Feasibility study on a non-binding legal instrument regarding stateless children's access to nationality

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Feasibility study on a non-binding legal instrument regarding stateless children's access to nationality

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Council of Europe

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Étude de faisabilité sur un instrument juridique non contraignant concernant l'accès des enfants apatrides à la nationalité

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Contents

Introduction

1. As a follow-up to the international conference on "Statelessness and the right to a nationality in Europe: progress, challenges, and opportunities", co-organised with the Office of the United Nations High Commissioner for Refugees (UNHCR) in 2021, and the updated Analysis of current practices and challenges regarding the avoidance and reduction of statelessness in Europe, the European Committee on Legal Co-operation (CDCJ) decided, at its 97th plenary meeting (1-3 December 2021), to focus as a priority on the statelessness of children and their access to nationality and to develop guidance on child sensitive procedures in administrative and migration law matters for children who are stateless or at risk of being stateless as well as guidance on the establishment of nationality for children.[1]

2. The CDCJ agreed, at is 101st Plenary meeting (15-17 November 2023),[2] to give new terms of reference to its Limited working group on migration (CDCJ-MIG) for 2024-2026 to deal specifically with the statelessness of children and their access to nationality.[3] These activities were to contribute to the Council of Europe Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021-2025) and its Strategy for the Rights of the Child (2022-2027).

3. The 1st meeting of the CDCJ-MIG on the statelessness of children and their access to nationality took place online on 30-31 May 2024. During that meeting, a hearing of stateless advocates having experienced statelessness in their childhood was held in order to get a good overview on the types of problems encountered by stateless children to get their statelessness recognised and get access to a nationality. Furthermore, the identification of key themes and challenges regarding the statelessness of children and their access to nationality were further explored. As a result, the CDCJ-MIG prepared a questionnaire designed to obtain information from member states on procedures governing statelessness and acquisition of nationality in respect of children. In June 2024, the questionnaire was circulated by CDCJ delegations to the competent authorities of their countries.[4] In total, 27 states replied to the questionnaire.[5]

1. See document CDCJ(2021)34.
2. See document CDCJ(2023)32.
3. See terms of refence of the CDCJ-MIG, document CDCJ(2023)22.
4. See document CDCJ(2024)06.
5. See document CDCJ-MIG(2024)06.

4. This feasibility study is built around the issues related to the statelessness and access of nationality of children that had been identified by the CDCJ-MIG as the most relevant and served as basis for the questionnaire sent to the competent national authorities: preventing the statelessness of children; child-friendly procedures for determining nationality or statelessness: legal aid, representation, access to information and justice for children; age assessment; and awareness-raising measures and training of relevant actors on statelessness and access to nationality for children. In respect of most of these issues, a short description of existing international standards (conventions, soft law, and international case law) is provided. This is followed by a summary of the rules and practice existing at the national level as reflected in answers of states to the questionnaire. Where available, this is supplemented by information from other sources. The study then goes on to examine what appropriate follow-up could be given in terms of instruments to address the difficulties faced by stateless children in procedures connected with access to nationality.

Chapter 1

Issues at stake: international standards and stocktaking of national situations

A. Preventing statelessness among children

1. International standards

5. The 1961 United Nations Convention on the reduction of statelessness gives children who would otherwise be stateless the right to acquire the nationality of their country of birth through one of the following means. First, the state may grant its nationality to otherwise stateless children born on its territory automatically by operation of law (*ex lege*). The second alternative is that the state may later grant nationality upon application to otherwise stateless persons born on their territory. The grant of nationality on application may, according to Article 1(2) of the 1961 Convention, be subject to one or more of four conditions. Article 1 of the 1961 Convention also allows contracting states to provide for the automatic grant of nationality to otherwise stateless children born in their territory subsequently, at an age determined by domestic law.

6. A contracting state may apply a combination of these alternatives for acquisition of its nationality by providing different modes of acquisition based on the level of attachment of the individual to that state. For example, a contracting state might provide for automatic acquisition of its nationality by otherwise stateless children born in their territory whose parents are permanent or lawful residents in the country, whereas it might require an application procedure for those whose parents are not lawful residents. Any distinction in treatment of different groups of individuals, however, cannot be based on discriminatory grounds and must be reasonable and proportionate.[6]

6. See UNHCR Guidelines on statelessness No. 4 – Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention, para. 33.

7. Where contracting states opt to grant nationality upon application, it is permissible for them to do so subject to the fulfilment of certain conditions. Permissible conditions are listed exhaustively in Article 1(2) of the 1961 Convention and include: a fixed period for lodging an application immediately following the age of majority (Article 1(2)(a)); habitual residence in the contracting state for a fixed period, not to exceed five years immediately preceding an application nor ten years in all (Article 1(2)(b)); restrictions on criminal history (Article 1(2)(c)); and the condition that an individual has always been stateless (Article 1(2)(d)).

8. Providing for a discretionary naturalisation procedure for otherwise stateless children is not permissible under the 1961 Convention. A state may choose not to apply any of the permitted conditions and simply grant nationality upon submission of an application.

9. Contracting states that opt to grant nationality upon application pursuant to Article 1(1)(b) of the 1961 Convention, should accept such applications from children who would otherwise be born stateless in their territory as soon as possible after their birth and during childhood. However, where contracting states set deadlines to receive applications from otherwise stateless individuals born in their territory at a later time, they must accept applications lodged at a time beginning not later than the age of 18 and ending not earlier than the age of 21 in accordance with Article 1(2)(a) of the 1961 Convention. These provisions ensure that otherwise stateless individuals born in the territory of a contracting state have a window of at least three years after majority to lodge their application.

10. The condition of a period of "habitual residence" on the territory of the country of birth in order to acquire that country's nationality is not to exceed five years immediately preceding an application nor ten years in total. "Habitual residence" should be understood as stable, factual residence and does not imply a legal or formal qualification. The 1961 Convention does not allow contracting states to make an application for the acquisition of nationality of otherwise stateless individuals conditional on a *lawful* residence.[7] In this respect, the 1961 Convention differs from Article 6(2) of the Council of Europe European Convention on Nationality (hereafter, ECN) (ETS No. 166), which provides that children born on the territory of a state party who do not acquire another nationality at birth should acquire the nationality of the country of

7. See UNHCR Guidelines on statelessness No. 4 – Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reductions of Statelessness (hereafter, UNHCR Guidelines on statelessness No. 4), paras. 40-43.

birth either automatically at birth or later upon application, which may be subject to the *lawful* and habitual residence on the territory for a period not longer than five years immediately preceding the application.

11. Furthermore, Principle 2 of Recommendation CM/Rec (2009)13 of the Committee of Ministers on the nationality of children allows to require a lawful residence by providing "*that children born on their territory who otherwise would be stateless acquire their nationality subject to no other condition than the lawful and habitual residence of a parent*".

12. Article 2 of the 1961 Convention and Article 6 (1)(b) of the ECN both provide that a foundling found on the territory of a state should acquire the nationality of that state. Children found abandoned on the territory of a state must be treated as foundlings and accordingly acquire the nationality of the country where found.[8] Article 2 of the 1961 Convention does not define an age at which a child can be considered a foundling. The UNHCR Guidelines on statelessness No. 4 – Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness underscore that at a minimum, the safeguard for contracting states to grant nationality to foundlings should apply to all young children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth.[9] If a state provides for an age limit for foundlings to acquire nationality, the age of the child at the date the child was found is decisive and not the date when a child came to the attention of the authorities[10]. Nationality acquired by foundlings pursuant to Article 2 of the 1961 Convention and Article 6 ECN should only be lost if it is proven that the child concerned possesses another state's nationality.[11]

13. A child born in the territory of a contracting state without having a parent, who is legally recognised as such (e.g. because the child is born out of wedlock and the woman who gave birth to the child is legally not recognised

8. See also Principle 8 of Recommendation CM/Rec(2009)13 of the Committee of Ministers on the nationality of children; Mai Kaneko-Iwase, Nationality of Foundlings, Avoiding Statelessness Among Children of Unknown Parents Under International Nationality Law, Springer 2021.
9. See UNHCR Guidelines on statelessness No. 4, para. 58.
10. Ibid, para. 60.
11. Compare with Article 7(1)(f) ECN: if later the child's parents or the place of birth are discovered, and the child derives a citizenship from (one of) these parents or acquired a citizenship because of his place of birth, the citizenship acquired because of the foundling provision may be lost. However, according to Article 7(3) such discovery may never cause statelessness.

as the mother), should also be treated as a foundling and should immediately acquire the nationality of the state of birth.[12]

14. It is also relevant to point to a specific rule for the avoidance of statelessness connected to the acquisition of the nationality of a parent (*ius sanguinis)*. A child has the right to acquire the nationality of a parent, but states may make exceptions for children born abroad and provide for a special procedure for children born out of wedlock. However, if the child would otherwise be stateless, the child must always automatically acquire the nationality of the parent including in case of birth abroad.[13] Moreover, a state may never make a distinction based on the maternal or paternal parentage.[14] Therefore, the acquisition of nationality through the father (*ius sanguinis a patre*) needs to occur under the same conditions as the acquisition of nationality through the mother (*ius sanguinis a matre*).[15] Moreover, a state may never regulate any ground for acquisition of nationality in a way that would result in ethnic, racial, or religious discrimination.[16]

15. A state may provide that a child of a national born abroad only acquires the nationality of this parent if (a) both parents are nationals; (b) both parents lodge a joint declaration; or (c) one parent lodges a declaration. A state may also differentiate between the first, second and subsequent generations born abroad.

