication of Home Office thinking at the interview stage. This would narrow the field of enquiry for an expert, reducing effort and cost, but it might be difficult to obtain an expert report in time before a decision is made. See **Part C, section**

¹³⁵ Paragraph 41 deals with various scenarios, and suggests conclusions which may be drawn.

¹³⁶ With reference to the Immigration Rules paragraph 402 (b) (whether they enjoy the rights and obligations of a national in a country of former habitual residence) or 403 (c) (admissibility, which the *2016 Home Office Instruction* clarifies must be for the purposes of permanent residence).

16.h. Representations in support: what to include and **Part C, section 16.e. Foreign nationality and immigration law.**

C.16.h. Representations in support: what to include

This is your chance to construct a clear argument that your client is a stateless person who should be recognised as such and granted leave, and to set up arguments that might be the basis of a challenge to any refusal. Representations are important in statelessness cases, as the law is not yet fully developed, and can assist in encouraging the Home Office to make its own enquiries and in helping decision makers to understand your client's case. They are an opportunity to persuade and to encourage a positive approach. If, and only if, your client is likely to be impressive in interview, you can use your representations to ask the Home Office to interview.

Your representations should cover all of the following:

- The client's history and current immigration status. Briefly summarise the facts claimed, especially the findings in any tribunal determination, and what the client's current position is in relation to those facts. Where you are not submitting a statement, you should be particularly careful to include all relevant information. You should ensure that all questions on the application form FLR (S) regarding the client's history have been answered;
- A reminder of burden and standard of proof to be applied. Argue for the Home Office to assist by making enquiries in line with the *2016 Home Office Instruction* and explain why you think Home Office enquiries might yield a better response than your own. Remind the caseworker that the UNCHR considers the lower standard of proof to be applicable, and that *Semeda*¹³⁷ indicates a higher degree of care is required in judicial review of Home Office decisions in statelessness applications;
- If relevant, address your client's lack of documentation and evidence. If you do not give an explanation your client could be refused under paragraph 403(d) of the Immigration Rules;
- Where you are arguing that any document is genuine, or is not, be sure that you establish where the burden of proof lies; see **Part B, section 4 Statelessness: burden of proof**;
- Ask that the Home Office indicate what steps that would satisfy it that your client is stateless;
- Clearly identify the relevant countries and the competent authorities and set out what efforts have been made to obtain evidence from them;
- Consider paragraph 402(b) (countries of former habitual residence) and paragraph 403(c) (admissibility to any other country) of the Immigration Rules. Check nationality law, evidential requirements, immigration law and residence rights in all relevant countries. See **Part B, section 2.d.iii. 'by any State'**. Where you consider that your client has no connection with a particular country, point this out;
- Remind the Home Office that anything less than a right to immediate entry and permanent residence in a country of former habitual residence, with the rights and obligations attaching to possession of nationality, is insufficient to exclude your client from the definition of statelessness;
- Remind the Home Office that the *2016 Home Office Instruction* at section 6.2 interprets 'admissible' in paragraph 403(c) of the Rules as 'admissible for the purposes of permanent residence';
- Continue to address the Immigration Rules, to ensure as far as possible there is no reason for refusal under paragraph 404;

137 *R (Semeda) v Secretary of State for the Home Department*, *supra* n 46.

- Where relevant, make representations that sub-paragraphs 322 (4), (6), (7), (8) and (12) do not apply in statelessness applications. In particular, sub-paragraph 322(4) (failure to support self/family) should not apply where the destitute person, or asylum seeker, has been supported by the State under s4 Immigration and Asylum Act 1999.¹³⁸ Sub-paragraph 322(8) (removability) would be an irrational ground of refusal where the applicant has already overcome the admissibility requirement at paragraph 403(c). See **Part B, section 10 General grounds of refusal**;
- Consider whether you can and should include an argument for an alternative grant of leave, for example based on paragraphs 353B, 276ADE, 399 or Appendix FM of the Immigration Rules; Article 8 of the European Convention on Human Rights; or s55 Borders, Citizenship and Immigration Act 2009. Such applications must be made according to the correct procedure;
- Consider making an argument under s55 Borders, Citizenship and Immigration 2009 requesting indefinite leave to remain for children, who may be adversely affected by having a short period of leave. See **Part C, section 23.c. Stateless child**;
- Make representations that any failure to grant your client leave to remain as a stateless person would result in a disproportionate interference with their right to family and/or private life which would be a breach of the UK's obligations under Article 8 of the European Convention on Human Rights;
- Where possible, point out that the client has other applications they could make, but has chosen not to do so, to emphasise the importance to them of the determination of their statelessness.

C.17. Timing of the application

C.17.a. Immediate applications

In a few special circumstances you may be able to advise your client with some confidence to make an immediate application soon after you are instructed. Such cases will be relatively unusual but may arise when you can rely on:

- Clear and persuasive documents already in your client's possession;
- Evidence about your client's previous attempts to document her/himself;
- Objective evidence about the nationality and immigration law of the relevant countries;
- A clear, well-evidenced finding from an immigration judge or judge that your client is stateless;
- An admission from the Home Office that your client is stateless;
- A failure by the Home Office to remove your client, perhaps due to lack of a travel document;

And

- You are confident that there are no inconsistencies in your client's account and that you have sufficient information about their immigration history to make an application without introducing inconsistencies, if you do not have a full copy of their immigration papers.

Your representations should address all relevant points in the Rules, which may include UNRWA exclusion and admissibility.

¹³⁸ The Immigration Act 2016 will repeal s4 and make alternative provision. These parts of the Act are not in force at the time of writing.

Example: an immigration judge found Mr Bidoon to be a documented Bidoon from Kuwait, at his asylum appeal. His particular history of persecution is not believed; his status as a documented Bidoon means that he is not otherwise considered to be at risk of persecution for a Refugee Convention reason. His Home Office file shows that the Home Office does not consider it possible to remove him in the near future. He has no new evidence and so cannot challenge the immigration judge's findings. His next step, instead of making a fresh claim, is to make an application for statelessness leave based on the determination in the asylum claim and the Home Office country information and guidance. The guidance makes clear that all Kuwaiti Bidoons, documented or not, are classified as 'illegal residents' in Kuwait. No statement or further evidence is required.

C.17.b. Emergency applications

In most cases your client will not have strong evidence to show that they are stateless based on what is accepted about them by an immigration judge or judge or by the Home Office. In such cases a client must be advised that it is unwise and perhaps futile to make an application until they have obtained adequate evidence, however urgent or desperate they are.

If your client is in detention, or faces removal, it may be necessary to make urgent summary representations arguing that they may be stateless, stating that further evidence and submissions will follow. This may give your client some short term protection against detention and attempted removal, and support arguments for bail or release. It can be followed up with detailed enquiries to embassies and research into other sources of information. Your client may also want to make an application for financial support and may instruct you to make an application to evidence the steps they are taking to leave the UK or why taking further steps would be futile.¹³⁹ Best practice would require that a client's full statement and complete documents, together with solid evidence of statelessness, should always be obtained and considered before making any application. Where this approach is not taken, you must advise carefully about any potential problems in taking a different approach and it is suggested that you do so in writing, ensuring your client has read and understood the advice.

You must consider carefully what to include in the application: insufficient detail risks a quick refusal of the application, but too much information risks creating inconsistencies, which will come to light once a full set of documents is obtained. Take care to avoid creating inconsistencies by taking very careful and thorough instructions and erring on the side of brevity in representations. In most cases, a detailed statement from your client should not be submitted before the entire papers and Home Office file have been obtained and you have decided what difficulties there are and how to deal with these.

C.17.c. Typical application

Where your client does not already have strong evidence of their statelessness, and in cases where that evidence is incomplete or out of date, you will need to take time to build the case. For example, you should make specific enquiries of national authorities, and relevant witnesses such as family members, **before** making an application. See **Part C, section 16 Evidencing the Claim**.

The process of attempting to obtain objective evidence in support of the intended application can take several months. Sometimes witnesses cannot be located, or are reluctant to give evidence and need persuading. Sometimes no response is forthcoming from an

¹³⁹ The Immigration Act 2016 repeals s4 Asylum and Immigration Act 1999 and makes alternative provision. The relevant provisions are not in force at the time of writing.

embassy or consulate despite your sending repeated letters. After a few months, consider whether the delay in responding is in itself evidence of statelessness. See **Part C, section 16 Evidencing the claim**.

Once an application is submitted, it can take a long time to receive a decision, and this is an opportunity to gather more evidence in support of the case. Clients should be advised that they *must* continue to try to gather evidence to comply with the requirement that they have **'obtained and submitted all reasonably available evidence'** (paragraph 403 (d) of the Immigration Rules). Failure to persist in their efforts to obtain re-documentation may provide the Home Office with a reason to refuse them under this paragraph.

