

Institute on Statelessness and Inclusion, ASKV Refugee Support, European Network on Statelessness and Defence for Children - The Netherlands

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

The Netherlands

Introduction

1. The Institute on Statelessness and Inclusion (the Institute), ASKV Refugee Support (ASKV), the European Network and Statelessness (ENS) and Defence for Children – The Netherlands (DCI-Netherlands) make this joint submission to the Universal Periodic Review (UPR) in relation to statelessness, access to nationality and human rights in the Netherlands.
2. The Institute¹ is an independent non-profit organisation committed to an integrated, human rights based response to the injustice of statelessness and exclusion through a combination of research, education, partnerships and advocacy. Established in August 2014, it is the first and only global centre committed to promoting the human rights of stateless persons and ending statelessness.
3. ASKV² is an Amsterdam-based organisation, providing legal assistance and social support (including shelter) to undocumented refugees. At present, ASKV is one the last remaining organisations of its kind in Amsterdam, and every year hundreds of undocumented people make use of our daily walk-in legal and social advice clinics. ASKV has particular expertise in providing housing and guidance to refugees with psychiatric disorders. In addition to direct assistance, ASKV is a vocal advocate for refugee rights, both locally and nationally.
4. ENS³ is a civil society alliance of NGOs, lawyers, academics and other independent experts committed to addressing statelessness in Europe. Based in London, it currently has over 100 members (including 55 organisations) in 39 European countries. ENS organises its work around three pillars – law and policy, communications and capacity-building. The Network provides expert advice and support to a range of stakeholders, including governments.
5. DCI-Netherlands⁴ is set up to ensure action directed towards promoting and protecting the rights of the child in The Netherlands and elsewhere. The organization fights against violation of children’s rights by focusing its efforts on research, lobbying for children’s rights, advocacy, education and legal advice. Our starting point and source of inspiration is the UN Convention on the Rights of the Child.

¹ For more information about the Institute on Statelessness and Inclusion, please see the website <http://www.institutesi.org/>.

² For more information about ASKV, please see the website <http://www.askv.nl/>.

³ For more information about ENS, please see the website <http://www.statelessness.eu/>.

⁴ For more information about DCI-Netherlands, please see the website <http://www.defenceforchildren.org/dci-netherlands/>

6. This submission focuses on children’s right to a nationality, identification of stateless persons, detention of stateless persons and those at risk of statelessness and protection of stateless refugees in the Netherlands. It draws on experience with research, advocacy, litigation, awareness raising and direct support by the co-submitting organisations and their partners, performed both in the Netherlands and internationally. Among other resources, it draws extensively on an ASKV and ENS report and related publications entitled “*Protecting Stateless Persons from Arbitrary Detention in the Netherlands*”.⁵

The Universal Periodic Review of the Netherlands under the First and Second Cycle (2008, 2012)

7. The Netherlands were first subjected to the UPR on 15 April 2008, at Session 1 of the First Cycle, and subsequently on 31 May 2012, at Session 13 of the Second Cycle of the UPR. Despite various ongoing concerns regarding the right to a nationality and the human rights of stateless persons in the Netherlands, it did not receive recommendations that directly related to statelessness or the right to a nationality in either of these sessions. Various recommendations were however made during the Netherlands’ second review, including on the topics of addressing arbitrary detention, implementing alternatives for detention of undocumented immigrants and ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. These recommendations and the response of the Netherlands are set out below:

Recommendation	Response
98.112. “Due to the criminalization of irregular residency in the country, design alternatives for the detention of irregular or undocumented immigrants” – by Brazil	This recommendation was ‘noted’ by the Netherlands.
98.108. “Introduce measures to reduce detention of individuals solely for immigration purposes and consider other alternatives than detention to use when possible” – by Sweden	This recommendation was ‘accepted’ by the Netherlands
98.2. “Consider ratifying the ICRMW” – by Mexico	This recommendation was ‘rejected’ by the Netherlands

The international obligations of the Netherlands

8. The Netherlands has ratified nearly all core international and regional human rights treaties. Stateless persons benefit from the general application of international human rights standards found in these core treaties, including non-discrimination, adequate standard of living and equality before the law.⁶

⁵ To access the report and related documents, visit <http://www.statelessness.eu/resources/protecting-stateless-persons-arbitrary-detention-netherlands>.

⁶ There are a few exceptions under international human rights in which stateless persons are restricted, such as in the right to vote or to be elected to political office.