16. A parent is a person who acquired this status under the law of the state involved or under foreign law but recognised in the state involved. It does not matter whether the legal status of a parent is based on genetic truth. A state

12. See UNHCR Guidelines on statelessness No. 4, para. 61. This is, for example, the case with the so-called "delivery under X" ("accouchement sous X") in France. French law allows a woman who gives birth to a child out of wedlock to ask not to be mentioned as the mother in the birth certificate of the child (Article 326 French Code civil). Consequently, the child will not have a family relationship with that woman. Such children are therefore legally in a similar vulnerable position as foundlings and should enjoy the benefit of the statelessness avoiding rule of Article 2. Contracting states should not be able to subject such children to the application procedure of Article 1(1) and article 1(2). The same applies for legal systems which still require, that a mother must recognise her child born out of wedlock to establish a family relationship. The ECtHR concluded on 13 June 1979 in the case of *Marckx v. Belgium* (C-6833/74) that such requirement of recognition violates Article 8 of the European Convention of Human Rights. As a consequence of that decision, this requirement was abolished in the member states of the Council of Europe, but the construction still exists in several other countries.
13. See Article 6(1)(a) ECN and Principle 1 of Recommendation CM/Rec (2009)13.
14. See Article 9(2) of the Convention on the Elimination of All Forms of Discrimination against Women 1979); see also *Genovese v. Malta,* No. 53124/09, § 46, 11 October 2011.
15. See Principle 11 of Recommendation CM/Rec (2009)13.
16. See Article 5 ECN and Article 9 of the 1961 Convention.

should not make the acquisition of nationality by parentage conditional on evidence of the biological truth if this evidence was not a condition for the establishment of the parentage yet.[17]

17. Furthermore, if the parentage established abroad between a child born by a surrogate mother with an intending parent, i.e. the person who commissions the pregnancy, is recognised by the state of nationality of this parent, the child must have access to the nationality of the intending parent under the same conditions as a child born from this parent.[18] Therefore, it is not the "blood" (*sanguis*) of a child that matters for the acquisition of nationality, but the legal tie of parentage (*filiatio*). For that reason, it would be better to use the expression *ius filiationis* (right by filiation) instead of *ius sanguinis* (right by blood).

18. In order to determine whether rules concerning the avoidance of statelessness are applicable, the authorities often need detailed information, in particular on the acquisition or non-acquisition of a certain foreign nationality. Lack of information could, in some circumstances, result in the statelessness of the child concerned. Of course, states have to observe data protection rules, but they should not prevent the sharing of relevant data with another state if the best interests of the child require it. Principle 6 of Recommendation CM/Rec (2009)13 therefore calls on states to *"co-operate closely on issues of statelessness of children, including exchanging information on nationality legislation and public policies, as well as on nationality details in individual cases, subject to applicable laws on personal data protection".*

2. Rules and practices in member states[19]

19. Most states provide that a child born on their territory who would otherwise be stateless automatically acquires the nationality of the country of birth.[20] This does not preclude verifying that this ground for the attribution of nationality does apply in the case at hand.

17. See Principle 11 of Recommendation CM/Rec (2009)13 and its explanatory memorandum, para. 28.
18. See Principle 11 of Recommendation CM/Rec (2009)13 and its Explanatory Memorandum, para. 32; see also *Labassee v. France*, No. 65941/11, § 79 and *Mennesson v. France*, No. 65192/11, § 100, 26 June 2014.
19. This description is based on the answers to the questionnaire sent to the member states in June 2024 and supplemented by data of the Globalcit database.
20. Andorra, Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Finland, France, Greece, Ireland, Italy, Luxembourg, Portugal, Serbia, Slovak Republic, Spain and Türkiye.

20. However, a number of states limit this ground for acquisition to cases where the parent(s) is/are themselves stateless.[21] Another limitation is to require that at least one parent has lawful residence in the state involved.[22]

21. In several states, stateless children born on their territory are entitled to acquire the nationality of their country subject to a certain period of habitual or even lawful residence.[23] The way this acquisition takes place can differ from one state to another: the right to register as a national to acquire nationality by declaration of option or acquisition through entitlement to naturalisation.

22. In three states, a stateless child can only acquire the nationality of the country of birth through discretionary naturalisation, although the conditions for this naturalisation are more favourable than in other circumstances.[24] Three other states do not provide a more favourable treatment for acquiring nationality to stateless children born on their territory.[25]

23. Nearly all states provide for the attribution of their nationality to foundlings discovered on their territory. Only in one state is this rule lacking.[26] At the same time, state practice reveals a broad range of ages within which this provision applies. Several states limit the granting of nationality to foundlings who are very young (in six states newborns[27]; in one state under six months[28], and in one state under three years[29]). Several other states do not specify the scope of application of their rules in favour of foundlings, but also apply this ground for the attribution of nationality to older children, including in some cases up to the age of majority.

24. An unconditional *ius soli* provision does not exist in any member states. However, five states provide for the attribution of nationality to a child of foreigners born on their territory subject to a specific residence condition in respect of a parent.[30] Two other states provide – also subject to a specific residence condition – that a person born on their territory can acquire the nationality of their country upon application.[31]

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21. Azerbaijan, Croatia, Czechia, Georgia, Hungary, Latvia, Lithuania, North Macedonia, Poland and Slovenia.
22. Ukraine.
23. Austria, Estonia, Germany, Iceland, Liechtenstein, Malta, Netherlands, Sweden and United Kingdom.
24. Denmark, Norway and Switzerland.
25. Albania, Cyprus and Romania.
26. Cyprus.
27. Belgium, Ireland, Portugal, Ukraine and United Kingdom.
28. Austria.
29. Czechia.
30. Belgium, Germany, Ireland, Portugal and United Kingdom.
31. Greece and Republic of Moldova.

25. Three states have an unconditional double *ius soli* provision: the nationality of the country is attributed to the child of foreign parents if at least one of the parents was also born in the country.[32] Four other states have a similar rule but subject to specific residence requirement in respect of the (grand)parent.[33]

26. All states provide for the attribution or recognition of the nationality of the country if a child of a national is born there. However, three countries apply a wedlock restriction: the provision does not apply only if the unmarried father is a national and the mother a foreigner.[34] Two other states apply a dual nationality restriction: the provision does not apply automatically also if another nationality is attributed to the child.[35]

27. Most states provide that the child of a national born abroad acquires the nationality of the parent. However, some exceptions exist. In four states, a generational transmission restriction exists for children born abroad: the nationality of the parent is not automatically attributed or recognised if the parent was also born abroad (except if this would leave the child stateless).[36] However, according to the legislation of some of these states, the nationality of the parent may be acquired by registration. As regards the attribution or recognition of the nationality of the parent for the child born abroad, six other states have the condition of registration of the child at a consulate, upon application for the nationality of the parent, except in cases where the child would otherwise be stateless.[37]

28. A rule exists in one state where nationality of this country is not attributed to the child of a national of this country if the child was born abroad in a designated area where terrorist groups are active (e.g. in Iraq and Syria).[38]

3. The activation of rules preventing statelessness, including assistance to acquire the nationality of a foreign country

29. Rules and practices to guarantee that the nationality of a state is attributed to a child because they would otherwise be stateless are essential. The activation of rules preventing statelessness makes it necessary to answer a preliminary question: has the child acquired another nationality? Answering that question requires not only knowledge of facts but also an in-depth knowledge of foreign nationality law and practice.