C.18. Making the application

C.18.a. Application form

Paragraph 403 (a) of the Rules requires a 'valid application' to be made. The *2016 Home Office Instruction* states at section 2.2 that an application for leave to remain as a stateless person must be made using an application form: FLR(S) is the relevant form to use and is periodically updated. You must check online that you are using the up-to-date form.

To make a valid application certain sections of the FLR(S) form are mandatory and must be completed: section 1 personal details; section 9 an explanation of why the applicant is not a national of any state; and the declaration. We suggest completion of the form in every case. Where the sections are unclear as to what information should be provided (see **section C.18.b Problems with the application form**) we suggest that you refer to your letter of representations. Experience shows that the Home Office does not refuse to consider applications substantively where this method has been adopted.

The application form contains a declaration that 'I understand that the Home Office will normally seek my consent before making enquiries of those authorities which may be necessary in order to reach a decision on my application'. The experience of advisers is that the Home Office does not in practice carry out any enquiries until after the interview has taken place and asks for consent in the interview if it plans to do so.

The application form requires the applicant to list dependants. More than one member of the family may be stateless and you will need to decide, based on the merit of their applications and in consultation with your client/s, who, and how many persons, are going to apply. See **Part C, section 3 Representing families**.

There is no Immigration Health Surcharge payable, and no fee.

C.18.b. Problems with the application form¹⁴⁰

The February 2016 version of the FLR (S) form is not well designed to elicit the relevant information and does not direct the applicant clearly to the issues at stake. Unrepresented applicants are likely to struggle to complete it. It is very long and parts are repetitive. It fails to explain the law correctly in the two sections which ask the applicant for information about their statelessness. Comments made on these issues by ILPA in November 2015 as part of a consultation process did not result in many improvements. The best way to deal with the shortcomings of the form is to answer all the questions in your representations, in the order set out in the form, and to write 'please see attached representations' in the boxes.

In section 3.7 of form FLR(S) the applicant is required to explain why 'you are not entitled to citizenship of, or a right of residence/admission in the country where you were born or any other country with which you are connected by residence....' The notes to section 9 of

¹⁴⁰ The Home Office has undertaken in email correspondence of September 2016 to the authors to reconsider the form in the light of these comments.

the form require an explanation of links with countries to which the applicant is connected by 'birth, family descent or ethnicity'. Connections by way of residence and marriage are omitted. It is not clear how 'ethnic origin', a term which does not appear anywhere in the Immigration Rules, 1954 Convention, or *UNHCR Statelessness Handbook*, could be acquired in any way except through 'family descent'. Neither list reflects *2016 Home Office Instruction* (see especially section 4.5.1) or the *UNHCR Statelessness Handbook* (see especially paragraph 18) which refer to connections by birth, ancestry, marriage or habitual residence. Because the form fails to ask about marriage and descent, the applicant might not appreciate the importance of these connections.

It appears that section 3.7 of the form is intended to elicit information relevant to three distinct parts of the Immigration Rules; paragraph 401(a) the statelessness definition; paragraph 402 (b) rights of residence in the country of former habitual residence; and paragraph 403 (c) admissibility to any other country.

Section 3.7 of the form also requires a letter from the relevant embassy/High Commission, without acknowledging that there are other competent authorities which may be empowered to determine nationality (see **Part B, section 2.d. Definition of a stateless person/competent authorities**). The option of sending other documents in support of the application is kept open in form FLR(S) checklist, which contains internally contradictory instructions:

'If you cannot provide any photographs or all the documents that we have asked for, please still complete and submit this application form, but use this space to explain why some of the items cannot be sent in. You should also tell us when you will provide them. We will not be able to complete your application until you have provided everything that we have asked for.'

Section 9 of the form repeats the request in section 3.7, asking for an explanation of the 'circumstances which resulted in your becoming stateless', this time with no clues as to what is relevant.

Nowhere is the applicant invited to explain how they might comply with the requirements of paragraphs 403-405 of the Rules (grant of leave). The difference between a right of residence and mere admission is not spelled out. There is no warning as to the potential impact on any outstanding asylum claim of the enquiries necessary to establish an entitlement to statelessness leave. See **Part C section 8 Obtaining informed consent**.

C.18.c. What to send: checklist

You should send the application form with the documents in the list below, unless you are making a more skeletal application:

- Covering Letter;
- Representations – setting out why the applicant is stateless and should be granted leave to remain (see **Part C, section 16.h. Representations in support: what to include**);
- Index to a bundle of documents, which includes:
 - Application form;
 - Two unseparated passport photos of the applicant and also any dependants;
 - All identity documents, evidence of schooling, military service, healthcare etc. as per the checklist on form FLR(S);
 - Written evidence of efforts the applicant(/s) has made to document him/herself: letters from embassies, attendance notes of telephone conversations with, or visits to, embassies or other competent authorities, evidence accepted at any appeals against refusal of support;

- Relevant foreign law: copies of statutes, secondary legislation, immigration rules and embassy websites explaining visa requirements, giving the source of the information;
- Possibly an expert report commenting on State practice, foreign law, or other relevant issues;
- Objective evidence e.g. human rights reports that include information about statelessness in your client's country of origin or conditions of entry and residence for your client;
- Relevant legal or country guidance decisions from the UK or other jurisdictions;
- Possibly statements from the applicant and dependants, see **Part C, section 16.c. Statement in support**;
- Possibly a statement from the representative; see **Part C, section 16.c. Statement in support** for when you might consider this.

C.18.d. Home Office response to the application

The Home Office may send a letter asking the applicant and any dependants to attend the Post Office to give biometric details. This is an automatic procedure and does not indicate that there is going to be a grant of leave.

According to the Home Office, new applications undergo a speedy review and there is prompt refusal of any case that is considered unmeritorious and prompt grant of cases where it takes the view that no interview is required. The Home Office has refused those apparently holding a valid passport, without considering whether the passport indicates that the applicant actually holds a nationality or not.¹⁴¹

Decisions, to be lawful, must be made on the individual case and any summary refusal of an application on the basis that the applicant holds a passport, or has a particular 'nationality' should be vigorously challenged if your client has a meritorious claim.

The caseworker may write to the applicant requesting further information about their application. Experience shows that caseworkers are not proactive in approaching either the client for explicit consent or a competent authority for further information. Instead it is more common for the Home Office caseworker to wait until the interview to determine whether any further action might be appropriate, or, at the decision-making stage, to reject the client's account of efforts to document themselves without setting out what the Home Office considers should have been done. A substantive decision of the Upper Tribunal in a statelessness judicial review confirms that there is a basic duty of enquiry on the caseworker, who must take reasonable steps to acquaint her/himself with the relevant information before taking a decision.¹⁴²

The Home Office may refuse the application without considering it substantively on the basis that there is still an asylum claim pending (see **Part C, section 14 Co-ordination of statelessness applications and asylum claims**).

The Home Office may tell the applicant that they have to pursue a different category of application before the statelessness application would be considered (see **Part C, section 12-14 on prioritisation of applications**).

C.18.e. Delay

The statelessness team in the Home Office has had very few decision makers (for long periods just two), who have been handling the almost 1600 applications made during the first

¹⁴¹ There are ongoing difficulties for Zimbabweans with apparent dual nationality, and some Zimbabweans have applied for statelessness leave on the basis that they have been deprived of their Zimbabwean nationality.

¹⁴² *R (Smeda) v Secretary of State for the Home Department*, at paragraph 17, *supra* n 46.

three years of operation of the procedure. The rate of decision making has been slow. Some decisions have taken two, or even three, years, including months of waiting after the interview took place. More resources have been promised to this team at various points.

There is no legal requirement that the Home Office make a decision within any particular time frame. With reference to children and the Home Office's duties under s55 Borders, Citizenship and Immigration Act 2009, the *2016 Home Office Instruction* at section 1.4 reflects some parts of the *UNHCR Statelessness Handbook*¹⁴³ and refers to applications being dealt with in a 'timely and sensitive manner',¹⁴⁴ mentioning 'the same procedural and evidentiary safeguards for child claimants as apply in asylum claims, including priority processing of their claims'.

Delays in Home Office decision-making are contrary to the advice in the *UNHCR Statelessness Handbook*, which suggests that an initial decision should be made within six months so as not to prolong the 'period spent by an applicant in an insecure position' (paragraph 75 *UNHCR Statelessness Handbook*). It is only if further enquiries are needed, in 'exceptional circumstances' that the first decision might be issued within 12 months (paragraph 75, *ibid*).

Where you can establish a strong case for statelessness leave, and a clear detriment to your client such as, for example, separation from family members or lack of material support, you can make representations for a priority decision, and then advise your client as to the merits of bringing an application for judicial review of the Home Office delay.

C.18.f. Submitting additional evidence

There is no bar to submitting additional evidence and representations after the initial application is made (see *2016 Home Office Instruction*, section 3.4). Whilst waiting for a decision, you and your client should continue to collect and submit evidence, including notifying the Home Office if competent authorities continue to fail to respond.

C.18.g. What rights does my client have while their claim is pending?