9. The specific right to a nationality and/or protection of stateless persons is further reinforced by a variety of these instruments, including the International Covenant on Civil and Political Rights (ICCPR, Article 24), the Convention on the Elimination of all forms of Discrimination Against Women (Article 9), and the Convention on the Rights of the Child (CRC, Article 7) to which the Netherlands is a Party. The Netherlands has furthermore ratified the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention), the 1961 Convention on the Reduction of Statelessness (1961 Convention) and the European Convention on Nationality (ECN), all of which oblige States Parties to take certain measures to protect persons who are stateless or at risk of statelessness.
10. The Netherlands has additional international and regional obligations to protect the liberty and security of all persons and to protect against arbitrary and unlawful detention. These obligations derive from the ICCPR (Article 9), the European Convention on Human Rights (ECHR, Article 5), the Charter of Fundamental Rights of the European Union (Article 6) and the European Union (EU) Returns Directive (Article 15), all of which protect the right to liberty and security of the person and freedom from arbitrary detention. Importantly, Article 26 of the 1954 Convention additionally requires States to permit stateless persons “lawfully in” their territory to choose their place of residence and move freely within the State.⁷

Statelessness in the Netherlands

11. The government of the Netherlands estimates there are 4,000-5,000 stateless persons in the country, whereas UNHCR estimates the number to be around 10,000.⁸ There are also more than 80,000 individuals whose nationality is deemed ‘unknown’ currently registered in the Netherlands.⁹ As this submission points out, these statistics misrepresent the likely real number of stateless persons in the Netherlands. While an unidentified number of stateless persons (or people at risk of statelessness) may be hidden within the figure of persons with ‘unknown nationality’, the majority are immigrants who were undocumented at the time of registration with their municipality. At the same time, it must be emphasised that efforts to pin down exact numbers of stateless persons are frustrated by the current absence of a dedicated determination mechanism (although its establishment was announced in September 2014). It is possible to be recorded as ‘stateless’ in the population register which is administered by the municipalities, but this is only open to stateless persons who are legally residing in the country and who have documentary evidence to prove their stateless status beyond doubt. The requirement of legal stay and the substantial burden of proof likely cause a large number of stateless (and at risk) individuals to go unidentified. Without formal determination of their status, they may experience substantial difficulties in accessing rights accorded to them under the Statelessness Conventions. Furthermore, the lack of accurate statistical data is a matter of concern because failure

⁷ In line with UNHCR observations the drafting history of the 1954 Convention affirms that persons who have applied to remain in a country based on their statelessness are ‘lawfully in’ that country. UNHCR, *Handbook on Protection of Stateless Persons* (30 June 2014, ‘UNHCR Statelessness Handbook’), para 135. Available at <http://www.refworld.org/docid/53b676aa4.html>.

⁸ Government information about statelessness [*Rijksoverheid*], available at <https://www.rijksoverheid.nl/onderwerpen/nederlandse-nationaliteit/inhoud/staatloosheid>. Both of these estimates were recently featured in the newspaper Trouw: Hans Marijnissen, Aantal staatlozen in Nederland groeit [*Number of stateless persons in the Netherlands is growing*], 14 September 2016. Available at <http://www.trouw.nl/tr/nl/39681/nbsp/article/detail/4376168/2016/09/14/Aantal-staatlozen-in-Nederland-groeit.dhtml>.

⁹ *Ibid.*

to comprehend the true scale of the issue or to identify individual stateless persons makes it extremely difficult to respond both at a policy level and in terms of protecting the individual rights of stateless persons.

12. Despite the lack of accurate statistical data, it is possible to categorise stateless persons in the Netherlands into two main groups. The first (and likely smaller group) consists of children who were born in the Netherlands but whose right to acquire a nationality was denied, resulting in their statelessness. The second (larger) group comprises stateless persons/those at risk of statelessness who migrated to and live in the Netherlands. This group will include people whose statelessness was evident before they migrated as well as those whose statelessness became apparent upon failed attempts to remove them from the country. In terms of legal status, this groups includes a mix of refugees, asylum seekers, irregular migrants and those who have legal stay rights.
13. Regardless of which group they belong to, all stateless persons in the Netherlands are vulnerable to discrimination and face serious human rights challenges, as this submission aims to demonstrate.

The right of every child to acquire a nationality

14. The 1961 Convention requires States to grant nationality to persons born in their territory 'who would otherwise be stateless'.¹⁰ Furthermore, both the ECN and 1961 Convention obligate that foundlings automatically acquire nationality.¹¹ The most important human rights provision related to the child's right to acquire a nationality is Article 7 of the CRC, which requires that:

"1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

15. International law also sets out rules and timeframes for the acquisition of nationality by children who would otherwise be stateless. Both the ECN and the 1961 Convention set out various criteria according to which nationality should be acquired by such children, either at birth or later in life.¹² The current practice of the Netherlands is assessed against these criteria later in this submission. Importantly, guiding principles of the CRC including the right to non-discrimination and the best interests of the child, further dictate the manner in which these provisions are to be implemented.¹³
16. Despite these international obligations, Dutch law currently only allows children born in the country, who have been stateless since birth, the right to opt for Dutch citizenship after an uninterrupted

¹⁰ 1961 Convention, Article 1.

