International Journal of Refugee Law, 2020, Vol 32, No 3, 440–471
doi:10.1093/ijrl/eeaa036

Identifying the Stateless in Statelessness Determination Procedures and Immigration Detention in the United Kingdom

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ABSTRACT

Stateless persons, not recognized as citizens of any State, have restricted access to identification and travel documents. As they often also do not enjoy the right to enter, leave, or remain in any country, stateless persons can be at great risk of prolonged and arbitrary immigration detention. It is therefore crucial to identify stateless persons in or facing detention. Adopting an access to justice lens, this article explores aspects and legal challenges of the statelessness determination–immigration detention nexus in the United Kingdom. Despite the adoption of a national statelessness determination procedure, stateless persons still experience a plethora of problems. This is especially so for applicants who are in immigration detention. Statelessness is generally not acknowledged due to gaps in the legal framework and a number of interrelated objective, subjective, and physical barriers that prevent tackling the problem of statelessness and concomitant restriction-of-liberty problems. This situation sits uneasily with access to justice principles, which require the guarantee of an effective remedy and a fair solution to the legal problems of every individual. As such, the article ultimately shows that lack of access requires a holistic approach, whereby the special problems and needs of the users must always be taken into consideration.

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1. INTRODUCTION

Statelessness, or the lack of a nationality, prevents affected people from enjoying diplomatic protection and the right to enter, leave, or stay in any country. It also often excludes them from accessing a number of other rights, such as access to courts, documentation, employment, benefits, and other civil and social rights. Stateless persons also find themselves at great risk of prolonged and arbitrary immigration detention with limited or no recourse to a legal remedy.[1]

To address the problem of the lack of legal protection for stateless persons, States adopted the 1954 Convention on the Status of Stateless Persons (1954 Convention), considered the most important legal instrument regulating the obligation to guarantee a set of basic rights to stateless persons.[2] This treaty, however, is silent on whether and what kind of procedures should be adopted to recognize a person as stateless. In light of the implementation problems that this creates at the national level,[3] the United Nations High Commissioner for Refugees (UNHCR), which is the UN agency mandated to protect stateless persons, has provided guidance in its *Handbook on the Protection of Stateless Persons* regarding the adoption of specific stateless determination procedures (SDPs) and their essential elements.[4] Three European Union (EU) countries now have SDPs in place and, compared to 10 years ago, some progress is evident.[5] Nevertheless, the effectiveness of national systems in ensuring protection for stateless persons is being debated as a number of legal, practical, and political challenges remain.[6] Some

1 Gerard-René de Groot, Katja Swider, and Oliver Vonk, 'Practices and Approaches in EU Member States to Prevent and End Statelessness' (PE 536.476, European Union 2015) 14.

2 Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (1954 Convention). See Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008); Katia Bianchini, 'The "Stateless Person" Definition in Selected EU Member States: Variations of Interpretation and Application' (2017) 36(3) Refugee Survey Quarterly 81; Paul Weis, *Nationality and Statelessness in International Law* (Brill Nijhoff 1979).

3 Bianchini (n 2) 81; Katia Bianchini, 'A Comparative Analysis of Statelessness Determination Procedures in 10 EU States' (2017) 29 International Journal of Refugee Law 42.

4 UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons* (2014) (Handbook). The Handbook, for instance, recommends sharing the burden of proof between the applicant and the decision maker (para 89); the standard of proof shall be that of establishing the case to a 'reasonable degree' (para 91); a decision shall be taken within a reasonable time, normally six months (para 75); access to legal counsel shall be ensured and legal aid shall be offered to applicants, if available (para 28); a right of appeal to an independent body shall be provided (para 76).

5 The countries are the United Kingdom (UK), Spain, and Hungary. In other Member States, formal determinations of statelessness are either impossible or take place on the basis of scattered legal provisions. Katia Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons across EU States* (Brill Nijhoff 2018); Katja Swider and Maarten den Heijer, 'Why Union Law Can and Should Protect Stateless Persons' (2017) 19 European Journal of Migration and Law 101.

6 Bianchini (n 2) 81; Bianchini (n 3) 42; Swider and den Heijer (n 5) 101; Gábor Gyulai, 'Statelessness in Hungary: The Protection of Stateless Persons and the Prevention and Reduction of Statelessness' (Hungarian Helsinki Committee 2010); Gábor Gyulai, 'Statelessness in the EU

studies specifically criticize the existing SDPs for poor procedural guarantees, administrative and practical barriers to accessing the procedure, inadequate coordination with other immigration procedures, unclear and complex rules of evidence, and restrictive interpretations of the definition of 'stateless person' which deviate from international standards.[6]

Studies also identify gaps in protection against the arbitrary detention of stateless persons.[7] Much of the research dealing with immigration detention is largely theoretical or written by non-governmental organizations (NGOs).[8] In particular, it shows that immigration detention policies are often developed without considering the specificity of the situation and the degree of vulnerability of stateless persons.[9] In many States, it appears that statelessness and the legal problems that the stateless face are normally disregarded when authorizing detention. Academic research has given little consideration to the interconnection between the problem of identification of the stateless, its connection to immigration detention, and its impact on access to justice. To be precise, academic scholarship and regulatory policies have not adequately appreciated the nexus of these areas, leading to neglect of this issue on multiple levels.

Immigration detention is widely used in Europe and justified on the ground that it is necessary to fulfil or execute an expulsion order to the country of origin or habitual residence.[10] It is extrajudicial in the sense that it mostly operates outside the framework of judicial incarceration and guarantees existing in the criminal justice system. Being in immigration detention means that certain rights, such as the right to access a legal aid lawyer and to have one's rights read, among others, are not automatically provided,[11] which further exacerbates how stateless persons, asylum seekers, and vulnerable

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Framework for International Protection' (2012) 14 European Journal of Migration and Law 279; Gábor Gyulai, 'The Determination of Statelessness and the Establishment of a Statelessness-Specific Protection Regime' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

7 European Network on Statelessness (ENS), 'Statelessness Index: Hungary' (February 2019) <https://index.statelessness.eu/country/hungary> accessed 10 March 2020; ENS, 'Statelessness Index: United Kingdom' (March 2019) <https://index.statelessness.eu/country/united-kingdom> accessed 10 March 2020.

8 Katia Bianchini, *Protecting Stateless Persons from Arbitrary Detention in the United Kingdom* (ENS 2016); Valeria Ilareva, *Protecting Stateless Persons from Arbitrary Detention in Bulgaria* (ENS 2016); Ostap Tymchiy, 'Protecting Stateless Persons from Arbitrary Detention in Ukraine (ENS 2016); Bianchini (n 5); van Waas (n 2) 9–10.

9 ibid.

10 Maartje van der Woude, Vanessa Barker, and Joanne van der Leun, 'Crimmigration in Europe' (2017) 14 European Journal of Criminology 3–4; Alice Edwards, 'Detention and Security' (2013) 44 Forced Migration Review 4; Lucy Fiske, *Human Rights, Refugee Protest and Immigration Detention* (Palgrave MacMillan 2016) 191–92; ENS, 'Statelessness Index' (as at 1 May 2020) <https://index.statelessness.eu/> accessed 1 May 2020.

11 Stephanie J Silverman and Amy Nethery, 'Introduction: Understanding Immigration Detention' in Amy Nethery and Stephanie J Silverman, *Immigration Detention: The Migration of a Policy and Its Human Impact* (Routledge 2015).

migrants are treated. Even if the system does allow the possibility of filing immigration applications to obtain lawful status, in practice this is difficult.[12]

From the perspective of international law, immigration detention in and of itself is not considered arbitrary. However, compliance with the fundamental principles of human rights demands that detention is resorted to only in exceptional cases and on grounds established in national law – moreover, only for a specific period of time and after less intrusive alternatives have proven inadequate.[13] In particular, human rights standards regarding indefinite detention specify that the overall length of its possible duration must be set by law.[14] However, there is no international provision concerning what the maximum time limit for detention should be. The EU Return Directive sets it at six months (extendable in exceptional circumstances to 18 months).[15] Additionally, detention decisions must be assessed on a case-by-case basis and must not result from a blanket policy.[16] Human rights standards also necessitate periodic review of detention decisions by the judiciary or other authorities to ensure that they are applicable for the shortest possible period only.[17]

Legal advocates and UNHCR alike have sought to ensure that immigration detention is understood as a measure of last resort.[18] Nevertheless, immigration detention is rife with access to justice issues. Research has shown that the high degree of complexity

[12] Philippe De Bruycker and Evangelia (Lilian) Tsourdi, 'The Challenge of Asylum Detention to Refugee Protection' (2016) 35(1) Refugee Survey Quarterly 1.

[13] European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (ECHR) art 5(1)(f); Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 (Return Directive) para 15; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 9(1); American Convention on Human Rights 'Pact of San José, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 7(2).

[14] See eg Human Rights Committee, 'General Comment No 35: Article 9 (Liberty and Security of Person)', UN doc CCPR/C/GC/35 (16 December 2014) para 15; UNGA, *Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court*, UN doc WGAD/CRP.1/2015 (4 May 2015) para 28.

[15] Return Directive (n 13) art 15(5)–(6); ENS, 'Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners' (2015) 27.

[16] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'Immigration Detention' (CPT/Inf(2017)3, March 2017) 2.

[17] Jane McAdam, 'Human Rights and Forced Migration' in Elena Fiddan-Qasmiyeh and others, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) 210. See ICCPR (n 13) art 9; ECHR (n 13) art 5. In the UK, the Human Rights Act 1998 domesticates art 5.

[18] Vivian Tan, 'UNHCR, Civil Society Warn of Growing Detention Problem in Asia-Pacific' (*UNHCR News*, Bangkok, 11 November 2013) <https://www.unhcr.org/news/latest/2013/11/5280dc409/unhcr-civil-society-warn-growing-detention-problem-asia-pacific.html> accessed 8 March 2020; UNHCR, *Beyond Detention. Progress Report 2018* (2019).

of the legislation and the disconnect between policy and practice are the main issues,[19] aggravated by the uncertainty of whether immigration detention is being used in compliance with international and domestic law.[20]

In light of the above, this article analyses how the failure to give in-depth consideration to statelessness, and thereby also to identify stateless persons, places them at great risk of arbitrary detention. The article focuses on a case study of statelessness in the United Kingdom (UK), for three reasons. First, the UK is one of the few States worldwide with an SDP,[21] which offers the possibility of identifying problems within specific identification mechanisms. Secondly, the UK has one of the largest immigration detention estates in Western Europe.[22] Thirdly, among all Western European countries, the UK is the only one with no statutory time limit for immigration detention, making stateless persons there particularly vulnerable to long-term detention and cycles of detention.[23] While the study focuses on the situation in the UK, the findings, arguments, and insights may be applicable to the situation of stateless persons in other countries.