Some applicants may have leave under section 3C of the Immigration Act 1971 and should be advised about their on-going rights and entitlements.

Any reporting requirements are likely to be maintained. There is no policy or immigration rule which gives an applicant for statelessness leave, who is waiting for a decision for an extended period, an entitlement to request permission to work. Applications for permission to work have been made but refused by the Home Office.

Applicants who are in receipt of support under s4 Immigration and Asylum Act 1999¹⁴⁵ at the time when they submit an application, generally do not have their entitlement to support reviewed whilst the statelessness application is pending. A destitute applicant without support already in place will need to make an application for support. There is no reference to stateless applicants in the January 2015 Home Office *Asylum support s4 policy and process*. Where support is refused, you may be able to argue that there is a breach of Article 3 of the European Convention on Human Rights¹⁴⁶ and the client may require assistance under community care law, in which case a referral should be made to a good community care lawyer.

143 For example, paragraph 119.

144 In spite of its being explicitly reminded of this requirement, and being provided with the birth certificate of the baby of an applicant for statelessness leave, in one claim the Home Office took eight months from the date of interview to the date of (positive) decision, and 18 months overall. The lack of status meant that the applicant was unable to arrange to marry or to live with his partner and baby.

145 The Immigration Act 2016 will repeal s4 and make alternative provision. These provisions parts of the Act are not in force at the time of writing.

146 *R v Secretary of State for the Home Department ex p Adam, R v Secretary of State for the Home Department ex p Limbuela, R v Secretary of State for the Home Department ex p Tesema* [2005] UKHL 66, paragraph 7, per Lord Bingham.

C.19. Interview: advising your client

C.19.a. Introduction

You should expect your client to be interviewed although, according to the *2016 Home Office Instruction*, this is no longer a mandatory requirement. Applicants have been granted statelessness leave to remain without an interview. In one case a letter before claim was written to obtain an interview for a person who had been refused statelessness leave without one, and who was subsequently granted leave as a stateless person. You may argue that your client is entitled to an interview, using the guidance at section 3.4 of the *Instruction*.

Refer to the *2016 Home Office Instruction*, section 1.4, regarding the treatment of children in the interview process (see **Part C, section 9 Children in the statelessness determination procedure**). It states that children, and in particular unaccompanied children, may 'face acute challenges in communicating basic facts with respect to their nationality' (section 1.4, echoing paragraph 119 of the *UNHCR Statelessness Handbook*). Since experience suggests that the Home Office is unlikely to interview children in statelessness cases, you may need to look for other means to ensure that their voice is heard. See **Part C, section 16.c. Statement in support**.

It is good practice to ensure that your client is familiar with the contents of any statements they have made previously, including those made in the course of their asylum claim, and any submissions or appeals in support matters. Point out to your client the weak points in their case, or credibility problems, and tell them that they will have to explain these during the interview with the Home Office.

Ensure that you have up to date documentary evidence of your client's continuing efforts to be re-documented, if relevant. See **Part C, section 16 Evidencing the claim**. You can send updated evidence to the Home Office in advance or take it with you to the interview.

Ensure that, before the interview, you have a clear understanding with your client whether they are willing for the Home Office to investigate their case by making enquiries of foreign embassies. Where applicable, it is useful for the client clearly to express their wish for the Home Office to obtain evidence. This may increase the likelihood of the caseworker undertaking research or making enquiries of other national authorities (*2016 Home Office Instruction* at sections 4.3.3, third paragraph, and 4.3.5). The decision maker may then be precluded from refusing on the grounds that the applicant has failed to obtain and submit '**all reasonably available evidence**' (paragraph 403(c) Immigration Rules).

A child's statement was submitted in support of a request for her family's discretionary leave to be withdrawn, and leave as stateless persons to be granted instead. This statement allowed the child to express her views on the importance of recognising her as a stateless person, and on her future in the UK.

C.19.b. Interview: practical considerations

The Home Office will send a letter out inviting the client for an interview with about two weeks' notice. Generally, the interview takes place about 12 months after the application was submitted. The appointment letter is usually sent to the representative and the applicant. The interviews are carried out in Liverpool, at the Further Submissions Unit, and tend to last one to two hours.

You can get in touch with the caseworker to request a ticket for travel, particularly if your client lives some distance from Liverpool and has limited means. There is no right to a travel ticket, which is issued on a discretionary basis, but the Home Office has supplied them for clients who are receiving financial support.

If your client needs an interpreter you should notify the Home Office of the client's language and any regional dialect as soon as you are notified of the interview. The Home Office has had to postpone some interviews in Liverpool where interpreters have not been available.

You can attend the interview as a legal representative. Due to funding constraints, doing so is relatively rare, so you should inform the Home Office in advance if you are attending and if you are bringing your own interpreter.

If you are not able to attend, it is essential to request that the interview is recorded. The Home Office has confirmed that it will follow the guidance about interviewing in asylum cases and will record an interview where requested to do so.

The interviewer's enquiries may cover whether your client falls under one of the exclusion clauses in paragraph 402 of the Rules (especially 402(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**'); and the grounds on which leave might be refused (especially paragraph 403(c), '**admissible to their country of former habitual residence or any other country**'). See **Part B, section 6.c. Paragraph 402(b): exclusion where other international protection is available** and **section 8 Further requirements for a grant of statelessness leave: admissibility paragraph 403(c)**.

A common question is whether the client is happy to go back to their country of origin should a travel document be issued, which is presumably a test of whether they are genuinely attempting to obtain documents. Similar enquiries are made in the Asylum Support Tribunal.¹⁴⁷

The interviewing officer takes notes during the interview and will write the question down, and then ask it to your client, noting their response more or less verbatim. The notes will not be read back to your client but the interviewing officer will, on request, supply two copies of the notes at the end of the interview, one for you and one for your client. There is an opportunity to compare your own notes with the Home Office notes after the interview and write with corrections afterwards. Therefore, take your own verbatim record.

Make sure you also request the recording and that a transcript be provided to your client at the end of the interview as this is the best way of ensuring that it is provided to you. You can do this in writing before the interview, or send your client with a letter to hand to the interviewer.

If you attend, the interviewing officer may allow you to comment and even play an active role during the interview to help clarify the client's case as questioning progresses. Comments, and interventions clarifying issues where it is clear there is a misunderstanding, are sometimes possible, depending on the interview, and you should aim for a constructive dialogue. If the interviewer asks questions that are clearly not relevant to determination of statelessness, and you are concerned about your client's answers, you may intervene and explain why that line of questioning is not relevant. At the end of the interview it may be possible to enter into a discussion about whether the client has other options to establish their nationality; what the decision maker might expect of the client; and what the Home Office will or might do before a decision is taken. At a minimum you will be invited to make any comments at the end of the interview.

If the interviewing officer makes a commitment to take certain steps, take a very clear note of what is agreed. Ask them to record the agreement in the interview notes as well. Follow up with a letter. The interviewing officer may otherwise not communicate that agreement to a decision maker, resulting in a refusal based on a misapprehension of the evidence that is available.

Depending on the case you might remind the caseworker of the standard and burden of proof; see **Part B, section 4 Statelessness: burden of proof** and **section 5 Statelessness:**

¹⁴⁷ Decisions in the Asylum Support Tribunal, by way of 'statements of reasons', do not assess the motivations of the applicant when considering whether or not the applicant is 'taking all reasonable steps to leave the UK'. These 'statements of reasons' do not create precedent.

standard of proof. Remind the decision maker that they are expected to take a decision on the applicant's **current** nationality. Agree a timescale for you to make further representations.

C.20. Post interview representations

The caseworker will normally allow just one or two weeks for further representations to be made following the interview. Following the interview it is good practice to write to the Home Office to:

- Address any inconsistencies between your own record of the interview or the recording of it and the Home Office's interview record, after taking instructions. This should be done within two days of the interview taking place;
- Record any points of dispute which were identified during the interview;
- Record any Home Office request for particular further actions which the applicant should take, or for any evidence which they should submit;
- Confirm action which you as representative intend to carry out. If you did not attend the interview, but can see that further enquiries might help the Home Office to reach a positive decision, take the initiative and contact the Home Office explaining what you are going to do now, and asking the caseworker to wait for your further representations before making a decision;
- Set out any action which the Home Office agreed to carry out. The caseworker may have agreed a maximum time to wait for a response from an embassy;
- Provide a detailed statement if you did not submit one earlier;
- Set out legal argument in support of your client's case, including a reminder of the standard and burden of proof.

C.21. Decision: determination that a person is not stateless

An immediate practical point is that any financial support may end and you may need to challenge this by way of appeal to the Asylum Support Tribunal, or by way of the appropriate challenge to the decision-making authority. Include a copy of your pre-action protocol letter to the Home Office, challenging the refusal of statelessness leave, or your detailed request for administrative review, or your appeal, as appropriate. See below.

C.21.a. How to challenge the decision

Challenge to a refusal of a statelessness application is only available by applying for administrative review of a 'case working error' (see below) or judicial review.

