



# The Equal Rights Trust

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## **The Equal Rights Trust Statement to the OSCE Review Conference on Problems Pertaining to Statelessness - October 2010**

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The Equal Rights Trust (ERT) welcomes the inclusion of statelessness within the 'tolerance and discrimination' section of the ongoing Organisation for Security and Cooperation in Europe (OSCE) Review Conference. This inclusion indicates a recognition by member states of the importance of addressing the statelessness issue and its root causes, and ensuring that stateless people are protected within the region under international human rights law, relevant European treaties and the 1954 Convention Relating to the Status of Stateless Persons.

The Equal Rights Trust has over the past two years conducted extensive research on the detention and discrimination of stateless persons throughout the world. ERT's recent report "*Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*" sets out our principle research findings, conclusions and recommendations in this regard.<sup>1</sup> Of the OSCE countries, this report focussed on detention practices of stateless persons in the UK and USA and also on good practices implemented in Spain and Hungary, through the implementation of statelessness determination procedures.

Statelessness is a complex issue which must be addressed by all OSCE states in a comprehensive manner which is consistent with their obligations arising from human rights law and the statelessness treaties. In order for stateless persons to be properly integrated into society and protected from discrimination, vulnerability and abuse, states must review and revisit their laws, policies and political attitudes. ERT is deeply concerned about the treatment of stateless persons in the OSCE region, and the failure to effectively address protracted cases of statelessness. There are many large stateless communities within the OSCE region, of which the non-citizens of Latvia are the most well known. Similarly, many Roma remain stateless even today, and others are at heightened risk of statelessness due to the irregular nature of their status in many countries throughout Europe. ERT is also concerned of the failure to accommodate stateless migrants throughout the region, and the resultant insecurity, irregularity and even detention that they are compelled to undergo.

<sup>1</sup> The Equal Rights Trust, "*Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*", July 2010. Available at:

<http://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf>

ERT would like to draw attention to the following problems in particular, and urges OSCE member states to come together to find a common and sustainable solution to statelessness:

1. Present inequalities between the treatment of *de jure* and *de facto* stateless persons.
2. The failure of the majority of member states to implement statelessness determination procedures.
3. The failure of immigration detention regimes to recognise and respond to the specific challenge posed by statelessness, and to ensure that immigration detention practices and policies do not discriminate against the stateless.
4. The failure of security detention regimes to recognise the impact that security detention may have in creating and exacerbating statelessness.
5. Specific challenges which emerge from protracted cases of statelessness – the Latvian case

### **Present inequalities between the treatment of *de jure* and *de facto* stateless persons.**

Stateless persons have historically been divided into two categories: those who have no legal nationality – the *de jure* stateless, and those who have no “effective” nationality – the *de facto* stateless. The 1954 Convention Relating to the Status of Stateless Persons only obligates protection towards the *de jure* stateless. Consequently, there is a protection gap into which the *de facto* stateless fall. This protection hierarchy is a serious problem in all OSCE member states, and ERT urges OSCE member states to take leadership in rectifying this imbalance and calls for a more comprehensive and inclusive approach to statelessness, to ensure that persons are not arbitrarily excluded from protection.

Examples of *de facto* statelessness include persons who do not receive consular protection in a migrant context. Many immigration detainees in the UK cannot be removed from the country due to the lack of cooperation from their own consulates. Such detainees remain in detention for excessive periods due to their non-removability.

ERT’s position is that all stateless persons suffer from ineffective nationality, and consequently “ineffective nationality” is the most suitable concept around which to build a definition which is comprehensive, inclusive and non-discriminatory.

ERT argues that the factors which should be taken into consideration when determining whether a person enjoys an effective nationality are:

1. Recognition as a national – Does the person concerned enjoy a legal nationality? i.e. is he *de jure* stateless?
2. Protection of the state – Does the person enjoy the protection of his/her state, particularly when outside their country concerned?
3. Ability to establish nationality – Does the person concerned have access to documentation (either held by the state, or which is issued by the state) to

establish nationality? This access may be through a consulate, or through state officials within the country of presumed nationality.