The article begins by introducing the methodology and framework of analysis (parts 2 and 3), before discussing the SDP, including its outcomes and flaws (part 4). The study uncovers problems of access to the SDP for stateless persons irrespective of whether they are detained or not, emphasizing additional complications for those in detention. The article then analyses the relevant legislation and Home Office (HO) policies and practices regarding immigration detention, as well as their interconnection with statelessness (part 5). This part argues that while stateless immigration detainees share issues that are common to all detainees, by virtue of their statelessness, they face a set of other challenges, such as being arbitrarily detained for excessive lengths of time. Finally, the article summarizes and compares the study's findings with the scholarship on statelessness and immigration detention. The main conclusion is that in order to improve access to justice for stateless persons, it is important to address: (a) the issue of identification and status, (b) problems with the immigration detention provisions, and (c) modes of implementation, as opposed to an analysis limited to black letter law.

[19] Sarah Singer, '"Desert Island" Detention: Detainees' Understandings of "Law" in the UK's Immigration Detention System' (2019) 38 Refugee Survey Quarterly 1.

[20] Joanna Pétin, 'Exploring the Role of Vulnerability in Immigration Detention' (2016) 35(1) Refugee Survey Quarterly 91, 98–102.

[21] UNHCR and Asylum Aid, 'Mapping Statelessness in the UK' (2012); UNHCR, 'Good Practices Paper: Action 6. Establishing Statelessness Determination Procedures to Protect Stateless Persons' (2016) 3–4.

[22] Stephanie J Silverman and Melanie Griffiths, 'Immigration Detention in the UK' (6th revision, Migration Observatory Briefing, University of Oxford 2019) 5. Between 2009 and 2018, 25,000–32,000 people entered immigration detention each year, with 1,800–3,500 migrants detained at any given time. ibid; Home Office (HO), National Statistics, 'Detention Data Tables Immigration Statistics Year Ending March 2019' (24 May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803188/detention-mar-2019-tables.ods> 20 March 2020.

[23] Asylum Aid, 'Ending Detention of Stateless Persons in the UK', Policy Briefing (November 2017) <https://d1r349398pb5ky.cloudfront.net/wp-content/uploads/2019/06/Policy-briefing-statelessness-detention-Nov-2017.pdf> accessed 8 March 2020.

2. METHODOLOGY

The article adopts a qualitative approach using analysis of law, policy, case law, secondary sources (academic literature and reports), and interviews. All data were collected between February 2016 and October 2019.[24] Even though the semi-structured interviews date back to 2016, the data remain relevant due to the absence of major changes in national law and policy.[25]

The 20 interviews included nine interviews with lawyers and advocates expert on statelessness and immigration detention[26] and 11 with stateless persons from Kuwait, Zimbabwe, South Sudan, Djibuti, Nigeria, Ghana, Guinea, Palestine, Ivory Coast, and Western Sahara. The stateless persons interviewed were individuals recognized as stateless or having a claim pending.[27] Their legal status at the time of interview varied. Only two had been granted a legal status based on statelessness; one had refugee status;[28] and the others were staying irregularly in the UK. Specifically, two had pending statelessness cases[29] and one had an application based on his right to family life. Two were receiving legal advice on applying for stateless status. Three had had their statelessness application refused. Nine had experienced immigration detention (two remained in detention at the time of interview). Detention periods varied from three months to three and a half years; some of the interviewees had been detained several times. The two interviewees who had not been detained were included in the dataset because their experiences provide insights into access to justice within the SDP. Table 1 below provides a list of the stateless persons interviewed in the study.

The interviewees, who were living in different parts of England, were identified through lawyers and NGOs. The snowball method was employed to find other research participants.[30] Interviews lasted about two hours. Two of them took place in immigration detention centres,[31] while the others were held in public places, such as

[24] The primary research was carried out in 2016 in preparation for the report *Protecting Stateless Persons from Arbitrary Detention in the United Kingdom* (n 8).

[25] Explanatory Memorandum to the Statement of Changes in Immigration Rules presented to Parliament on 7 March 2019 (House of Commons (HC) 1919).

[26] Some of the lawyers and advocates interviewed gave permission for their names to be used in the article, whereas some others preferred to be referred to anonymously.

[27] The interviewees who were in limbo claimed to be stateless and, using the triangulation method, they indeed seemed to have a claim for statelessness. On the triangulation method, see Julia Brannen, *Mixing Methods: Qualitative and Quantitative Research* (Routledge 1995).

[28] The interviewee who was granted refugee status was a stateless Bidoon. When a stateless person is also a refugee, the preference is to grant him or her refugee status as it ensures access to more rights than stateless status.

[29] Specifically, one had an application pending with the HO, and one had a judicial review claim against the refusal of his statelessness application.

[30] Ilse van Liempt and Veronika Bilger, 'Methodological and Ethical Dilemmas in Research among Smuggled Migrants' in Ricard Zapata-Barrero and Evren Yalaz (eds), *Qualitative Research in European Migration Studies* (IMISCOE 2018) 273, 276.

[31] In the immigration detention centres, I used interview rooms to secure sufficient privacy. Federica d'Alessandra and others (eds), *Handbook on Civil Society Documentation of Serious Human Rights Violations* (Public International Law & Policy Group 2016) 97.

Table 1. List of stateless persons interviewed

Person	Cause of statelessness	Periods spent in immigration detention	Years in the UK as at 2016	Immigration status	Damages for unlawful detention
1	Born in the border area of Nigeria	9 months + 3 months	22	No legal status. Judicial review pending against refusal of stateless status	Yes, for second detention
2	State's discrimination against ethnic minority (Bidoons)	n/a	4	Refugee status	n/a
3	State's discrimination against ethnic minority (Bidoons)	n/a	9	No legal status. Pending application based on family life	n/a
4	Palestine not recognized as a State under international law. Several migrations	11 months	5	Stateless status	Yes
5	African parents, several migrations. Used false documents	3 years + 6.5 months + on tag for over 6 months	12	No legal status. Stateless application refused on public order grounds	Yes, after first detention
6	Saharawi, born in a refugee camp	Detained several times for a total of about 4.5 years (last episode of detention lasted about 1 year)	18	In immigration detention. No legal status. Stateless application refused on public order grounds	n/a

Table 1. (continued)

Person	Cause of statelessness	Periods spent in immigration detention	Years in the UK as at 2016	Immigration status	Damages for unlawful detention
7	Parents of different African nationalities. Lived in two African countries before coming to the UK. Used false documents	3.5 years	13	No legal status. Stateless application pending	Yes
8	Parents with different African nationalities. Lived in two African countries. Used false documents	14 months + 6 months + 6 months	8	No legal status. Stateless application refused on grounds of unclear nationality	Yes, after first detention
9	Orphan of African mother and unknown African father. Came to the UK as an unaccompanied minor	2 years + on tag for over 1 year	4	No legal status. Receiving advice to apply for stateless status	n/a
10	Orphan, victim of trafficking. Migrated to several countries before coming to the UK	About 3 months	6	Stateless status	n/a
11	Born in the UK to African parents. Fled the family as a teenager and lived homeless for about 20 years. No documents	About 5 months	Claimed to be born in the UK	In immigration detention. Status unclear. Receiving advice to apply for stateless status	n/a

libraries and community centres, to ensure the privacy and safety of the interviewees.[32] As a former immigration solicitor, and having read the relevant literature on empirical research methods,[33] I was prepared for the possible ethical and practical issues that might arise in carrying out interviews with vulnerable subjects.[34] The vulnerability of stateless persons stems, among other things, from their having no legal representation and no legal status,[35] experiencing mental health problems, being destitute, and lacking family or community support. To mitigate the effect of the inevitably unequal power relations with the research participants,[36] which was exacerbated by the immigration detention context,[37] I followed key ethical principles for collecting information, including the principles of doing no harm,[38] informed consent, referrals, and confidentiality.[39] Adhering to the principle of doing no harm, which meant always keeping the safety of the participants in mind, I watched for signs of emotional distress, avoided topics that the interviewees had indicated they did not want to talk about,[40] and at times offered the option of pausing or stopping the interview altogether. Observing the principle

[32] During preparation of the interviews, I tried to anticipate issues that might arise during the meeting. For example, if an interviewee showed an unwillingness to talk or was distressed about a crime committed in the UK, I would instead gather data from the immigration file. d'Alessandra and others (n 31) 99. The semi-structured interviews with stateless persons focused on three main areas: (1) assessment of statelessness (ie, place of origin, their nationality and that of their parents, ethnic group of belonging (if any), journey to the UK, immigration history, available identity documents and, if none, efforts made to obtain them); (2) experience with the law, immigration officials, and embassies of the country of origin; (3) reasons, times, length of and experience with immigration detention; whether alternatives to detention had been used; awareness of rights.

[33] See eg Tina Miller and Mary Boulton, 'Changing Constructions of Informed Consent: Qualitative Research and Complex Social Worlds' (2007) 65 Social Science and Medicine 2199; Elizabeth Murphy and Robert Dingwall, 'Informed Consent, Anticipatory Regulation and Ethnographic Practice' (2007) 65 Social Science and Medicine 2223.

[34] The term 'vulnerability' can be defined 'as indicating a condition whereby an individual is affected or can potentially be affected by physical or emotional harm. Vulnerability, in other words, signifies actual or potential exposure to harm'. Ingrid Nifosi-Sutton, *The Protection of Vulnerable Groups under International Human Rights Law* (Routledge 2017) 4.

[35] ibid 141.

[36] The inequalities between study participants and researchers has been recognized in previous research. See eg Mary Bosworth and Blerina Kellezi, 'Doing Research in Immigration Removal Centres: Ethics, Emotions and Impact' (2017) 17 Criminology and Criminal Justice 121, 125; Franck Düvell, Anna Triandafyllidou, and Bastian Vollmer, 'Ethical Issues in Irregular Migration Research' (European Commission 2008) 18.

[37] Christina Clark-Kazak, 'Developing Ethical Guidelines for Research' (2019) 61 Forced Migration Review 12, 14.

[38] The principle of doing no harm entails 'preventing and minimizing any unintended negative effects of activities that can increase people's vulnerability to physical and psychosocial risks'. d'Alessandra and others (n 31) 22.

[39] ibid 21.

