

The legal limbo of detention

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Of the broad range of human rights violations suffered by stateless people, that of the right to be free from arbitrary detention has received little attention. The extent and scale of the problem are not fully known.

Physical restriction, including prolonged or indefinite detention, of those who have no effective nationality is increasingly common around the world.¹ Preliminary analysis of available research suggests that practically all types of stateless persons may be at risk of arbitrary detention. Without the full set of rights available to citizens, stateless persons face a greater likelihood of discrimination in the administration of justice, harassment and arbitrary detention. One common problem faced by stateless persons – as also by IDPs – is a lack of documentation which can leave them more vulnerable to rights violations.

Very little information is available on the plight of stateless persons in detention in their country of habitual residence; research suggests that this is not only because by their nature stateless populations are often ‘hidden’ but also because relatively little international attention has been paid to stateless populations. It seems that human rights research rarely identifies statelessness as a factor when reporting on individual detainees in their country of origin or habitual residence.

A growing body of information suggests that stateless people who are migrants, refugees or asylum seekers are extremely vulnerable to arbitrary detention and other forms of restriction, including immigration detention and restriction in closed refugee and displaced persons camps. The UN Working Group on Arbitrary Detention has found that “a straight analysis of the statistics indicates that in some countries the numbers of non-citizens in administrative detention exceeds the number of sentenced prisoners or detainees, who have or are suspected of having committed a crime.”² An unknown number of stateless persons are caught up in such practices and held with

other non-citizens in administrative detention, whilst their status is being determined, or ‘pending removal’ under immigration regulations.

Arbitrary detention

While the administrative detention of asylum seekers and irregular migrants is not expressly prohibited under international law, it can amount to arbitrary detention if it is not absolutely necessary given the circumstances. UNHCR and others have developed guidelines on alternatives to detention.³ Even where detention is not initially prohibited, it may become arbitrary over the course of time owing to the length of detention.

Furthermore, discussions concerning the legality of detention of stateless persons, whether *de jure* or *de facto*, must be guided by the fundamental principle of equality. This does not necessarily require identical treatment but rather different treatment according to the needs and particular circumstances of the individual. In order to fulfil this principle, a first step must be an appropriate status determination procedure capable of identifying stateless persons as a category of persons with unique protection needs. Although the issue of prolonged or indefinite detention of *de jure* and *de facto* stateless persons has reached the courts in a number of countries, the issue of discrimination is rarely addressed.

The situation of a stateless person differs fundamentally from that of other non-citizens. For example, legally stateless persons can be subject to lengthy detention while their status is being determined, owing to the delays inherent in attempting to prove that they are not a national of any state. Of particular concern are the protection gaps faced by non-refugee stateless persons in detention – an issue which has to date

received relatively little attention, as compared to the detention of refugees and asylum seekers.

When a stateless person is a refugee, he or she cannot be penalised for illegal entry or presence.⁴ Stateless persons who are not refugees do not enjoy such protection under the 1954 Convention Relating to the Status of Stateless Persons and are therefore potentially at greater risk of detention for breach of immigration regulations.

Most legally stateless persons in need of international protection are not refugees and have no claim to asylum. In many countries, non-refugee stateless persons who cannot acquire a legal status are subject to removal from the country, and may be detained pending removal. A legally stateless person who is refused asylum or otherwise deemed not qualified to remain lawfully, and who is detained or restricted ‘pending deportation’, often cannot be removed because a) they have no state of nationality to which they can be ‘removed’ and b) their country of habitual residence will not take them back. Thus, because removal is often impossible, what should be short-term detention in preparation for removal may become long-term or even indefinite, as officials try to convince another country to accept a stateless person. In countries where there is no limit to detention, stateless persons can face a real risk of indefinite detention.

One vivid illustration of this risk is the case of Ahmed Ali Al-Kateb, a stateless Palestinian man who was taken into administrative detention as an unlawful non-citizen in Australia in December 2000. With his claim to asylum rejected, no grounds to remain in Australia and no other country willing to receive him, he remained in detention until April 2003 when he was conditionally released by the Federal Court. In 2004 the High Court of Australia held that it would not in fact have been unlawful to detain him indefinitely. Following considerable pressure from advocacy groups, in May 2005 the

Australian government introduced a 'Removal Pending Bridging Visa' which applies to all detainees whom it is not reasonably practicable to remove for the time being and who have cooperated fully with efforts to remove them from Australia.

De facto statelessness

Individuals who are *de facto* stateless have no effective nationality and are without the protection of either the country where they are present or their country of legal nationality. *De facto* stateless persons can also find themselves in detention and in the same kind of legal limbo. This situation may arise as a result of a number of practical, humanitarian or legal circumstances, such as where deportation would violate the principle of *non-refoulement*; where the country of origin refuses to issue identity documents or to cooperate in re-admitting their national, preventing the completion of deportation proceedings; where, as in the case of Somalia, there is no functioning state of origin; or where there is no safe means of transportation to the country of origin.

One refused asylum seeker from Algeria was held in immigration detention in the UK for 16 months. At the end of his first five months in detention, the Algerian authorities notified the UK government that attempts to establish his identity had failed. Despite this, and although this person cooperated with efforts to facilitate his return to Algeria, he remained in detention for a further 11 months and was released only when the High Court ruled that his detention was unlawful because of its length and the "complete uncertainty about when it might be brought to an end by deporting him."

While there is a clear legal distinction between *de jure* and *de facto* statelessness, in practice both groups may be detained or restricted. UNHCR and others have expressed the view that stateless persons should not be detained only because they are stateless. If there is no alternative to detention, its maximum length should be specified, based on strict and narrowly defined criteria. This principle should now be translated into clear international and national legal standards and put into practice.

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1. UNHCR 'Brief on Statelessness and Detention Issues', 27 November 1997 <http://www.unhcr.org/refworld/docid/4410638f.html>
2. Report of the Working Group on Arbitrary Detention, Annual Report 2007, <http://www2.ohchr.org/english/issues/detention/index.htm>
3. UNHCR 'Alternatives to Detention of Asylum Seekers and Refugees', April 2006. <http://www.unhcr.org/refworld/docid/4472e8b84.html>
4. 1951 Refugee Convention.

The Equal Rights Trust is documenting the detention and physical restriction of stateless persons around the world, and is developing a legal advocacy strategy based on the universality of human rights principles. The project will identify cases where stateless persons are detained or otherwise restricted, due at least in part to their being stateless. The authors would welcome information concerning individual cases of stateless persons in detention.