C.21.b. Challenging a refusal letter

Where your client is refused leave as a stateless person, analyse the refusal letter and establish the basis of the refusal, for example whether it is accepted that your client is stateless, but s/he is asserted to be admissible elsewhere and therefore not entitled to leave. Refer to the sections in this guide where the issues raised by the reasons for refusal are discussed. Sometimes the reasons given do not reflect an accurate understanding of the law or the facts or misapply the Immigration Rules or the *2016 Home Office Instruction*.

You should establish whether your client has a right of appeal because they made a concurrent human rights claim, and advise on whether to lodge an appeal or not. A human rights appeal will not challenge the decision on the statelessness application under the Immigration Rules directly. The immigration judge will only adjudicate on whether the statelessness decision was right in the context of whether the human rights of the appellant have been breached. If the human rights appeal is allowed, with findings that demonstrate that your client meets the requirements for leave as a stateless person, you can argue that the

Home Office should grant your client statelessness leave and not, for example, leave outside the Immigration Rules on the basis of Article 8 of the European Convention on Human Rights. In any event, if your client wishes to apply for a stateless person's travel document you can argue that this should be issued to them on the basis of the findings of the immigration judge.

You will need to consider and advise on pursuing an application for administrative review and/or judicial review of the decision to refuse statelessness leave.

Administrative review is available where 'the decision is wrong due to a case working error'.¹⁴⁸ Case working error is defined in the Rules at AR2.11. There are no known examples of administrative review of refusals of statelessness leave. You must form a view of whether the decision discloses a case working error. Advise your client and, if appropriate, pursue an administrative review. Your client may get a quicker, favourable decision via this route. The application for administrative review is free in statelessness cases but you may have to pay the fee and then request a refund.

An application for judicial review may be refused if alternative remedies, including administrative review, have not been exhausted. There are also costs implications of proceeding to an application for judicial review without exhausting alternative remedies. The time limit for issuing judicial review proceedings is 'promptly' and in any event not later than three months from the date of receipt of the revised decision following any administrative review.¹⁴⁹

The Upper Tribunal has stated that 'particularly close scrutiny' and 'more rigorous scrutiny' are required of the Secretary of State's decision-making in statelessness cases on an application for judicial review.¹⁵⁰ Expert counsel with experience of statelessness should be consulted as this is a developing area of law.

Consider whether or not the following arguments are available to you in a request for judicial review of a refusal; whether they are likely to result in a different outcome, and whether they are strong enough to merit a challenge in your client's case:

- The decision letter fails to make a determination sequentially under paragraphs 401, 402, 403 of the Immigration Rules, and simply skips to reasons to refuse a grant of leave; this is contrary to the *2016 Home Office Instruction* which states that decision makers 'must clearly indicate whether the applicant is nevertheless recognised as being stateless in accordance with paragraph 401(a) of the Immigration Rules' (section 6.2). You could also argue that a declaration under paragraph 401(a) should be made independently of any finding that the person is excluded under paragraph 402;
- Consider the principle, referred to in paragraph 154 of the *UNHCR Statelessness Handbook*, that criteria which allow the host State to reduce the scope of its responsibility to stateless persons should be narrowly construed; this principle should apply to the exclusion criteria, the admissibility criteria, the refusal criteria at paragraph 404 of the Immigration Rules (danger to the security/public order of the UK), and to paragraph 322 of the Immigration Rules;
- Failure by the Home Office to make enquiries where it is clear that the Home Office might be in a good position to do so or had agreed to do so before making a decision;
- The decision maker has failed to consider the best interests of a child applicant or dependant in a proper way or at all (s55 Borders, Citizenship and Immigration Act 2009);
- The application has been refused without an interview; see **Part C, section 19 Interviews, advising your client**;
- The application has been refused without substantive consideration of the evidence submitted;

148 Immigration Rules HC 395, Appendix AR: Administrative Review, AR 2.1.

149 See Home Office *Administrative Review version 7.07* April 2016 p90.

150 *R (Semedá) v Secretary of State for the Home Department*, *supra* n 46.

- The application has been refused on the basis that insufficient evidence has been provided when you have provided detailed evidence;
- The decision maker has not agreed there is a right of appeal in relation to a human rights (e.g. an Article 8) claim which you advanced in a procedurally proper manner. In such a case you should lodge an appeal in any event;
- The letter fails to address private life outside the Immigration Rules/s117A-D Nationality Immigration and Asylum Act 2002 as amended;
- The refusal is made because the Home Office granted leave on a different and less advantageous basis, e.g. discretionary leave, and argued that there was no need for a decision on the statelessness application.

If your judicial review is successful, you will secure a new decision by the Home Office. You should, subject to your client's instructions, push for this to be considered promptly rather than placed in a lengthy queue of applications.

C.21.c. Renewing the application

If you are able to collate further evidence to address the points raised in the Home Office refusal letter you may consider submitting a further application for stateless leave as an alternative to an administrative review, appeal, or application for judicial review. This will be an option to take into account when assessing the costs and benefits of challenging the decision, together with the length of time it may take to get a new decision.

Unlike paragraph 353 of the Immigration Rules for fresh asylum claims, there is no threshold that new evidence must pass and there are no rules or guidance which prevent renewed applications from being made. That said, there will be little point in putting in a further application without some new evidence, information, or a change of circumstances.

A renewed application is envisaged in the *2016 Home Office Instruction*, which, at section 6.3, states that, after the decision has been made and notified, any new information or evidence must be submitted as a new application, with another application form FLR(S).

C.22. Decision: determination that a person is stateless but leave to remain is refused

C.22.a. How does this happen?

The statelessness determination procedure requires the Home Office first to determine whether or not someone is stateless under paragraphs 401 and 402 of the Rules and then to decide whether to grant leave to remain, with reference to paragraphs 403 and 404.

C.22.b. Your client is recognised as stateless but refused a grant of leave

If the Home Office has recognised a person as stateless, but has not granted them leave to remain, their immigration status will depend on what leave they had at the time of making the application. Most applicants are likely to remain on temporary admission unless they are removable. See **Part C, section 21.b. Challenging a refusal letter**.

C.22.c. What rights does the stateless person still have?

The *2016 Home Office Instruction* says nothing about the domestic status of a person who is recognised as stateless but not granted leave. An example would be a Palestinian who may have a right to a passport from the Palestinian Authorities which would enable her/him to re-enter and live permanently in the Palestinian Territories, but has not obtained one; another would be a person who has committed a crime which does not fall under the exclusion paragraph 402(d) ('**a serious non-political crime**'), but does fall under paragraph 404(b)(ii) ('**a danger to the public order of the United Kingdom**'). You may argue that such a person has

some rights under the 1954 Convention; the *UNHCR Statelessness Handbook* at paragraph 132 explains that rights are accorded to stateless persons 'on a gradual, conditional scale' depending on their 'degree of attachment to the state'.

A stateless child without a grant of leave to remain may be or may become entitled to be registered as a British citizen, for example if they were born in the UK and are still in the UK when they reach the age of five;¹⁵¹ see **Part B, section 2.d.iii. 'by any State'**.

Paragraphs 132-139 of the *UNHCR Statelessness Handbook* provide fairly detailed information about what kind of status a stateless person might have at different points in the statelessness determination procedure. The footnotes refer to case law which may be helpful. If you wish to assert any of these rights you should bear in mind the case law on the legal authority of the 1954 Convention and *UNHCR Statelessness Handbook*; see **Part A, section 5 The authority in UK law of the 1954 Convention and UNHCR Statelessness Handbook**.

If your client remains in the UK on temporary admission, you may argue that they have the rights which are described as accruing to those who are 'lawfully staying' in a State (paragraph 137 *UNHCR Statelessness Handbook*), since they have entered into the statelessness determination procedure, but not been granted a residence permit. 'Lawfully staying', according to the *UNHCR Statelessness Handbook*, is a status which may be gained because of the 'greater duration of presence in a territory'. See **Part A, section 5 The authority in UK law of the 1954 Convention and UNHCR Statelessness Handbook**.

A request for a formal document recognising the person as stateless could be based on Article 27 of the Convention, although this has not been incorporated into UK law. The Home Office has not, as far as is known, issued an identity document to stateless persons who have not also been granted leave to enter/remain, except for one which was issued prior to the implementation of the statelessness determination procedure. It is possible that an IS96 would satisfy the requirement of Article 27 since it does contain the information specified in Article 27. A stateless person who does not have leave to remain is not entitled to a stateless person's travel document; see **Part C, section 26 Travel document**.

C.23. Grant of Leave to Remain as a stateless person: rights

C.23.a. Decision letter: grant

The applicant should receive a letter explaining that they have been granted statelessness leave. Their biometric residence permit will be endorsed 'work permitted' and will not have a restriction on access to public funds. The nationality on the biometric residence permit card is recorded as 'XXA' which signifies statelessness. Family members who have applied should be granted leave in line, provided that the general grounds for refusal do not apply to them. They may be granted statelessness leave if they have made their own application and submitted an FLR(S) form.