[40] For instance, Stateless Person 11 said indirectly that he was a victim of child abuse. Thus, I did not ask for any details. Interview with Stateless Person 11 (Immigration Detention Centre, 6 May 2016).

of informed consent, participants were fully informed of the scope and aim of the research,[41] the potential risks and benefits of participating, and the voluntary character of their participation.[42] I introduced myself and my affiliation, and provided the research participants with my contact details.[43]

I also managed the interviewees' expectations by stressing that I was unable to provide them with legal advice: the purpose of the interviews was for academic research, to raise awareness of statelessness, and to advocate on behalf of stateless persons generally.[44] This was of particular relevance for my meetings with people in detention.[45] I explained that I could provide referrals to legal aid lawyers if the participants needed legal representation, or, if other needs, such as emotional needs or assistance with tracing family members, arose, I had information on the relevant services that could be of support and would make the necessary referrals, including to community visitor groups and the Red Cross.[46] I also clarified that such assistance was not dependent on the interviewee's participation in the research.[47] Not least, to ensure confidentiality, all data were anonymised.[48]

Since stateless persons are a difficult-to-access population,[49] the pool was relatively small and I did not seek to obtain a representative sample of interviewees. The interviews nevertheless helped to provide insights about the implementation of law and policies. Moreover, I balanced and confirmed the interviewees' assertions with the country of origin information, immigration law literature, and immigration files.[50] Six interviewees gave consent to discuss their cases with their representing solicitors. My experience as a former immigration solicitor helped to build connections, trust, and dialogue with both lawyers and stateless persons. It also helped me to check the

41 d'Alessandra and others (n 31) 97–98.

42 Regarding communication, five of the research participants did not wish to be contacted after the interviews, whereas the others agreed to be contacted within a maximum period of six months, in case further clarification about their cases was needed. Stateless persons 1 and 8 expressly wished to remain in contact and update me about their cases.

43 The research was undertaken without approval or oversight by an ethics committee or other body as such a system is not available in German academic institutions in the field of law.

44 Upon completion of the research, I collaborated with UNHCR London, NGOs, and refugee lawyers to disseminate the findings and organized trainings and lectures that were open to the public. On the professional responsibility of social researchers to inform society about irregular migration, see Düvell (n 36) 15.

45 Mary Bosworth and others, 'Doing Prison Research: Views from Inside' (2005) 11 Qualitative Inquiry 1.

46 d'Alessandra and others (n 31) 29.

47 ibid 31.

48 van Liempt and Bilger (n 30) 273, 276.

49 This is due to the small number of statelessness applicants, their insecure immigration status which deters them from participating in research, as well as confidentiality issues. Moreover, working with illegal migrants requires particular care due to the risk of harming their residence in the country. ibid 275.

50 These files included UK government documents, judicial decisions, and correspondence with the representing solicitors.

accuracy of the information gathered. After each interview, those research participants who had expressed the wish to check the accuracy of my notes received a computer printout of them.

Lastly, I gathered background information to gain a deeper understanding of the situation through conversations with practitioners at conferences and training programmes on statelessness.[51] HO officials in charge of immigration detention declined to be interviewed for the study.[52]

3. ACCESS TO JUSTICE AS THE FRAMEWORK OF ANALYSIS

The term 'access to justice' is not used in international law or judicial decisions.[53] In legal scholarship, 'access to justice' is associated with a number of other, often interchangeable, terms used 'to cover particular elements, such as access to court, effective remedies or fair trial'.[54] The umbrella concept of 'access to justice' highlights the nature and extent of unmet legal needs and legal assistance.[55] It further explores the impact of the gap – between availability and access – on persons for whom access to the legal system is highly challenging and administrative procedures lack the necessary effectiveness. This study's focus on access to justice allowed an enhanced analysis of legislation, policies, and practices that prevent fair and equal treatment when stateless persons interact with SDPs and the immigration detention framework.[56]

A review of the literature shows that, over the past 40 years, the concept of 'access to justice' has changed such that, at present, there is little agreement amongst scholars as to what it means in practice. This is partly because on-the-ground legal problems have recently become more complex due to a more socio-demographically diverse population of rights claimants (such as racial minorities, immigrants, people of colour, refugees, non-native speakers, people with disabilities) whose needs vary from those of the

[51] Training on statelessness and immigration detention for practitioners (London, 16 February 2017); 'Arbitrary Detention of Stateless Persons in the UK' (ENS Conference, Budapest, Hungary, 3–5 May 2017). This information was used purely as background to aid my understanding of the actual practice.

[52] Hoping to improve policy and decision making, I provided a copy of the final study to the HO statelessness unit.

[53] European Union Agency for Fundamental Rights (FRA), *Access to Justice in Europe: An Overview of Challenges and Opportunities* (2010) 14. The Treaty of Lisbon is an exception in that it introduces a specific reference to 'access to justice', stating that 'the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters'. ibid 15; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon) art 81(12)(e).

[54] FRA (n 53) 16.

[55] Organisation for Economic Co-operation and Development (OECD), 'Understanding Effective Access to Justice' (OECD Conference, Paris, France, 3–4 November 2016) 1.

[56] 'Within the legal setting, justice is traditionally equated with equality, fairness and respects for individual rights'. Asher Flynn and Jacqueline Hodgson, 'Access to Justice and Legal Aid Cuts: A Mismatch of Concepts in the Contemporary Australian and British Legal Landscapes' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid. Comparative Perspectives on Unmet Legal Need* (Hart Publishing 2017) 1, 6.

mainstream population.[57] The term 'access to justice' is difficult to define, as Cappelletti and Garth have acknowledged, but it serves 'to focus on two basic purposes of the legal system – the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just'.[58] The United Nations Development Programme (UNDP) describes it more broadly as 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards'.[59]

Contemporary commentators identify several 'features that would characterize an accessible justice system: (1) just results, (2) fair treatment, (3) reasonable cost, (4) reasonable speed, (5) understandable to users, (6) responsive to needs, (7) certain, and (8) effective, adequately resourced, and well organized'.[60] Macdonald has pointed out that these elements must be understood within a multidimensional strategy because 'access to justice is a multi-faceted phenomenon'.[61]

Diversity in approaches to access to justice is indispensable – as practice has shown – for the simple reason that legal needs are as diverse as the situations in which individuals find themselves. As a consequence, the issues that fall within the scope of an access to justice agenda include, among others, access to legal advice, usability and fairness of procedures, and accommodation of diversity. Nevertheless, the supply side (courts and lawyers) of access to justice research continues to focus principally on procedures and complaint mechanisms, since projects currently being funded mainly address issues relevant to institutional players. In addition, empirical research in this area is more generally focused on the characteristics of an accessible dispute resolution system than those of an accessible justice system[62] and is not concerned with investigating the quality of the outcomes that are produced.[63]

[57] See eg Roderick A Macdonald, 'Access to Justice in Canada Today: Scope, Scale and Ambitions' in Julia Bass, WA Bogart, and Frederick H Zemans (eds), *Access to Justice for a New Century: The Way Forward* (Law Society of Upper Canada 2005) 19; Theresa Marchiori, 'A Framework for Measuring Access to Justice Including Specific Challenges Facing Women' (UN Women and Council of Europe 2015); OECD (n 55) 11; Ashley Terlouw, 'Access to Justice for Asylum Seekers: Is the Right to Seek and Enjoy Asylum Only Black Letter Law?' in Carolus Grütters, Sandra Mantu, and Paul Minderhoud (eds), *Migration on the Move: Essays on the Dynamics of Migration* (Brill Nijhoff 2017).

[58] Mauro Cappelletti and Bryant G Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181, 182.

[59] UNDP, *Programming for Justice: Access for All – A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) 5.

[60] Macdonald (n 57) 23. See also Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996); Marchiori (n 57); Terlouw (n 57).

[61] Macdonald (n 57) 24.

[62] Thomas Burke, *Lawyers, Lawsuits, and Legal Rights: Litigation in American Society* (University of California Press 2002); Christine Coumarelos, Zhigang Wei, and Albert Z Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (Law and Justice Foundation of NSW 2006); Alan Uzelac and CH Van Rhee (eds), *Access to Justice and the Judiciary: Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (Intersentia 2009).

[63] Robert A Baruch Bush, 'Defining Quality Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments' (1989) 66 Denver University Law Review 335; Tom R Tyler, 'The Quality of Dispute Resolution. Procedures and Outcomes: Measurement Problems and Possibilities (1989) 66 Denver University Law Review 419.

Furthermore, research on claimants' conception of justice and access remains limited. It is only recently that studies have begun investigating access to justice from claimants' points of view by adopting a holistic perspective so that the analysis additionally includes dismantling the 'barriers' that claimants face.[64] The metaphor of 'barriers' points to the underlying distinction between the availability of a service or right, and access to it.[65] 'Availability' refers to whether a right or service (for example, right to counsel) exists at all, whereas 'access' denotes whether a right or service is actually secured. The gap between availability of a right and access to enjoyment of that right is caused by 'barriers'.[66] Traditionally, the literature's main focus has been on 'objective barriers' (those that are capable of measurement), such as delays, cost, and complexity of the law.[67] The emphasis on objective barriers has been criticized for ignoring the lack of access owing to socio-cultural obstacles, also known as 'subjective barriers', which refer to difficulties commonly experienced by racial minorities, women, migrants, and the elderly in dealing with the legal system.[68] In particular, these challenges include a lack of basic communication skills for those not fluent in the language of the host country; poor understanding of the legal consequences of simple actions, such as signing a form; the unavailability of legal assistance resulting in claimants' inability to present their cases to the administration or to the courts; and economic disadvantage.[69] Finally, some scholars also address the problem of 'physical barriers', which concern material access to official institutions and related legal services (for instance, for people in detention).[70]

Drawing from the aforementioned scholarship, this article uses 'access to justice' to mean, first, the ability to vindicate rights in an accessible way through a process that ensures an effective remedy.[71] This entails all the elements of a fair trial, such as access to an independent and impartial adjudicator; a timely remedy; and the right to be advised and represented through legal aid in the case of lack of or insufficient resources. [72]

[64] Stephanie J Silverman and Petra Molnar, 'Everyday Injustices: Barriers to Access to Justice for Immigration Detainees in Canada' (2016) 35(1) Refugee Survey Quarterly 109. For empirical studies, see also Jennifer A Leitch, 'Looking for Quality: The Empirical Debate in Access to Justice Research' (2013) 31 The Windsor Yearbook of Access to Justice 229; Jessica Steinberg, 'Demand Side Reform in the Poor People's Court' (2015) GWU Law School Public Law Research Paper No 2015–21.

[65] Robert Doyle and Livy Visano, 'Equality and Multiculturalism: Access to Community Services' (1988) 3 Journal of Law and Social Policy 21.

[66] Andrew J Roman, 'Barriers to Justice: Including the Excluded' in Allan C Hutchinson (ed), *Access to Civil Justice* (Carswell 1990) 181.