4. Guarantee of safe return - Is there a guarantee of safe return to the country of nationality or habitual residence – or is there a risk of ‘irreparable harm’? Is return practicable?
5. Enjoyment of human rights – Does an individual’s lack of documentation, nationality or recognition as a national have a significant negative impact on the enjoyment of his or her human rights?

ERT hopes that the OSCE Review Conference becomes a forum at which problems pertaining to ineffective nationality will be addressed and a common approach to ensuring equal protection for all stateless persons in the OSCE member states is promoted.

### **The failure of the majority of member states to implement statelessness determination procedures**

ERT is deeply concerned by the fact that the majority of OSCE countries do not have statelessness determination procedures in place. Without identifying who the stateless are, it is impossible to protect the stateless and uphold treaty obligations in this regard. The UNHCR Analytical Framework for Prevention, Reduction and Protection of Stateless Persons urges states to be pro-active in finding out who the stateless are, so that they may be protected:

*The first step towards addressing statelessness is to **identify** stateless populations, determine how they became stateless and understand how the legal, institutional and policy frameworks relate to those causes and offer possible solutions.<sup>2</sup>*

Hungary and Spain are the two OSCE countries which through legislation have created detailed rules for dedicated stateless determination procedures to provide for a separate stateless status. A few countries including France and Belgium provide some protection to the stateless in a less regulated administrative procedure, or in the case of Italy, through a judicial process.<sup>3</sup>

Hungary created a separate stateless status determination procedure in 2007, under which it is possible to apply for stateless status.<sup>4</sup> The standard of proof in determining statelessness is similar to that applied in refugee status determination; applicants are entitled to legal assistance and the UNHCR is granted a special position in the process, but only persons who are legally present in Hungary can apply.

Like Hungary, Spain has a procedure for examining an application for recognition as a stateless person. The Minister of Interior is obligated to recognise that a person is

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<sup>2</sup> UN High Commissioner for Refugees, “*Statelessness: an analytical framework for prevention, reduction and protection*”, Geneva, 2008. available at: [http://unhcr.org.ua/files/mf30\\_e.pdf](http://unhcr.org.ua/files/mf30_e.pdf)

<sup>3</sup> Gyulai, Gabor. “*Practices in Hungary Concerning the Granting of Non-EU-Harmonised Protection Statuses*”, Budapest, September 2009. Page 24.

<sup>4</sup> Hungarian Aliens Act no. II of 2007.

stateless if the requirements of the 1954 Convention are met, and is further obligated to grant status accordingly.<sup>5</sup>

The Hungarian and Spanish procedures must be replicated by other OSCE member states. Furthermore, ERT urges Spain and Hungary to continue leading the world in protecting the stateless through legislation, through recognising *de facto* stateless persons as well.

### **The failure of immigration detention regimes to recognise and respond to the specific challenge posed by statelessness, and to ensure that immigration detention practices and policies do not discriminate against the stateless**

The Universal Declaration of Human Rights states that “*no one shall be subjected to arbitrary arrest, detention or exile*”, a principle that has become entrenched in international law and reiterated by subsequent human rights instruments including Article 9 of the ICCPR and Article 5 of the ECHR. From the authoritative texts and jurisprudence of the UN Treaty bodies and the European Courts has emerged a strong set of principles which must be applied to establish the legitimacy of detention including that of stateless persons. Standards of proportionality, necessity and non-arbitrariness must be met in all such detention.

ERT research in the UK and USA indicates that despite some positive developments in the USA, stateless persons continue to be discriminated against by immigration detention regimes which are not sensitive to the challenges of statelessness particularly in the context of removal. All OSCE member states have complex and comprehensive immigration laws, regulations and policies. However, they do not accommodate or create exceptions for stateless persons.