Check all the details are correct. It can take several weeks for a card issued with errors to be re-issued, resulting in delays in the client's ability to access benefits and public housing. Any financial support will be withdrawn soon after the grant of leave is made.

C.23.b. Periods of leave, renewal and indefinite leave to remain

The Immigration Rules provide that a grant of leave will be for a period of 30 months.

The *2016 Home Office Instruction* states that 'subsequent periods of leave can be granted providing the applicant continues to meet the relevant criteria'. It should be assumed that the person should make an application on form FLR(S) unless they are eligible for indefinite leave to remain (see below) since there are no criteria for automatic review, as there are for refugee status. It is not known if anyone has yet renewed their statelessness leave.

¹⁵¹ Paragraph 3, Sch 2, British Nationality Act 1981.

Your client must still be stateless and meet the other requirements of the Immigration Rules, including that they are not admissible to any other country. Therefore it is important to advise the client at the time of the grant of leave of any circumstances under which they would no longer meet the requirements of Part 14 of the Immigration Rules, e.g. acquiring a nationality or the right to live in another country through marriage or naturalisation.

A stateless person can make an application for indefinite leave to remain after five years in the UK with lawful leave and as long as they were last granted leave to remain as a stateless person in accordance with paragraph 405. It may be possible to apply for indefinite leave to remain soon after switching from one form of leave to statelessness leave; see **Part C, section 15 Switching**.

C.23.c. Stateless child

A child who is recognised as stateless may be able to register as British under Schedule 2 to the British Nationality Act 1981. This application can potentially be made before indefinite leave to remain is granted.

There is nothing in the 1954 Convention or the *UNHCR Statelessness Handbook* about the length of leave which the UK should grant to children; there is no obligation to grant leave. The *2016 Home Office Instruction* discusses at section 1.4 the duty under s55 Borders, Citizenship and Immigration Act 2009. It is possible to argue for a grant of a longer period of leave in accordance with the Home Office's policy instruction on discretionary leave where there is good reason to state that a grant of 30 months leave is insufficient, for example where the child needs, or will need, to obtain student finance.

C.23.d. Rights enjoyed by a stateless person who has been granted leave to remain

Persons granted leave to enter/remain as stateless, or as dependants of a stateless person, will have the right to work and to claim public funds. There are some gaps in provision as compared to refugees and their dependants: for example access to student finance and access to homelessness assistance.

In contrast to persons recognised as refugees, stateless persons, including children, have no automatic entitlement as stateless persons to pay home student fees or to student finance in the form of a loan. They become so entitled once they have indefinite leave to remain and may become so entitled earlier on the grounds of long residence.¹⁵²

Article 22 of the 1954 Convention, like Article 22 of the Refugee Convention, includes a right to access education.¹⁵³ One option is to argue for an early grant of indefinite leave to remain to enable a person to progress their studies. In a relevant case, provide advice, collect evidence of the impact of being unable to pursue studies, and make detailed representations supported by evidence such as letters from educational institutions, statements from the client and family members, and financial evidence that the fees cannot be met. Consider constructing an argument on the basis of Article 22 of the 1954 Convention, using refugees as your comparator. In children's cases, the best interests of the child and the duty under s55 Borders, Citizenship and Immigration Act 2009 are relevant. Experience shows that even taking this approach is unlikely to result in a grant of indefinite leave to remain unless you have further reasons why a discretionary grant of indefinite leave should be made. A judicial

152 Education (Fees and Awards) (England) Regulations 2007 (SI 2007/779) as amended, see The Education (Student Fees, Awards and Support) (Amendment) (Regulations) 2016 (SI 2016/584); The Education (Student Loans for Tuition Fees) (Scotland) Regulations (SSI 2006/333); The Education (Student Support) (Wales) Regulations (SI 2015/54), the Northern Ireland (Education (Student Support) (No.2) Regulations (Northern Ireland) (SI 2009/373). In Scotland a person may also qualify where they claim asylum and the claim is rejected but they are granted leave to remain (SI 2006/333, regulation 6).

153 This is not the case for discretionary leave and other forms of leave considered in *R (Tigere) v Secretary of State for Business, Investment and Skills* [2015] UKSC 57, which is potentially distinguishable.

review of a refusal to grant indefinite leave to remain to stateless children has been refused permission in the Upper Tribunal but the argument could be advanced again.

Another option is to apply for a scholarship; some universities now provide a scholarship scheme for young persons who do not qualify for student finance.

It may be possible to bring a judicial review. *In R (Tigere) v Secretary of State for Business, Investment and Skills*¹⁵⁴ a challenge was brought to the effect of the regulations in England on those with limited or discretionary leave, resulting in a change to the regulations and the introduction of long residence provisions.¹⁵⁵ Any challenge on behalf of a stateless person would need the input of expert counsel and to set out why stateless persons should be treated in a more favourable way than that for which the new regulations provide.

The Immigration and Asylum Act 1999 s 118 specifies that each housing authority must secure that, so far as practicable, a tenancy of, or licence to occupy, housing accommodation is not granted to a person subject to immigration control unless s/he belongs to a class specified in an order made by the Secretary of State. Stateless persons have not been specified in any part of the UK. It would be straightforward to amend the eligibility criteria by statutory instrument, as was done in England and Wales for a group of 600 Afghan nationals (a 2014 amendment). Article 21 of the 1954 Convention, relating to housing, provides that stateless persons lawfully staying in the territory should be accorded treatment which is as favourable as possible and in any case no less favourable than that accorded to aliens generally in the same circumstances.

The UK has in the past indicated that it does not consider that the protection of stateless persons (or refugees) includes diplomatic protection in international law.¹⁵⁶ Diplomatic protection means a State asserting a claim against another State because of an injury done to its own national by that State.

C.24. Rights of family members of a stateless person

Family members are defined as a spouse; civil partner; unmarried or same sex partner with whom a person has lived in a subsisting relationship akin to marriage or a civil partnership for two years or more; and a child under 18 who is not leading an independent life, is not married or a civil partner and has not formed an independent family unit (Immigration Rules paragraph 410).

Family members can apply for leave in line with the stateless person. They can make a valid application as the family member in the UK of a stateless person (paragraph 411 (a) of the Immigration Rules) and can make an application from outside the UK and obtain entry clearance (paragraph 411 (c)). They can be refused on public policy grounds (paragraph 412) or on the basis of the general grounds for refusal set out in paragraphs 320-322 of the Immigration Rules (paragraph 412 (c), see below in this section). Leave is for an initial period of 30 months (paragraph 413). The Home Office will issue a biometric residence permit to each dependent family member. All cards will be endorsed 'work permitted' including those for children. There is no endorsement of a restriction on access to public funds.

Family members can renew their limited leave for a further 30 months and can apply for indefinite leave to remain after five years of lawful leave in the UK, as long as they were last granted limited leave to remain as a family member of a stateless person, are still such a family member, and have made a valid application (paragraph 415 of the Immigration Rules). A person may switch into statelessness leave from another form of leave and count the previous leave toward the qualifying period for indefinite leave to remain. There is no separate application form on which a family member can apply independently of the principal for

¹⁵⁴ *Supra* n 153.

¹⁵⁵ The Education (Student Fees, Awards and Support) (Amendment) (Regulations) 2016 (SI 2016/584).

¹⁵⁶ M Symes and P Jorro *Asylum Law and Practice*, 2nd Ed, Bloomsbury Professional, West Sussex, 2010, paragraph 6.8, p320, with reference to a UK communication to the UN on 28 February 2001.

further leave, or for indefinite leave to remain, where their leave expires before or after that of the principal or they qualify sooner. Use form ILR (O) for applications for indefinite leave in such cases.

Paragraph 415(b) (ii) of the Immigration Rules provides for a child who is a dependent family member to be granted indefinite leave to remain but there is no provision for such a child to be granted further limited leave. This may be an unintentional omission. Given that paragraph 415 requires five years' residence in the UK and that the last grant of leave was as a dependant of a stateless person, this has the potential to create problems in practice for children who are not themselves stateless. Investigate the possibility of a discretionary grant of indefinite leave to remain or of registration as a British citizen under section 3(1) of the British Nationality Act 1981. The young person may also advance arguments based on Article 8 of the European Convention on Human Rights.

Grounds of refusal of applications by family members are public policy considerations and paragraphs 320-322 of the Immigration Rules (paragraphs 412 and 416 therein). The general grounds of refusal include refusal to comply with maintenance and accommodation sponsorship requirements (paragraphs 320 (14) and 322 (6)). In such cases, arguments based on Article 8 of the European Convention on Human Rights may succeed, but there are no such known cases to date.

Where family members are themselves stateless and present in the UK then they should make an application for leave to remain in their own right or as a dependant. See **Part C, section 3 Representing families**.

C.25. Family members of a stateless child

There is no provision for parents to be granted leave in line with, or to join, their stateless child in the UK. The definition of a family member does not include a parent.