¹¹ 1997 European Convention on Nationality, Article 6 (1) (b); 1961 Convention on the Reduction of Statelessness, Article 2.

¹² 1997 European Convention on Nationality, Article 2 (6) (b); 1961 Convention on the Reduction of Statelessness, Article 1 (2) (a) and (b).

¹³ 1989 Convention on the Rights of the Child, Articles 2 and 3.

period of at least three years of *legal* residence.¹⁴ The legal residence requirement in this provision is contrary to the Netherlands' international obligations meaning that some children born in the country will not be able to acquire Dutch nationality, purely because their parents are irregular migrants. Various actors and organisations including the UNHCR and the Dutch Advisory Committee on Migration Affairs (ACVZ) have critiqued this provision and pointed out that it is contrary to both the 1961 Convention and the CRC with regard to the prevention of childhood statelessness.¹⁵ These organisations have recommended that the legal residence requirement be dropped.¹⁶

17. Significantly, the Commissioner for Human Rights of the Council of Europe stated in 2014 that:

"In 2012, 5,641 children born in the Netherlands who were five years old or older were still registered as being of unknown nationality. [...] Another concern is that, under Dutch law, the granting of Dutch nationality to a child who would otherwise be stateless only applies to children who have been lawfully resident in the Netherlands for three years, contrary to the 1961 UN Convention [...] which only requires habitual residence. According to the ACVZ, registration statistics suggest that at least 85 stateless children born in the Netherlands could have acquired Dutch nationality by now were it not for this added condition of lawful residence. [...]"

*the Commissioner **strongly recommends that the Dutch authorities find solutions for stateless children born in the Netherlands, notably by rescinding the requirement of lawful stay for their acquisition of Dutch nationality.** The Commissioner also recalls that in its Recommendation on the Nationality of Children, the Committee of Ministers stressed that member states should register children as being of unknown nationality only for as short a period of time as possible."*¹⁷

18. Responding to these criticisms, in November 2014, the Dutch government proposed a provisional amendment to the Dutch Nationality Act¹⁸ that aims to enable stateless children born in the Netherlands with no legal residence to opt for Dutch citizenship.¹⁹ While the proposed amendment is to be welcomed, it only partially addresses the above concerns, as it retains three problematic conditions:

- I. The stateless child is required to have had a factual residence²⁰ in the Netherlands of five consecutive years;

¹⁴ Dutch Nationality Act, Article 6 (1) (b).

¹⁵ Compare Article 4 of the 1961 Convention and Article 7 of the CRC.

¹⁶ ACVZ, *No Country of One's Own* (The Hague: ACVZ, September 2014), in particular Recommendation 5, 74, available at <https://acvz.org/en/pubs/no-country-of-ones-own/>; UNHCR, *Mapping Statelessness in the Netherlands* (The Hague: UNHCR, November 2011), in particular Recommendation 19, p. 63, available at <http://www.refworld.org/docid/4eef65da2.html>.

¹⁷ Commissioner for Human Rights of the Council of Europe, *Report by Nils Muiznieks following his visit to the Netherlands from 20-22 May 2014* (October 2014).

¹⁸ *Rijkswet op het Nederlanderschap*.

¹⁹ Letter of the State Secretary for Security and Justice and Minister for Immigration [*Staatssecretaris van Veiligheid en Justitie*] to the House of Representatives [*Tweede Kamer*], *Kamerstukken II 2014/15*, 19637, no. 1917. Note that this is not a full-fledged legislative proposal, but it is a concrete plan to amend the Dutch Nationality Act as a reaction on one of the recommendations by ACVZ.

²⁰ The concept of 'factual residence' is comparable to 'habitual residence'. See also UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961*

- II. At least one of the parents of the stateless child should not be able to resolve the statelessness of the child through his or her own actions, e.g. by reporting the child's birth to the country of origin's embassy so the child may acquire its nationality; and
- III. The residence of the child should be stable: the parents should not have obstructed their departure or evaded supervision by the Immigration and Naturalisation Service (*IND*), the Repatriation and Departure Service, the Central Agency for the Reception of Asylum Seekers or the Aliens Police (*Vreemdelingenpolitie*) in the context of any obligation to report to the relevant authorities.