32. France, Luxembourg and Spain.
33. Belgium, Greece, Netherlands and Portugal.
34. Finland, Malta and Türkiye.
35. Armenia and North Macedonia.
36. Belgium, Germany, Ireland, Malta and United Kingdom.
37. Armenia, Bosnia and Herzegovina, Croatia, Portugal, North Macedonia and Montenegro.
38. Denmark.

30. Co-operation between states is key in this respect. For that reason, Principle 6 of the Recommendation CM/Rec (2009)13 underlines the importance of co-operation. This is also recognised in Article 23 ECN concerning information on relevant legislation and developments. Co-operation should also be used for case specific issues, in particular on the possible acquisition or non-acquisition of nationality. Lack of information can lead to situations of statelessness for the child concerned.[39]

31. Co-operation is essential if a stateless child can acquire the nationality of the state of a parent. Principle 3 of Recommendation CM/Rec (2009)13 calls on the state of birth or residence of a stateless child to provide them *"with any necessary assistance to exercise that right"*.

32. However, Principle 4 of Recommendation CM/Rec (2009)13 deals with the possibility that the parent of a child may have very good reasons not to use the right to acquire a certain foreign nationality. If (the parents of) a child cannot *"reasonably be expected to acquire that nationality"*, rules for the avoidance of statelessness of the country of birth should apply, for instance, if the parents left the state of their nationality to become refugees.

33. It transpires from the answers given by states to the questionnaire that co-operation between states is often problematic. Co-operation agreements between states do not appear to exist. Requests for general information or in individual cases are often not answered.

B. Child-friendly procedures for determining nationality or statelessness: legal aid, representation, access to information and justice for children

1. International standards

34. As already mentioned above, the activation of rules and practice for the avoidance of statelessness requires to respond to the preliminary question of whether a person who could be protected by such rules might already be a national of another state. In some instances, this question can be answered in the context of a procedure for determining whether a person is a national of the country of birth as a result of the protection of rules for the avoidance of statelessness or can acquire that nationality through a simplified procedure. However, the best way to organise a reliable and quick way to determine statelessness is to provide a dedicated statelessness determination procedure.

39. See also para. 18.

The UNHCR pointed out that providing a statelessness determination procedure is an implicit obligation for states parties to the 1954 United Nations Convention Relating to the Status of Stateless Persons and the aforementioned 1961 Convention, because the protective rules of these conventions can only operate if it is established that a person is stateless.[40]

35. It is very important to make a statelessness determination procedure or any other procedure easily accessible for children.[41] If necessary, a special guardian *ad litem* should be appointed to initiate such procedures and act as the child's legal representative during the process.

2. Rules and practices in member states[42]

36. At least 14 member states have a statelessness determination procedure.[43] There are also special procedures in two other states.[44] In some of these states specific attention is given to the determination of the statelessness of children. In one state, while there is no statelessness determination procedure, there is a legal position paper on assessment of statelessness as part of a person's identity, adopted in 2023.[45]

37. In almost all states, rules on the appointment of a special legal representative exist if a child does not have legally recognised parents or has entered the country as an unaccompanied minor. The appointment of a legal representative has to happen *ex officio*.

38. During the procedure, the guiding principle is the protection of the best interests of the child.[46] For example, one state described what this means as follows:

- fair treatment which meets the same standard as a child who is a national of the country would receive;
- the child's best interests is a primary consideration;

40. See UNHCR Handbook on the protection of stateless persons, para 57-107.
41. See also Principles 3-5 of Recommendation CM/Rec (2009)13.
42. This description is based on the answers to the questionnaire sent to the member states in June 2024 and supplemented by data from, inter alia, the statelessness index of the European Network on Statelessness (ENS).
43. Albania, Bulgaria, Czechia, France, Georgia, Hungary, Italy, Latvia, Republic of Moldova, Netherlands, Spain, Türkiye, Ukraine, and United Kingdom.
44. Belgium and Montenegro.
45. Sweden.
46. See the standards described in Recommendation CM/Rec (2019)11 of the Committee of Ministers to member States on Effective guardianship for unaccompanied and separated children in the context of migration.

- no discrimination of any kind takes place;
- timely processing of applications is ensured;
- identification of those who might be at risk from harm takes place.[47]

39. Information on statelessness and access to a nationality is available in almost all states on the website of the competent ministry or authority. However, a challenge may be for the persons concerned to know which ministry or authority is competent and how to access the website where relevant information can be found. The language in which the information is available may also be an issue for accessibility.

40. Other challenges for the determination of statelessness status can be mentioned:

- Getting complete answers on facts and law from foreign authorities (e.g. the state of origin of a child or their parent), resulting in a lack of proof;
- Restrictions on the exchange of information imposed by the General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR) for EU countries;
- Cases concerning children born abroad and not in the country of origin of a parent;
- Situations where a child of a foreign national stays stateless due to the inaction or ignorance of the parent;
- Lack of essential elements of the identity of a person, like the country of birth or the parentage;
- Questions of the burden of proof;
- Need to assist in the determination of statelessness by making enquiries with relevant (foreign) authorities, which children will not be able to undertake themselves.

41. On the issue of the burden of proof, interesting information is given by one state[48] where, while the burden of proof is shared. In most cases, the burden of proof lies primarily on the state authorities because they are competent to request information from the relevant national authorities as well as from those of other countries. Any doubts regarding citizenship are resolved in favour of the applicant. A similar approach also exists in another state.[49] If it is uncertain whether a child acquired a foreign nationality, the central registry office may conduct direct contacts with the relevant embassies/consulates so

47. United Kingdom.
48. Georgia.
49. Portugal.

that the burden of proof does not lie solely on the applicant. If after the expiry of a three-month period, no information on the acquisition of the nationality of the countries with which the person concerned has relevant links has been provided, it will be presumed that the person concerned has not acquired the nationality of any of these countries and the nationality of the country is granted.

C. Age assessment of unaccompanied children

1. International standards

42. The determination of the age of a person, in particular of a child, can be of paramount importance. This is particularly the case if an unaccompanied person without documents arrives on the territory of a state. In such cases, it is essential to determine whether this person is a minor. In other cases, age determination may also be necessary, for example, in order to decide whether or not this person can benefit from the protection of certain rules for the avoidance of statelessness, which include age limitations.

43. Age assessment is a procedure that is carried out in the case of justified doubts about the age of an unaccompanied child. Recommendation CM/Rec (2022)22 of the Committee of Ministers to member States on human rights principles and guidelines on age assessment in the context of migration provides guidance and emphasises that age assessment procedures should respect the dignity and best interests of the child. It provides clear principles in this area. It also underlines that states should have in place a clearly established process for age assessment which uses a multidisciplinary approach, grounded in evidence-based knowledge, methods and practice, and which is child-centred. It goes on to say that a medical examination for age assessment purposes should only be undertaken when reasonable doubts remain about the person's estimated age once the other measures of the multidisciplinary approach have been exhausted, with the person's informed consent and with due respect for the principles of proportionality and the best interests of the child.

44. Before the examination is done, a special guardian should be appointed to assist the person involved with deciding on giving his or her consent. It is important that the explanation of the age verification procedure is given in a language which the person concerned understands.

45. During age assessment procedures, the persons concerned have to be treated as a minor.[50] Moreover, the European Court of Human Rights (hereinafter,

50. See Recommendation CM/Rec (2022)22; see also the views adopted by the UN Committee on the Rights of the Child in A.M. v Switzerland).

ECtHR) identified in *Darboe and Camara v. Italy*[51] two main procedural safeguards that should be applied in age assessment procedures, first, the right to an appointment of a guardian or a representative, second, the right of the applicant to information in the framework of the age assessment procedure. The Court based these procedural safeguards on the principle of presumption of minority which shall be applied. Also, further procedural safeguards might be derived from the judgment, such as right to an informed consent with the medical examination, right to have the medical results be delivered to the applicant with an indication of the possible margin of error of the medical examination and to have a decision present which the applicant can appeal to challenge the results of the age assessment procedure. Furthermore, the age determination should take place as soon as possible.[52]

2. Rules and practices in member states

46. In some countries, a refusal to undergo an age assessment test without valid reasons can have as the consequence that the person is considered to be an adult.[53]

47. It should be stressed, that not all member states apply an age assessment procedure that follows the aforementioned international standards. In some states, age assessment is based on physical appearance and development.[54] At the same time, other states expressly forbid such methods.