[67] See eg Hutchinson (n 66).

[68] Macdonald (n 57) 28.

[69] Ronald Sackville, *Law and Poverty in Australia* (Australian Government Publishing Service 1975) 3; Doyle and Visano (n 65) 21, 27.

[70] Macdonald (n 57) 27.

[71] In this article, 'effective remedy' means that the application of procedural rules should not make the exercise of the right virtually impossible or excessively difficult. FRA (n 55) 18.

[72] Terlouw (n 57).

Secondly, 'access to justice' is employed in this article to express the idea that stateless persons should have the right to a fair solution, with emphasis on developing changes for achieving legal and decision-making outcomes that are just and reflect people's interests and needs.[73] This wider view of access to justice is concerned with a more substantive access to justice that would include improving both substantive rights and procedural arrangements.[74] With this in mind, the following part considers the current legal framework and implementation of the UK's SDP. By identifying interrelated objective, subjective, and physical barriers, it also examines how the lack of recognition of statelessness interconnects with immigration detention.[75]

4. PROCEDURE TO DETERMINE STATELESSNESS IN THE ACCESS TO JUSTICE FRAMEWORK

SDPs have the potential to protect stateless people because they facilitate the recognition of legal status and rights. In particular, the purpose of SDPs is to ensure the identification of stateless persons and provide a practical solution for those who do not enjoy the benefits normally attached to having a nationality.[76]

As the result of pressure from UNHCR and civil society, the UK adopted an SDP that came into effect on 6 April 2013.[77] The HO issued initial guidelines on 1 April 2013 to explain the policy and provisions for considering statelessness applications, updating them in 2016 and 2019.[78] Although the introduction of the SDP was a step forward, the process contains a number of flaws, which are examined in the following sections. Overall, the mechanism has had little effect in reducing the risk of arbitrary detention of stateless persons.

4.1 Legal framework: definition of 'stateless person' and procedure

According to paragraph 401 of the Immigration Rules, in order to be considered stateless, a person must meet the definition set out in article 1(1) of the 1954 Convention,[79]

[73] Jeremy McBride, 'Access to Justice for Migrants and Asylum Seekers in Europe' (Council of Europe 2009) 7; Jin Ho Verdonschot and others, 'Measuring Access to Justice: The Quality of Outcomes' (2008) Tilburg University Legal Studies Working Paper No 014/2008, 4–5 and TISCO Working Paper Series on Civil Law and Conflict Resolution Systems No 007/2008.

[74] McBride (n 73) 7; Terlouw (n 57).

[75] See also Marchiori (n 57) 5 fn 2; UNDP, 'Access to Justice Practice Note' (2004) Box 1; UN Women, 'Progress of the World's Women: In Pursuit of Justice' (2011) 48–63, 118–21; World Bank, *World Development Report 2012: Gender Equality and Development* (2011) 166–68.

[76] Carol A Batchelor, 'The 1954 Convention Relating to the Status of Stateless Persons. Implementation within the European Union Member States and Recommendations for Harmonization' (2004) 22 Refuge 31; Bianchini (n 3) 45–48; Bianchini (n 5); Gyulai 2014 (n 6) 120–23; UNHCR (n 4) paras 8–12.

[77] Immigration Rules 2013, HC 1039, Part 14: Stateless Persons (amended).

[78] HO, 'Stateless Guidance: Applications for Leave to Remain as a Stateless Person. V1.00' (2013); HO, 'Asylum Policy Instruction: Statelessness and Applications for Leave to Remain. V2.0' (2016); HO, 'Asylum Policy Instruction: Statelessness. V3.0' (2019).

[79] 1954 Convention (n 2) art 1(1).

namely he or she must be a 'person who is not considered as a national by any state under the operation of its law'.[80] According to UNHCR and HO policy, this definition requires that a person's nationality be assessed with reference to both black letter law and its application in practice.[81]

Paragraph 402 of the Immigration Rules excludes Palestinians who are currently protected and assisted by the United Nations Relief and Works Agency for Palestine Refugees in the Near East[82] and all persons against whom there are serious grounds for considering that they have committed war crimes, crimes against peace or humanity, serious non-political crimes, or acts contrary to the purposes and principles of the United Nations (UN).[83] The Immigration Rules also set out additional grounds that serve as the basis for denying stateless persons a grant of leave to remain: (1) under paragraph 403(c), those admissible to their country of former habitual residence or any other country where they will have permanent residence, and (2) under paragraph 404, those against whom there are reasonable grounds for considering that they are a danger to the security or public order of the UK. Under the former ground, a strict test is required in order to be excluded, and the person must have permanent residence and enjoy the rights normally attached to the nationality of that State.[84] The latter ground only requires that the HO be 'satisfied' that reasonable grounds exist.[85]

As far as the procedure is concerned, applications for statelessness must follow particular rules. First, they must be filed using a specific online form published on the HO website.[86] Secondly, applicants bear the burden of proof[87] to establish that they do not have a nationality on the balance of probabilities (that is, more likely than not).[88] Since April 2019, and complicating the situation, the applicant must have 'sought and failed to obtain or re-establish their nationality with the appropriate authorities of the relevant country'.[89] This language is unclear as it does not specify precisely what is expected from the applicant.

[80] Immigration Rules (n 77) para 401. This definition is in line with the internationally accepted definition of 'stateless person' as set out in the 1954 Convention. For a detailed analysis of the definition and its application, see Bianchini (n 2).

[81] UNHCR (n 4); HO, 'Asylum Policy Instruction. V3.0' (n 78) 19.

[82] On the exclusion of Palestinians, see Bianchini (n 5) 214–22.

[83] Immigration Rules (n 77) para 402. Similar exclusion grounds can be found in refugee law and the subsidiary protection framework. Geoff Gilbert, 'Exclusion and Evidentiary Assessment' in Gregor Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers 2005) 161–77.

[84] HO, 'Asylum Policy Instruction. V3.0' (n 78) 23.

[85] ibid 24. For further discussion on this exclusion ground, see section 4.2 below.

[86] GOV.UK, Visas and Immigration, 'Apply to Stay in the UK as a Stateless Person' <https://visas-immigration.service.gov.uk/product/flr-s> accessed 8 March 2020.

[87] Immigration Rules (n 77) para 403(d).

[88] HO, 'Asylum Policy Instruction. V3.0' (n 78) 15. It should be noted that the new para 403 of the Immigration Rules contains two additional requirements: that the applicant '(e) has sought and failed to obtain or re-establish their nationality with the appropriate authorities of the relevant country; and (f) … in the case of a child born in the UK, has provided evidence that they have attempted to register their birth with the relevant authorities but have been refused'. Explanatory Memorandum (n 25).

[89] Immigration Rules (n 77) para 403(f).

In light of the problems that stateless persons may encounter in proving their case, HO guidance states that immigration officials must assist genuinely cooperating applicants who lack the necessary resources or knowledge with gathering the necessary evidence, whether by way of research or enquiry with foreign authorities.[90] HO guidance also sets out detailed rules on gathering and assessing evidence, including the types of proof that should be submitted, such as written and oral testimonies of the applicant, replies of foreign authorities concerning an individual's nationality, identity documents (for example, birth certificates, national identity cards, voter registration documentation), school and medical records, and expired travel documents.[91] Where the national authorities do not provide evidence of their position, the HO guidance indicates that '[i]t is a matter for judgement in the individual case as to how long it is reasonable to wait for any response'.[92] It adds that immigration officials must avoid making any automatic assumptions if a State fails to reply after being contacted. Moreover, in situations where a State normally responds to similar queries from the HO, the lack of a response may support a conclusion that the individual is not known to the State.[93] The wording leaves open certain questions such as how long is a reasonable time to wait to receive the necessary evidence from overseas governments and what are the implications if a person appears not to be known to a State.[94]

Normally, where the information provided is insufficient, immigration officials interview the applicant. An individual will not be heard and his or her case may be refused if recent and reliable evidence (including the applicant's own statements or fact findings of an immigration judge) has already 'established that the applicant is not stateless or is clearly admissible to another country for purposes of permanent residence and where no evidence to the contrary has been provided'.[95] This applies even if the findings were made as part of other immigration procedures. If a stateless person has previously been involved in an earlier, failed asylum claim, or if false documents have been used to stake the claim, such findings may negatively impact the credibility assessment in the SDP.[96] As a result, stateless persons may not be able to rectify potentially incorrect information collected by the authorities.

Where an application is refused, there is no right to appeal to the Immigration Tribunal. Individuals whose applications are rejected can apply for an internal administrative review for 'casework errors', carried out by a team within the HO.[97] Once all administrative remedies have been exhausted, applicants can lodge an application for judicial review with the territorially competent Upper Tribunal.[98] However, the Upper

[90] HO, 'Asylum Policy Instruction. V3.0' (n 78) 14.

[91] ibid 15–16.

[92] ibid 21.

[93] ibid.

[94] See section 4.2 below.

[95] HO, 'Asylum Policy Instruction. V3.0' (n 78) 12.

[96] ibid 10.

[97] Immigration Rules, Appendix AR: administrative review 2016, HC 667, AR2.11.

[98] The High Court can accept challenges to statelessness if there are other grounds to believe that the Upper Tribunal does not have jurisdiction to consider – ie, challenging a statelessness decision with an unlawful detention claim. Email from Solicitor 1 to author (12 April 2017).

Tribunal can only declare whether or not the decision that it is reviewing is lawful; it cannot substitute the decision with its own and, if necessary, must send the case back to the HO for reconsideration.[99]

Individuals whose applications are successful are granted leave to remain for five years[100] and, at the end of that time, can apply for indefinite leave to remain.[101] In terms of leave to remain, the duration for the stateless now parallels that for persons with refugee status despite some remaining 'differences to entitlements of persons granted stateless leave'.[102]

As understanding access to justice requires focusing not only on black letter law but also on its implementation, the next section analyses whether these outcomes meet the needs of stateless persons. Section 4.2 examines whether stateless persons are able to exercise their rights through a fair, accessible, and effective process that ensures: the impartiality of adjudicators, a fair burden and standard of proof, a timely remedy, and legal representation.

4.2 Unjust outcomes and unfair exclusion from stateless status

To date, despite the guarantees of existing procedures, many stateless people in the UK have not satisfactorily received substantive justice.[103] While more empirical data are required in order to be able to generalize from the research findings, this study points to three broad problematic areas within the SDP: (1) poor implementation of the definition of 'stateless person'; (2) biased immigration officials; and (3) unfair exclusion from stateless status on security and public order grounds.