19. The Committee on the Rights of the Child, UNHCR and academic experts have already pointed out that (some of) these conditions are problematic in light of the Netherlands' obligations under international human rights law.²¹ Most notably, in its most recent review of the Netherlands, the Committee on the Rights of the Child:

*“recommends that the State party ensure that all stateless children born in its territory, irrespective of residency status, have access to citizenship without any conditions. In particular, it recommends the State party not to adopt the proposed requirement of parents' cooperation with the authorities.”*²²

The third condition is thus particularly problematic as it does not comply with the CRC, the 1961 Convention or the ECN. Article 2(2) of the CRC says that States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. The third condition of the proposed amendment however solely concerns the actions or inactions of the parent(s) or guardians of the child. Therefore, children could be discriminated against or punished by being denied the right to acquire Dutch nationality, based on whether their parents cooperate with the authorities. This is in contravention of the principles of non-discrimination and the best interests of the child.²³

20. This condition also undermines the right to private life protected under the ECHR. According to the European Court of Human Rights, when laws which are aimed to penalise parents, also *“affect the children themselves, whose right to respect for private life [...] is substantially affected. Accordingly, a*

Convention on the Reduction of Statelessness (21 December 2012) HCR/GS/12/04, para 41; UNHCR, *UNHCR's legal observations regarding the Proposal to amend the Nationality Act - Conditions to grant stateless children born in the Netherlands the right to apply for Dutch nationality* (30 January 2015) available online at <http://www.refworld.org/docid/5617c2c74.html>.

²¹ *CRC Concluding Obligations on the fourth periodic report of the Netherlands* (8 June 2015) CRC/C/NDL/CO/4; UNHCR, *UNHCR's legal observations regarding the Proposal to amend the Nationality Act - Conditions to grant stateless children born in the Netherlands the right to apply for Dutch nationality* (30 January 2015) available online at <http://www.refworld.org/docid/5617c2c74.html>; Katja Swider & Caia Vlieks, *Voorgestelde nieuwe optie voor Nederlanderschap. Discriminatie van staatloze kinderen zonder wettig verblijf* [Proposed new option for acquisition of Dutch nationality. Discrimination of stateless children without legal residence] (2016) 4 *Asiel & Migrantenrecht* [Asylum & Migration Law] 168.

²² *CRC Concluding Obligations on the fourth periodic report of the Netherlands* (8 June 2015) CRC/C/NDL/CO/4, para 33.

²³ *Convention on the Rights of the Child*, Article 3(1).

serious question arises as to the compatibility of that situation with the child's best interests, respect for which must guide any decision in their regard."²⁴

21. The wording of the third condition moreover resembles the 'cooperation' requirement of the Child Pardon Act [Kinderpardonregeling] of 2013, which grants residency to children who have been residing in the Netherlands for at least five years after applying for asylum.²⁵ This requirement has been the major impediment for granting residency permits under the Child Pardon Act and since 2013, 95% of all requests have been denied, mainly due to the cooperation requirement.²⁶
22. Furthermore, as alluded to above, both the 1961 Convention and the ECN allow for an exhaustive number of specific conditions that may be attached to granting nationality to otherwise stateless children born in the territory of States Parties. The 1961 Convention only allows (one or more of) the following four conditions to be attached to an application for nationality of such a child: 1) a fixed period for lodging an application immediately following the age of majority; 2) habitual residence in the Contracting State for a fixed period, not exceeding five years immediately preceding an application nor ten years in all; 3) restrictions on criminal history; 4) the person has always been stateless.²⁷ The ECN only allows the application to be made subject to the lawful and habitual residence on the territory for a period not exceeding five years immediately preceding the lodging of the application.²⁸ The third requirement of 'stable residence' as defined in the proposed amendment is not one of these conditions, and is therefore contrary to the 1961 Convention and ECN.

The identification and integration of stateless persons

23. The Netherlands presently does not have a dedicated mechanism to identify statelessness. The identification of stateless persons is however of utmost importance in guaranteeing the rights of stateless persons living in the country. In its Handbook on Statelessness, UNHCR observes that *"although the 1954 Convention does not explicitly address statelessness determination procedures, there is an implicit responsibility for States to identify stateless persons in order to accord them*

²⁴ European Court of Human Rights, *Mennesson v. France*, Application No. 65192/11, 26 June 2014, para 99.