48. One state[55] indicated that, according to ministerial guidance on assessing age guidance, immigration officers may only treat an individual as an adult where they have no credible and clear documentary evidence proving their age. There is a deliberately high threshold and, where there is doubt, an individual will be treated as a child pending further observation and consideration by a local authority, usually in the form of an holistic, social worker-led assessment which must adhere to principles that have been set out by the courts. It typically involves interviews between the individual and two appropriately qualified and experienced social workers. They should also consider any other information obtained, including the views of other individuals with a role in the young person's life. A young person will be given the opportunity to have an appropriate adult who provides assistance to the young person with understanding, support, helping communication and offering comfort.

51. *Darboe and Camara v. Italy*, No. 5797/17, § 128 and §§ 151-157, 21 July 2022.
52. *T.K. v. Greece*, No. 16112/20, §§ 23-24, 18 January 2024.
53. E.g. Lithuania, Poland, Slovenia and Sweden.
54. E.g. Montenegro.
55. United Kingdom.

Individuals will also have access to interpreters, if necessary, during the initial decision of age assessment.

49. In many states[56], individuals can challenge their age assessment through judicial review and have access to legal aid to support them through the process of legally disputing any decision on age.

D. Birth registration

1. International standards

50. Already in Recommendation CM/Rec (2009)13, the Committee of Ministers gave important guidance on birth registration as a basic requirement to ensure that a child can get access to nationality. According to Principle 23 of the recommendation, member states should *"register the birth of all children born on their territory, even if they are born to a foreign parent with an irregular immigration status or if the parents are unknown, in order to safeguard their right to a nationality. The registration of birth should be free of charge and be performed without delay, even if the period within which the birth should have been declared has already expired."*

51. The explanatory memorandum clarifies this principle: *"States should register the birth of every child born on their territory, even in cases of illegal presence of foreign or stateless parents or when the parents are unknown. States should not refuse the registration because of the foreign nationality of the child. The registration should be free of any charge and happen without delay if the period within which the birth of the child should take place in accordance with domestic legislation of the state concerned in all cases where a child is discovered on the territory of the state and no evidence exists that the child was born abroad. It should be stressed, that the term 'child' applies – as is the case in the ECN – to every person who has not yet reached the age of majority. The birth certificate can be subject to later adjustments in accordance with the law. This registration of birth is crucial for giving the child access to the rights guaranteed in the United Nations Convention on the Rights of the Child. The mere registration of birth does not necessarily mean that the state of birth must grant its nationality to such a child, but it is an essential step necessary to give the child access to the protection of a state with which a legal bond in terms of nationality exists."* (paragraph 57)

52. Where Recommendation CM/Rec (2009)13 does not require to register the birth of a child present on the territory of a state, but obviously born abroad,

56. Estonia, France and United Kingdom.

the ECtHR found in *G.T.B. v. Spain*[57] that, also in such cases, birth registration can be required. The case concerned attempts in Spain to register G.T.B.'s birth (a Spanish national), which had taken place in Mexico. Briefly after his birth, his mother was repatriated to Tenerife (Spain) after an earthquake in Mexico. The Court found in particular that the Spanish authorities, despite their knowledge that the documents needed could not be located in Mexico, had not done enough to provide G.T.B. with a birth certificate and identification in accordance with Article 8 of the European Convention on Human Rights. The Court underlined that it was the first case in which it had examined the right to a birth certificate under Article 8.

53. The ECtHR underlines that *"[it] considers that in the present case it was incumbent on the authorities to act in the best interests of the child whose birth registration was being sought in order […] to prevent the child from being left unregistered, and hence without identity documents. The authorities were thus under a positive obligation stemming from Article 8 to act with due diligence in order to assist the applicant in obtaining his birth certificate and his identity documents, so as to ensure effective respect for his private life […]. The Court agrees with the Government concerning the need to ensure that the information provided was reliable before the applicant's birth could be registered. However, the protection of public order in that regard was not incompatible with assisting a person such as the applicant, in view of the particular vulnerability resulting from health and social factors, so as to protect a particularly important facet of the applicant's identity".* (paragraph 124)

2. Rules and practices in member states

54. Births must be reported to the civil status registry or to another institution responsible for birth registration. In most states, the civil status registry office competent for the place of birth is responsible for the birth registration. In a number of states, the registry office of the place of residence of the mother is competent for birth registration.[58] The period within which the notification of birth has to be made, varies from three days [59] to three months [60]. In practice, however, the notification of birth is often made by the health care institution where the birth takes place or by the doctor or midwife who attends the birth within a few hours after birth. The actual birth registration is carried out by the civil registrar within a few working days after the birth.

57. *G.T.B. v. Spain*, No. 3041/19, 16 November 2023.
58. Azerbaijan and Denmark.
59. Andorra, Netherlands, Portugal and Switzerland.
60. Lithuania.

55. If a midwife or doctor was not present at the birth, the parents, or the person in whose house the birth took place, or any other person who knows about the birth must report the birth to the civil registrar. Furthermore, state institutions for the protection of the rights of the child have the obligation to do so if they discover a case of a not yet reported birth.

56. In many states, notification of birth can take place electronically with the civil registry[61] or even directly to a central e-population register[62]. In several states[63] the birth will be entered by the registry office in a Central Civil Status Register.

57. The birth of all children born on the territory of a state should be registered. In many states, the parents' documentation is not a requirement for birth registration. Incomplete entries will be verified and completed at a later date. The child's right to be registered is considered to be a human right irrespective of the residence status of the child and the parent(s).

58. In many states,[64] births that take place abroad are also entered into the civil register of the state of which the parents are nationals based on an extract of the birth certificate issued by the competent foreign civil register. In some cases, a birth taking place abroad can also be entered in the civil register of the state of which the parents are nationals without producing a foreign birth certificate. However, in such cases, a court decision is often necessary.

3. Fees for birth registration

59. In all states, which answered the questionnaire, birth registration is free of charge and, in almost all states, there are no fees for the first issuance of a birth certificate for a child.

4. Documentation requirements; relation with the parents' documentation

60. The documentation required for a record to be entered in a birth register includes, in particular, the parents' identity documents, the parents' registry documents (e.g. birth certificates, marriage certificate, divorce decree, etc.) and a declaration of the child's given name and, in several states, a declaration on the choice of the surname. The list of documents required by law depends on the family status of the parents (whether they are married or not, etc.).

61. E.g. Georgia and Ireland.
62. E.g. Estonia.
63. Austria, Azerbaijan and Belgium.
64. E.g. France and the Netherlands.

In some states, the facts, time, and place of birth have to be confirmed by a document of a health care institution.[65] If a person other than a parent reports the birth to the registry office, they should submit an identity document to confirm their identity.

61. In several states, parents who are or have been residing in the state, do not need to provide documentation as the registration will be based on information from a civil status register.[66]

62. As regards proof and documentation requirements, in some states a copy of an identity document suffices, but not a verbal witness statement.[67] This is different in one state[68] where information for birth registration is obtained by a personal interview led by the registrar of a qualified informant which is usually one or both parents of the child. This informant is not required by law to provide any identity documentation. Where parents are not married or in a civil partnership and are not both attending the registration, a signed declaration to confirm their parentage is required.

63. If the mother cannot provide documentation, the birth will, in the great majority of states, still be registered, but the mother's information will be marked as uncertain in the civil status registry or/and – if it exists- in a central person register.

64. Some interesting practices should be highlighted:

- In Austria, if no documents are presented, the registration is based on the principle of free consideration of evidence.
- In Croatia, if the parents do not have any identity documents and their identity has not been previously established, the child will be entered into the birth register with only the data from the hospital admission or based on medical documents on the child's birth. In such cases, the data entered into the birth register on the basis of the parents' statement (for example, proper name and nationality) are not filled out. However, before registering the child, the registrar will check *ex officio* the data on the parents against the records they keep or medical documentation which the authorities have on the birth of a child born outside a health facility about the birth and proof of motherhood. However, the registrar cannot enter a newly born child in the birth register without these documents.

65. E.g. Azerbaijan and Estonia.
66. E.g. Azerbaijan and Denmark.
67. E.g. Denmark.
68. United Kingdom.

- To register a birth, a German registry office requires proof that the child was born in its jurisdiction. The parents' lack of documentation only affects the timing and content of birth registration. A certain amount of flexibility is allowed although the evidentiary requirements for issuing proof of parentage documentation is strict. If the parents have no identity documents, birth registration takes longer, but the birth is still registered, although the registry entry will mention that it was not possible to establish the identity of the parents.