First, the definition of 'stateless person' is not properly implemented.[104] According to UNHCR and HO guidance, the phrase 'operation of law' encompasses 'not just legislation, but also ministerial decrees, regulations, orders, [and] judicial case law'.[105] It also includes administrative practice.[106] Cases where both State law and practice must be analysed tend to be highly complex, with the result that protection is often refused.[107] According to the findings in this study, this is partially due to a lack of readily available and sometimes inaccurate country of origin information on nationality laws and the

[99] ILPA and University of Liverpool Law Clinic, 'Statelessness and Applications for Leave to Remain: a Best Practice Guide' (2016) 72–74.

[100] HO, 'Asylum Policy Instruction. V3.0' (n 78) 25.

[101] ibid 27.

[102] Cynthia Orchard, 'UK Home Office Changes to Immigration Rules on Statelessness: A Mixed Bag' (*ENS*, 18 March 2019) <https://www.statelessness.eu/blog/uk-home-office-changes-immigration-rules-statelessness-mixed-bag> accessed 20 March 2020.

[103] As explained in part 3 above, 'substantive justice' refers to the notion that the system must lead to fair results of disputes.

[104] Johanna Bezzano and Judith Carter, 'Statelessness in Practice: Implementation of the UK Statelessness Application Procedure' (Liverpool Law Clinic, University of Liverpool 2018) 7, 17–22.

[105] UNHCR (n 4) para 18.

[106] HO, 'Asylum Policy Instruction. V3.0' (n 78) 19.

[107] Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons* (2010) 220.

assessment of State practice.[108] Further, expert evidence was not presented to assist in any of the interviewees' cases, whether due to the limitations of legal aid, or a lack of awareness on statelessness matters among the lawyers.[109]

Situations may be complicated where an applicant has, in the past, used different identities to enter the country or gain employment. The HO often labels such cases as cases of 'disputed nationality'. In three of the cases under review, the evidence presented was deemed tentative owing to numerous issues, resulting in a substantial degree of uncertainty concerning some facts of the claims (that is, the country of birth, applicable nationality laws, and relevant State practice) and their consequent refusal.[110] However, the concept of disputed nationality in the context of statelessness assessment is not legally significant.[111] As van Waas has pointed out, the situation of a person whose nationality is disputed or doubtful is a matter of *identification* of statelessness,[112] which requires the adoption of clear rules. Such rules should address, for instance, when embassies' long delays in assisting someone who has requested documentation amount to a denial of recognition of nationality, even in the absence of an answer; how many times a person should reasonably be requested to contact his or her own embassy; and how long individuals can remain without status.[113] As sections 5.2 and 5.5 will show, in the absence of well-defined provisions, situations of disputed or undetermined nationality become particularly problematic when the authorities detain a person and engage in attempts to remove them.[114] Removal attempts can be very time-consuming and may be pursued on the assumption of a country of nationality. Most of the time, they do not reflect a comprehensive understanding of nationality laws and country conditions.

[108] Interview with Nasser Al-Anezy, Director of the Kuwait Community Association (London, 2 May 2016); Interview with Barrister (London, 11 March 2016). For instance, the UK Country Guidance on Kuwait is incorrect as it distinguishes between documented Bidoons – registered with the 'Bidoon Committee' and issued with 'security cards' or 'green cards', which allows some rights, such as health care, and access to employment – and undocumented Bidoons – not registered, with no rights, and at risk of persecution. This distinction is problematic as it excludes many Kuwaiti Bidoons who hold a security card but face harm. Moreover, the cards issued by the government do not grant rights equal to those of nationals. Finally, it opens the door to abuse of the system as it encourages non-Bidoons to adopt the 'non-documented Kuwaiti Bidoon' narrative in order to obtain lawful status. HO, UK Visas and Immigration, 'Country Information and Guidance Kuwait: Bidoons. Version 2.0' (July 2016); Nasser Al-Anezy and Katia Bianchini, 'Problems Faced by the Bidoons in the UK' (*ENS*, 21 July 2016) <https://www.statelessness.eu/blog/problems-faced-bidoons-uk> accessed 8 March 2020.

[109] 'Expert evidence' is advice from experts on country conditions and nationality legislation of the country of origin. Lawyers' 'lack of awareness' refers to a lack of knowledge of and experience in dealing with the legal provisions on statelessness. See further section 5.3 below.

[110] This was the case for Stateless Person 5 (Middlesbrough, 23 May 2016), Stateless Person 7 (Reading, 20 March 2016), and Stateless Person 8 (Middlesbrough, 23 May 2016).

[111] van Waas (n 2) 23–27.

[112] ibid 28.

[113] ibid 423–32.

[114] Equal Rights Trust (n 107) 65.

The second problematic area concerns immigration officials' predisposition to refuse applications.[115] Contrary to HO guidance on assisting applicants with the presentation of evidence, it appears that attempts by immigration officials to explore inconsistencies or the reasons why documents were not obtained are limited. For instance, some applicants may not have been adequately represented; others may suffer from mental health problems that affect their ability to disclose relevant evidence.[116] Some may have been detained and thus had limited access to documentary evidence.[117] While immigration officials have discretion in assessing evidence, and have to prevent abuse of the system, the decisions examined and the testimonies heard point to a tendency to quickly assume that conflicting evidence or being undocumented diminishes a person's credibility. Previous studies, as well as judicial decisions, have cautioned against this approach.[118] Some have argued that there is 'a culture of disbelief' within the HO. The literature explains that the HO has the propensity to doubt applicants' credibility and, on that basis, to refuse their cases. This attitude is deliberate and based on a policy choice aimed at reducing the number of successful claims and discouraging prospective applicants.[119] This aspect is well illustrated by the cases of Stateless Persons 1 and 6, which the HO refused, despite undisputed evidence of their lack of nationality. In particular, Stateless Person 1, originally from an area near the border of Nigeria with Cameroon, had provided a witness statement from an NGO volunteer affirming that, despite several attempts to obtain a passport, neither the Nigerian High Commission nor the Cameroonian embassy had agreed to provide a passport because they did not recognize him as a national. In its refusal letter, the HO minimized the applicant's efforts and the complexity of his situation. In so doing, the HO unlawfully maintained that if Stateless Person 1 had provided correct information regarding his nationality, he

[115] Robert Thomas and others, 'Immigration and Access to Justice: A Critical Analysis of Recent Restrictions' in Ellie Palmer and others (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016) 107.

[116] Guy Coffey, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2004) 15 International Journal of Refugee Law 377, 388–89. This was clear for Stateless Persons 6 and 11. Stateless Person 6 felt very stressed, had collapsed several times while in detention, and the immigration detention doctor wrote a report stating that, due to his mental health, he was unsuitable for detention. Stateless Person 11 was seeing a psychologist once a week in the detention centre. He reported having nightmares and being prescribed medication to be able to sleep. Both individuals were unsure whether the immigration officer had considered their medical condition. Interview with Stateless Person 6 (Immigration Detention Centre, 24 April 2016); Stateless Person 11 (n 40).

[117] For instance, this was the case for Stateless Person 1 (Middlesbrough, 24 May 2016) and Stateless Person 6 (n 116).

[118] Coffey (n 116) 390.

[119] James Souter, 'A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom' (2011) 1 Oxford Monitor of Forced Migration 48; Michael Kagan, 'Believable Victims: Asylum Credibility and the Struggle for Objectivity' (2015) 16 Georgetown Journal of International Affairs 123; Helen Baillot, Sharon Cowan, and Vanessa E Munro, 'Reason to Disbelieve: Evaluating the Rape Claims of Women Seeking Asylum in the UK' (2014) 10 International Journal of Law in Context 105; Interview with Solicitor 2 (Liverpool, 4 April 2016).

could return to either Nigeria or Cameroon.[120] In the case of Stateless Person 6, the HO refused his application on public order grounds without making a finding on his statelessness, leaving him with no status and no rights in the country. However, the HO did not dispute that Stateless Person 6 was born in a refugee camp in the Western Sahara and that he was a stateless Saharawi.[121] In both scenarios, relevant facts that would have served as evidence of statelessness were ignored, rendering the decisions unsubstantiated and clearly wrong.

A third problematic issue relates to the use of the 'exclusion clause' to refuse cases on the basis of security or public order. Three research participants, including the Saharawi person, had their cases refused on this ground. This is particularly unjust when the crime committed is an immigration offence, as certain migrant profiles (especially undocumented individuals and those without a support network) trigger application of the clause.[122] It should be noted that, under both international and UK law, unlike refugees, stateless persons can be penalized for illegal entry or presence and are therefore at greater risk of criminalization for breach of immigration laws.[123] Thus, a vicious cycle follows: deprivation, statelessness, lack of documents and support may lead to criminal behaviour. In turn, criminal convictions further reduce the few opportunities to obtain lawful status, creating a hopeless situation for persons affected by statelessness. Criminal convictions also trigger deportation orders and, along with them, immigration detention.[124] Although it appears that immigration officials do not deal with the feasibility of deportation, further research is needed to understand the approach taken in these situations and how it could be improved to ensure better compliance with human rights standards.

In conclusion, poor decisions have dangerous consequences – this is one of the main challenges that stateless persons face when accessing substantive justice.[125] Additionally, exclusion on account of immigration-related offences disregards the needs and situation of the stateless, exposing them to the risk of immigration detention. Furthermore, the procedural aspect of access to justice in the SDP is also affected by shortcomings, as will now be explained.

4.3 Inability to vindicate rights and barriers to accessing justice in the SDP

The data highlight several weaknesses relating to both the design and implementation of the SDP framework: (1) unfair burden and standard of proof; (2) inaccessibility; (3) long waiting periods; and (4) unfairness of review mechanisms.

First, contrary to HO guidance, decision makers rarely assist applicants to gather evidence. This creates an objective barrier for applicants: statelessness is essentially a

120 Interview with Solicitor 1 (London, 9 June 2016).

121 Valeria Cherednichenko, 'A Ray of Hope for Stateless Sahrawis in Spain?' (*ENS*, 22 October 2013) <https://www.statelessness.eu/blog/ray-hope-stateless-sahrawis-spain-1> accessed 8 March 2020.

122 Ana Aliverti, 'Briefing. Immigration Offences: Trends in Legislation and Criminal and Civil Enforcement' (The Migration Observatory, University of Oxford 2016).

123 Equal Rights Trust (n 107) 239.

124 Bianchini (n 8) 22–23.

125 See n 103 and part 3.

negative concept, and thus difficult to prove. Many situations are not straightforward – for instance, the case of Interviewee 5, who was born in South Sudan to Liberian parents, and migrated several times both as a child and as an adult. Secondly, the Immigration Rules state that the onus is on the applicant to prove his or her case according to the *ordinary* civil standard (the balance of probabilities) rather than the *lower* civil standard (reasonable degree of likelihood). As a consequence, it is not easy to convince the HO that applicants have made genuine efforts to obtain their documents in situations where their nationality or identity is unclear.[126] Documentation may not be forthcoming simply because embassies often fail to reply to requests.