The argument that if a stateless child is recognized, and granted leave to remain, their parents who are already present in the UK should remain with them, is compelling. By definition, the child's return to a country of former habitual residence, and admissibility to the country to which their parents may be removed, will have been considered and rejected, as will acquisition of nationality of that country. In most cases, the application for the parents would need to be made relying on Article 8 of the European Convention on Human Rights and on exceptional circumstances.

Where the child has parents who wish to join them in the UK, the same arguments can be advanced – the Home Office must have accepted that the child is not admissible to another country *and* is not excluded because of enjoying rights akin to nationality in the country of their former habitual residence; therefore the only place in which the family can live together is the UK. The application, which will be made outside the Immigration Rules, will rely on arguments based on Article 8 of the European Convention on Human Rights.

An exception might be where the grant of statelessness leave was made because parents could not be located, in which case if parents come forward this could be a ground for refusal of an extension of stay. If the parents wish to be granted leave in line with their child or entry clearance to join their child in the UK they will have to make an application by arguing that the child cannot leave the UK and that therefore a decision to refuse leave would be in breach of the UK's obligations under Article 8 of the European Convention on Human Rights and s55 Borders, Citizenship and Immigration Act 2009. The prospects of success will be fact sensitive.

C.26. Travel documents

The UK recognises the right of a stateless person who has been granted leave as a stateless person to request a stateless person's travel document.¹⁵⁷ Persons who are under 16 apply for their own travel documents.¹⁵⁸ Those aged 16 or over are treated as adults.

The fee is £72 for an adult and £46 for a child under 16. The form to use is TD 112 BRP, which is also used to apply for other types of Home Office travel document. A stateless person does not have to show that they have been unreasonably refused a travel document by another country to be eligible. The document that will be issued is a biometric immigration document, and looks very similar to a refugee travel document except that it is red in colour.

The travel document is stated to be valid in all countries. That does not mean that all countries will recognise it for the purpose of granting entry and many countries will require the holder to obtain a visa prior to travel.

The State which issues a travel document is responsible for its renewal.

Seek specialist advice if your client requires advice about their rights as a holder of a travel document, for example to consular services and diplomatic protection. The travel document bears the legend "the issue of the document does not entitle the holder to the protection of British Diplomatic or Consular representatives in foreign countries". This restriction is permitted by paragraph 16 of the Schedule to the 1954 Convention.

C.27. Curtailment

The Immigration Rules provide for curtailment of limited leave as follows:

406. Limited leave to remain as a stateless person under paragraph 405 may be curtailed where the stateless person is a danger to the security or public order of the United Kingdom or where leave would be curtailed pursuant to paragraph 323 of these Rules.

There is similar provision for family members at paragraph 414 of the Immigration Rules.

Those granted leave to remain as stateless persons should be advised about the possible grounds for curtailment, which include no longer meeting the requirements of the rule under which leave was granted (paragraph 323(ii) of the Immigration Rules). For those with limited leave who no longer meet the requirements of the rules because, for example, they acquire a nationality or become admissible to any other country, this will cause difficulties in any event when they come to apply for an extension of stay (see **Part C, section 23.b. Periods of leave, renewal and indefinite leave to remain**).

The Secretary of State must discharge the burden of proof when curtailing leave. It may be possible to rely on human rights arguments to resist curtailment, for example that because statelessness leave has been granted the family will be divided if a family member is removed.

The 1954 Convention does not contain revocation and cessation clauses.

¹⁵⁷ Article 28, 1954 Convention.

¹⁵⁸ See TD112 guidance, paragraph 8. Paragraph 2 of the Schedule to the 1954 Convention states that a child may be included in an adult's document, which is no longer considered good practice.

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APPENDIX 1: Immigration Rules part 14: stateless persons

As at September 2016.

Definition of a stateless person

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
 - (c) is not excluded from recognition as a Stateless person under paragraph 402.

Exclusion from recognition as a stateless person

402. A person is excluded from recognition as a stateless person if there are serious reasons for considering that they:
- (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.

Requirements for limited leave to remain as a stateless person

403. The requirements for leave to remain in the United Kingdom as a stateless person are that the applicant:
- (a) has made a valid application to the Secretary of State for limited leave to remain as a stateless person;
 - (b) is recognised as a stateless person by the Secretary of State in accordance with paragraph 401;
 - (c) is not admissible to their country of former habitual residence or any other country; and
 - (d) has obtained and submitted all reasonably available evidence to enable the Secretary of State to determine whether they are stateless.

Refusal of limited leave to remain as a stateless person

404. An applicant will be refused leave to remain in the United Kingdom as stateless person if:
- (a) they do not meet the requirements of paragraph 403;
 - (b) there are reasonable grounds for considering that they are:
 - (i) a danger to the security of the United Kingdom;
 - (ii) a danger to the public order of the United Kingdom;
 - (c) their application would fall to be refused under any of the grounds set out in paragraph 322 of these Rules.

Grant of limited leave to remain to a stateless person

405. Where an applicant meets the requirements of paragraph 403 they may be granted limited leave to remain in the United Kingdom for a period not exceeding 30 months.

Curtailed leave to remain as a stateless person

406. Limited leave to remain as a stateless person under paragraph 405 may be curtailed where the stateless person is a danger to the security or public order of the United Kingdom or where leave would be curtailed pursuant to paragraph 323 of these Rules.

Requirements for indefinite leave to remain as a stateless person

407. The requirements for indefinite leave to remain as a stateless person are that the applicant:

- (a) has made a valid application to the Secretary of State for indefinite leave to remain as a stateless person;
- (b) was last granted limited leave to remain as a stateless person in accordance with paragraph 405;
- (c) has spent a continuous period of five years in the United Kingdom with lawful leave, except that any period of overstaying for a period of 28 days or less will be disregarded;
- (d) continues to meet the requirements of paragraph 403.

Grant of indefinite leave remain as a stateless person

408. Where an applicant meets the requirements of paragraph 407 they may be granted indefinite leave to remain.

Refusal of indefinite leave to remain as a stateless person

409. An applicant will be refused indefinite leave to remain if:

- (a) the applicant does not meet the requirements of paragraph 407;
- (b) there are reasonable grounds for considering that the applicant is:
 - (i) a danger to the security of the United Kingdom;
 - (ii) a danger to the public order of the United Kingdom; or
- (c) the application would fall to be refused under any of the grounds set out in paragraph 322 of these Rules.

Requirements for limited leave to enter or remain as the family member of a stateless person

410. For the purposes of this Part a family member of a stateless person means their:

- (a) spouse;
- (b) civil partner;
- (c) unmarried or same sex partner with whom they have lived together in a subsisting relationship akin to marriage or a civil partnership for two years or more;
- (d) child under 18 years of age who:
 - (i) is not leading an independent life;
 - (ii) is not married or a civil partner; and
 - (iii) has not formed an independent family unit.

411. The requirements for leave to enter or remain in the United Kingdom as the family member of a stateless person are that the applicant:

- (a) has made a valid application to the Secretary of State for leave to enter or remain as the family member of a stateless person;
- (b) is the family member of a person granted leave to remain under paragraphs 405 or 408;
- (c) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

Refusal of leave to enter or remain as the family member of a stateless person

412. A family member will be refused leave to enter or remain if:
- (a) they do not meet the requirements of paragraph 411;
 - (b) there are reasonable grounds for considering that:
 - (i) they are a danger to the security of the United Kingdom;
 - (ii) they are a danger to the public order of the United Kingdom; or
 - (c) their application would fall to be refused under any of the grounds set out in paragraph 320, 321 or 322 of these Rules.

Grant of leave to enter or remain as the family member of a stateless person

413. A person who meets the requirements of paragraph 411 may be granted leave to enter or remain for a period not exceeding 30 months.

Curtailed leave to enter or remain as the family member of a stateless person

414. Limited leave to remain as the family member of a stateless person under paragraph 413 may be curtailed where the family member is a danger to the security or public order of the United Kingdom or where leave would be curtailed pursuant to paragraph 323 of these Rules.

Requirements for indefinite leave to remain as the family member of a stateless person

415. The requirements for indefinite leave to remain as the family member of a stateless person are that the applicant:
- (a) has made a valid application to the Secretary of State for indefinite leave to remain as the family member of a stateless person;
 - (b) was last granted limited leave to remain as a family member of a stateless person in accordance with paragraph 413; and
 - (i) is still a family member of a stateless person; or
 - (ii) is over 18 and was last granted leave as the family member of a stateless person; and
 - (a) is not leading an independent life;
 - (b) is not married or a civil partner; and
 - (c) has not formed an independent family unit.
 - (c) has spent a continuous period of five years with lawful leave in the United Kingdom, except that any period of overstaying for a period of 28 days or less will be disregarded.