²⁵ The Child Pardon Act can be found at

²⁶ Defence for Children – The Netherlands, *Annual Report on Child Rights*, 2016, pages 26 and 27. Available at, <https://www.defenceforchildren.nl/images/68/4572.pdf>

²⁷ 1961 Convention, Article 1(2). That this list is exhaustive is also clear from UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness* (21 December 2012) HCR/GS/12/04, para 36. See furthermore ENS, *Ending Childhood Statelessness: A Comparative Study of Safeguards to Ensure the Right to a Nationality for Children Born in Europe*, ENS Working Paper 01/16, which complements the earlier report on childhood statelessness by ENS: ENS, *No Child Should Be Stateless* (ENS 2015), available online at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf.

²⁸ European Convention on Nationality, Article 6 (2) (b). Note the difference between the 1961 Convention, which allows States to only require habitual residence, and the ECN, which allows States to require lawful and habitual residence. States that are party to both the 1961 Convention and the ECN, like the Netherlands, should comply with both treaties and can hence not require lawful and habitual residence, but only habitual residence. See on this matter also Katja Swider & Caia Vlieks, 'Voorgesteld de nieuwe optie voor Nederlanderschap. Discriminatie van staatloze kinderen zonder wettig verblijf' [*Proposed new option for acquisition of Dutch nationality. Discrimination of stateless children without legal residence*] (2016) 4 *Asiel & Migrantenrecht [Asylum & Migration Law]* 170; UNHCR, *Mapping Statelessness in the Netherlands* (The Hague: UNHCR 2011) para 117.

*appropriate standards of treatment under the Convention.*²⁹ The obligation to identify statelessness is also inherently related to other international human rights. When particular rights, such as the liberty and security of the person are engaged the identification of stateless persons is of juridical relevance. Without accurate identification of stateless persons there is moreover a lack of insight into the extent of statelessness and a lack of ability to monitor their status and treatment.

24. Plans exist to introduce a statelessness determination procedure (SDP), the legislation for which is expected to be tabled in Parliament towards the end of 2016.³⁰ The co-submitting organisations welcome this development but remain engaged to ensure that the new procedure is compliant with the international obligations of the Netherlands. In this regard, the likelihood that statelessness determination will not automatically result in the granting of residence status is a significant concern, as access to all social services and general participation in society is linked to lawful stay. In fact, the Netherlands would be the first country to deviate from a good practice established by all States that implemented SDPs before it, namely to grant legal residence upon determination of statelessness.³¹ With the notable exception of the right to obtain an identity document under Article 27 of the 1954 Convention. By not linking determination with legal residence the proposed SDP runs the risk of becoming an empty gesture.
25. Until the new procedure is introduced, there are two ways in which stateless persons and those at risk of statelessness may be identified. Firstly, through the registration of individuals in the Basic Registration of Persons Database (BRP). However, this does not constitute a proper determination of statelessness. Registration in the BRP as a stateless person requires that the statelessness status of the person is already apparent and documented. The BRP thus registers the statelessness of those who can already prove this status, but does not determine statelessness. Moreover, only persons who are permitted to stay in the Netherlands can be registered in the BRP, while the 1954 Convention also enshrines rights to stateless persons who are not lawfully present in the country. Particularly children with no legal residence are often not registered in the BRP, because a document proving legal residency of the mother of the child seems to be a requirement for such registration.³² In the absence of recognition of their status, many rights enshrined in the Statelessness Conventions are in practice inaccessible, including their right to an identity or travel document.³³
26. The lack of a dedicated SDP furthermore results in potentially stateless persons recorded in the BRP as having an unknown nationality.³⁴ Migrants without passports are generally recorded as such.³⁵ This

²⁹ UNHCR Statelessness Handbook, para 144.

³⁰ Letter of the State Secretary for Security and Justice and Minister for Immigration [*Staatssecretaris van Veiligheid en Justitie*] to the House of Representatives (*Tweede Kamer*), *Kamerstukken II 2013/14*, 19637, no. 1889. Note that is again not a full-fledged legislative proposal, but it is a concrete plan to introduce a statelessness determination procedure as a reaction to one of the recommendations by the ACVZ.

³¹ European Network on Statelessness, *Statelessness Determination and the Protection Status of Stateless Persons* (2013), 36.

³² There appears to be an exception for children who are born on Dutch soil and have their birth registered at the municipality with them needing to be registered in the BRP after six months. See Decision BRP [*Besluit BRP*], Article 21.

³³ Article 27 of the 1954 Convention compels State parties to “*issue identity papers to any stateless person in their territory who does not possess a valid travel document*”. Article 28 provides for the right to a travel document for stateless persons who reside in the territory legally.

³⁴ ACVZ, *No Country of One's Own* (The Hague: ACVZ, September 2014) 36.