- In Georgia, the only document that is required for birth registration is proof of the identity of one of the parents or, in the case of a joint application, the identity of both parents. If no identity document of the parent can be provided, the birth of the child is registered without indicating parent information. Such information can be clarified later. If a child was born outside of a medical institution, the birth can be registered on the ground of a decision of the authorised body establishing legally the birth of a person. In that case testimonies and any other evidence are used.

- In Lithuania, if the data on the parents or one of them are not in the Residents' Register, documents should be submitted to confirm the missing data such as the identity documents of the child's parents. To confirm identity, a passport of the Republic of Lithuania or an identity card must be submitted. For citizens of a foreign country, a valid travel document or a residence permit, if the person has lost their travel document or is a stateless person, refugee or foreigner benefiting from additional protection, can be provided. A registration certificate can also be submitted to confirm the identity of the asylum seeker if the asylum seeker does not have a valid travel document. A valid residence permit in Lithuania must be submitted to confirm the status of a stateless person, refugee, or foreigner. If an asylum seeker or a person illegally present in Lithuania who is not an asylum seeker does not have a valid travel document and has not been issued a registration certificate, a document issued by the Migration Department of the Ministry of the Interior must be submitted, and must contain the person's facial image and personal data (name (names), surname (surnames), date of birth, citizenship, identification code of a foreigner from the Lithuanian Migration Information System (ILTU code)). If copies of documents issued by the institutions of Lithuania or foreign countries are submitted without submitting the originals of the documents, copies must be certified.

- In Montenegro, a child cannot be registered based on oral statements without documentation and with copied documentation.

- In Norway, the registry authorities may ask a DNA test of the mother and child or other documentation that can confirm that the mother was pregnant if the child was born without competent healthcare personnel present.
- In Slovenia, a mother's personal document is required to report a birth. For Slovenian nationals, the father's data is entered after running a check on the mother's status in the civil register, while foreign nationals need to submit an extract of a marriage certificate of the child's parents.
- Sweden requires no further documentation if the parents are registered as residents in the country. Additional information, such as the child's name and information regarding recognition of parental status for the non-birthing parent (if it needs to be established) is added later. For persons who are not registered as residents, additional information is requested from the parents but is not necessary for the registration of the birth as such. A similar approach is also present in Azerbaijan.
- In the United Kingdom, there is no legal requirement for the parent(s) to provide evidence of their civil status as part of the birth registration process.
- In Switzerland, the officer of civil status has some discretionary power in respect of certain formal aspects of the documents required (including to accept copies, old documentation and the necessity of a translation or the need of a legalisation). If the parents are not able to submit the necessary documents, exceptionally a birth certificate with incomplete data will be made.

5. Cases of unmarried parents or LGBTIQ* families

65. The information of persons who have been legally established as parents according to the relevant rules is recorded in the birth certificate. This includes, in several states, the possibility of being registered as a same-sex spouse or partner of the mother who gave birth to the child, if this parentage is established under the national or foreign law applicable in accordance with private international law.[69] The non-birthing parent will be registered as such based on a legal presumption of parentage, in case of recognition of the child or adoption, or if parenthood is determined by court.[70]

69. E.g. Austria, Czechia, Denmark, Estonia, Netherlands, Switzerland and United Kingdom.
70. E.g. Sweden and Switzerland.

66. In a number of states,[71] so-called hidden data will be added to the birth certificate, if the principle of presumption of the child's descent from the mother's husband cannot be applied or if paternity has not been recognised or established by a court. This hidden data includes the name of the father indicated by the person reporting the birth, and if there is no such indication chosen by the head of the registry office. However, the mother's surname at the time of the child's birth is indicated as the father's surname.[72]

67. In some countries,[73] certain other non-legal data can be included in the register. For example, the name of the surrogate mother, of the provider of the egg cell or sperm. These data on the biological or genetic filiation are not mentioned in the birth certificate but could be necessary to trace the biological or genetic origin of the child.

68. When the civil registry office registers the birth of a child found or born and abandoned by a mother without identity documents at a personal health care facility, data about the child's parents are not recorded, and a remark is entered in the birth record: "Child found, parents unknown" or "Child left in personal health care institution, parents unknown."[74]

6. Registration in case of absence of proof of the exact place, time, or date of birth

69. A few different types of case, where the exact place, time or date of birth may be uncertain, have to be distinguished: (i) birth in an airplane, ship, or a train; (ii) birth abroad; (iii) other circumstances which make the place, time, or date of birth difficult to establish.

i. Birth in a means of transport

70. Special rules exist in several states for births that took place on board of a ship or aircraft. Two states reported that such birth must be reported to the civil registrar at the first port or airport of arrival if this is located in the country.[75]

71. In another state,[76] law stipulates that if a child was born on a ship, a document stamped by the ship's captain which indicates the time and gender of the child's birth, mother's first name, surname, social security number

71. E.g. Poland.
72. Idem.
73. E.g. Switzerland.
74. E.g. Lithuania.
75. Croatia and Denmark.
76. Lithuania.

or date of birth must be submitted. If possible, data on the child's mother's spouse should be indicated. However, there is no administrative procedure for registration of the birth of a child in the absence of proof of the exact place, time, or date of birth. If it is not possible to register a birth, because there is no evidence of the exact place, time or date of birth, the legal fact of the birth can be determined by a court. In this case the civil registry office would register the birth on the basis of a court decision.

72. The law of another state[77] provides that if a child is born in a means of transport, the place of birth is deemed to be the place where the birth actually took place. If it is impossible to determine the place of birth, the place of birth is taken to be the place where the person was transferred from the means of transport.

ii. Birth abroad

73. In several states,[78] the birth of children born abroad can be registered if the child is a national at the time of application or is recognised at that time as a foreign refugee or stateless person. In cases where civil status data is missing, investigation procedures must be carried out. Any witness statements or other information must also be considered.

74. One state[79] indicated that a special rule exists if a child's birthdate is unknown or undocumented, and the child applies for asylum. In that case, the child's birthdate will be registered as the date on which they applied for asylum. If the child applies for family reunification, the child's birthdate will be registered as the date on which they entered the country, or – if the child applies from abroad – the date of the application.

iii. Other situations

75. One state[80] indicated that a decision on the establishment of a legal fact of birth can be made even in the absence of specific data required for the registration of a civil act if such data cannot be established due to insufficient evidence or other compelling reasons.

76. In another state,[81] if a document of a medical institution confirming the time and place of birth is lacking, the fact of the child's birth must be determined by the court.

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77. Czechia.
78. E.g. Czechia, Germany and the Netherlands.
79. Denmark.
80. Georgia.
81. Azerbaijan.

77. One state indicated that the law also does not provide for the possibility of preparing a birth certificate for a child born in the state without a medical document confirming the birth containing data on the date and place of birth. In the absence of such documents, the preparation of a child's birth certificate by the head of the registry office depends on a court decision.

78. In several states, the registration of the time of birth is not mandatory and the child can be registered in the birth register without this information if the exact time of birth has not been established.

79. One state[82] reported that the registrar must be satisfied of the date and place the birth occurred prior to recording the particulars in their register. The residence status of the parent(s) does not form part of the birth registration process.

7. Registration of children of refugees or migrants without residence / proof of birth

80. In the great majority of stat0es,[83] all children born in the territory (also those born to refugees or migrants, even if they do not meet the residency requirements) are registered.

81. The law of one state[84] provides for cases involving individuals seeking international protection, asylum seekers, and beneficiaries of subsidiary protection, that the registry office may permit documents required by law to be substituted with a declaration of honour from the parents. If the place of birth is unknown, the birth is recorded by the registry office in whose administrative district the person was found (this would also apply, for example, in cases where a person is found/intercepted on a migration route). In all instances where the place and time of birth cannot be determined or where there are reasonable grounds for doubt, these facts are investigated and established before the registry office responsible for recording the birth. This is done to prevent, for example, instances of human trafficking.

82. In another state,[85] original documents and extracts are required as a rule. If the parents have absolutely no option to submit the required documents (i.e. refugees, asylum seekers), the parents' data is entered on the grounds of any available documents.