Refusal of indefinite leave to remain as the family member of a stateless person

416. An applicant will be refused indefinite leave to remain as a family member of a stateless person if:
- (a) they do not meet the requirements of paragraph 415;
 - (b) there are reasonable grounds for considering that:
 - (i) they are a danger to the security of the United Kingdom;
 - (ii) they are a danger to the public order of the United Kingdom; or
 - (c) the application would fall to be refused under any of the grounds set out in paragraph 322 of these Rules.

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APPENDIX 2: Tables of International Conventions, Legislation, and Cases

International Conventions

1933 Montevideo Convention on the Rights and Duties of States, League of Nations Treaty Series, 8 January 1936

1951 Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series Vol 189, p150, and its *1967 Protocol* 13 January 1967, United Nations Treaty Series Vol 606 p267 available together at: <http://www.refworld.org/docid/4ec4a7f02.html> [accessed 18 September 2016]. Referred to in this guide as the 'Refugee Convention'.

1954 Convention relating to the Status of Stateless Persons, 28 September 1954, United Nations Treaty Series Vol 360, p117, available at: <http://www.refworld.org/docid/3ae6b3840.html> [accessed 18 September 2016]. Referred to in this guide as the '1954 Convention'.

1961 Convention on the Reduction of Statelessness, United Nations Treaty Series, vol. 989, p175, available at: <http://www.refworld.org/docid/3ae6b39620.html> [accessed 18 September 2016]. Referred to in this guide as the '1961 Convention'.

1950 Convention on the Protection Human Rights and Fundamental Freedoms, European Treaty Series 0005 available at: <http://www.echr.coe.int/pages/home.aspx?p=basictexts> [accessed 23 September 2016]. Referred to in this guide as the 'European Convention on Human Rights'.

Legislation, etc.

Acts of Parliament

Borders, Citizenship and Immigration Act, 2009, s55

British Nationality Act, 1981 (as amended), s3(1), s40 and Schedule 2

Immigration Act, 1971, s3C

Immigration and Asylum Act 1999, s4, s118

Immigration Act 2016

Legal Aid, Sentencing and Punishment of Offenders Act 2012

Nationality, Immigration and Asylum Act 2002, s96, ss117A, 117B, 117D and 117E

Statutory instruments

The Education (Fees and Awards) (England) Regulations 2007 (SI 2007/779)

The Education (Student Fees, Awards and Support) (Amendment) (Regulations) 2016 (SI 2016/584)

The Education (Student Loans for Tuition Fees) (Scotland) Regulations (SSI 2006/333)

The Education (Student Support) (Wales) Regulations (SI 2015/54)

The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 (SI 2005/930)

The Northern Ireland (Education (Student Support) (No.2) Regulations (Northern Ireland) (SI 2009/373)

Immigration Rules

HC 395 (as amended)

Home Office Guidance

Asylum Policy Instruction: Statelessness and applications for leave to remain, v2, 18 February 2016, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501509/Statelessness_AI_v2.0__EXT_.pdf [accessed 29 September 2016]. Referred to in this guide as the '2016 Home Office Instruction'.

Applications for leave to remain as a stateless person, v1, 1 May 2013, available at: <http://webarchive.nationalarchives.gov.uk/20140104224755/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/stateless-guide/stateless-guide.pdf?view=Binary> [accessed 29 September 2016]. Referred to in this guide as the '2013 Home Office Instruction'.

Administrative Review, v7, Modernised Guidance, 7 April 2016, available at: <https://www.gov.uk/government/publications/administrative-review> [accessed 30 September 2016]

Asylum support section 4 policy and process, v7, January 2015, updated to 4 April 2016, available at: <https://www.gov.uk/government/publications/asylum-support-section-4-policy-and-process> [accessed 30 September 2016]

Country information and guidance: *Ethiopia: People of mixed Eritrean/Ethiopian nationality*, v1, 31 August 2016, available at: <https://www.gov.uk/government/publications/ethiopia-country-information-and-guidance> [accessed 30 September 2016]

Enforcement Instructions and Guidance, Chapter 53 *Extenuating Circumstances* and Chapter 55 *Detention and Temporary release* available at: <https://www.gov.uk/government/collections/enforcement-instructions-and-guidance> [accessed 21 September 2016],

Exclusion (Article 1F) and Article 33(2) of the Refugee Convention, 1 July 2016, available at: <https://www.gov.uk/government/publications/asylum-instruction-exclusion-article-1f-of-the-refugee-convention> [accessed 16 September 2016]

General Grounds for Refusal Modernised Guidance, Section 4 of 5 *Considering leave to remain*, v23, 19 April 2016, available at: <https://www.gov.uk/government/publications/general-grounds-for-refusal-considering-leave-to-remain> [accessed 30 September 2016]

Nationality: doubtful, disputed and other cases, Asylum Instruction, Asylum Screening and Routing, 26 October 2016, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257467/nativity-doubtful-disputed.pdf [accessed on 12 July 2016]

Victims of Modern Slavery: Competent Authority Guidance, v3, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521763/Victims_of_modern_slavery_-_Competent_Authority_guidance_v3_0.pdf [accessed 17 September 2016]

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Adam, Limbuela, Tesema; R (Adam) v Secretary of State for the Home Department, R v Secretary of State for the Home Department ex p Limbuela, R v Secretary of State for the Home Department ex p Tesema [2005] UKHL 66

Adimi; Ex parte Adimi [1999] EWHC Admin 765; [2001] QB 667

- AH (Algeria) v Secretary of State for the Home Department* [2015] EWCA Civ 1003. Permission to appeal to the Supreme Court was refused on 22 March 2016, Case No: UKSC 2016/0012.
- Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62
- Al- Sirri v Secretary of State for the Home Department* [2012] UKSC 54
- B2 v Secretary of State for the Home Department* [2013] EWCA Civ 616 (the case was re-named, see *Pham v Secretary of State for the Home Department*, below, for the Supreme Court decision)
- Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 00702
- Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804
- EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809
- El Kott et Ors v Bevándorlási és Állampolgársági Hivatal* CJEU Case 346/11, judgment of 19 December 2012
- HA (Article 24 QD) Palestinian Territories* [2015] UKUT 00465 (IAC)
- H. El-H v Secretary of State for the Home Department* Upper Tribunal, AA/04018/2013
- Iqbal (paragraph 322 Immigration Rules)* [2015] UKUT 00434 (IAC)
- Janko Rottmann v Freistaat Bayern* ECJ Case C-135/08, judgment of 2 March 2010
- JM; R(JM) v Secretary of State for the Home Department (Statelessness: Part 14 of HC 395)* IJR [2015] UKUT 00676 (IAC)
- Khadir; R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39
- MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289
- MJ (Singh v Belgium: Tanveer Ahmed (unaffected)) Afghanistan* [2013] UKUT 253 (IAC)
- MS, AR and FW; R (MS, AR and FW) v Secretary of State for the Home Department* [2009] EWCA Civ 1310
- Pham v Secretary of State for the Home Department* [2015] UKSC 19
- Surinder Singh; R v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* Case 370/90 [1992] ECR I-4265
- Smeda; R (Smeda) v Secretary of State for the Home Department (statelessness; Pham [2015] UKSC 19 applied)* (IJR) 658
- SG et ors; R (SG et ors) v Secretary of State for Work and Pensions* [2015] UKSC 16
- Singh et ors v Belgium* European Court of Human Rights, Appl. No. 33210/11, judgment of 2 January 2013
- Smith v Secretary of State for the Home Department* 00/TH/02130
- ST (Ethnic Eritrean – nationality – return) Ethiopia* CG [2011] UKUT 252 (IAC)
- Tanveer Ahmed v Secretary of State for the Home Department* [2002] Imm AR 318
- Tameside; Secretary of State for Education and Science v Metropolitan Borough Council of Tameside* [1977] AC 1014
- Tigere; R (Tigere) v Secretary of State for Business, Investment and Skills* [2015] UKSC 57
- Tjhe Kwet Koe v Minister for Immigration & Ethnic Affairs & Ors* [1997] FCA 912
- ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4

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APPENDIX 3: Specialist Organisations

Asylum Aid

<http://www.asylumaid.org.uk/>

Asylum Aid is part of Migrants Resource Centre (MRC), which also hosts the Project for the Registration of Children as British Citizens (PRCBC) – see below for details about this project. Asylum Aid provides free legal representation to asylum seekers and stateless persons and undertakes related policy work, education and advocacy. Asylum Aid has played a key role in researching statelessness in the UK and advocating for the government to introduce a statelessness determination procedure. Asylum Aid is, in 2016, offering free training on statelessness for lawyers, community groups, NGOs, and stateless persons.

Asylum Support Appeals Project

<http://www.asaproject.org/>

The Asylum Support Appeals Project offers free legal representation and advice to asylum seekers and refused asylum seekers appealing against Home Office decisions to refuse or withdraw their housing, financial subsistence, or both. It also provides training and does policy and lobbying work.