Because most OSCE countries do not have statelessness determination procedures in place, stateless persons who are in need of protection are often compelled to go through asylum procedures. This means that if they are refused asylum, the fact that they are stateless often remains unidentified, because officials have no clear duty to consider whether they may be stateless and they have no opportunity to seek protection as stateless persons. They may then be treated as other rejected asylum seekers and placed in immigration detention “pending removal”, on the assumption that – like other migrants - they have a country of nationality to which they can be removed.

One of ERT’s primary concerns is that there is a severe lack of statistics and information on stateless persons in immigration detention. This gap is indicative of general attitudes which do not consider statelessness to be a distinct issue. In the UK for example, there is little published information on the detention of stateless persons as a distinct group. There are no separate records of the number of stateless persons detained or who have had their liberty restricted in any manner.

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<sup>5</sup> Law 4/2000, as amended by law 8/2000. The procedure is regulated by the implementing Royal Decree 865/2001 of 20 July 2001.

One of the biggest immigration detention challenges is the fact that it is almost impossible to remove stateless detainees. This is an issue which is particularly relevant to the *de facto* stateless – persons who would not be classified as stateless by OSCE member states, due to the definitional limitations discussed above, but who no other country will admit.

Equally problematic is the continued restriction of liberty and likely destitution of stateless persons who are finally released from detention. In the UK, stateless persons released from immigration detention continue to have their liberty restricted. Restrictions include a requirement to reside at a fixed address, electronic tagging and reporting requirements.<sup>6</sup> Furthermore, restriction on working mean that most released detainees are condemned to lives of destitution and social exclusion.

### **The failure of security detention regimes to recognise the impact that security detention may have in creating and exacerbating statelessness**

ERT urges the OSCE member states to address the impact of security detention on stateless persons. The failure of the Obama administration to close down the Guantanamo Bay detention facility despite a serious commitment to do so highlights the significance of the statelessness problem.

A few of the remaining detainees at Guantanamo Bay including three Palestinians are legally stateless. Most of the men who have now been cleared for release do have a legal nationality, but while in most cases the countries of nationality have expressed a willingness to receive the men, their interest appears to be less in protecting the rights of their citizens than in interrogating them as former Guantanamo detainees; moreover, a number of these countries are known to use torture. This means that the detainees, while not *de jure* stateless, have been rendered *de facto* stateless by their detention at Guantanamo Bay because they cannot safely return to their country of nationality. Furthermore, in most cases, no third country has stepped forward to offer these men refuge.

ERT urges the OSCE to find a sustainable and fair solution to this intractable problem. An earlier call by the Council of Europe's Commissioner for Human Rights for Europe to open its doors to Guantanamo Detainees must be heeded. In his statement, the Commissioner said:

*While the United States has created the Guantanamo problem and has the primary responsibility for correcting the injustices, there are cogent arguments for European assistance in closing the centre as soon as possible. To achieve this goal, Council of Europe member states should stand ready to accept a few of the small number of remaining detainees cleared for release and currently stuck in limbo.<sup>7</sup>*

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<sup>6</sup> R (Abdi) v. Secretary of State for the Home Department, [2009] EWHC 1324 (Admin), paragraph 79; Mitting J in R (Wang) v. Secretary of State for the Home Department [2009] EWHC 1578 (Admin) paragraph 36; R (Daq) v. Secretary for State for the Home Department [2009] EWHC 1655 (Admin), paragraph 40.

<sup>7</sup> Thomas Hammarberg, "Europe must open its doors to Guantanamo Bay detainees cleared for release", 19.01.2009. Available at: [http://www.coe.int/t/commissioner/Viewpoints/090119\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/090119_en.asp)

The USA however, is particularly responsible for resolving this problem. ERT reiterates its appeal to the US Government first made in January 2010 to fulfil its obligations by the stateless detainees who have been cleared for release but are still held in detention in Guantanamo Bay, by:

- Observing its obligations under the ICCPR and CAT not to return any persons to countries where they are likely to face severe harm including torture.
- Resettling all *de jure* stateless detainees cleared to be released from Guantanamo Bay and any other security detention centres including CIA 'black sites' in its national territory and offering them the possibility to regularise their situation legally under U.S. immigration laws.
- Resettling all cleared to be released detainees at Guantanamo Bay and any other security detention centres including CIA 'black sites' who are *de facto* stateless because they cannot be resettled in their country of nationality for various reasons and offering them the possibility to regularise their situation legally under U.S. immigration laws.
- Providing due compensation to all persons illegally held in detention in Guantanamo Bay without being charged.<sup>8</sup>

### **Specific challenges which emerge from protracted cases of statelessness – the Latvian case**

Latvia's non-citizens are perhaps the most protracted case of statelessness within a country of habitual residence to be found in the OSCE region. There are about 400,000 "non citizens" in Latvia today.<sup>9</sup>

The phenomenon of "non-citizens" in Latvia emerged as a result of the break-up of the USSR. Consequently, many minorities within Latvia including persons of Russian origin were discriminated against and classified as "non-citizens". Even though these "non-citizens" have certain rights, they do not receive the same protection or entitlements as Latvian citizens do. Some of the main constraints faced by "non-citizens" in Latvia include:

- Prohibitions on occupying certain state and public positions including a prohibition to serve in some professions.
- Restrictions on property ownership.
- Restrictions on travel abroad without obtaining a visa.

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<sup>8</sup> Equal Rights Trust, "From Mariel Cubans to Guantanamo Detainees: Stateless Persons Detained under U.S. Authority". January 2010. Para 134 – 138. Available at:

[http://www.equalrightstrust.org/ertdocumentbank/Statelessness\\_in\\_USA\\_17\\_Jan.pdf](http://www.equalrightstrust.org/ertdocumentbank/Statelessness_in_USA_17_Jan.pdf)

<sup>9</sup> See Latvian Human Rights Committee, "Citizens of a Non-Existent State – The Long-term Phenomenon of Mass Statelessness in Latvia", 2008, for a detailed account of the statelessness problem in Latvia. Available at: [http://www.pctvl.lv/i/doc/citizens\\_nonexisting.pdf](http://www.pctvl.lv/i/doc/citizens_nonexisting.pdf)

ERT urges Latvia and the OSCE member states to find a sustainable and non-discriminatory solution to this phenomenon which has denied many persons born in Latvia of equal enjoyment of their human rights.

## **Recommendations**

The Equal Rights Trust puts forward the following recommendations to the OSCE Review Conference, with regard to the statelessness problem:

- Equal treatment for all stateless persons – ERT urges OSCE member states to recognise that both *de jure* and *de facto* stateless persons face similar problems arising out of the common handicap of ineffective nationality. Consequently the OSCE member states should provide equal protection to all stateless persons and not discriminate between the *de jure* and *de facto* stateless.
- Statelessness Determination Procedures – ERT urges all OSCE member states to follow the example of Spain and Hungary and introduce statelessness determination procedures through legislation. ERT also urges Spain and Hungary to expand their statelessness determination procedures to include *de facto* stateless persons.
- Solution to immigration detention of stateless persons – Stateless persons who remain in detention for long periods of time pending removal should be released from detention and integrated into society. A maximum time-limit on immigration detention should be imposed in all OSCE countries.
- Solution to security detention of stateless persons – the continued detention of persons who have been cleared for release, but cannot be released to their own countries because they are stateless must end immediately. In the context of Guantanamo Bay, ERT urges the US Government to take steps to release such persons onto US territory until suitable third nations are found for their settlement. ERT also urges other OSCE member states to accept these detainees.
- Resolve long-standing problems of statelessness including in Latvia – The Latvian statelessness problem must be addressed. The category of “non-citizens” must be abolished and all “non-citizens” must be given citizenship through a facilitated procedure.
- Ratify the 1954 and 1961 Conventions on statelessness as well as relevant European Conventions – All OSCE member states are urged to ratify the 1954 UN Convention Relating to the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness. All member states are also urged to ratify the 1997 European Convention on Nationality and the 2006 European Convention on the Avoidance of Statelessness in Relation to State Succession.