82. United Kingdom.
83. E.g. Austria, Azerbaijan, Croatia, Denmark, Germany, Georgia and Lithuania.
84. Czechia.
85. Slovenia

8. Late registration: procedures, fees, and fines

83. In most states, birth registration will still take place after the set deadline when the civil registrar is made aware of the birth. In these cases, a birth notification must still be submitted. This registration may require additional evidence.[86] Registration is free of charge and, in the vast majority of states, there is no legal basis for issuing fines for late notification.[87]

84. However, in a number of states, the registrar may need the permission of another authority[88] or a court to make a late birth registration.[89]

85. In some states, a person who fails to register a child's birth may be subject to a fine[90], but states indicate that this is often not applied.[91] However, one state reports a fine for non-registering the birth of a child or late registration of up to 1 000 euros.[92]

9. Nationality

86. In a number of states,[93] the child's nationality is automatically registered in the birth certificate and the civil status register. In some other states[94], the nationality is only mentioned in the birth certificate if this is the nationality of the state in question; any foreign nationality is not mentioned.

87. One state[95] reported that the child's birth certificate does not contain information about nationality. Information about nationality is only included in the civil status register.

88. In several other states,[96] the nationality of the child is not mentioned in the birth certificate.

89. Two examples of national practice should be mentioned here:

- If the parents are registered as residents in Sweden, the child's nationality will be registered in the birth certificate. The child's nationality is determined by the nationality of the registered parents and the requirements

86. E.g. Germany.
87. E.g. Austria, Denmark and Lithuania.
88. E.g. Croatia.
89. E.g. Netherlands.
90. E.g. Netherlands, Portugal, Slovenia and Switzerland.
91. E.g. Estonia.
92. Germany.
93. Croatia, Denmark and Sweden.
94. Georgia, Germany, Lithuania and Serbia.
95. Portugal.
96. Czechia, Estonia, Montenegro, Netherlands, North Macedonia and United Kingdom.

on acquisition of nationality in the state concerned. The birth certificate of a child born to non-resident parents will not include nationality.

- Azerbaijan provides that, if the nationality of the father and the mother are different, the nationality of both parents is indicated in the birth certificate. If the nationality of the parents is not mentioned in their birth certificates or if the birth certificate cannot be presented and this information is not available in the archives of the registry departments, the nationality of that parent is not indicated in the child's birth certificate. In this case, "Information not provided" is written in the "Nationality" column of the birth certificate.

10. Firewall to prohibit the sharing of information for the purpose of immigration control

90. A very important issue is whether a registrar of civil status will report to the immigration control authorities instances where they have to register the birth of a child of an irregular migrant born in the country. If so, this possibility will discourage irregular migrants to register the birth of their children which makes them extremely vulnerable, for instance to human trafficking, and is contrary to birth registration as a human right. If not, some may consider it as hampering effective immigration control.

91. The attitudes of states in respect of this issue differ considerably. In some states the registry office does not verify the legality of the stay of the child or its parents in the territory of the state. For that reason, birth certificates do not include information which would be of interest for immigration control authorities.[97] One state recently abolished the condition of a document of residence registration as a condition for reporting birth.[98]

92. By way of example, in one state,[99] the birth of a child will be registered by making a record and submitting it electronically to the Residents' Register. These data from the Residents' Register are submitted to the Foreigners' Register, the data of which are directly accessible to the migration authorities. There is no need for the civil registry office to inform the immigration authorities about the registration of a birth of a child without residence status, as these authorities receive this information from the Foreigners' Register directly. Conversely, in another state[100], if the child born in the country does not have the nationality of the country, registration will be passed on to the immigration authorities.

97. E.g. Poland and United Kingdom.
98. Azerbaijan.
99. Lithuania.
100. Netherlands.

In one state[101], national and other authorities holding foreigner-related data are obliged to forward this data to the competent authorities at their request.

E. Awareness-raising and training of relevant actors on matters of nationality and statelessness

93. Most states report that they provide training and awareness raising for migration officials, civil registrars, guardians, judges and civil servants responsible for registering asylum seekers, refugees and migrants. Training and awareness raising activities are often prepared in co-operation with civil society, such as the European Network on Statelessness (ENS), and international organisations (e.g. the European Migration Network (EMN), International Centre for Migration Policy Development (ICMPD), the International Organization for Migration (IOM), UNHCR and UNICEF). However, it is important to stress that the effectiveness of training and awareness raising activities depends on their regularity for the public most likely to detect statelessness in particular of children.

94. Some states gave more detailed information on the content of training programmes:

- Austria indicated that training courses on interviews are held for officers of the Federal Office for Immigration and Asylum. These courses focus, *inter alia*, on children and adolescents in general as well as on the best interests of the child.
- Azerbaijan organised a seminar on asylum seekers and stateless persons for members of the State Migration Service, the Ministry of Justice, the Judicial and Legal Council, representatives of state bodies, judges, lawyers and academics. In this seminar attention was paid to the right to effective protection and procedural obligations in asylum-related cases, the role of information on the country of origin in court cases related to asylum applications, international law standards on access to nationality and the role of judicial processes in the documentation of persons at risk of statelessness. Additionally, a magazine in Azerbaijani and English languages on "Statelessness in Azerbaijan: Achievements and Goals" was published by the State Migration Service and the Office of UNHCR in Azerbaijan.
- Croatia reported organising workshops, training courses, and events aimed at raising awareness on the causes and consequences of statelessness as well as different profiles of stateless persons in Europe.

101. Slovenia.

- In Czechia, the awareness of staff members of the General Administration Department is raised on statelessness issues in the context of their work on nationality and civil status registration. Local government officials falling within the scope of the General Administration Department and in particular civil registrars are trained in this area as part of preparations for their exam on special professional competence.
- Denmark provides training to caseworkers on the criteria for establishing nationality and statelessness. The country-of-origin unit has a designated team that monitors developments pertaining to issues of statelessness in several relevant countries. The office produces internal and public country specific reports on a number of countries addressing statelessness and possible consequences of statelessness in a given country.
- German civil servants working in the field of asylum are trained in interviewing techniques. Methods to conduct child-sensitive asylum interviews and the variety of possible child-specific reasons for granting asylum/international protection are part of specific training. The function of so-called "specially commissioned case-officers" has been created. These are experienced case officers who have attended additional training. They are specialised in operating child-specific asylum procedures, especially regarding the detection of child-specific reasons for persecution. Co-operation takes place with non-governmental organisations such as organisations working with unaccompanied minor refugees and working on the protection of children from sexual exploitation. Registrars in Germany receive training on a regular basis and are therefore aware of problems around statelessness and nationality. Civil servants conducting asylum interviews and deciding on an asylum application are provided with general information about statelessness in the context of asylum and migration and, where relevant, specific information about statelessness in countries of origin.
- In Serbia, coordinated efforts by ministries, the Ombudsman, and organisations with international experience have been made to identify individuals without personal documents and ensure the issuance of personal documents. Additionally, free assistance is provided for the late registration of births in the birth register and for non-contentious procedures to establish the time and place of birth, which are free of charge. Moreover, training programmes for officials (including staff in maternity hospitals handling birth registrations, registrars, police officers and social workers) have been intensified to raise awareness of how to deal with vulnerable groups, particularly in cases where a child's mother lacks personal documents. Informative campaigns for individuals at risk of statelessness, especially within the Roma community, have been

launched to provide information on how and whom to contact to obtain registration in the birth register and personal documents.

- In the United Kingdom, the Home Office publishes caseworker guidance which explains the policy, process and procedure which must be followed when considering applications for permission to stay as a stateless person in the UK. It applies to all staff dealing with statelessness applications and covers:
  - the definition of statelessness;
  - evidence gathering and how to consider applications;
  - applying exclusion provisions and general grounds for refusal when considering statelessness applications.

  Additionally, the Home Office has an operational team that is trained to assess and determine statelessness applications. Decision makers have statelessness policy guidance to reference and support making complex decisions as well as the ability to consult with senior caseworkers, technical specialists and policy officials where needed. Decision makers follow the policy guidance to carefully consider all statelessness applications, which may include undertaking research or making enquiries of other national authorities where an applicant has been unable to obtain relevant information to support their claim or obtain documents to establish nationality (or lack of nationality). The UK also publishes many country Policy Information Note guidance which help decision makers navigate through asylum and human rights applications that often include statelessness aspects.