Bail for Immigration Detainees

<http://www.biduk.org/tdp>

The Travel Document Project provides tools to help people to apply for travel documents from their own national authorities, including standard letters, and contact details. There is advice on how such evidence can be used for the purpose of engaging the Home Office with an individual's efforts to cooperate with the documentation process, thereby also serving as evidence that they are unlikely to abscond if released.

European Network on Statelessness

<http://www.statelessness.eu/>

The European Network on Statelessness is a pan-European network of organisations and individual experts working on statelessness through law and policy, capacity-building and awareness-raising activities. The staff of the European Network on Statelessness may be able to connect you with experts on the nationality laws of particular European countries and/or with practitioners representing stateless persons in other countries. Its newsletter contains interesting information from around the world about stateless people.

European Union Democracy Observatory

<http://eudo-citizenship.eu/about>

The Observatory, commonly called 'EUODO', has a web platform on citizenship which includes a database on citizenship laws. This database at present covers Europe, Russia, some former USSR states, Lebanon, Turkey and the Americas.

ILPA / Electronic Immigration Network directory of experts

<https://www.ein.org.uk/experts>

This directory provides a list of experts willing to provide reports in asylum cases. Some will be willing to provide reports in statelessness cases.

Institute on Statelessness and Inclusion

<http://www.institutesi.org/>

The Institute on Statelessness and Inclusion is an independent non-profit organisation committed to promoting the human rights of stateless persons and fostering inclusion ultimately to end statelessness. Email address for enquiries: info@institutesi.org

Liverpool Law Clinic

<https://www.liverpool.ac.uk/law/liverpool-law-clinic/>

The Clinic is based in the School of Law and Social Justice, University of Liverpool. It offers free legal representation to stateless persons, involving law students in this work. It is involved in statelessness training, and in advocacy and policy work. Two of its staff members wrote this guide with the assistance of an advisory board.

Project for the Registration of Children as British Citizens (PRCBC)

<https://prcbc.wordpress.com/>

The project provides legal advice, aid, assistance and services relating to the registration of children as British citizens, to those persons who could not otherwise obtain such provision due to lack of means. It also conducts research and educates on this issue.

Refugee Action's 'Embassy Liaison Project'

http://www.refugee-action.org.uk/about/what_we_do/2834_embassy_liaison_project

The Project aims to support people in need and to ensure that their rights are respected. It helps people to navigate the process of obtaining documents, accompanying them to their embassy appointments and advocating on their behalf in complex cases. Volunteers may write up an impartial statement afterwards. It may be able to accompany those who have arranged an appointment from immigration detention, subject to safeguards, and the project volunteer being permitted to sit in on the interview itself.

Rights in Exile

<http://www.refugeelegalaidinformation.org/country-origin-information-experts>.

These pages give access to an extensive list of experts from all over the world.

UNHCR "Refworld"

<http://www.refworld.org/statelessness.html>

Refworld has a page with a wide range of resources on statelessness. It also has information about individual states' citizenship laws. This is not always comprehensive, or necessarily up to date, especially where a State has enacted changes to its nationality laws by way of secondary legislation. It is a good place to start.

National bodies

First-tier Tribunal (Asylum Support)

<https://www.gov.uk/courts-tribunals/first-tier-tribunal-asylum-support>

You may be able to obtain statements of reasons on asylum support appeals from the tribunal if they are less than 12 months old.

Home Office casework team asylum support

AsylumSupportLSE@homeoffice.gsi.gov.uk

Fax: 0870 336 9627
Telephone: 0300 123 2235

LSE Team
Long corridor, 14th floor
Lunar House
Wellesley Road
Croydon CR9 2BY

Home Office status review team

(decides statelessness applications)

Status Review Team
Statelessness Determination Team – FLR(S)
Complex Casework Directorate,
Department 156, 7th Floor,
Capital Building, Old Hall Street,
Liverpool, L3 9PP

Email: StatusReviewUnit@homeoffice.gsi.gov.uk

4 APPENDIX 4: Further reading on statelessness

BADIL *Handbook on Protection of Palestinian Refugees in States signatories to the 1951 Refugee Convention*, 2nd ed, BADIL Resource Centre for Palestinian Residency and Refugee Rights, Bethlehem, February 2015

K Bianchini *The implementation of the Convention relating to the status of stateless persons: procedures and practice in selected EU States*, PhD thesis, University of York, 2015, available at: <http://etheses.whiterose.ac.uk/11243/> [accessed 29 September 2016]

A Edwards and L van Waas *Nationality and Statelessness under International Law*, Cambridge University Press, Cambridge, 2014

A Edwards 'The Meaning of Nationality in International Law: Substantive and Procedural Aspects', in A Edwards and L van Waas, (eds), *Nationality and Statelessness under International Law*, Cambridge University Press, Cambridge, 2014

O El-Abed *The Invisible Community: Egypt's Palestinians*, 8 June 2011, available at: <https://al-shabaka.org/briefs/invisible-community-egypts-palestinians/#fnref-331-5> [accessed 13 September 2016]

European Network on Statelessness *Protecting Stateless Persons from Arbitrary Detention: A regional toolkit for practitioners*, European Network on Statelessness, London, December 2015, available at: http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Detention_Toolkit.pdf [accessed 29 September 2016]

European Network on Statelessness *No Child should be Stateless*, European Network on Statelessness, London, 2015, available at: www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf [accessed 17 September 2016]

European Network on Statelessness *Ending Childhood Statelessness – A Comparative Study of Safeguards to Ensure the Right to a Nationality for Children Born in Europe*, European Network on Statelessness, London, 2016.

European Network on Statelessness *An Obligation for Statelessness Determination under the European Convention on Human Rights?* Discussion Paper, Caia Vlietk et al, European Network on Statelessness, London, September 2014

L Fransman *British Nationality Law*, 3rd edn, Bloomsbury Professional, West Sussex, 2011

E Fripp *Nationality and Statelessness in the International Law of Refugee Status*, Hart, Oxford, 2016

M Ganczer 'The Right to a Nationality as a Human Right?' in Marcel Szabó, Petra Lea Lánkos, Réka Varga and Tamás Molnár (eds.) *Hungarian Yearbook of International Law and European Law 2014*, Eleven International Publishing, The Hague, 2015, 15-33

G Goodwin-Gill *Deprivation of Citizenship resulting in Statelessness and its Implications in International Law*, 5 May 2014, available at: <http://www.ilpa.org.uk/resources.php/26116/ilpa-briefing-for-the-immigration-bill-house-of-lords-report-7-april-2014-deprivation-of-citizenship> [accessed 11 October 2016].

A Harvey 'The de facto statelessness debate', *Journal of Immigration, Asylum and Nationality Law* (2010) 24(3), 257

A Harvey 'The UK's new statelessness determination procedure in context', *Journal of Immigration, Asylum and Nationality Law*, (2013) 27(4), 294-314

A. Harvey 'Recent Developments on Deprivation of Nationality on Grounds of National Security and Terrorism resulting in Statelessness', *Journal of Immigration, Asylum and Nationality Law* (2014) 28(4), 339-341

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, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501999/detention-q4-2015-tabs.ods. [accessed 17 September 2016]

Institute on Statelessness and Inclusion *The World's Stateless 2014*, Institute of Statelessness and Inclusion, Eindoven, 2014, available at: <http://www.institutesi.org/worldsstateless.pdf>

H Lambert 'Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status', (2015) 64 *International and Comparative Law Quarterly*, 348

B Manby *Struggles for Citizenship in Africa*, Zed Books, London, 2009

C Sawyer and B Blitz *Statelessness in the European Union: Displaced, Undocumented, Unwanted*, Cambridge University Press, Cambridge, 2011

M Symes and P Jorro *Asylum Law and Practice*, 2nd Ed, Bloomsbury Professional, West Sussex, 2010

UN High Commissioner for Refugees (UNHCR) *Handbook on Protection of Stateless Persons*, 30 June 2014, available at: <http://www.refworld.org/docid/53b676aa4.html> [accessed 18 September 2016]. This consolidates the three 'Guidelines Nos 1-3' on the Criteria for Determining Statelessness, Procedures for the Determination of Statelessness and the Status of Stateless Persons at the National Level. It is referred to in this guide as 'UNHCR Statelessness Handbook'.

UN High Commissioner for Refugees (UNHCR) *Expert Meeting – Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ('Tunis Conclusions')*, March 2014, available at: <http://www.refworld.org/docid/533a754b4.html> [accessed 15 September 2016]

UN High Commissioner for Refugees (UNHCR) *Mapping Statelessness in The United Kingdom*, 22 November 2011, available at: <http://www.refworld.org/docid/4ecb6a192.html> [accessed 23 September 2016]

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UN High Commissioner for Refugees (UNHCR) *Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons*, 11 July 2016, available at: <http://www.refworld.org/docid/57836cff4.html> [accessed 15 September 2016]

UN High Commissioner for Refugees (UNHCR) *Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Refugee Convention and its 1967 Protocol relating to the Status of Refugees*, October 2014, PPLA/2014/01, available at: <http://www.refworld.org/docid/543525834.html> [accessed 15 September 2016]

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