³⁵ *Ibid.* 37.

status however determines neither a nationality nor the lack of a nationality and generally does not result in further investigation into the person's status.³⁶ The existence of this category and the fact that people remain within it for many years, creates uncertainty and all kinds of problems such as the inability of the children of such persons to access naturalisation under the Dutch Nationality Act.³⁷

27. The second, procedural recourse for stateless persons to regularise their residence is the so-called 'no-fault procedure'³⁸, which grants a one-year renewable regular residence permit to persons who cannot leave the country despite their best efforts. The procedure was met with heavy criticism due to its one-sided and stringent burden of proof; its low approval rate; the absent formal recognition of statelessness and subsequent difficulty in invoking the rights enshrined in the Statelessness Conventions; the provision of considerable subjective discretion to immigration authorities; the requirement that there is no uncertainty about the applicant's identity and nationality; and finally the fact that an (often futile) asylum procedure has to be completed first.³⁹
28. The Netherlands is obligated to facilitate naturalisation of stateless persons. Under the current legal framework, stateless persons who have not had their statelessness formally recognised due to the lack of a determination procedure do not benefit from the expedited process and are required – like all other persons – to establish at least five years of legal residence in the country and to present a passport as part of the procedure. Those whose statelessness status has been registered under the BRP have access to a facilitated naturalisation procedure open to stateless persons in the country following legal residency of just three years. While they are exempted from the obligation to present a passport, they are however still required to prove their identity through means of a birth certificate.⁴⁰ Given the lack of documents of many stateless persons and the unwillingness of most States to issue birth certificates for non-citizens, this requirement may still pose an insurmountable and discriminatory barrier to some, undermining the objective of facilitated naturalisation.

The detention of stateless persons⁴¹

29. The Netherlands may be commended for several positive developments over recent years, including positive planned amendments to its relevant national law and renewed commitment to the application of alternatives to immigration detention. A draft law with several revisions on the use of immigration detention was submitted to parliament on 30 September 2015, though these changes are not yet in effect. Significant revisions include those to Article 59 of the Aliens Act 2000, which currently allows for detention for the purpose of removal in the public interest or national security and stipulates that while detention is only permitted where a real prospect of removal exists, detention is to cease when "*the alien indicates he wishes to leave the Netherlands and the opportunity to do so exists*". If the amendments are accepted, detention will only be allowed as a measure of last resort after it has been established that no less intrusive measures can be used.

³⁶ *Ibid.*

³⁷ Dutch Nationality Act, Articles 6 (1) (b) and 8 (4).

³⁸ *Buitenschuldprocedure.*

³⁹ For more details, see ENS and ASKV, *Protecting Stateless Persons from Arbitrary Detention in the Netherlands*, 2015.

⁴⁰ ACVZ, *No Country of One's Own* (The Hague: ACVZ, September 2014) 63.

⁴¹ This section of the joint submission is directly attributed to the ENS and ASKV report, *Protecting Stateless Persons from Arbitrary Detention in the Netherlands*, 2015.

Furthermore, the detaining authority will then be imposed with an 'investigative duty' to consider alternatives to detention. If necessary, "*detention shall be as short as possible*" and the detention of vulnerable groups requires additional motivation. Generally, the changes will harmonise Dutch legislation on the application of immigration detention more closely with the EU Returns Directive.

30. It is also important to note that immigration detention capacity of the Netherlands has declined from more than 3,000 cells detaining 12,485 persons in 2007 to 933 places in 2016.⁴² It is however impossible to establish how many stateless persons and persons at risk of statelessness are detained, due to the statistical concerns raised above and the lack of a statelessness determination procedure. Despite these positive developments which have brought Netherlands' law and practice closer to its international and regional legal obligations, a number of problems remain deeply entrenched.
31. Alien detention in the Netherlands has the formal purpose of ensuring that people remain within sight of the government while preparing for their removal and should only be permitted where a real prospect of removal exists.⁴³ Formally, it is only allowed as a measure of last resort, after it has been established that no less intrusive measures can be used.⁴⁴ Contrary to the framework set out, evidence suggests that stateless persons are often detained without a thorough or realistic assessment of whether or how quickly deportation is possible as part of the administrative and judicial decision to do so. This puts stateless persons in a vulnerable position, as it is often impossible to safely remove stateless persons within a reasonable period of time, due to their statelessness status.
32. The lack of a statelessness determination procedure, is a significant concern in this regard, as the failure to identify statelessness or the risk of statelessness before a decision to remove or detain is made, often results in persons being arbitrarily detained. The new procedure, if integrally linked into the removal and detention decision making processes, would play a crucial role in this regard, by preventing the incarceration of persons whose return is *a priori* infeasible.
33. Immigration authorities moreover regularly assume return to be feasible for an entire population based on a single individual who received travel documents from the relevant State. In line with this is the general underestimation by removing (and detaining authorities) of the impact of non-cooperation by diplomatic missions in removal proceedings.
34. The length of detention is also linked with the view to expulsion and may be longer for stateless persons. The EU Return Directive provides a number of clearly delineated instructions on the maximum length of detention, all of which have been transposed into national legislation: detention may not exceed six months initially but may be extended for another 12 months after judicial review. This extension may be approved due to a lack of cooperation, or because of "*delays in obtaining the necessary documentation from third countries*", a criterion which appears to disadvantage stateless persons. Problematically, the 'prospect of deportation' is often defined liberally by both the authorities and the judiciary, regularly leading to lengthy detention without achieving the stated purpose of removal. Specifically persons whose citizenship status is more complex, including those at risk of statelessness, are more likely to be detained for disproportionately long periods.