Chapter 2

Towards a new non-binding instrument on access to nationality for children

A. Recent developments and emerging standards

95. Since the adoption by the Committee of Ministers of Recommendation CM/Rec (2009)13 on the nationality of children on 9 December 2009, several important standard setting activities have taken place that dealt with access to a nationality by stateless children. This has led to the emergence of new issues and standards, the most important of which are the following:

- The position of the UNHCR is that providing for a statelessness determination procedure is an implicit obligation for the state parties to the aforementioned 1954 and 1961 statelessness conventions. The effective and speedy determination whether a person is stateless, is a *sine qua non* condition for the operation of the protective rules of both conventions. This has in the meantime also been recognised by several member states of the Council of Europe which introduced dedicated statelessness determination procedures.[102]
- The position of the UNHCR that the burden of proof on statelessness matters has to be shared between the person involved and the state authorities, is of significant relevance and already influenced the approach taken by several member states in this respect.[103] The sharing of the burden of proof is of great importance in cases of potential statelessness of children.
- The UNHCR has provide further guidance on the interpretation of both statelessness conventions. For access of stateless children to a nationality, the interpretation of Article 1 of the 1961 Convention given in light of the human rights treaties opened for signature after 1961, is of paramount importance to reduce the number of cases of children born statelessness.[104] Moreover, the interpretation given by the UNHCR

102. See above para. 37.
103. See UNHCR Handbook on the protection of stateless persons, paras. 89 and 90.
104. See UNHCR Guidelines on Statelessness No. 4, paras. 29-48.

to the conditions which may be used by a state for not providing an automatic attribution of its nationality to stateless children born on its territory but offers the possibility to acquire the nationality at a later moment, has been endorsed by the United Nations Human Rights Committee in its decision on the interpretation of Article 24 (3) of the International Covenant on Civil and Political Rights in the case *Denny Zhao v. The Netherlands* (2020).[105]

- In respect of birth registration, the judgment of the ECtHR in *G.T.B. v. Spain* makes it necessary that states be flexible when applying rules on birth registration, and special attention needs to be given to the registration of children born abroad.[106]

96. These developments raise the question of whether to revisit the existing standards of the Council of Europe as contained in earlier instruments and, if so, whether the Council of Europe should embark on the revision of Recommendation CM/Rec (2009)13 of the Committee of Ministers or on the preparation of another type of instrument containing updated principles on issues such as statelessness determination procedures, and training of stakeholders in the field of statelessness and nationality, which could take the form of guidelines or practical tools.

97. Revisiting the positions taken by the Council of Europe in earlier instruments and, in particular Recommendation CM/Rec (2009)13, would build on the answers provided by member states to the questionnaire sent out in June 2024; relevant case law of the European Court of Human Rights and the UN Human Rights Committee; analyses on statelessness related issues in member states by a number of stakeholders, in particular institutional partners such as UNHCR and the European Migration Network (EMN), and civil society partners such as the European Network on Statelessness (ENS) and the Global Citizen Observatory (Globalcit); as well as the increasing number of comparative studies published by academics on statelessness related issues.

B. Different options for a new instrument

98. In line with the terms of reference of the CDCJ, the most appropriate legally non-binding instrument to address the situation of stateless children's access to nationality should be examined. There are different avenues to consider to inform any decision on the most effective way forward.

105. See Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication CCPR/C/130/D/2918/2016.

106. *G.T.B. v. Spain*, No. 3041/19, § 129, 16 November 2023.

1. Practical guidance for policy makers and practitioners

99. Guidance, in the form of a handbook,[107] for policy makers and practitioners on the implementation of existing standards, in particular those of Recommendation CM/Rec (2009)13 in the light of recent developments could be considered. It would build on the principles contained in Recommendation (2009)13 and, in particular, on the explanations provided in its explanatory memorandum, whilst taking into account recent developments described in the previous section.

100. Such a document could include examples of best practice and provide guidance to policy makers for the development or review of their national framework on the access to nationality for children as well as to practitioners on the implementation of existing standards.

101. In order to supplement such a handbook, checklists for relevant practitioners could be further developed, for instance on the determination of nationality status of children, birth registration or on child-friendly procedures connected to the determination of the status of statelessness.

102. One added value of such guidance would be to help member states in navigating and implementing existing standards in the light of recent developments and could be used later in co-operation projects where a need has been identified.

2. Guidelines of the Committee of Ministers

103. Alternatively, using as a point of departure Recommendation CM/Rec (2009)13 and its explanatory memorandum, guidelines could be envisaged to bring into one document standards already formalised in the recommendation and those having emerged since its adoption and, according to the practice of the Council of Europe, presenting them as principles adopted by the Committee of Ministers.[108] While a non-binding instrument, it would offer a higher degree of formality than guidance taking the form of a handbook and could give more flexibility than a recommendation.

107. See, for example, the Administrative detention of migrants and asylum seekers – Guide for practitioners.

108. See, for example, the Guidelines on the protection and promotion of Human rights in culturally diverse societies, adopted by the Committee of Ministers on 2 March 2016, and the Guidelines on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law, prepared by the CDCJ and adopted by the Committee of Ministers on 31 March 2021.

3. Revising Recommendation CM/Rec (2009)13 of the Committee of Ministers to member states on the nationality of children

104. Revising Recommendation CM/Rec (2009)13 on the nationality of children would present the advantage of not embarking on the creation of totally new instrument and could prove to be the most expedient and effective way of acknowledging new standards without rewriting those that are still relevant.

105. In order to decide whether the best way forward would be to revise existing Recommendation CM/Rec (2009)13, the most effective way to proceed is to take as a starting point the text of the Recommendation and to identify which principles remain relevant the way they are couched in the Recommendation and which ones would need updating in the light of present-day circumstances and recent developments described above.

106. In order to facilitate the decision as to whether this recommendation should be revised, some comments are made below on the desirability to modify/elaborate on the formulation of several principles. Suggestions will also be made on where to include principles on statelessness determination procedures. This preliminary analysis can also prove useful in the event that another type of instrument is preferred as the principles contained in the recommendation will remain the common standard basis, irrespective of the instrument chosen.

107. In respect of the Principles 10 and 13 to16 dealing with the issue of intercountry adoption and nationality, one can hesitate whether they should be included in a new (revised) instrument. In many states, discussions on intercountry adoptions are taking place and the situation has become more complex.

108. Below is the aforementioned preliminary assessment of the principles contained in Recommendation CM/Rec (2009)13 to help gauge the advisability of a revision:

i. Reducing statelessness of children

> *Principle 1. provide for the acquisition of nationality by right of blood (jure sanguinis) by children without any restriction which would result in statelessness;*

109. Whilst it would appear that this principle remains valid, it would be worth exploring whether using the term "access" instead "acquisition" would not be preferable as it would cover national situations where the term "attribution" is used rather than "acquisition".

Principle 2. provide that children born on their territory who otherwise would be stateless acquire their nationality subject to no other condition than the lawful and habitual residence of a parent;

110. The question of the advisability of keeping the word "lawful" should examined in view of recent developments, in particular the aforementioned UNHCR Guidelines on statelessness No. 4 and decision of UN Human Rights Committee in the case *Denny Zhao v. The Netherlands*. Further explanation could be included in the explanatory memorandum accordingly.

Principle 3. provide that children on their territory who are stateless despite the provisions contained in principles 1 and 2 above, and who have the right to acquire the nationality of another state, be provided with any necessary assistance to exercise that right;

111. Further elaboration on the type of assistance should be considered for inclusion in the explanatory memorandum, including about the privacy of personal data.

Principle 4. provide that children who, at birth, have the right to acquire the nationality of another state, but who could not reasonably be expected to acquire that nationality, are not excluded from the scope of principles 1 and 2 above;

112. It would appear that this principle does not need any modification.

Principle 5. provide that stateless children have the right to apply for their nationality after lawful and habitual residence on their territory for a period not exceeding five years immediately preceding the lodging of the application;

113. As with principle 2, the question of the advisability of keeping the word "lawful" should be examined in view of recent developments, in particular the UNHCR Guidelines on statelessness No. 4 and the decision of UN Human Rights Committee in the case *Denny Zhao v. The Netherlands*. Further explanation could be included in the explanatory memorandum accordingly.

Principle 6. co-operate closely on issues of statelessness of children, including exchanging information on nationality legislation and public policies, as well as on nationality details in individual cases, subject to applicable laws on personal data protection;

114. Further elaboration on the types of co-operation could be considered in the explanatory memorandum. There appears to be difficulties in understanding

what co-operation entails, which can potentially contribute to the statelessness of children.[109]

Principle 7. treat children who are factually (de facto) stateless, as far as possible, as legally stateless (de jure) with respect to the acquisition of nationality;

115. The appropriateness of the use of the notion of "*de facto* stateless" should be examined. Since the adoption of the recommendation, the UNHCR has considered that the notion of "*de facto* stateless" was not desirable as it was not defined in any international instrument and there was no specific regime attached to it in any treaty.[110] If this principle were to be kept, further elaboration should be made in the explanatory memorandum in connection with the position of UNHCR.