The problems resulting from an extremely high burden of proof are exemplified by the research participants' statements that they were uncertain what steps to take in order to obtain documents, particularly when they were in immigration detention. Generally, interviewees believed that approaching the embassy of their country of habitual residence or perceived nationality would be enough, even if they did not receive a written reply.[127] However, the HO usually insisted on more concrete evidence of such attempts and asked to see documentary evidence in the form of written communications. In practice, applicants were expected to contact the authorities of the country of origin in writing and provide as many original documents as possible. Thereafter, they were expected to try to obtain a statement of non-nationality from the country concerned. Applicants could also be expected to use tracking services to contact relatives or friends in the country of origin who might be able to help to obtain documents. Unless applicants take these steps, they do not succeed in their applications.[128] This approach diminishes the effectiveness of the procedure, making the recognition of statelessness extremely difficult, if not impossible, to attain. The very nature of statelessness means that applicants 'are often unable to substantiate the claim [that they are stateless] with much, if any, documentary evidence. This is because stateless persons are often deprived of documentation, including birth registration, identity, and other documents'.[129] On this matter, it would be helpful to follow UNHCR's recommendation 'to take [inability to obtain documentary evidence] into account, where appropriate giving sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence'.[130]

In terms of the SDP's accessibility and its responsiveness to needs, the research participants referred to objective and subjective difficulties in complying with the rules of the application process. These included the complexity of the legal language, answering the questions on the application form, as well as locating documents and statements to support the claim. In particular, interviewees found the form cumbersome, requiring

[126] Interview with Solicitor 3 (Liverpool, 27 April 2016).

[127] Interview with Stateless Person 1 (n 117); Stateless Person 6 (n 116); Stateless Person 7 (n 110); Stateless Person 8 (n 110).

[128] Adrian Berry, 'The Burden of Proof and Standard of Proof in Statelessness Cases' (*Nationality and Citizenship Law*, 17 September 2019) <https://nationalityandcitizenshiplaw.com/2019/09/17/the-burden-of-proof-and-standard-of-proof-in-statelessness-cases/> accessed 11 October 2019.

[129] Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford University Press 2019) 116.

[130] UNHCR (n 4) para 89.

'many details of family members and places of former residence and ask[ing] the same information in a repetitive and confusing manner'.[131] Lack of English language skills and formal education, and inability to comprehend the legal system, were common problems in making an application without the help of a solicitor.[132] Moreover, the recent requirement to complete the application form online raises particular problems for unrepresented detainees, since not all are computer literate and access to computers at immigration centres is limited.[133] Lack of sufficient access to the internet and other forms of communication has been raised in other studies as a serious obstacle to lodging and preparing cases.[134]

As far as the timeliness of the proceedings was concerned, many interviewees reported long waiting times for a decision, which made them less willing to pursue their cases.[135] Most applications take more than a year, some take more than two years.[136] The waiting time becomes even longer when judicial review is sought for refusals. In addition, individuals may have tried to seek asylum before, and their failed applications add to the delay, due to having to go through one more layer of procedures.[137] These delays are a barrier, especially for represented persons who may worry about the legal fees involved. Meanwhile, unrepresented persons can become so frustrated that they relinquish their rights.[138]

When a statelessness application is refused, the main issues of fairness appear to be: (1) the lack of independence of the HO team in charge of the internal review;[139] (2) inability to lodge an application for judicial review, especially if the person is in immigration detention; and (3) difficulties in pursuing cases without legal representation due to the complexity of the legal issues and procedures involved, and a lack of knowledge of the system and language (as will be discussed further in section 5.3).

In conclusion, there are serious problems concerning the fairness and effectiveness of the SDP. Status determination is fundamental to the protection of stateless persons, particularly in cases where they have nowhere else to go and would otherwise be in legal limbo.[140] Persons without a determined nationality status are particularly vulnerable to

131 Stateless Person 1 (n 117).

132 All the stateless interviewees in the study confirmed this.

133 Singer (n 19) 15; Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons* (Cm 9186, HO 2016) 133.

134 While detention immigration centres do have computers with internet access in their libraries, many sites are blocked and unavailable. Singer (n 19) 15; Shaw (n 133) 133.

135 Interview with Stateless Person 3 (London, 2 May 2016); Stateless Person 6 (n 116).

136 Asylum Aid, 'The UK's Approach to Statelessness: Need for Fair and Timely Decisions', Policy Briefing (September 2016) 3–4; Bianchini (n 8); Bezzano and Carter (n 104) 25.

137 Solicitor 1 (n 120); Solicitor 3 (n 126).

138 Cappelletti and Garth (n 58) 181–82.

139 Although the internal review is carried out by a HO team in a different location and management chain from the officials who made the original immigration decision, the independence of the reviewers has been questioned. Bianchini (n 5) 152. On internal reviews in general, and the difficulty in guaranteeing independence from the primary decision maker, see Denis J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (2nd edn, Oxford University Press 2004) 132.

140 Alexandra Poupotsi, 'Stateless Persons in Detention: Trapped by Law?' (MA thesis, Tilburg University 2017) 4, 31.

immigration detention because they are often undocumented, in an irregular situation, and without access to consular services.[141] It is therefore important to be mindful of the strengths and limitations of the provisions concerning both the determination of statelessness and immigration detention. In light of that, the next part turns to discuss the interconnection between the two fields by focusing on immigration detention.

5. IMMIGRATION DETENTION OF STATELESS PERSONS IN THE ACCESS TO JUSTICE FRAMEWORK

In the UK, the use of detention for immigrants constitutes a central focus of the government's policy to enforce immigration law.[142] The original powers of detention are set out in the Immigration Act 1971.[143] In addition to statutory restrictions, other factors, such as HO policy, human rights law, and judicial scrutiny, also limit the broad powers of immigration detention. The following sections discuss the relevant provisions and demonstrate a failure to ensure adequate access to justice for stateless people. Owing to the lack of provisions relating to the detention of stateless persons, these sections draw on standards generally applicable to migrants and identify the particular issues that arise for stateless persons.

5.1 Legal framework on immigration detention

Generally, HO officials can authorize the immigration detention of migrants in the following situations: (1) to effect removal; (2) to establish a person's identity or grounds for a claim; or (3) where there is reason to believe that the person will not comply with the conditions of temporary admission or release.[144] Factors that must be taken into account when authorizing detention include the likelihood of the person being removed and the time frame involved; evidence of previous absconding and failure to comply with release conditions; previous breach of immigration laws; ties to the UK; expectation of the outcome of the substantive immigration case; whether the person is a minor or an 'adult at risk' (for example, a victim of trafficking/modern slavery, a transgender or intersex person, someone suffering from a physical or mental condition, including those who have undergone torture).[145] Significantly, statelessness is not listed among the factors to be considered despite its complex nature and negative consequences. Furthermore, the law does not require that a country of removal be identified prior to detention. Finally, there is a presumption in favour of detention in the case of foreigners who have committed criminal offences in order to protect the public interest and prevent absconding.[146]

[141] Katia Bianchini, 'The Case Law of the European Court of Human Rights Pertaining to Immigration Detention of Stateless Persons' (2019) 2 Asyl 17.

[142] Ian A Macdonald and Ronan Toal, *Macdonald's Immigration Law & Practice* (LexisNexis 2014) 1621.

[143] Immigration Act 1971 (as amended) sch 2 para 16; sch 3.

[144] HO, UK Visas and Immigration, 'Enforcement Instructions and Guidance' ch 55, para 55.1.1.

[145] HO, 'Adults at Risk in Immigration Detention. V5.0' (2019) 5–8.

[146] HO (n 144) ch 55, para 55.3.A; Equal Rights Trust (n 107) 115.

Once authorized, detention must be internally reviewed periodically: after 24 hours, 7 days, 14 days, and then every month, as well as each time there is a relevant change that may have an impact on the reasons for detention.[147] Unlike in criminal cases, detention is not subject to judicial scrutiny within a few hours of its authorization. Since the adoption of the Immigration Act 2016, there is automatic review by an immigration judge only after four months of detention, but persons with criminal convictions are excluded.[148] Detainees can apply for bail to the First Tier Immigration Tribunal if they have been in the UK for at least seven days. The grant of bail is discretionary and, in most cases, some conditions, such as having accommodation and sureties, must be met.[149]

One controversial issue is the absence of a statutory maximum time limit on administrative detention.[150] Some general limitations on and guidance about the length of immigration detention can be found in HO policy and the case law. According to the policy, immigration detention must be used 'sparingly' and for 'the shortest period necessary'.[151] In the seminal *Hardial Singh* case, the UK Supreme Court established the principle that the power to detain is limited to a reasonable duration and by circumstances consistent with its statutory purpose and reasonableness.[152] The Supreme Court confirmed this principle in *R (Lumba) v Secretary of State for the Home Department*,[153] and it further established that migrants may be detained only for the purpose of removal for a reasonable period to achieve that purpose, and if the HO is acting with due diligence and expedition in order to remove them.[154] Since these judgments, there have been several High Court decisions ruling that immigration detention had become unlawful due to the HO's abuse of power.[155] However, a frequent question arising in cases of stateless people is what to do if persons ordered to leave the UK are refused readmission by the country of origin, or if the authorities of that country fail to reply to a request for documentation. The HO's response is detention. The concern that such persons will

147 HO (n 144) ch 55, para 55.8.

148 HL Deb 10 May 2016, vol 771, cols 1652–1673.

149 Refusal of bail cannot be appealed, but detainees may make a new application after 28 days. In addition, they can challenge the lawfulness of their detention in the High Court. Macdonald and Toal (n 142) 1708–10.

150 It should be noted that the UK opted out of the Return Directive, which imposes a maximum time limit of 18 months for immigration detention. Return Directive (n 13) para 15.

151 HO (n 144) ch 55, para 55.1.3.

152 Macdonald and Toal (n 142) 1676; *R v Governor of Durham Prison, ex p Hardial Singh* [1983] EWHC 1 (QB).

153 *R (Lumba) v SSHD* [2011] UKSC 12.

154 ibid.