⁴² ENS and ASKV, *Protecting Stateless Persons from Arbitrary Detention in the Netherlands*, 2015.

⁴³ Aliens Act 2000, Article 59.

⁴⁴ EU Returns Directive, as also reflected in the proposed changes to Article 59 of the Aliens Act.

35. Following release, stateless detainees are not given a legal status. This heightens the likelihood of repeat detention. In fact, 27% of all people in alien detention centres have been held at least once before and stateless persons are at a particular risk for such repeat detention. The theoretical duration of detention is moreover limitless, as it is possible to re-detain an alien immediately after release as long as the assistant public prosecutor presents new facts and circumstances.
36. The above described practices moreover expose stateless detainees to detention conditions that are a particular cause for concern for a group of people that is already vulnerable. The Aliens Act 2000 which governs the administrative deprivation of liberty does not address the specific vulnerabilities of the stateless and stateless detainees are under lock and key for 16 hours a day without any clarity as to how long they will be held. Unlike criminal detainees, those in administrative detention cannot work or access education. Visits are strictly regulated and visitors need to present a valid ID, something that stateless visitors may not be able to do. Until March 2015, strip- and cavity searches were standard practice. A particularly distressing practice is the use of solitary confinement, either as a disciplinary measure; or as a method of maintaining order.

Stateless refugees in the Netherlands

37. The Netherlands faces two realities relating to stateless refugees: the arrival of stateless refugees and asylum seekers and the birth on Dutch territory of children of refugees and asylum seekers who are stateless or at heightened risk of statelessness. According to available data, between September 2015 and August 2016 a total of 49,824 asylum applications were lodged in the Netherlands of which 3,535 were made by people who the IND recorded as stateless, amounting to 7% of all asylum applications.⁴⁵ As such, 'stateless' is listed among the top ten 'countries' of origin during the same period. The nine countries on this list are also known to have pre-existing statelessness problems within their territory.⁴⁶
38. Given the volume of stateless refugees and asylum seekers entering the Netherlands, asylum authorities require a degree of understanding of statelessness and its impacts in order to adequately assess vulnerability and risk. Importantly, where statelessness is a result of arbitrary deprivation of nationality, it may be a factor which is to be taken into consideration when determining a well-founded fear of persecution. Additionally, failed asylum seekers may still be stateless or at risk of statelessness, and failure to determine this, often compounded by wrongly registering such persons as having a nationality they do not, or as having an 'unknown nationality' is likely to result in such persons being treated in a discriminatory manner and subjected to removal and detention which is arbitrary, as discussed above.
39. Children born to refugees and asylum seekers on Dutch territory may be at risk of statelessness due to the laws of their countries of origin and the gaps in Dutch nationality law discussed above. This is likely to be the case when the parents of such children are stateless and may also apply to some

⁴⁵ Statistics in Immigration and Naturalisation Service (IND) *Monthly report on Asylum Applications in the Netherlands and in Europe August 2016*, available at <https://ind.nl/Documents/AT%20August%202016.pdf>.

⁴⁶ From September 2015 until August 2016 the top ten of origin countries for asylum seekers were 'stateless', Syria, Eritrea, Iraq, Afghanistan, Iran, Albania, Serbia, Ukraine and Kosovo. IND *Monthly report on Asylum Applications in the Netherlands and in Europe August 2016*, available at <https://ind.nl/Documents/AT%20August%202016.pdf>.

children whose parents hold a nationality. Gender discriminatory nationality laws may for example prevent a mother from passing nationality to her children.⁴⁷ The main challenge here is to ensure the right to a nationality for these children, ideally through a provision in the national law that enables otherwise stateless children born on Dutch territory to acquire Dutch citizenship that is in accordance with Article 7 CRC and Article 1 of the 1961 Convention and the guiding interpretation thereof by the UNHCR,⁴⁸ thereby ensuring that all children can enjoy their right to a nationality.