Principle 8. register children as being of unknown or undetermined nationality, or classify children's nationality as being "under investigation" only for as short a period as possible;

116. The revision of this principle should be examined in order to take into account developments with UNHCR Guidelines on statelessness No 4 and the decision of UN Human Rights Committee in the case *Denny Zhao v. The Netherlands.* More specifically, The appropriateness of specifying in the principle a time limit of five years in line with these developments should be considered.

Principle 9. treat children found abandoned on their territory with no known parentage, as far as possible, as foundlings with respect to the acquisition of nationality;

117. Further guidance in the explanatory memorandum could prove useful as this has proved a complex area to navigate for member states.

Principle 10. provide that the revocation or annulment of an adoption will not cause the loss of the nationality acquired by this adoption, if statelessness would be the consequence;

118. Owing to the extreme sensitivity on the issue of intercountry adoption, it should be discussed whether principles related to it should be kept or left out and dealt with in a separate instrument.

109. See also paras. 18 and 31.
110. See UNHCR Handbook on the Protection of Stateless Persons, 2014, para. 7.

ii. Nationality as a consequence of a child-parent family relationship

Principle 11. provide that children whose parentage is established by recognition, by court order or similar procedures acquire the nationality of the parent concerned, subject only to a procedure determined by their internal law;

119. More guidance in the explanatory memorandum could prove useful as this has proved to be a complex issue in practice.

Principle 12. apply to children their provisions on acquisition of nationality by right of blood if, as a result of a birth conceived through medically assisted reproductive techniques, a child-parent family relationship is established or recognised by law;

120. This principle appears to be relevant for LGBTQ* families. More guidance in the explanatory memorandum may be desirable to take into account social developments.

Principle 13. subject the granting of their nationality to children adopted by a national to no other exceptions than those generally applicable to the acquisition of their nationality by right of blood, if as a consequence of the adoption the family relationship between the child and the parent(s) of origin is completely replaced by the family relationship between the child and the adopter(s);

Principle 14. facilitate the acquisition of their nationality by children adopted by a national in the case of an adoption in which the family relationship between the child and the parent(s) of origin is not completely replaced by the family relationship between the child and the adopter(s);

Principle 15. provide that revocation or annulment of an adoption will not cause the permanent loss of the nationality acquired by the adoption, if the child is lawfully and habitually resident on their territory for a period of more than five years;

Principle 16. provide that foreign children lawfully residing on their territory with a view to adoption have the right to file applications for the acquisition of their nationality if the adoption is not finalised. States should not in this case require a period of more than five years of habitual residence on their territory;

121. Owing to the extreme sensitivity on the issue of intercountry adoption, it should be discussed whether principles 13 to 16 should be kept or left out and dealt with in a separate instrument.

iii. Children born on the territory of a state to a foreign parent

Principle 17. facilitate the acquisition of nationality, before the age of majority, by children born on their territory to a foreign parent lawfully and habitually residing there. Enhanced facilitation should be offered in cases where that parent is also born on their territory;

122. This principle can be kept as is. Further elaboration in the explanatory memorandum should be discussed.

iv. Position of children treated as nationals

Principle 18. provide that children who were treated in good faith as their nationals for a specific period of time should not be declared as not having acquired their nationality;

123. As some Council of Europe member states do not have any protection on the possession of nationality in good faith, it would appear desirable to elaborate more on it in the explanatory memorandum.

v. Rights of children in proceedings affecting their nationality

124. It would be worth examining whether the title of this section ought to be modified to "affecting their (access to) nationality". In that case recommendations on statelessness determination procedures could also be inserted in this chapter. It would seem important to take into account the principles on statelessness determination procedure as described in the UNHCR Handbook on the protection of stateless persons.

Principle 19. ensure that, as far as possible, in proceedings affecting their nationality, children are consulted and their views and wishes are taken into account, having regard to their degree of maturity. Applications for nationality made on behalf of children should include the opinion of children considered by law as having sufficient understanding. A child should be considered as having sufficient understanding upon attaining an age, prescribed by law, which should not be more than 14 years;

125. It should be explored whether this principle ought to be reformulated with more emphasis being put on statelessness determination procedures and child-friendly proceedings.

Principle 20. give children the right to file applications for the acquisition or loss of nationality if they are considered by law as having sufficient understanding and are, where necessary, legally represented as required by domestic law;

126. It should be explored whether this principle ought to be reformulated with more emphasis being put on statelessness determination procedures and child-friendly proceedings. It should be considered whether to delete the sentence "if they are considered by law as having sufficient understanding" and underline the need to appoint a special guardian if the child does not have a legal representative.

> *Principle 21. grant children, where necessary, legally represented as required by domestic law, the right to challenge decisions regarding their nationality;*

127. It would be worth considering adding "or their statelessness" at the end of the principle to tackle both situations.

> *Principle 22. provide that children who have lost their nationality have the right to apply for recovery of it before the age of majority, or within at least three years after reaching the age of majority, and that they shall be, where necessary, legally represented as required by domestic law;*

128. It would appear that this principle could stay as it is, with further explanations being provided in the explanatory memorandum.

vi. Registration of birth

> *Principle 23. register the birth of all children born on their territory, even if they are born to a foreign parent with an irregular immigration status or if the parents are unknown, in order to safeguard their right to a nationality. The registration of birth should be free of charge and be performed without delay, even if the period within which the birth should have been declared has already expired.*

129. It seems advisable that this principle be expanded significantly. Attention for (late) birth registration of persons born abroad but present on the territory of the state is necessary if these persons do not have (access to) a birth certificate. The explanatory memorandum should be further elaborated.

Conclusion

130. The purpose of the work to be undertaken is improving stateless children's access to nationality, including guidance on child-sensitive procedures relating to the determination of nationality or statelessness, by means of a non-binding legal instrument.

131. As described in the study, several options can be contemplated. A new instrument that would reflect existing standards can be elaborated, such as guidelines or a handbook. Guidelines would be adopted by the Committee of Ministers and therefore would carry political weight and draw attention to the need to reduce the statelessness of children as a matter of priority, whilst a handbook would be of a more practical nature and could respond to a need for more guidance for the benefit of policy-makers and practitioners to help them navigate this complex legal field and hence contribute to reducing child statelessness.

132. However, the point of departure of any work in this area remains an already existing instrument prepared by the CDCJ, namely Recommendation CM/Rec 2009(13) of the Committee of Ministers to Member States on the nationality of children adopted on 9 December 2009. Whilst many of the principles contained in the recommendation remain relevant, developments having occurred since its adoption in a number of areas and combined with the fast-evolving migration circumstances faced by Europe today, would justify updating it. This would require also adjusting and supplementing the explanatory report. At the same time, in order to respond to the need for practical guidance, it would seem advisable to prepare in parallel a tool, designed for policy makers and practitioners, in the shape of checklists that would serve to reinforce the dissemination of the principles contained in the recommendation and reach those dealing with situations of stateless children and their access to nationality.

133. The Limited Working Group on Migration of the CDCJ (CDCJ-MIG), upon examination of the feasibility study in its draft form during its second meeting of 26-27 September 2024, was of the view that revising Recommendation CM/Rec 2009(13) and preparing an accompanying practical tool for policy makers and practitioners, would be the most effective and expedient way of responding to the terms of reference given by the CDCJ.

Statelessness remains a significant issue of concern both in Europe and globally. The causes of statelessness are manifold and often stem from conflicts in nationality laws, state succession, forced displacement, historical and contemporary migration, structural birth registration problems, and administrative practices related to nationality. The right to a nationality is recognised in widely ratified international treaties and, according to the European Court of Human Rights, constitutes part of a person's social identity. Yet, thousands of children are born or become stateless in Europe each year. The lack of nationality has a serious impact on a child's life, including their enjoyment of the full range of human rights, such as access to education, healthcare, housing, and freedom of movement.

This study, carried out for the European Committee on Legal Co-operation of the Council of Europe, examines key issues such as preventing childhood statelessness, child-friendly nationality determination procedures, age assessments, awareness-raising measures and training of relevant actors. It also reviews international standards and national practices and identifies what appropriate follow-up could be given to address the difficulties faced by stateless children in procedures connected with access to nationality.

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