155 See eg *R (Sino) v SSHD* [2011] EWHC 2249 (Admin); *Re Mahmod (Wasfi Suleman)* [1995] Imm AR 311; *R (A) v SSHD* [2007] EWCA Civ 804, para 45; *Lumba* (n 153); *R (Bashir) v SSHD* [2007] EWHC 3017 (Admin) [2007] All ER(D) 493 (Nov) para 20; May Bulman, 'Asylum Seekers Unlawfully Held in Removal Centres for Months despite Courts Ruling They Can Be Released, Lawyers Warn' *The Independent* (27 May 2018) <https://www.independent.co.uk/news/uk/home-news/asylum-seekers-held-removal-centres-home-office-emergency-housing-a8354731.html> accessed 8 March 2020.

abscond or represent a risk to the public if released is often used to justify the prolonged restriction of their liberty, although at some point their release is inevitable.

In light of the above, the main gaps in the legal framework that prevent access to justice for stateless people are the absence of provisions requiring the mandatory assessment of statelessness during the decision-making process relating to immigration detention or referral to the SDP for cases involving people who appear to be stateless (for instance, cases of disputed nationality; cases of people who belong to generally recognized stateless groups; people who originate from an area where there is no recognized State entity under international law); insufficient judicial control over immigration detention; and the absence of a time limit on immigration detention.

Moreover, barriers to accessing justice arise at the implementation stage. These barriers can be grouped into three types: (1) unjust outcomes and unfair bail mechanisms; (2) insufficient legal aid and physical barriers; and (3) unresponsiveness to needs by failing to detect statelessness and prolonged detention. In particular, the sections below explain how the application of general legal provisions does not meet the legal needs of the stateless, since the prospect of removal is too easily assumed to exist and individual facts are not adequately examined. As a result, persons whose citizenship status is complex may be unfairly detained for disproportionately long periods of time, or repeatedly.[156] Judicial control of administrative decisions through bail mechanisms emerges as insufficient due to the conditions normally imposed for release, which stateless persons are unable to meet.[157] Limited legal aid funding for stateless detainees and the remoteness of immigration detention centres impact on efforts to retain counsel and the ability to enjoy certain rights.[158] Finally, the fragmentation of the legal provisions between the area dealing with detention and the determination of statelessness is a major issue that impacts on the possibility of reaching a substantive solution to the lack of a nationality.

5.2 Unjust outcomes and unfair bail mechanisms

All the research participants in the study were concerned that immigration detention was being authorized based on the arbitrary assessment of certain key factors, which affected the fairness of the decision-making process.[159] Even though removal of eight of the 11 interviewees was impossible, and they cooperated to return to their countries of origin (that is, they took part in interviews with the embassies and signed the necessary documents to return), immigration officials approved and upheld their detention, arguing the need to make further attempts with the countries of origin to obtain documents. According to some research participants, the monthly 'progress reports' did not actually report progress but rather repeated the same things.[160] As statelessness was the cause of their 'non-removability' and precisely that factor was not being considered, detention became particularly long and unjustified. In addition, the failed attempts to

156 Bianchini (n 8) 24–26.

157 De Bruycker and Tsourdi (n 12) 5.

158 See section 5.3 below.

159 This is supported by previous studies. See eg Equal Rights Trust (n 107) 116.

160 Stateless Person 1 (n 117); Stateless Person 7 (n 110).

remove them affected their credibility. Whereas the inability to return does not automatically mean that a person is stateless, immigration officials do not usually question nationality laws and their application. This results in a failure to understand a situation that is typical for many stateless persons. The underlying causes of non-removability should receive greater attention, as they can flag the condition of statelessness.

Whereas the 'hidden nature' of statelessness and lack of awareness on the part of immigration officials can explain the failure to identify the protection needs of stateless persons, some of the interviewees' vulnerabilities, including as victims of torture or as people suffering post-traumatic stress disorder, were not taken into account, despite evidence being provided to support such claims and the obligation to assess them.[161] In these cases, the use of immigration detention clearly falls short of the legal standards requiring it to serve a legitimate purpose, to be proportionate, and necessary. Thus, immigration detention becomes arbitrary – unlawful, inappropriate, unjust, and unpredictable.[162]

The testimonies collected are in line with studies that uncover the release of one-third – up to nearly half – of all detainees due to the impossibility of removal.[163] Whereas previous research does not distinguish between stateless persons and irregular migrants, it corroborates the insight that many removals cannot be carried out for a variety of reasons and circumstances, and that the use of immigration detention is marked by a severe lack of attention directed towards those individual reasons and circumstances.[164]

Regarding the effectiveness and fairness of review mechanisms, the research participants stressed their lack of confidence in bail hearings as an opportunity to exercise their rights. The majority questioned their ability to satisfy the legal requirements for their release because these requirements did not respond to their particular circumstances.[165] Solicitors underlined the difficulty of meeting the accommodation

[161] Interview with Stateless Person 5 (n 110); Stateless Person 1 (n 117); Stateless Person 6 (n 116); Stateless Person 7 (n 110); Stateless Person 8 (n 110); Stateless Person 9 (Plymouth, 13 July 2016); Stateless Person 10 (Huddersfield, 13 May 2016); Stateless Person 11 (n 40).

[162] UNHCR, 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternative to Detention' (2012) Guideline 4, para 18; UNHCR, 'Stateless Persons in Immigration Detention: A Tool for Their Identification and Enhanced Protection' (2017) 10; ENS (n 15) 8. Although several human rights law provisions that deal with deprivation of liberty use the term 'arbitrariness', there is no clear definition of what it means. Different supervisory bodies provide different definitions. Stephen Phillips, 'Establishing Arbitrariness' (2013) 44 Forced Migration Review 9.

[163] A Joint Enquiry by the All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration (All Party Group), 'The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom' (House of Commons 2015) 17; Her Majesty's (HM) Inspectorate of Prisons and Independent Chief Inspector of Borders and Immigration, 'The Effectiveness and Impact of Immigration Detention Casework' (2012) 8; Shaw (n 133) 183–84.

[164] HM Inspectorate of Prisons and Independent Chief Inspector of Borders and Immigration, *Annual Report 2018–19* (HC 2469, House of Commons, 9 July 2019) 65; William, 'My Story: Indefinite Detention in the UK' (2013) 44 Forced Migration Review 27.

[165] Stateless Person 1 (n 117); Stateless Person 4 (Leeds, 22 May 2016); Stateless Person 5 (n 110); Stateless Person 7 (n 110); Stateless Person 8 (n 110); Stateless Person 9 (n 161); Stateless Person 11 (n 40).

requirement, especially for destitute individuals with no ties in the UK. While it is possible to apply for basic government accommodation, the process can be particularly time-consuming for migrants with a criminal record, as permission from probation officers and police checks are also required.[166] Addressing this problem, Singer argues that the uncertainty characterizing bail decisions and the difficulties that individuals face when asked to support applications for their release make the system unclear and arbitrary.[167] She also suggests that distrust of the judicial system is so pervasive that many detainees see it as part of the same apparatus as the HO.[168] In line with her findings, participants in the present study felt that many immigration officials deliberately, or through negligence, undermined their immigration cases.

Finally, the interviewees emphasized the uselessness of bail hearings as a mechanism to check the length of detention.[169] Their statements mirror a former study on immigration detention of irregular migrants according to which '[o]bservation of 50 bail hearings where the applicant had been held in detention for three or more months, and for which the observers were able to record this item of information, the judge mentioned length of detention in only ten of them'.[170] A larger sample of 220 bail hearings showed some evidence of good practice.[171] However, widespread variations in judicial decisions continue to be reported, which is of concern given that the role of immigration judges is to ensure a fair hearing.[172] Further research is warranted to explore the role of statelessness in bail hearings and the awareness of the problem among immigration judges. Future studies may find that immigration judges lack sufficient knowledge about the problem of statelessness and find themselves out of their depth when dealing with these cases. In addition, the ineffectiveness of the bail mechanism is exacerbated by insufficient legal aid, as explained below.

5.3 Inability to vindicate rights due to insufficient legal aid and physical barriers

For stateless persons, the availability of legal aid will determine whether they have access to legal representation. With the justification of austerity in the past few years, legal aid in the context of immigration law has been limited to bail and asylum applications. For matters such as statelessness and deportation, legal aid is difficult, if not impossible, to obtain in England and Wales, despite their crucial impact on the legal status of the applicant as much as on the decision to detain.[173] At the administrative stage, legal aid to prepare statelessness

166 Interview with Clare Miller, Solicitor (Oxford, 29 April 2016).

167 Singer (n 19) 5; Brad K Blitz and Miguel Otero-Iglesias, 'Stateless by Any Other Name: Refused Asylum-Seekers in the United Kingdom' (2011) 37 Journal of Ethnic and Migration Studies 657, 669. The same problems have been discussed in the Canadian context. See Silverman and Molnar (n 64) 122–23.

168 Singer (n 19) 23.

169 Stateless Person 1 (n 117); Stateless Person 6 (n 116); Stateless Person 7 (n 110); Stateless Person 8 (n 110).

170 Close Campsfield Campaign, 'Still a Travesty. Justice in Immigration Bail Hearings: Second Report from the Bail Observation Project' (Windrush Press 2013) 46; Bianchini (n 8) 22.

171 Close Campsfield Campaign (n 170) 46.

172 ibid.

173 There is legal aid for statelessness applications in Northern Ireland and Scotland. Interview with Alison Harvey, Director, Immigration Lawyers Practitioners Association (London, 20 March 2016).

applications may be accessible under 'exceptional funding' for those cases that would not normally be paid for by the Legal Aid Agency. According to the HRA, the argument for funding a statelessness claim is based on a person's inability to exercise his or her right to private life (article 8)[174] as lack of counsel would amount to denial of access to justice in breach of article 6, stressing the unlawfulness of measures taken by a public authority which are 'incompatible with a Convention right'.[175] For judicial review, free legal assistance is available to challenge the unlawful denial of leave to remain as a stateless person.

In addition to the limitations discussed above, another major problem is the limited accessibility to 'qualified' solicitors who are willing to undertake immigration detention work and have the necessary experience to properly navigate the complexity of statelessness cases.[176] Previous investigations point out that up to a quarter of detainees never obtain legal representation.[177] Furthermore, there is concern about the quality of the legal advice provided.[178] In this regard, most interviewees said they had received legal advice at some point, but mentioned a severe lack of accuracy and thoroughness in the presentation of important facts concerning their cases.[179] Regarding the possibility of representing stateless applicants under exceptional funding, some solicitors admitted their stretched capacity or unwillingness to engage in such cases – the significant work and effort involved do not pay off if funding is refused.[180]

Additionally, there are physical obstacles that prevent the preparation of a case and the retention of counsel for detainees. Due to the geographical segregation of immigration detention centres, legal aid lawyers must travel long distances to meet with the client, and this is often unmanageable.[181] Even worse, foreign nationals who have finished serving a criminal sentence can be detained in prisons under immigration powers while attempts are made to carry out their deportation.[182] Foreign nationals in prisons are subject to Prison Rules which forbid the use of mobile phones and internet and the

174 HRA (n 17) art 8.

175 ibid art 6; Bianchini (n 8) 21–22.