Recommendations

40. Drawing on the information provided in this submission, we urge Member States to make the following recommendations to the Netherlands:

- I. Ensure that every child born in the Netherlands who would otherwise be stateless, has the right to acquire Dutch nationality in accordance with the international obligations of the Netherlands under the Convention on the Rights of the Child, 1961 Convention on the Reduction of Statelessness and European Convention on Nationality. In particular, ensure that the principles of non-discrimination and the best interests of the child are adhered to at all times and that systems for the effective identification of children who would otherwise be stateless are implemented to allow for the application of the requisite safeguards in practice.
- II. Align proposed amendments to the Dutch Nationality Act with the international law obligations of the Netherlands and the most recent recommendations of the Committee on the Rights of the Child. In particular, ensure that no child is discriminated against or punished for the status, actions or inactions of their parents or guardians, and do away with unnecessary residency requirements which exclude some children who would otherwise be stateless from accessing Dutch nationality.
- III. Expedite efforts to introduce a statelessness determination procedure, which is accessible to all persons on the territory of the Netherlands, regardless of their legal status. The procedure should follow the procedural safeguards set out in UNHCR's Handbook on Protection of Stateless Persons and should provide persons recognised as stateless with a legal status, protection and guaranteed access to basic human rights, in accordance with the international obligations of the Netherlands. Also ensure that identity documents are issued to all recognised stateless people – regardless of their residence status.
- IV. Do away with the legal residence requirement for parents to register children in the Basic Registration of Persons Database.

⁴⁷ This is the case under the Syrian nationality law and several of the other countries in the aforementioned list of principal countries of origin of asylum seekers in the Netherlands. There has moreover been some media reporting on this issue, including Thomson Reuters Foundation, *European refugee crisis risks creating generation of stateless children*, September 2015, available at: <http://www.trust.org/item/20150920230231-idujs>.

⁴⁸ UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness* (21 December 2012) HCR/GS/12/04. Available at <http://www.unhcr.org/protection/statelessness/5465c9ff9/guidelines-statelessness-nr-4-ensuring-childs-right-acquire-nationality.html>.

- V. Strengthen statistical data on statelessness in the country, including in relation to stateless children born in the Netherlands, stateless persons in detention and stateless migrants, asylum seekers and refugees.
- VI. Build the capacity of relevant administrative and judicial bodies to proactively identify and address situations of statelessness, including among cases of 'unknown nationality', and ensure that persons recorded as having 'unknown nationality' – in particular children born in the Netherlands - do not remain in this category indefinitely.
- VII. Determination of statelessness in a dedicated procedure should unequivocally rule out detention, as it precludes the view to expulsion. Alternatives to detention may be employed to effectuate return to a country of former habitual residence, as long as this is not in violation of the principle of *non refoulement* and (at least) permanent residence status is on offer there.
- VIII. Build the capacity of relevant administrative and judicial bodies to identify statelessness and the risk of statelessness as part of the decision to remove and detain, and on an ongoing basis. Previous failed efforts to deport should be considered more strongly in any decision to re-detain, both by the Aliens' Police assistant public prosecutor, and by courts – also beyond the 12-month period that most courts appear to apply.
- IX. Ensure that detention is always used as a last resort, after all alternatives (starting with the least restrictive) are exhausted. Examine the prospect of deportation more thoroughly and at an earlier stage before a decision to detain is made. If detention is deemed to be necessary, the initial decision to detain should motivate explicitly why an alternative is not being applied.
- X. Efforts at re-documentation should be subject to limitations, both in terms of time and the number of embassy presentations. After repeated rejections or prolonged non-response, statelessness should be assumed – and all corresponding rights offered. People must not end up as victims of a State's reluctance to facilitate return.
- XI. Fulfil the Netherlands' obligations under the 1954 Convention to facilitate naturalisation of stateless persons by waiving or providing appropriate alternatives to the requirement of establishing identity through a birth certificate where a person has been recognised as stateless.
- XII. Ensure that refugee status determination procedures take into consideration the issue of statelessness, where relevant and appropriate, to allow statelessness to be assessed as a factor when determining a well-founded fear of persecution.
- XIII. Determine the statelessness of failed asylum seekers who may be stateless or at risk of statelessness, and accordingly grant them legal status, protection and access to rights.