176 Miller (n 166); Interview with Pierre Makhlouf, Legal Director, Bail for Immigration Detainees (London, 24 February 2016).

177 'Up to One Quarter of Detainees Have Never Had Legal Representation' (*Bail for Immigration Detainees*, 15 March 2016) <https://www.biduk.org/posts/83> accessed 23 November 2019.

178 Bianchini (n 8) 22.

179 Stateless Person 5 (n 110); Stateless Person 6 (n 116); Stateless Person 7 (n 110); Stateless Person 8 (n 110); Stateless Person 9 (n 161); Stateless Person 11 (n 40).

180 Solicitor 1 (n 120); Miller (n 166).

181 There are currently nine immigration removal centres in the UK. GOV.UK, 'Find an Immigration Removal Centre' <https://www.gov.uk/immigration-removal-centre> accessed 8 March 2020.

182 Deportation is a statutory power of the Secretary of State. People who are not UK citizens are liable to deportation if the Secretary of State deems deportation to be conducive to the public good. The UK Borders Act 2007 provides for the automatic deportation of foreign criminals. The Secretary of State *must* make a deportation order unless specific exceptions apply (eg, where deportation would contravene the UK's obligations under the Refugee Convention and/or human rights conventions). Terry McGuinness, 'Deportation of Foreign National Offenders' (Commons Briefing Papers CBP-8062, House of Commons Library, 1 August 2017) 5–7 <https://commonslibrary.parliament.uk/research-briefings/cbp-8062/> accessed 10 March 2020.

receipt of incoming calls, and complicate access for legal visitors.[183] Thus, opportunities for taking instructions and evidence, and for bail hearing preparation are further restricted.[184]

The consequences of leaving stateless persons without representation are very serious – as an economically and socially disadvantaged group, they are structurally excluded and denied the possibility of exercising their rights.[185] While legal needs may never be fully met, the level of restrictions currently in place raises serious concerns about due process, the rule of law, and the ability of marginalized persons and communities to access justice.

5.4 Unresponsiveness to needs by failing to detect statelessness resulting in prolonged detention

The subjective barriers that stateless persons face are fundamentally different from those faced by other non-citizens, owing to the delays in attempts to prove that they are not nationals of any State.[186] Nevertheless, statelessness is not normally detected before authorizing immigration detention or during its periodic reviews. There are no safeguards to prevent a stateless person being subjected to immigration detention multiple times; there is evidence that cycles of detention occur when authorities engage in new removal attempts. This is because stateless persons may previously have been released without a residence permit and thus left in a legal limbo.[187]

Moreover, the system lacks specific provisions to require or facilitate detainees' access to the SDP. All interviewees who had been detained reported their inability to gather documents and their difficulties in getting in touch with their embassies. In addition, due to lack of resources, the HO had failed to schedule their interviews, contrary to its internal policy,[188] or to take them to the Statelessness Unit in Liverpool, which has competence to decide on statelessness cases, or to arrange for specialized immigration officials to visit them. The HO did not inform the applicants of the possibility of applying for stateless status in any of the cases under review; NGOs or their solicitors had told them. One solicitor explained that 'generally, the HO does not treat statelessness applications as applications for protection. Immigration officers have no duty to do anything when someone claims to be stateless, whereas in asylum cases, procedures are started when someone claims fear of persecution'.[189] Consequently, some cases of

183 Bianchini (n 8) 30; Detention Action, 'The State of Detention: Immigration Detention in the UK in 2014' (2014) 9; Bwalya Kankulu, 'The Use of Detention and Alternatives to Detention in the Context of Immigration Policies. National Contribution from the United Kingdom' (HO 2014) 20. By contrast, foreign nationals in immigration detention centres are subject to the Detention Centre Rules which recognize many rights that are denied to those in prisons.

184 Silverman and Molnar (n 64) 124.

185 Magdalena Sepúlveda Carmona and Kate Donald, 'Access to Justice for Persons Living in Poverty: A Human Rights Approach' (Ministry for Foreign Affairs of Finland 2014) 33.

186 Katherine Perks and Jerlath Clifford, 'The Legal Limbo of Detention' (2009) 32 Forced Migration Review 42–43.

187 ENS (n 15) 31.

188 This policy is explained in section 4.1 above.

189 Solicitor 3 (n 126).

statelessness can remain unidentified, or become apparent only at a later stage, after the initial decision to detain has been made. As earlier studies have shown, stateless persons are not protected if the nexus between the identification of statelessness and the right to liberty and security of the person is not recognized.[190]

The risk of lengthy detention is greater when the authorities engage in futile efforts to obtain proof of nationality and travel documents to carry out the removal of stateless persons.[191] In these circumstances, the failure to recognize the specific challenges related to statelessness, including the unavailability of consular protection (no State is empowered to intervene on behalf of an individual lacking a nationality),[192] often results in undue penalization of the individual.[193] According to lawyers and advocates, particularly problematic is the HO's perception of non-cooperation by the individual during the process of removal when there is a lack of documentation, [194] and when attempts to establish a person's nationality with the help of the embassies are unsuccessful.[195]

Against this backdrop, the research participants were detained for considerable periods while the HO tried to obtain documents, even after their claimed country of origin had either denied or refused to confirm that they were nationals and refused to admit them. Two persons eventually spent more time in immigration detention than in criminal detention (one was detained under immigration powers for more than four years after completing a sentence of one year for having worked with a false identity; the other was detained under immigration powers for more than two years after having served two years in gaol for cannabis smuggling).[196] It is significant that following applications for judicial review, four of the research participants eventually obtained damages for unlawful immigration detention due to its unreasonable length.[197]

Therefore, it is possible to conclude that detention and determination of statelessness are not sufficiently coordinated or integrated with one another,[198] and fail to respond to the legal needs. For according to the principles of necessity and proportionality required to authorize immigration detention, stateless persons should not be detained pending their removal, as removal is impossible; at most, they could be required to comply with non-custodial measures.[199]

190 Equal Rights Trust (n 107) 266–67.

191 Bianchini (n 8); Foster and Lambert (n 129) 77–79, 81.

192 David Weissbrodt and Michael Divine, 'Unequal Access to Human Rights: The Categories of Noncitizenship' (2016) 19 Citizenship Studies 870, 873; Equal Rights Trust (n 107) xxv, 5.

193 Release may be affected by the non-cooperation of the country of origin, for instance by refusing to identify or readmit a person; Equal Rights Trust (n 107) 138; Gyulai 2014 (n 6) 116, 139.

194 Gyulai 2014 (n 6) 116, 139, 381.

195 Makhlouf (n 176); Solicitor 1 (n 120); Interview with Clara della Croce, Associate Lecturer, Oxford Brookes University (Oxford, 4 March 2016).

196 Stateless Person 5 (n 110); Stateless Person 9 (n 161).

197 Stateless Person 1 (n 117); Stateless Person 5 (n 110); Stateless Person 7 (n 110); Stateless Person 8 (n 110).

198 Solicitor 2 (n 119).

199 Equal Rights Trust (n 107) xxv; Equal Rights Trust, *Guidelines to Protect Stateless Persons from Arbitrary Detention* (2012) 11.

6. CONCLUSION

Stateless persons in the UK continue to face difficulties in accessing procedural and substantive justice in the SDP and in the context of immigration detention. On one hand, this is due to legal gaps and, on the other, to objective, subjective, and physical barriers. The small sample size of this study uncovered common challenges and advocates for further exploration of the close connection between these two areas. In particular, the article demonstrated that the obstacles preventing access to justice for stateless persons in the SDP and immigration detention spheres are interrelated, self-reinforcing, and predisposed to snowballing.[200]

In line with earlier research,[201] this study highlighted shortcomings in the SDP framework, especially with respect to detained applicants and the strict prerequisites and procedural formalities that have to be met.[202] The article also showed that, while there are problems of access to justice in immigration detention for all detainees, stateless people have to deal with additional challenges. Those challenges are linked to the lack of provisions that address their special circumstances.[203] Far worse, the physical, subjective, and objective barriers experienced by detained stateless persons complicate their prospects of accessing the appeals mechanism and counsel even further when they are in a remote location and have poor phone and internet access.[204] Problems caused by barriers affect the conduct of immigration interviews and the preparation of cases,[205] which, in turn, influence the decision-making process.[206] Furthermore, whereas legal aid covers the issue of the unlawfulness of detention, it does not fund the substantive immigration case, although it is the contested immigration status that justifies the power to detain.[207] The cumulative effect of these obstacles, along with the inability to navigate the immigration processes, excludes stateless persons from the comprehension and use of rules and decisions[208] and impacts on the persistence of their irregular situation. Eventually, these issues expose many stateless people to administrative detention without a defined time limit.[209]

200 Silverman and Molnar (n 64) 109.

201 Bianchini (n 8); Bianchini (n 5) 134–59; Equality and Human Rights Commission, 'Torture in the UK: Update Report. Submission to the UN Committee against Torture in response to the UK List of Issues' (May 2019).

202 See section 4.3 above; Bianchini (n 8) 20.

203 ibid 34–36.

204 Singer (n 19) 12–13.

205 McBride (n 73) 125.

206 'Ministry of Justice Publishes Long-Awaited Review into Legal Aid, Proposes No Significant Changes for Immigration' (*Electronic Immigration Network*, 11 February 2019) <https://www.ein.org.uk/news/ministry-justice-publishes-long-awaited-review-legal-aid-proposes-no-significant-changes> accessed 8 March 2020.

207 In other words, legal aid covers bail hearings, but not statelessness applications or deportation cases. Cases regarding a person's status (like stateless status) concern their 'substantive case'. Sheona York, 'The End of Legal Aid in Immigration: A Barrier to Access to Justice for Migrants and a Decline in the Rule of Law' (2013) 27 Journal of Immigration, Asylum and Nationality Law 106, 108. See section 5.3 above.

208 Singer (n 19) 12.

209 Bianchini (n 8) 23.

In sum, this article illustrated the nexus between unresolved cases of statelessness (despite the existing SDP) and immigration detention, and vice versa. It also demonstrated that access to justice for stateless persons is still highly restricted and that there is a pressing need to tackle their legal problems. It reaffirms an important lesson: addressing the lack of access requires a holistic approach, whereby not only black letter law, but also the special problems and needs of the people concerned must be taken into consideration.[210] If improved to tackle the hurdles connected to the absence of a nationality discussed above, the SDP may then become a tool to potentially prevent unlawful and arbitrary restrictions of liberty.

[210] Macdonald (n 57) 24–25.